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Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub.L. 101-238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

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Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c), 1182 (m) and 1184; and 29 U.S.C. 49 *et seq.*

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#### § 655.0 Scope and purpose of part.

(a) *Subparts A, B, and C.* (1) *General.* Subparts A, B, and C of this part set out the procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (i) Whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (ii) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required to carry out the policies of the Immigration and Nationality Act (INA), that a nonimmigrant alien worker not be admitted to fill a par-

ticular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.

(2) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Usery*, 531 F. 2d 299 (5th Cir. 1976).

Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this part set forth requirements for recruiting U.S. workers in accordance with this principle.

(3) *Construction.* This part and its subparts shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc. v. Brennan*, 508 F. 2d 493, 500 (1st Cir. 1974), *Flecha v. Quiros*, 567 F. 2d 1154 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the terms and conditions of domestic workers similarly employed, *Williams v.*

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*Usery*, 531 F. 2d 305 (5th Cir. 1976); *Florida Sugar Cane League, Inc. v. Usery*, 531 F. 2d 299 (5th Cir. 1976), and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

(b) *Subparts D and E.* Subparts D and E of this part set forth the process by which health care facilities can file attestations with the Department of Labor for the purpose of employing or otherwise using nonimmigrant registered nurses under H-1A visas.

(c) *Subparts F and G.* Subparts F and G of this part set forth the process by which employers can file attestations with the Department of Labor for the purpose of employing alien crewmembers in longshore work under D-visas and enforcement provisions relating thereto.

(d) *Subparts H and I of this part.* Subparts H and I of this part set forth the process by which employers can file with, and the requirements for obtaining approval from, the Department of Labor of labor condition applications necessary for the purpose of petitioning INS for H-1B visas for aliens to be employed in specialty occupations or as fashion models of distinguished merit and ability, and the enforcement provisions relating thereto.

(e) *Subparts J and K of this part.* Subparts J and K of this part set forth the process by which employers can file attestations with the Department of Labor for the purpose of employing nonimmigrant alien students on F-visas in off-campus employment and enforcement provisions relating thereto.

[43 FR 10312, Mar. 10, 1978, as amended at 52 FR 20507, June 1, 1987; 55 FR 50510, Dec. 6, 1990; 56 FR 24667, May 30, 1991; 56 FR 54738, Oct. 22, 1991; 56 FR 56875, Nov. 6, 1991; 57 FR 1337, Jan. 13, 1992; 57 FR 40989, Sept. 8, 1992]

EFFECTIVE DATE NOTE: At 65 FR 43542, July 13, 2000, §655.0 was amended by adding a new paragraph (a)(4), effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001. For the convenience of the user, the added text is set forth as follows:

§ 655.0 Scope and purpose of part.

(a) \* \* \*

(4) *Subpart B; Delegation From Immigration and Naturalization Service.* Subpart B also contains the authority from the Commissioner of Immigration and Naturalization for the Secretary to consider H-2A petitions and revocations under criteria set out in 8 CFR 214.2(h) of the Immigration and Naturalization Service's regulations.

\* \* \* \* \*

§ 655.00 Authority of the Regional Administrator under subparts A, B, and C.

Pursuant to the regulations under this part, temporary labor certification determinations under subparts A, B, and C of this part are ordinarily made by the Regional Administrator of an Employment and Training Administration region. The Director, however, may direct that certain types of applications or certain applications shall be handled by, and the determinations made by, the United States Employment Service (USES) in Washington, DC. In those cases the Regional Administrator will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

[43 FR 10313, Mar. 10, 1978, as amended at 52 FR 20507, June 1, 1987; 55 FR 50510, Dec. 6, 1990]

EFFECTIVE DATE NOTE: At 65 FR 43542, July 13, 2000, §655.00 was amended by revising the second sentence, effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001. For the convenience of the user, the revised text is set forth as follows:

§ 655.00 Authority of the Regional Administrator under subparts A, B, and C.

\* \* \* The Director, however, may direct that certain applications, types of applications, H-2A petitions, or H-2A petition revocations shall be handled by, and the determinations made by, the United States Employment Service (USES) in Washington, DC. \* \* \*

\* \* \* \* \*

**Subpart A- Labor Certification Process for Temporary Employment in Occupations Other Than Agriculture, Logging, or Registered Nursing in the United States (H-2B Workers)**

**§ 655.1 Scope and purpose of subpart A.**

This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant aliens in the United States in occupations other than agriculture, logging, or registered nursing.

[55 FR 50510, Dec. 6, 1990]

**§ 655.2 Applications.**

Application forms for certification of temporary employment of nonimmigrant aliens may be obtained from and should be filed in duplicate with the local office of the State employment service serving the area of proposed employment.

(Approved by the Office of Management and Budget under control number 1205-0015)

(Pub. L. No. 96-511)

[33 FR 7570, May 22, 1968, as amended at 49 FR 18295, Apr. 30, 1984. Redesignated and amended at 55 FR 50510, Dec. 6, 1990]

**§ 655.3 Determinations.**

(a) When received, applications for certification shall be forwarded by the local office of the State employment service to the appropriate Regional Administrator, Employment and Training Administration, who will issue them if he or she finds that qualified persons in the United States are not available and that the terms of employment will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(b) In making this finding, such matter as the employer's attempts to recruit workers and the appropriateness of the wages and working conditions offered, will be considered. The policies of the United States Employment Service set forth in part 652 of this chapter and subparts B and C of this part shall be followed in making the findings.

(c) In any case in which the Regional Administrator, Employment and

Training Administration, determines after examination of all the pertinent facts before him or her that certification should not be issued, he or she shall promptly so notify the employer requesting the certification. Such notification shall contain a statement of the reasons on which the refusal to issue a certification is based.

(d) The certification or notice of denial thereof is to be used by the employer to support its visa petition, filed with the District Director of the Immigration and Naturalization Service.

[33 FR 7570, May 22, 1968, as amended at 43 FR 10311, Mar. 10, 1978. Redesignated and amended at 55 FR 50510, Dec. 6, 1990]

**§ 655.4 Territory of Guam.**

Subpart A of this part does not apply to temporary employment in the Territory of Guam, and the Department of Labor does not certify to the Immigration and Naturalization Service (INS) the temporary employment of nonimmigrant aliens under H-2B visas in the Territory of Guam. Pursuant to INS regulations, that function is performed by the Governor of Guam, or the Governor's designated representative within the Territorial Government.

[56 FR 56875, Nov. 6, 1991]

**Subpart B- Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers)**

SOURCE: 52 FR 20507, June 1, 1987, unless otherwise noted.

**§ 655.90 Scope and purpose of subpart B.**

(a) *General.* This subpart sets out the procedures established by the Secretary of Labor to acquire information sufficient to make factual determinations of: (1) Whether there are sufficient able, willing, and qualified U.S. workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H-2A workers); and (2) whether the employment of H-2A workers will adversely effect the wages and working conditions of workers in the

U.S. similarly employed. Under the authority of the INA, the Secretary of Labor has promulgated the regulations in this subpart. This subpart sets forth the requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers in agriculture. This subpart provides the Secretary's methodology for the two-fold determination of availability of domestic workers and of any adverse effect which would be occasioned by the use of foreign workers, for particular temporary and seasonal agricultural jobs in the United States.

(b) *The statutory standard.* (1) A petitioner for H-2A workers must apply to the Secretary of Labor for a certification that, as stated in the INA:

(A) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) Section 216(b) of the INA further requires that the Secretary may not issue a certification if the conditions regarding U.S. worker availability and adverse effect are not met, and may not issue a certification if, as stated in the INA:

(1) There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification.

(2)(A) The employer during the previous two-year period employed H-2A workers and the Secretary has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or non-immigrant workers.

(B) No employer may be denied certification under subparagraph (A) for more than three years for any violation described in such subparagraph.

(3) The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers'

compensation law for comparable employment.

(4) The Secretary determines that the employer has not made positive recruitment efforts within a multistate region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer. The obligation to engage in positive recruitment . . . shall terminate on the date the H-2A workers depart for the employer's place of employment.

(3) Regarding the labor certification determination itself, section 216(c)(3) of the INA, as quoted in the following, specifically directs the Secretary to make the certification if:

(i) The employer has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary), and

(ii) The employer does not actually have, or has not been provided with referrals of, qualified individuals who have indicated their availability to perform such labor or services on the terms and conditions of a job offer which meets the requirements of the Secretary.

(c) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities below which similarly employed U.S. workers would be adversely affected must be established. (The regulations in this subpart establish such minimum levels for wages, terms, benefits, and conditions of employment). Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Usery*, 531 F. 2d 299 (5th



Cir. 1976). Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this subpart set forth requirements for recruiting U.S. workers in accordance with this principle.

(d) *Construction.* This subpart shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc. v. Brennan*, 508 F. 2d 493, 500 (1st Cir. 1974); *Flecha v. Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the wages, terms, and conditions of domestic workers similarly employed. *Williams v. Usery*, 531 F. 2d 305, 306 (5th Cir. 1976), *cert. denied*, 429 U.S. 1000, and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

EFFECTIVE DATE NOTE: At 65 FR 43542, July 13, 2000, §655.90(a) was amended by adding before the last sentence a new sentence, effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001. For the convenience of the user, the added text is set forth as follows:

**§ 655.90 Scope and purpose of subpart B.**

(a) \* \* \* This subpart also describes the processes and procedures governing consideration of requests for H-2A petition approval and revocation, set out in the Immigration and Naturalization Service regulations at 8 CFR 214.2(h). \* \* \*

\* \* \* \* \*

**§ 655.92 Authority of the Regional Administrator.**

Under this subpart, the accepting for consideration and the making of temporary alien agricultural labor certification determinations are ordinarily performed by the Regional Administrator (RA) of an Employment and Training Administration region, who, in turn, may delegate this responsibility to a designated staff member.

The Director of the United States Employment Service, however, may direct that certain types of applications or certain applications shall be handled by, and the determinations made by USES in Washington, DC. In those cases, the RA will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

EFFECTIVE DATE NOTE: At 65 FR 43542, July 13, 2000, §655.92 was amended by revising the first sentence, effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001. For the convenience of the user, the revised text is set forth as follows:

**§ 655.92 Authority of the Regional Administrator.**

Under this subpart and INS regulations at 8 CFR 214.2(h), the accepting for consideration, the making of temporary alien agricultural labor certification determinations, and H-2A petition determinations ordinarily are performed by the Regional Administrator (RA) of an Employment and Training Administration region, who, in turn, may delegate this responsibility to a designated staff member. \* \* \*

\* \* \* \* \*

**§ 655.93 Special circumstances.**

(a) *Systematic process.* The regulations under this subpart are designed to provide a systematic process for handling applications from the kinds of employers who have historically utilized non-immigrant alien workers in agriculture, usually in relation to the production or harvesting of a particular agricultural crop for market, and which normally share such characteristics as:

- (1) A fixed-site farm, ranch, or similar establishment;
- (2) A need for workers to come to their establishment from other areas to perform services or labor in and around their establishment;
- (3) Labor needs which will normally be controlled by environmental conditions, particularly weather and sunshine; and
- (4) A reasonably regular workday or workweek.

(b) *Establishment of special procedures.* In order to provide for a limited degree

of flexibility in carrying out the Secretary's responsibilities under the INA, while not deviating from the statutory requirements to determine U.S. worker availability and make a determination as to adverse effect, the Director has the authority to establish special procedures for processing H-2A applications when employers can demonstrate upon written application to and consultation with the Director that special procedures are necessary. In a like manner, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the Director has the authority to establish monthly, weekly, or bi-weekly adverse effect wage rates for those occupations, for a Statewide or other geographical area, other than the rates established pursuant to § 655.107 of this part, provided that the Director uses a methodology to establish such adverse effect wage rates which is consistent with the methodology in § 655.107(a). Prior to making determinations under this paragraph (b), the Director may consult with employer representatives, appropriate RAs, and worker representatives.

(c) *Construction.* This subpart shall be construed to permit the Director to continue and, where the Director deems appropriate, to revise the special procedures previously in effect for the handling of applications for sheepherders in the Western States (and to adapt such procedures to occupations in the range production of other livestock) and for custom combine crews.

**§ 655.100 Overview of this subpart and definition of terms.**

(a) *Overview—(1) Filing applications.* This subpart provides guidance to an employer who desires to apply for temporary alien agricultural labor certification for the employment of H-2A workers to perform agricultural employment of a temporary or seasonal nature. The regulations in this subpart provide that such employer shall file an H-2A application, including a job offer, on forms prescribed by the Employment and Training Administration (ETA), which describes the material terms and conditions of employment to be offered and afforded to U.S. workers

and H-2A workers, with the Regional Administrator (RA) having jurisdiction over the geographical area in which the work will be performed. The entire application shall be filed with the RA no less than 45 calendar days before the first date of need for workers, and a copy of the job offer shall be submitted at the same time to the local office of the State employment service agency which serves the area of intended employment. Under the regulations, the RA will promptly review the application and notify the applicant in writing if there are deficiencies which render the application not acceptable for consideration, and afford the applicant a five-calendar-day period for resubmittal of an amended application or an appeal of the RA's refusal to approve the application as acceptable for consideration. Employers are encouraged to file their applications in advance of the 45-calendar-day period mentioned above in this paragraph (a)(1). Sufficient time should be allowed for delays that might arise due to the need for amendments in order to make the application acceptable for consideration.

(2) *Amendment of applications.* This subpart provides for the amendment of applications, at any time prior to the RA's certification determination, to increase the number of workers requested in the initial application; without requiring, under certain circumstances, an additional recruitment period for U.S. workers.

(3) *Untimely applications.* If an H-2A application does not satisfy the specified time requirements, this subpart provides for the RA's advice to the employer in writing that the certification cannot be granted because there is not sufficient time to test the availability of U.S. workers; and provides for the employer's right to an administrative review or a *de novo* hearing before an administrative law judge. Emergency situations are provided for, wherein the RA may waive the specified time periods.

(4) *Recruitment of U.S. workers; determinations—(i) Recruitment.* This subpart provides that, where the application is accepted for consideration and meets the regulatory standards, the State agency and the employer begin to recruit U.S. workers. If the employer has

complied with the criteria for certification, including recruitment of U.S. workers, by 20 calendar days before the date of need specified in the application (except as provided in certain cases), the RA makes a determination to grant or deny, in whole or in part, the application for certification.

(ii) *Granted applications.* This subpart provides that the application for temporary alien agricultural labor certification is granted if the RA finds that the employer has not offered foreign workers higher wages or better working conditions (or has imposed less restrictions on foreign workers) than those offered and afforded to U.S. workers; that sufficient U.S. workers who are able, willing, and qualified will not be available at the time and place needed to perform the work for which H-2A workers are being requested; and that the employment of such aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers.

(iii) *Fees—(A) Amount.* This subpart provides that each employer (except joint employer associations) of H-2A workers shall pay to the RA fees for each temporary alien agricultural labor certification received. The fee for each employer receiving a temporary alien agricultural labor certification is \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than \$1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, each employer-member receiving a temporary alien agricultural labor certification shall pay a fee of \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than \$1,000. The joint employer association will not be charged a separate fee.

(B) *Timeliness of payment.* The fee must be received by the RA no later than 30 calendar days after the granting of each temporary alien agricultural labor certification. Fees received any later are untimely. Failure to pay fees in a timely manner is a substantial

violation which may result in the denial of future temporary alien agricultural labor certifications.

(iv) *Denied applications.* This subpart provides that if the application for temporary alien agricultural labor certification is denied, in whole or in part, the employer may seek review of the denial, or a *de novo* hearing, by an administrative law judge as provided in this subpart.

(b) *Definitions of terms used in this subpart.* For the purposes of this subpart:

*Accept for consideration* means, with respect to an application for temporary alien agricultural labor certification, the action by the RA to notify the employer that a filed temporary alien agricultural labor certification application meets the adverse effect criteria necessary for processing. An application accepted for consideration ultimately will be approved or denied in a temporary alien agricultural labor certification determination.

*Administrative law judge* means a person within the Department of Labor Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105; or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by part 656 of this chapter, but which shall hear and decide appeals as set forth in §655.112 of this part. "Chief Administrative Law Judge" means the chief official of the Department of Labor Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

*Adverse effect wage rate (AEWR)* means the wage rate which the Director has determined must be offered and paid, as a minimum, to every H-2A worker and every U.S. worker for a particular occupation and/or area in which an employer employs or seeks to employ an H-2A worker so that the wages of similarly employed U.S. workers will not be adversely affected.

*Agent* means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, which (1) is authorized to act on behalf of the employer for temporary alien agricultural labor certification purposes, and (2) is not itself an

employer, or a joint employer, as defined in this paragraph (b).

*Director* means the chief official of the United States Employment Service (USES) or the Director's designee.

*DOL* means the United States Department of Labor.

*Eligible worker* means a U.S. worker, as defined in this section.

*Employer* means a person, firm, corporation or other association or organization which suffers or permits a person to work and (1) which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee. An association of employers shall be considered the sole employer if it has the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with an employer member if it shares with the employer member one or more of the definitional indicia.

*Employment Service (ES) and Employment Service (ES) System* mean, collectively, the USES, the State agencies, the local offices, and the ETA regional offices.

*Employment Standards Administration* means the agency within the Department of Labor (DOL), which includes the Wage and Hour Division, and which is charged with the carrying out of certain functions of the Secretary under the INA.

*Employment and Training Administration (ETA)* means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

*Federal holiday* means a legal public holiday as defined at 5 U.S.C. 6103.

*H-2A worker* means any non-immigrant alien admitted to the United States for agricultural labor or services of a temporary or seasonal nature under section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)).

*Immigration and Naturalization Service (INS)* means the component of the U.S. Department of Justice which makes

the determination under the INA on whether or not to grant visa petitions to employers seeking H-2A workers to perform temporary agricultural work in the United States.

*INA* means the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*).

*Job offer* means the offer made by an employer or potential employer of H-2A workers to both U.S. and H-2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

*Job opportunity* means a job opening for temporary, full-time employment at a place in the United States to which U.S. workers can be referred.

*Local office* means the State agency's office which serves a particular geographic area within a State.

*Positive recruitment* means the active participation of an employer or its authorized hiring agent in locating and interviewing applicants in other potential labor supply areas and in the area where the employer's establishment is located in an effort to fill specific job openings with U.S. workers.

*Prevailing* means, with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that:

(i) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; and

(ii) This 50 percent or more of employers also employs 50 percent or more of U.S. workers in the occupation and area (including H-2A and non-H-2A employers for purposes of determinations concerning the provision of family housing, frequency of wage payments, and workers supplying their own bedding, but non-H-2A employers only for determinations concerning the provision of advance transportation and the utilization of farm labor contractors).

*Regional Administrator, Employment and Training Administration (RA)* means the chief ETA official of a DOL regional office or the RA's designee.

*Secretary* means the Secretary of Labor or the Secretary's designee.

*Solicitor of Labor* means the Solicitor, United States Department of Labor,

and includes employees of the Office of the Solicitor of Labor designated by the Solicitor to perform functions of the Solicitor under this subpart.

*State agency* means the State employment service agency designated under §4 of the Wagner-Peyser Act to cooperate with the USES in the operation of the ES System.

*Temporary alien agricultural labor certification* means the certification made by the Secretary of Labor with respect to an employer seeking to file with INS a visa petition to import an alien as an H-2A worker, pursuant to sections 101(a)(15)(H)(ii)(a), 214(a) and (c), and 216 of the INA that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services involved in the petition, and (2) the employment of the alien in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1186).

*Temporary alien agricultural labor certification determination* means the written determination made by the RA to approve or deny, in whole or in part, an application for temporary alien agricultural labor certification.

*United States Employment Service (USES)* means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices and carrying out certain functions of the Secretary under the INA.

*United States (U.S.) worker* means any worker who, whether a U.S. national, a U.S. citizen, or an alien, is legally permitted to work in the job opportunity within the United States (as defined at §101(a)(38) of the INA (8 U.S.C. 1101(a)(38))).

*Wages* means all forms of cash remuneration to a worker by an employer in payment for personal services.

(c) *Definition of agricultural labor or services of a temporary or seasonal nature.* For the purposes of this subpart, "agricultural labor or services of a temporary or seasonal nature" means the following:

(1) "*Agricultural labor or services*". Pursuant to section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), "agricultural labor or services" is defined for the purposes of this subpart as either "agricultural labor" as defined and applied in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) or "agriculture" as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)). An occupation included in either statutory definition shall be "agricultural labor or services", notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are quoted below:

(i) "*Agricultural labor*". Section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)), quoted as follows, defines the term "agricultural labor" to include all service performed:

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(2) Services performed in the employ of the owner or tenant or other operator of a farm, in connection with the operation, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(3) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(4)(A) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(B) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(ii) "Agriculture" Section 203(f) of title 29, United States Code, (section 3(f) of the Fair Labor Standards Act of 1938, as codified), quoted as follows, defines "agriculture" to include:

(f) \* \* \* farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(iii) "Agricultural commodity". Section 1141j(g) of title 12, United States Code, (section 15(g) of the Agricultural Marketing Act, as amended), quoted as follows, defines "agricultural commodity" to include:

(g) \* \* \* in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived:

Gum spirits of turpentine, and gum rosin, as defined in section 92 of Title 7.

(iv) "Gum rosin". Section 92 of title 7, United States Code, quoted as follows, defines "gum spirits of turpentine" and "gum rosin" as—

(c) "Gum spirits of turpentine" means spirits of turpentine made from gum (oleoresin) from a living tree.

\* \* \* \* \*

(h) "Gum rosin" means rosin remaining after the distillation of gum spirits of turpentine.

(2) "Of a temporary or seasonal nature"—(i) "On a seasonal or other temporary basis". For the purposes of this subpart, "of a temporary or seasonal nature" means "on a seasonal or other temporary basis", as defined in the Employment Standards Administration's Wage and Hour Division's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) MSPA definition. For informational purposes, the definition of "on a seasonal or other temporary basis", as set forth at 29 CFR 500.20, is provided below:

"On a seasonal or other temporary basis" means:

\* \* \* \* \*

Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

\* \* \* \* \*

A worker is employed on "other temporary basis" where he is employed for a limited time only or his performance is contemplated for a particular piece of work,

usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

\* \* \* \* \*

“On a seasonal or other temporary basis” does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

\* \* \* \* \*

“On a seasonal or other temporary basis” does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(iii) “Temporary”. For the purposes of this subpart, the definition of “temporary” in paragraph (c)(2)(ii) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances, pursuant to §655.106(c)(3) of this part.

[52 FR 20507, June 1, 1987, as amended at 57 FR 43123, Sept. 17, 1992; 64 FR 34966, June 29, 1999]

EFFECTIVE DATE NOTE: At 65 FR 43543, July 13, 2000, §655.100 was amended in paragraph (a)(1) by adding after “certification” in the first sentence, the phrase “and H-2A petition approval” and by adding at the end a new sentence; in paragraph (a)(4)(i) in the second sentence the phrase “20 calendar days” is removed and the phrase “30 calendar days” is added in lieu thereof, and in the last sentence the phrase “for certification” is removed; paragraph (a)(4)(iv) is amended by removing the phrase “for temporary alien agricultural labor certification”; paragraph (b) is amended in the final sentence of the definition of *Accept for consideration* by removing the phrase “in a temporary alien agricultural labor certification determination”; and in the definition of “Immigration and Naturalization Service (INS)”, by removing the phrase “which makes” and adding in lieu thereof the phrase “having the authority to

make”, effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001. For the convenience of the user, the added text is set forth as follows:

**§ 655.100 Overview of this subpart and definition of terms.**

(a) \* \* \* (1) \* \* \* The term ‘application’ here used in this subpart shall mean an application for temporary alien labor certification and an H-2A petition unless otherwise stated.

\* \* \* \* \*

**§ 655.101 Temporary alien agricultural labor certification applications.**

(a) *General*—(1) *Filing of application.* An employer who anticipates a shortage of U.S. workers needed to perform agricultural labor or services of a temporary or seasonal nature may apply to the RA in whose region the area of intended employment is located, for a temporary alien agricultural labor certification for temporary foreign workers (H-2A workers). A signed application for temporary alien agricultural worker certification shall be filed by the employer, or by an agent of the employer, with the RA. At the same time, a duplicate application shall be submitted to the local office serving the area of intended employment.

(2) *Applications filed by agents.* If the temporary alien agricultural labor certification application is filed by an agent on behalf of an employer, the agent may sign the application if the application is accompanied by a signed statement from the employer which authorizes the agent to act on the employer’s behalf. The employer may authorize the agent to accept for interview workers being referred to the job and to make hiring commitments on behalf of the employer. The statement shall specify that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer’s behalf, and for compliance with all regulatory and other legal requirements.

(3) *Applications filed by associations.* If an association of agricultural producers which uses agricultural labor or

services files the application, the association shall identify whether it is: (i) The sole employer; (ii) a joint employer with its employer-member employers; or (iii) the agent of its employer-members. The association shall submit documentation sufficient to enable the RA to verify the employer or agency status of the association; and shall identify by name and address each member which will be an employer of H-2A workers.

(b) *Application form.* Each H-2A application shall be on a form or forms prescribed by ETA. The application shall state the total number of workers the employer anticipates employing in the agricultural labor or service activity during the covered period of employment. The application shall include:

(1) A copy of the job offer which will be used by each employer for the recruitment of U.S. and H-2A workers. The job offer shall state the number of workers needed by the employer, based upon the employer's anticipation of a shortage of U.S. workers needed to perform the agricultural labor or services, and the specific estimated date on which the workers are needed. The job offer shall comply with the requirements of §§655.102 and 653.501 of this chapter, and shall be signed by the employer or the employer's agent on behalf of the employer; and

(2) An agreement to abide by the assurances required by §655.103 of this part.

(c) *Timeliness.* Applications for temporary alien agricultural labor certification are not required to be filed more than 45 calendar days before the first day of need. The employer shall be notified by the RA in writing within seven calendar days of filing the application if the application is not approved as acceptable for consideration. The RA's temporary alien agricultural labor certification determination on the approved application shall be made no later than 20 calendar days before the date of need if the employer has complied with the criteria for certification. To allow for the availability of U.S. workers to be tested, the following process applies:

(1) *Application filing date.* The entire H-2A application, including the job offer, shall be filed with the RA, in du-

plicate, no less than 45 calendar days before the first date on which the employer estimates that the workers are needed. Applications may be filed in person; may be mailed to the RA (Attention: H-2A Certifying Officer) by certified mail, return receipt requested; or delivered by guaranteed commercial delivery which will ensure delivery to the RA and provide the employer with a documented acknowledgment of receipt of the application by the RA. Any application received 45 calendar days before the date of need will have met the minimum timeliness of filing requirement as long as the application is eventually approved by the RA as being acceptable for processing.

(2) *Review of application; recruitment; certification determination period.* Section 655.104 of this part requires the RA to promptly review the application, and to notify the applicant in writing within seven calendar days of any deficiencies which render the application not acceptable for consideration and to afford an opportunity for resubmittal of an amended application. The employer shall have five calendar days in which to file an amended application. Section 655.106 of this part requires the RA to grant or deny the temporary alien agricultural labor certification application no later than 20 calendar days before the date on which the workers are needed, provided that the employer has complied with the criteria for certification, including recruitment of eligible individuals. Such recruitment, for the employer, the State agencies, and DOL to attempt to locate U.S. workers locally and through the circulation of intrastate and interstate agricultural clearance job orders acceptable under §653.501 of this chapter and under this subpart, shall begin on the date that an acceptable application is filed, except that the local office shall begin to recruit workers locally beginning on the date it first receives the application. The time needed to obtain an application acceptable for consideration (including the job offer) after the five-calendar-day period allowed for an amended application will postpone day-for-day the certification determination beyond the 20 calendar days before the date of need, provided that the RA notifies the



applicant of any deficiencies within seven calendar days after receipt of the application. Delays in obtaining an application acceptable for consideration which are directly attributable to the RA will not postpone the certification determination beyond the 20 calendar days before the date of need. When an employer resubmits to the RA (with a copy to the local office) an application with modifications required by the RA, and the RA approves the modified application as meeting necessary adverse effect standards, the modified application will not be rejected solely because it now does not meet the 45-calendar-day filing requirement. If an application is approved as being acceptable for processing without need for any amendment within the seven-calendar-day review period after initial filing, recruitment of U.S. workers will be considered to have begun on the date the application was received by the RA; and the RA shall make the temporary alien agricultural labor certification determination required by §655.106 of this part no later than 20 calendar days before the date of need provided that other regulatory conditions are met.

(3) *Early filing.* Employers are encouraged, but not required, to file their applications in advance of the 45-calendar-day minimum period specified in paragraph (c)(1) of this section, to afford more time for review and discussion of the applications and to consider amendments, should they be necessary. This is particularly true for employers submitting H-2A applications for the first time who may not be familiar with the Secretary's requirements for an acceptable application or U.S. worker recruitment. Such employers particularly are encouraged to consult with DOL and local office staff for guidance and assistance well in advance of the minimum 45-calendar-day filing period.

(4) *Local recruitment; preparation of clearance orders.* At the same time the employer files the H-2A application with the RA, a copy of the application shall be submitted to the local office which will use the job offer portion—of the application to prepare a local job order and begin to recruit U.S. workers in the area of intended employment.

The local office also shall begin preparing an agricultural clearance order, but such order will not be used to recruit workers in other geographical areas until the employer's H-2A application is accepted for consideration and the clearance order is approved by the RA and the local office is so notified by the RA.

(5) *First-time employers of H-2A workers.* With respect only to those applications filed on or before May 31, 1989, and notwithstanding the time requirements in paragraphs (c)(1) through (c)(4) of this section, under the following circumstances the RA shall make the certification determination required by §655.106 of this part no later than 10 calendar days before the date of need:

(i) The employer would be a first-time employer of H-2A workers (and, prior to June 1, 1987, did not use or apply for certification to use H-2 agricultural workers under the INA as then in effect) and has not previously applied for a temporary alien agricultural labor certification to use H-2A workers;

(ii) The RA, the employer, and the ES System have had a reasonable opportunity to test the availability of U.S. workers under the conditions of a job offer which has been determined to be acceptable by the RA in accordance with the provisions of §§655.102 and 655.103 of this part at least 30 calendar days before the date of need; and

(iii) The RA has determined that the employer has otherwise made good faith efforts to comply with the requirements of this subpart.

(d) *Amendments to application to increase number of workers.* Applications may be amended at any time, prior to an RA certification determination, to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers of less than ten workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved only when the need for additional workers could not have been foreseen, and that crops or commodities will be in jeopardy prior

to the expiration of an additional recruitment period.

(e) *Minor amendments to applications.* Minor technical amendments may be requested by the employer and made to the application and job offer prior to the certification determination if the RA determines they are justified and will have no significant effect upon the RA's ability to make the labor certification determination required by §655.106 of this part. Amendments described at paragraph (d) of this section are not "minor technical amendments".

(f) *Untimely applications*—(1) *Notices of denial.* If an H-2A application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the RA may then advise the employer in writing that the certification cannot be granted because, pursuant to paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial shall inform the employer of its right to an administrative review or *de novo* hearing before an administrative law judge.

(2) *Emergency situations.* Notwithstanding paragraph (f)(1) of this section, in emergency situations the RA may waive the time period specified in this section on behalf of employers who have not made use of temporary alien agricultural workers (H-2 or H-2A) for the prior year's agricultural season or for any employer which has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the RA has an opportunity to obtain sufficient labor market information on an expedited basis to make the labor certification determination required by §216 of the INA (8 U.S.C. 1186). In making this determination, the RA will accept information offered by and may consult with representatives of the U.S. Department of Agriculture.

(g) *Length of job opportunity.* The employer shall set forth on the application sufficient information concerning the job opportunity to demonstrate to the RA that the need for the worker is "of a temporary or seasonal nature", as defined at §655.100(c)(2) of this part.

Job opportunities of 12 months or more are presumed to be permanent in nature. Therefore, the RA shall not grant a temporary alien agricultural labor certification where the job opportunity has been or would be filled by an H-2A worker for a cumulative period, including temporary alien agricultural labor certifications and extensions, of 12 months or more, except in extraordinary circumstances.

[52 FR 20507, June 1, 1987, as amended at 64 FR 34966, June 29, 1999]

EFFECTIVE DATE NOTE: At 65 FR 43543, July 13, 2000, §655.101 was amended in paragraph (a)(1) by removing from the first sentence the final period and by adding in lieu thereof the phrase "and H-2A petition on Form ETA 9079, Application for Temporary Agricultural Labor Certification and H-2A Petition."; and by removing from the second sentence the phrase "for temporary alien agricultural worker certification"; by revising paragraph (a)(2) and the section heading; paragraph (b)(1) is amended by removing from the first sentence the phrase "A copy of the" and adding in lieu thereof the word "The"; paragraph (b)(2) is amended by removing the period at the end of the sentence and adding in lieu thereof the phrase "; and"; by adding new paragraphs (b)(3) and (h); in paragraph (c), introductory text, in the first sentence the phrase "for temporary alien agricultural labor certification is removed and in the third sentence the phrase "20 calendar days" is removed and the phrase "30 calendar days" is added in lieu thereof; in paragraph (c)(2) by removing the phrase "20 calendar days" in the four places it appears and the phrase "30 calendar days" is added in each place in lieu thereof, effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001. For the convenience of the user, the added and revised text is set forth as follows:

**§ 655.101 Temporary alien agricultural labor certification applications and petitions.**

(a) \* \* \*

(2) *Applications filed by agents.* If an employer intends to be represented by an agent, the employer shall sign the statement set forth on the Form ETA 9079—*Application for Temporary Agricultural Labor Certification and H-2A Petition* that the agent is representing the employer and that the employer takes full responsibility for the accuracy of any representations made by the agent. The agent may accept for interview workers

being referred to the job and make hiring commitments on behalf of the employer.

\* \* \* \* \*

(b) \* \* \*

(3) An H-2A petition.

\* \* \* \* \*

(h) Requests to change Consulates or ports of entry designated on approved petitions or to request a duplicate approval notice, shall be made by filing an ETA Form 9079M, *Visa Issuance Change Addendum*, with the Certifying Officer that approved ETA Form 9079, *Application for Temporary Agricultural Labor Certification and H-2A Petition*.

**§ 655.102 Contents of job offers.**

(a) *Preferential treatment of aliens prohibited.* The employer's job offer to U.S. workers shall offer the U.S. workers no less than the same benefits, wages, and working conditions which the employer is offering, intends to offer, or will provide to H-2A workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's H-2A workers. This does not relieve the employer from providing to H-2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(b) *Minimum benefits, wages, and working conditions.* Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, DOL has determined that in order to protect similarly employed U.S. workers from adverse effect with respect to benefits, wages, and working conditions, every job offer which must accompany an H-2A application always shall include each of the following minimum benefit, wage, and working condition provisions:

(1) *Housing.* The employer shall provide to those workers who are not reasonably able to return to their residence within the same day housing, without charge to the worker, which may be, at the employer's option, rental or public accommodation type housing.

(i) *Standards for employer-provided housing.* Housing provided by the employer shall meet the full set of DOL Occupational Safety and Health Ad-

ministration standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404-654.417 of this chapter, whichever are applicable, except as provided for under paragraph (b)(1)(iii) of this section. Requests by employers, whose housing does not meet the applicable standards, for conditional access to the intrastate or interstate clearance system, shall be processed under the procedures set forth at § 654.403 of this chapter.

(ii) *Standards for range housing.* Housing for workers principally engaged in the range production of livestock shall meet standards of the DOL Occupational Safety and Health Administration for such housing. In the absence of such standards, range housing for sheepherders and other workers engaged in the range production of livestock shall meet guidelines issued by ETA.

(iii) *Standards for other habitation.* Rental, public accommodation, or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards, State standards shall apply. In the absence of applicable local or State standards, Occupational Safety and Health Administration standards at 29 CFR 1910.142 shall apply. Any charges for rental housing shall be paid directly by the employer to the owner or operator of the housing. When such housing is to be supplied by an employer, the employer shall document to the satisfaction of the RA that the housing complies with the local, State, or federal housing standards applicable under this paragraph (b)(1)(iii).

(iv) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by an employer, and use of the public housing unit normally requires charges from migrant workers, such charges shall be paid by the employer directly to the appropriate individual or entity affiliated with the housing's management.

(v) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing shall not be levied upon workers by employers who provide housing for

their workers. However, employers may require workers to reimburse them for damage caused to housing by the individual workers found to have been responsible for damage which is not the result of normal wear and tear related to habitation.

(vi) *Family housing.* When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, family housing shall be provided to workers with families who request it.

(2) *Workers' compensation.* The employer shall provide, at no cost to the worker, insurance, under a State workers' compensation law or otherwise, covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law, if any, for comparable employment. The employer shall furnish the name of the insurance carrier and the insurance policy number, or, if appropriate, proof of State law coverage, to the RA prior to the issuance of a labor certification.

(3) *Employer-provided items.* Except as provided below, the employer shall provide, without charge including deposit charge, to the worker all tools, supplies, and equipment required to perform the duties assigned; the employer may charge the worker for reasonable costs related to the worker's refusal or negligent failure to return any property furnished by the employer or due to such worker's willful damage or destruction of such property. Where it is a common practice in the particular area, crop activity and occupation for workers to provide tools and equipment, with or without the employer reimbursing the workers for the cost of providing them, such an arrangement is permissible if approved in advance by the RA.

(4) *Meals.* Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall provide each worker with three meals a day. When such facilities are not available, the employer either shall provide each worker with three meals a day or shall furnish free and convenient cooking and kitchen facilities to the workers which will enable

the workers to prepare their own meals. Where the employer provides the meals, the job offer shall state the charge, if any, to the worker for such meals. Until a new amount is set pursuant to this paragraph (b)(4), the charge shall not be more than \$5.26 per day unless the RA has approved a higher charge pursuant to §655.111 of this part. Each year the charge allowed by this paragraph (b)(4) will be changed by the same percentage as the 12-month percent change in the Consumer Price Index for All Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Director as a notice in the FEDERAL REGISTER.

(5) *Transportation; daily subsistence—*  
 (i) *Transportation to place of employment.* The employer shall advance transportation and subsistence costs (or otherwise provide them) to workers when it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, or when such benefits are extended to H-2A workers. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved. If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer shall pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer to the place of employment. The amount of the daily subsistence payment shall be at least as much as the employer will charge the worker for providing the worker with three meals a day during employment. If no charges will be made for meals and free and convenient cooking and kitchen facilities will be provided, the amount of the subsistence payment shall be no less than the amount permitted under paragraph (b)(4) of this section.

(ii) *Transportation from place of employment.* If the worker completes the work contract period, the employer shall provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, came to work for the employer, or, if the worker has contracted with a subsequent employer who has not agreed in that contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer shall provide or pay for such expenses; except that, if the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer is not required to provide or pay for such expenses.

(iii) *Transportation between living quarters and worksite.* The employer shall provide transportation between the worker's living quarters (*i.e.*, housing provided by the employer pursuant to paragraph (b)(1) of this section) and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations. This paragraph (b)(5)(iii) is applicable to the transportation of workers eligible for housing, pursuant to paragraph (b)(1) of this section.

(6) *Three-fourths guarantee*—(i) *Offer to worker.* The employer shall guarantee to offer the worker employment for at least three-fourths of the workdays of the total periods during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the expiration date specified in the work contract or in its extensions, if any. If the employer affords the U.S. or H-2A worker during the total work contract period less employment than that required under this paragraph (b)(6), the employer shall pay such worker the amount which the worker would have earned had the worker, in fact, worked for the guaran-

teed number of days. For purposes of this paragraph (b)(6), a workday shall mean the number of hours in a workday as stated in the job order and shall exclude the worker's Sabbath and federal holidays. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time specified in the job order. The work shall be offered for at least three-fourths of the workdays (that is,  $\frac{3}{4} \times$  (number of days)  $\times$  (specified hours)). Therefore, if, for example, the contract contains 20 eight-hour workdays, the worker shall be offered employment for 120 hours during the 20 workdays. A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker shall not be required to work for more than the number hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays.

(ii) *Guarantee for piece-rate-paid worker.* If the worker will be paid on a piece rate basis, the employer shall use the worker's average hourly piece rate earnings or the AEW, whichever is higher, to calculate the amount due under the guarantee.

(iii) *Failure to work.* Any hours which the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to do so pursuant to paragraph (b)(6)(i) of this section and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met.

(iv) *Displaced H-2A worker.* The employer shall not be liable for payment under this paragraph (b)(6) with respect to an H-2A worker whom the RA certifies is displaced because of the employer's compliance with §655.103(e) of this part.

(7) *Records.* (i) The employer shall keep accurate and adequate records with respect to the workers' earnings

including field tally records, supporting summary payroll records and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (b)(6) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the three-fourths guarantee at paragraph (b)(6) of this section, the records shall state the reason or reasons therefore.

(iii) Upon reasonable notice, the employer shall make available the records, including field tally records and supporting summary payroll records for inspection and copying by representatives of the Secretary of Labor, and by the worker and representatives designated by the worker; and

(iv) The employer shall retain the records for not less than three years after the completion of the work contract.

(8) *Hours and earnings statements.* The employer shall furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for the pay period;

(ii) The worker's hourly rate and/or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with and over and above the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily.

(9) *Rates of pay.* (i) If the worker will be paid by the hour, the employer shall pay the worker at least the adverse ef-

fect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period; or

(ii)(A) If the worker will be paid on a piece rate basis and the piece rate does not result at the end of the pay period in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate, the worker's pay shall be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the appropriate hourly wage rate for each hour worked; and the piece rate shall be no less than the piece rate prevailing for the activity in the area of intended employment; and

(B) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention,

(1) Such standards shall be specified in the job offer and be no more than those required by the employer in 1977, unless the RA approves a higher minimum; or

(2) If the employer first applied for H-2 agricultural or H-2A temporary alien agricultural labor certification after 1977, such standards shall be no more than those normally required (at the time of the first application) by other employers for the activity in the area of intended employment, unless the RA approves a higher minimum.

(10) *Frequency of pay.* The employer shall state the frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least twice monthly whichever is more frequent).

(11) *Abandonment of employment; or termination for cause.* If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the local office of such abandonment or termination, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any

worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section, and that worker is not entitled to the “three-fourths guarantee” (see paragraph (b)(6) of this section).

(12) *Contract impossibility.* If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, hurricane, or other Act of God which makes the fulfillment of the contract impossible the employer may terminate the work contract. In the event of such termination of a contract, the employer shall fulfill the three-fourths guarantee at paragraph (b)(6) of this section for the time that has elapsed from the start of the work contract to its termination. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the employer shall:

(i) Offer to return the worker, at the employer’s expense, to the place from which the worker disregarding intervening employment came to work for the employer,

(ii) Reimburse the worker the full amount of any deductions made from the worker’s pay by the employer for transportation and subsistence expenses to the place of employment, and

(iii) Notwithstanding whether the employment has been terminated prior to completion of 50 percent of the work contract period originally offered by the employer, pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker, without intervening employment, has come to work for the employer to the place of employment. Daily subsistence shall be computed as set forth in paragraph (b)(5)(i) of this section. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved.

(13) *Deductions.* The employer shall make those deductions from the worker’s paycheck which are required by

law. The job offer shall specify all deductions not required by law which the employer will make from the worker’s paycheck. All deductions shall be reasonable. The employer may deduct the cost of the worker’s transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such cases, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker’s completion of 50 percent of the worker’s contract period. However, an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the federal minimum wage permitted by the FLSA as determined by the Secretary at 29 CFR part 531.

(14) *Copy of work contract.* The employer shall provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and application for temporary alien agricultural labor certification shall be the work contract.

(c) *Appropriateness of required qualifications.* Bona fide occupational qualifications specified by an employer in a job offer shall be consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops, and shall be reviewed by the RA for their appropriateness. The RA may require the employer to submit documentation to substantiate the appropriateness of the qualification specified in the job offer; and shall consider information offered by and may consult with representatives of the U.S. Department of Agriculture.

(d) *Positive recruitment plan.* The employer shall submit in writing, as a part of the application, the employer’s plan for conducting independent, positive recruitment of U.S. workers as required by §§ 655.103 and 655.105(a) of this

part. Such a plan shall include a description of recruitment efforts (if any) made prior to the actual submittal of the application. The plan shall describe how the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H-2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall describe how it will make the same level of effort as non-H-2A agricultural employers and provide an override which is no less than that being provided by non-H-2A agricultural employers.

**§ 655.103 Assurances.**

As part of the temporary alien agricultural labor certification application, the employer shall include in the job offer a statement agreeing to abide by the conditions of this subpart. By so doing, the employer makes each of the following assurances:

(a) *Labor disputes.* The specific job opportunity for which the employer is requesting H-2A certification is not vacant because the former occupant is on strike or being locked out in the course of a labor dispute.

(b) *Employment-related laws.* During the period for which the temporary alien agricultural labor certification is granted, the employer shall comply with applicable federal, State, and local employment-related laws and regulations, including employment-related health and safety laws.

(c) *Rejections and terminations of U.S. workers.* No U.S. worker will be rejected for or terminated from employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the local office.

(d) *Recruitment of U.S. workers.* The employer shall independently engage in positive recruitment until the foreign workers have departed for the employer's place of employment and shall

cooperate with the ES System in the active recruitment of U.S. workers by:

(1) Assisting the ES System to prepare local, intrastate, and interstate job orders using the information supplied on the employer's job offer;

(2) Placing advertisements (in a language other than English, where the RA determines appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the RA:

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the  $\frac{3}{4}$  guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid by the employer upon completion of 50% of the work contract, or earlier, if appropriate; and

(ii) Each such advertisement shall direct interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the ES System and independently contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone; and

(4) Cooperating with the ES System in contacting schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies such as sponsors of programs under the Job Training Partnership Act throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers.

(e) *Fifty-percent rule.* From the time the foreign workers depart for the employer's place of employment, the employer, except as provided for by § 655.106(e)(1) of this part, shall provide employment to any qualified, eligible U.S. worker who applies to the employer until 50% of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer shall offer to provide housing and the other



benefits, wages, and working conditions required by §655.102 of this part to any such U.S. worker and shall not treat less favorably than H-2A workers any U.S. worker referred or transferred pursuant to this assurance.

(f) *Other recruitment.* The employer shall perform the other specific recruitment and reporting activities specified in the notice from the RA required by §655.105(a) of this part, and shall engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H-2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall make the same level of effort as non-H-2A agricultural employers and shall provide an override which is no less than that being provided by non-H-2A agricultural employers. Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall not be required to provide meals through an override. The employer shall not be required to provide for housing through an override.

(g) *Retaliation prohibited.* The employer shall not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, and shall not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has with just cause:

(1) Filed a complaint under or related to §216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to §216 of the INA;

(2) Instituted or caused to be instituted any proceeding under or related to §216 of the INA, or this subpart or any other DOL regulation promulgated pursuant to §216 of the INA (8 U.S.C. 1186);

(3) Testified or is about to testify in any proceeding under or related to §216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to §216 of the INA;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to §216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to §216 of the INA; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by §216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to §216 of the INA.

(h) *Fees.* The application shall include the assurance that fees will be paid in a timely manner, as follows:

(1) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than \$1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, the fee for each employer-member receiving a temporary alien agricultural labor certification shall be \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than \$1,000. The joint employer association will not be charged a separate fee. Fees shall be paid by a check or money order made payable to "Department of Labor", and are nonrefundable. In the case of employers of H-2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H-2A workers under the application may be paid by one check or money order.

(2) *Timeliness.* Fees received by the RA within 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

[52 FR 20507, June 1, 1987, as amended by 55 FR 29358, July 19, 1990]

EFFECTIVE DATE NOTE: At 65 FR 43543, July 13, 2000, §655.103 was amended by removing from the first sentence of the introductory text the phrase "temporary alien agricultural labor certification", effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The

effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001.

**§ 655.104 Determinations based on acceptability of H-2A applications.**

(a) *Local office activities.* The local office, using the job offer portion of the H-2A application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment. The RA should notify the State or local office by telephone no later than seven calendar days after the application was received by the RA if the application has been accepted for consideration. Upon receiving such notice or seven calendar days after the application is received by the local office, whichever is earlier, the local office shall promptly prepare an agricultural clearance order which will permit the recruitment of U.S. workers by the Employment Service System on an intrastate and interstate basis.

(b) *Regional office activities.* The RA, upon receipt of the H-2A application, shall promptly review the application to determine whether it is acceptable for consideration under the timeliness and adverse effect criteria of §§ 655.101-655.103 of this part. If the RA determines that the application does not meet the requirements of §§ 655.101-655.103, the RA shall not accept the application for consideration on the grounds that the availability of U.S. workers cannot be adequately tested because the benefits, wages and working conditions do not meet the adverse effect criteria; however, if the RA determines that the application is not timely in accordance with § 655.101 of this part and that neither the first-year employer provisions of § 655.101(c)(5) nor the emergency provisions of § 655.101(f) apply, the RA may determine not to accept the application for consideration because there is not sufficient time to test the availability of U.S. workers.

(c) *Rejected applications.* If the application is not accepted for consideration, the RA shall notify the applicant in writing (by means normally assuring next-day delivery) within seven calendar days of the date the application was received by the RA with a

copy to the local office. The notice shall:

(1) State all the reasons the application is not accepted for consideration, citing the relevant regulatory standards;

(2) Offer the applicant an opportunity for the resubmission within five calendar days of a modified application, stating the modifications needed in order for the RA to accept the application for consideration;

(3) Offer the applicant an opportunity to request an expedited administrative review of or a *de novo* administrative hearing before an administrative law judge of the nonacceptance; the notice shall state that in order to obtain such a review or hearing, the employer, within seven calendar days of the date of the notice, shall file by facsimile (fax), telegram, or other means normally assuring next day delivery a written request to the Chief Administrative Law Judge of the Department of Labor (giving the address) and simultaneously serve a copy on the RA; the notice shall also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the RA's action; and

(4) State that if the employer does not request an expedited administrative-judicial review or a *de novo* hearing before an administrative law judge within the seven calendar days no further consideration of the employer's application for temporary alien agricultural labor certification will be made by any DOL official.

(d) *Appeal procedures.* If the employer timely requests an expedited administrative review or *de novo* hearing before an administrative law judge pursuant to paragraph (c)(3) of this section, the procedures at § 655.112 of this part shall be followed.

(e) *Required modifications.* If the application is not accepted for consideration by the RA, but the RA's written notification to the applicant is not timely as required by § 655.101 of this part, the certification determination will not be extended beyond 20 calendar days before the date of need. The notice will specify that the RA's temporary alien agricultural labor certification determination will be made no later than 20

calendar days before the date of need, provided that the applicant submits the modifications to the application which are required by the RA within five calendar days and in a manner specified by the RA which will enable the test of U.S. worker availability to be made as required by §655.101 of this part within the time available for such purposes.

[42 FR 45899, Sept. 13, 1977, as amended at 59 FR 41875, Aug. 15, 1994]

EFFECTIVE DATE NOTE: At 65 FR 43543, July 13, 2000, §655.104(e) was amended by removing in the two places it appears the phrase "20 calendar days" and adding in each place the phrase "30 calendar days" in lieu thereof, effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001.

**§ 655.105 Recruitment period.**

(a) *Notice of acceptance of application for consideration; required recruitment.* If the RA determines that the H-2A application meets the requirements of §§655.101-655.103 of this part, the RA shall promptly notify the employer (by means normally assuring next-day delivery) in writing with copies to the State agency. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in §655.103 with respect to the recruitment of U.S. workers. The notice shall require that the job order be laced into intrastate clearance and into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers. The notice may require the employer to engage in positive recruitment efforts within a multi-State region of traditional or expected labor supply where the RA finds, based on current information provided by a State agency and such information as may be offered and provided by other sources, that there are a significant number of able and qualified U.S. workers who, if recruited, would likely be willing to make themselves available for work at the time and place needed. In making such a finding, the RA shall take into account other recent recruiting efforts

in those areas and will attempt to avoid requiring employers to futilely recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations. Positive recruitment is in addition to, and shall be conducted within the same time period as, the circulation through the interstate clearance system of an agricultural clearance order. The obligation to engage in such positive recruitment shall terminate on the date H-2A workers depart for the employer's place of work. In determining what positive recruitment shall be required, the RA will ascertain the normal recruitment practices of non-H-2A agricultural employers in the area and the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers. The RA shall ensure that the effort, including the location(s) of the positive recruitment required of the potential H-2A employer, during the period after filing the application and before the date the H-2A workers depart their prior location to come to the place of employment, shall be no less than: (1) The recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers.

(b) *Recruitment of U.S. workers.* After an application for temporary alien agricultural labor certification is accepted for processing pursuant to paragraph (a) of this section, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall provide overall direction to the employer and the State agency with respect to the recruitment of U.S. workers.

(c) *Modifications.* At any time during the recruitment effort, the RA, with the Director's concurrence, may require modifications to a job offer when the RA determines that the job offer does not contain all the provisions relating to minimum benefits, wages, and working conditions, required by §655.102(b) of this part. If any such

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modifications are required after an application has been accepted for consideration by the RA, the modifications must be made; however, the certification determination shall not be delayed beyond the 20 calendar days prior to the date of need as a result of such modification.

(d) *Final determination.* By 20 calendar days before the date of need specified in the application, except as provided for under §§ 655.101(c)(2) and 655.104(e) of this part for untimely modified applications, the RA, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in § 655.103 of this part. If the RA concludes that the employer has not satisfied the requirements for recruitment of U.S. workers, the RA shall deny the temporary alien agricultural labor certification, and shall immediately notify the employer in writing with a copy to the State agency and local office. The notice shall contain the statements specified in § 655.104(d) of this part.

(e) *Appeal procedure.* With respect to determinations by the RA pursuant to this section, if the employer timely requests an expedited administrative review or a *de novo* hearing before an administrative law judge, the procedures in § 655.112 of this part shall be followed.

EFFECTIVE DATE NOTE: At 65 FR 43543, July 13, 2000, § 655.105 was amended by revising the section heading; by removing from the first sentence in paragraph (a) the word "H-2A"; by removing in paragraph (b) the phrase "for temporary alien agricultural labor certification"; by removing from the last sentence in paragraph (c) the phrase "20 calendar days" and adding the phrase "30 calendar days" in lieu thereof; in paragraph (d) in the first sentence the phrase "20 calendar days" is removed and the phrase "30 calendar days" is added in lieu thereof; and adding a new sentence after the second sentence, effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001. The added and revised text is set forth as follows:

20 CFR Ch. V (4-1-02 Edition)

**§ 655.105 Recruitment of U.S. workers and final determinations on certification and H-2A petition.**

\* \* \* \* \*

(d) \* \* \* If the RA denies the application for temporary alien agricultural labor certification, the RA shall also deny the petition for lack of a labor certification and any other applicable reason in accordance with the criteria set out in 8 CFR 214.2(h). \* \* \*

\* \* \* \* \*

**§ 655.106 Referral of U.S. workers; determinations based on U.S. worker availability and adverse effect; activities after receipt of the temporary alien agricultural labor certification.**

(a) *Referral of able, willing, and qualified eligible U.S. workers.* With respect to the referral of U.S. workers to job openings listed on a job order accompanying an application for temporary alien agricultural labor certification, no U.S. worker-applicant shall be referred unless such U.S. worker has been made aware of the terms and conditions of and qualifications for the job, and has indicated, by accepting referral to the job, that she or he meets the qualifications required and is able, willing, and eligible to take such a job.

(b) (1) *Determinations.* If the RA, in accordance with § 655.105 of this part, has determined that the employer has complied with the recruitment assurances and the adverse effect criteria of § 655.102 of this part, by the date specified pursuant to § 655.101(c)(2) of this part for untimely modified applications or 20 calendar days before the date of need specified in the application, whichever is applicable, the RA shall grant the temporary alien agricultural labor certification request for enough H-2A workers to fill the employer's job opportunities for which U.S. workers are not available. In making the temporary alien agricultural labor certification determination, the RA shall consider as available any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads. Such a firm commitment shall be considered to have been made not only by workers

who have signed work contracts with the employer, but also by those whom the RA determines are likely to sign a work contract. The RA shall count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons or who has not been provided with a lawful job-related reason for rejection by the employer, as determined by the RA. The RA shall not grant a temporary alien agricultural labor certification request for any H-2A workers if the RA determines that:

(i) Enough able, willing, and qualified U.S. workers have been identified as being available to fill all the employer's job opportunities;

(ii) The employer, since the time the application was accepted for consideration under §655.104 of this part, has adversely affected U.S. workers by offering to, or agreeing to provide to, H-2A workers better wages, working conditions or benefits (or by offering to, or agreeing to impose on alien workers less obligations and restrictions) than those offered to U.S. workers;

(iii) The employer during the previous two-year period employed H-2A workers and the RA has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of a temporary alien agricultural labor certification with respect to the employment of U.S. or H-2A workers;

(iv) The employer has not complied with the workers' compensation requirements at §655.102(b)(2) of this part; or

(v) The employer has not satisfactorily complied with the positive recruitment requirements specified by this subpart.

Further, the RA, in making the temporary alien agricultural labor certification determination, will subtract from any temporary alien agricultural labor certification the specific verified number of job opportunities involved which are vacant because of a strike or other labor dispute involving a work stoppage, or a lockout, in the occupation at the place of employment (and for which H-2A workers have been re-

quested). Upon receipt by the RA of such labor dispute information from any source, the RA shall verify the existence of the strike, labor dispute, or lockout and the vacancies directly attributable through the receipt by the RA of a written report from the State agency written following an investigation by the State agency (made under the oversight of the RA) of the situation and after the RA has consulted with the Director prior to making such a determination.

(2) *Fees.* A temporary alien agricultural labor certification determination granting an application shall include a bill for the required fees. Each employer (except joint employer associations) of H-2A workers under the application for temporary alien agricultural labor certification shall pay in a timely manner a nonrefundable fee upon issuance of the temporary alien agricultural labor certification granting the application (in whole or in part), as follows:

(i) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than \$1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, each employer-member receiving a temporary alien agricultural labor certification shall pay a fee of \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than \$1,000. The joint employer association will not be charged a separate fee. The fees shall be paid by check or money order made payable to "Department of Labor". In the case of employers of H-2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H-2A workers under the application may be paid by one check or money order.

(ii) *Timeliness.* Fees received by the RA no more than 30 calendar days after

the date of the temporary alien agricultural labor certification determination are timely.

(c) *Changes to temporary alien agricultural labor certifications; temporary alien agricultural labor certifications involving employer associations*—(1) *Changes*. Temporary alien agricultural labor certifications are subject to the conditions and assurances made during the application process. Any changes in the level of benefits, wages, and working conditions an employer may wish to make at any time during the work contract period must be approved by the RA after written application by the employer, even if such changes have been agreed to by an employee. Temporary alien agricultural labor certifications shall be for the specific period of time specified in the employer's job offer, which shall be less than twelve months; shall be limited to the employer's specific job opportunities; and may not be transferred from one employer to another, except as provided for by paragraph (c)(2) of this section.

(2) *Associations*—(i) *Applications*. If an association is requesting a temporary alien agricultural labor certification as a joint employer, the temporary alien agricultural labor certification granted under this section shall be made jointly to the association and to its employer members. Except as provided in paragraph (c)(2)(iii) of this section, such workers may be transferred among its producer members to perform work for which the temporary alien agricultural labor certification was granted, provided the association controls the assignment of such workers and maintains a record of such assignments. All temporary alien agricultural labor certifications to associations may be used for the certified job opportunities of any of its members. If an association is requesting a temporary alien agricultural labor certification as a sole employer, the temporary alien agricultural labor certification granted pursuant to this section shall be made to the association only.

(ii) *Referrals and transfers*. For the purposes of complying with the "fifty-percent rule" at §655.103(e) of this part, any association shall be allowed to refer or transfer workers among its members (except as provided in para-

graph (c)(2)(iii) of this section), and an association acting as an agent for its members shall not be considered a joint employer merely because of such referral or transfer.

(iii) *Ineligible employer-members*. Workers shall not be transferred or referred to an association's member, if that member is ineligible to obtain any or any additional workers, pursuant to §655.110 of this part.

(3) *Extension of temporary alien agricultural labor certification*—(i) *Short-term extension*. An employer who seeks an extension of two weeks or less of the temporary alien agricultural labor certification shall apply for such extension to INS. If INS grants such an extension, the temporary alien agricultural labor certification shall be deemed extended for such period as is approved by INS. No extension granted under this paragraph (c)(3)(i) shall be for a period longer than the original work contract period of the temporary alien agricultural labor certification.

(ii) *Long-term extension*. For extensions beyond the period which may be granted by INS pursuant to paragraph (c)(3)(i) of this section, an employer, after 50 percent of the work contract period has elapsed, may apply to the RA for an extension of the period of the temporary alien agricultural labor certification, for reasons related to weather conditions or other external factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing by the employer, with documentation showing that the extension is needed and could not have been reasonably foreseen by the employer. The RA shall grant or deny the request for extension of the temporary alien agricultural labor certification based on available information, and shall notify the employer of the decision on the request in writing. The RA shall not grant an extension where the total work contract period, including past temporary alien labor certifications for the job opportunity and extensions, would be 12 months or more, except in extraordinary circumstances. The RA shall not grant an extension where the temporary alien agricultural

labor certification has already been extended by INS pursuant to paragraph (c)(3)(i) of this section.

(d) *Denials of applications.* If the RA does not grant the temporary alien agricultural labor certification (in whole or in part) the RA shall notify the employer by means reasonably calculated to assure next-day delivery. The notification shall contain all the statements required in §655.104(c) of this part. If a timely request is made for an administrative-judicial review or a *de novo* hearing by an administrative law judge, the procedures of §655.112 of this part shall be followed.

(e) *Approvals of applications—(1) Continued recruitment of U.S. workers.* After a temporary agricultural labor certification has been granted, the employer shall continue its efforts to recruit U.S. workers until the actual date the H-2A workers depart for the employer's place of employment.

(i) Unless the local employment office is informed in writing of a different date, the local office shall deem the third day immediately preceding the employer's first date of need to be the date the H-2A workers depart for the employer's place of employment. The employer may notify the local office in writing if the workers depart prior to that date.

(ii)(A) If the H-2A workers do not depart for the place of employment on or before the first date of need (or by the stated date of departure, if the local office has been advised of a different date), the employer shall notify the local employment office in writing (or orally, confirmed in writing) as soon as the employer knows that the workers will not depart by the first date of need, and in no event later than such date of need. At the same time, the employer shall notify the local office of the workers' expected departure date, if known. No further notice is necessary if the workers depart by the stated date of departure.

(B) If the employer did not notify the local office of the expected departure date pursuant to paragraph (e)(1)(ii)(A) of this section, or if the H-2A workers do not leave for the place of employment on or before the stated date of departure, the employer shall notify the local employment office in writing (or

orally, confirmed in writing) as soon as the employer becomes aware of the expected departure date, or that the workers did not depart by the stated date and the new expected departure date, as appropriate.

(2) *Requirement for Active Job Order.* The employer shall keep an active job order on file until the "50-percent rule" assurance at §655.103(e) of this part is met, except as provided by paragraph (f) of this section.

(3) *Referrals by ES System.* The ES system shall continue to refer to the employer U.S. workers who apply as long as there is an active job order on file.

(f) *Exceptions.* (1) "Fifty-percent rule" inapplicable to small employers. The assurance requirement at §655.103(e) of this part does not apply to any employer who:

(i) Did not, during any calendar quarter during the preceding calendar year, use more than 500 "man-days" of agricultural labor, as defined in section 3(u) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(u)), and so certifies to the RA in the H-2A application; and

(ii) Is not a member of an association which has applied for a temporary alien agricultural labor certification under this subpart for its members; and

(iii) Has not otherwise "associated" with other employers who are applying for H-2A workers under this subpart, and so certifies to the RA.

(2) *Displaced H-2A workers.* An employer shall not be liable for payment under §655.102(b)(6) of this part with respect to an H-2A worker whom the RA certifies is displaced due to compliance with §655.103(e) of this part.

(g) *Withholding of U.S. workers prohibited.* (1) *Complaints.* Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the job site of H-2A workers in order to force the hiring of U.S. workers under §655.103(e) of this part may submit a written complaint to the local office. The complaint shall clearly identify the person or entity whom the employer believes has withheld the U.S. workers, and shall specify sufficient facts to support the allegation (*e.g.*, dates, places, numbers and names of U.S. workers) which will permit an

investigation to be conducted by the local office.

(2) *Investigations.* The local office shall inform the RA by telephone that a complaint under the provisions of paragraph (g) of this section has been filed and shall immediately investigate the complaint. Such investigation shall include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld. In the event the local office fails to conduct such interviews, the RA shall do so.

(3) *Reports of findings.* Within five working days after receipt of the complaint, the local office shall prepare a report of its findings, and shall submit such report (including recommendations) and the original copy of the employer's complaint to the RA.

(4) *Written findings.* The RA shall immediately review the employer's complaint and the report of findings submitted by the local office, and shall conduct any additional investigation the RA deems appropriate. No later than 36 working hours after receipt of the employer's complaint and the local office's report, the RA shall issue written findings to the local office and the employer. Where the RA determines that the employer's complaint is valid and justified, the RA shall immediately suspend the application of § 655.103(e) of this part to the employer. Such suspension of § 655.103(e) of this part under these circumstances shall not take place, however, until the interviews required by paragraph (g)(2) of this section have been conducted. The RA's determination under the provisions of this paragraph (g)(4) shall be the final decision of the Secretary, and no further review by any DOL official shall be given to it.

(h) *Requests for new temporary alien agricultural labor certification determinations based on nonavailability of able, willing, and qualified U.S. workers—(1) Standards for requests.* If a temporary alien agricultural labor certification application has been denied (in whole or in part) based on the RA's determination of the availability of able, willing, and qualified U.S. workers,

and, on or after 20 calendar days before the date of need specified in the temporary alien agricultural labor certification determination, such U.S. workers identified as being able, willing, qualified, and available are, in fact, not able, willing, qualified, or available at the time and place needed, the employer may request a new temporary alien agricultural labor certification determination from the RA. The RA shall expeditiously, but in no case later than 72 hours after the time a request is received, make a determination on the request.

(2) *Filing requests.* The employer's request for a new determination shall be made directly to the RA. The request may be made to the RA by telephone, but shall be confirmed by the employer in writing as required by paragraphs (h)(2)(i) or (ii) of this section.

(i) *Workers not able, willing, qualified, or eligible.* If the employer asserts that any worker who has been referred by the ES System or by any other person or entity is not an eligible worker or is not able, willing, or qualified for the job opportunity for which the employer has requested H-2A workers, the burden of proof is on the employer to establish that the individual referred is not able, willing, qualified, or eligible because of lawful job-related reasons. The employer's burden of proof shall be met by the employer's submission to the RA, within 72 hours of the RA's receipt of the request for a new determination, of a signed statement of the employer's assertions, which shall identify each rejected worker by name and shall state each lawful job-related reason for rejecting that worker.

(ii) *U.S. workers not available.* If the employer telephonically requests the new determination, asserting solely that U.S. workers are not available, the employer shall submit to the RA a signed statement confirming such assertion. If such signed statement is not received by the RA within 72 hours of the RA's receipt of the telephonic request for a new determination, the RA may make the determination based solely on the information provided telephonically and the information (if any) from the local office.

(3) *Regional office review—(i) Expedient review.* The RA expeditiously shall



review the request for a new determination. The RA may request a signed statement from the local office in support of the employer's assertion of U.S. worker nonavailability or referred U.S. workers not being able, willing, or qualified because of lawful job-related reasons.

(ii) *New determination.* If the RA determines that the employer's assertion of nonavailability is accurate and that no able, willing, or qualified U.S. worker has been refused or is being refused employment for other than lawful job-related reasons, the RA shall, within 72 hours after receipt of the employer's request, render a new determination. Prior to making a new determination, the RA promptly shall ascertain (which may be through the ES System or other sources of information on U.S. worker availability) whether able, willing, and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received.

(iii) *Notification of new determination.* If the RA cannot identify sufficient able, willing, and qualified U.S. workers who are or who are likely to be available, the RA shall grant the employer's new determination request (in whole or in part) based on available information as to replacement U.S. worker availability. The RA's notification to the employer on the new determination shall be in writing (by means normally assuring next-day delivery), and the RA's determination under the provisions of this paragraph (h)(3) shall be the final decision of the Secretary, and no further review shall be given to an employer's request for a new H-2A determination by any DOL official. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful job-related reasons.

[52 FR 20507, June 1, 1987, as amended at 55 FR 29358, July 19, 1990; 64 FR 34966, June 29, 1999]

EFFECTIVE DATE NOTE: At 65 FR 43543, July 13, 2000, §655.106 was amended in paragraph (a) by removing the phrase "for temporary alien agricultural labor certification"; in paragraph (b)(1) by removing from the first sentence the phrase "20 calendar days" and adding the phrase "30 calendar days" in lieu thereof; in paragraph (c) introductory text, by removing from the paragraph heading the phrase "temporary alien agricultural labor certifications", and adding in lieu thereof the word "applications"; in paragraph (c)(1) by removing from the first sentence the phrase "Temporary alien agricultural labor certifications are" and adding in lieu thereof the phrase "The application is"; and by removing from the third sentence the phrase "certification shall be" and adding in lieu thereof the phrase "certifications and H-2A petitions shall be"; in paragraph (c)(2)(i) by removing from the first sentence the phrase "certification as a joint employer" and adding in lieu thereof the phrase "certification and H-2A petition as a joint employer" and by removing the phrase "the temporary alien agricultural labor certification granted" and adding in lieu thereof the phrase "the temporary labor certification and petition granted"; by removing from the second sentence the phrase "certification was" and adding in lieu thereof the phrase "certification and H-2A petition were"; by removing from the third sentence the phrase "certifications to associations" and adding in lieu thereof the phrase "certifications and H-2A petitions to associations"; and by removing from the fourth sentence the phrase "certification as a sole employer" and adding in lieu thereof the phrase "certification and H-2A petition as a sole employer"; in paragraph (d) by removing from the first sentence the phrase "certification (in whole or in part)" and adding in lieu thereof the phrase "certification and H-2A petition (in whole or in part)"; in paragraph (e)(1) by removing the phrase "a temporary agricultural labor certification" and adding in lieu thereof the phrase "an application"; in paragraph (h) by removing from the first sentence the phrase "20 calendar days" and adding in lieu thereof the phrase "30 calendar days", effective Nov. 13, 2000. At 65 FR 67628, Nov. 13, 2000, the effective date was delayed until Oct. 1, 2001. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001.

#### § 655.107 Adverse effect wage rates (AEWRs).

(a) *Computation and publication of AEWRs.* Except as otherwise provided in this section, the AEWRs for all agricultural employment (except for those occupations deemed inappropriate under the special circumstances provisions of §655.93 of this part) for which

temporary alien agricultural labor certification is being sought shall be equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey. The Director shall publish, at least once in each calendar year, on a date or dates to be determined by the Director, AEWRS for each State (for which USDA publishes regional data), calculated pursuant to this paragraph (a) as a notice or notices in the FEDERAL REGISTER.

(b) *Higher prevailing wage rates.* If, as the result of a State agency prevailing wage survey determination, the prevailing wage rate in an area and agricultural activity (as determined by the State agency survey and verified by the Director) is found to be higher than the AEWRS computed pursuant to paragraph (a) of this section, the higher prevailing wage rate shall be offered and paid to all workers by employers seeking temporary alien agricultural labor certification for that agricultural activity and area.

(c) *Federal minimum wage rate.* In no event shall an AEWRS computed pursuant to this section be lower than the hourly wage rate published in 29 U.S.C. 206(a)(1) and currently in effect.

[52 FR 20507, June 1, 1987, as amended at 54 FR 28046, July 5, 1989]

**§ 655.108 H-2A applications involving fraud or willful misrepresentation.**

(a) *Referral for investigation.* If possible fraud or willful misrepresentation involving a temporary alien agricultural labor certification application is discovered prior to a final temporary alien agricultural labor certification determination or if it is learned that the employer or agent (with respect to an application) is the subject of a criminal indictment or information filed in a court, the RA shall refer the matter to the INS and DOL Office of the Inspector General for investigation. The RA shall continue to process the application and may issue a temporary alien agricultural labor certification.

(b) *Continued processing.* If a court finds an employer or agent not guilty

of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the RA shall not deny the temporary alien agricultural labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) *Terminated processing.* If a court or the INS determines that there was fraud or willful misrepresentation involving a temporary alien agricultural labor certification application, the application is thereafter invalid, consideration of the application shall be terminated and the RA shall return the application to the employer or agent with the reasons therefor stated in writing.

EFFECTIVE DATE NOTE: At 65 FR 43544, July 13, 2000, §655.108 was amended in paragraph (a) by removing from the first sentence the phrase "temporary alien agricultural labor certification" and adding in lieu thereof the phrase "an application"; and by removing from the second sentence the word "certification" and adding in lieu thereof the phrase "certification and the determination on the H-2A petition cannot be made until the investigation has been completed", effective Nov. 13, 2000. At 65 FR 67628, Nov. 13, 2000, the effective date was delayed until Oct. 1, 2001. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001.

**§ 655.110 Employer penalties for non-compliance with terms and conditions of temporary alien agricultural labor certifications.**

(a) *Investigation of violations.* If, during the period of two years after a temporary alien agricultural labor certification has been granted (in whole or in part), the RA has reason to believe that an employer violated a material term or condition of the temporary alien agricultural labor certification, the RA shall, except as provided in paragraph (b) of this section, investigate the matter. If, after the investigation, the RA determines that a substantial violation has occurred, the RA, after consultation with the Director, shall notify the employer that a temporary alien agricultural certification request will not be granted for the next period of time in a calendar year during which the employer would

normally be expected to request a temporary alien agricultural labor certification, and any application subsequently submitted by the employer for that time period will not be accepted by the RA. If multiple or repeated substantial violations are involved, the RA's notice to the employer shall specify that the prospective denial of the temporary alien agricultural labor certification will apply not only to the next anticipated period for which a temporary alien agricultural labor certification would normally be requested, but also to any periods within the coming two or three years; two years for two violations, or repetitions of the same violations, and three years for three or more violations, or repetitions thereof. The RA's notice shall be in writing, shall state the reasons for the determinations, and shall offer the employer an opportunity to request an expedited administrative review or a *de novo* hearing before an administrative law judge of the determination within seven calendar days of the date of the notice. If the employer requests an expedited administrative review or a *de novo* hearing before an administrative law judge, the procedures in §655.112 of this part shall be followed.

(b) *Employment Standards Administration investigations.* The RA may make the determination described in paragraph (a) of this section based on information and recommendations provided by the Employment Standards Administration, after an Employment Standards Administration investigation has been conducted in accordance with the Employment Standards Administration procedures, that an employer has not complied with the terms and conditions of employment prescribed as a condition for a temporary alien agricultural labor certification. In such instances, the RA need not conduct any investigation of his/her own, and the subsequent notification to the employer and other procedures contained in paragraph (a) of this section will apply. Penalties invoked by the Employment Standards Administration for violations of temporary alien agricultural labor certification terms and conditions shall be treated and handled separately from sanctions available to the RA, and an employer's obligations

for compliance with the Employment Standards Administration's enforcement penalties shall not absolve an employer from sanctions applied by ETA under this section (except as noted in paragraph (a) of this section).

(c) *Less than substantial violations—(1) Requirement of special procedures.* If, after investigation as provided for under paragraph (a) of this section, or an Employment Standards Administration notification as provided under paragraph (b) of this section, the RA determines that a less than substantial violation has occurred, but the RA has reason to believe that past actions on the part of the employer may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the RA may require the employer to conform to special procedures before and after the temporary alien labor certification determination (including special on-site positive recruitment and streamlined interviewing and referral techniques) designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary alien agricultural labor certification. Such requirements shall be reasonable, and shall not require the employer to offer better wages, working conditions and benefits than those specified in §655.102 of this part, and shall be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this subpart. The RA shall notify the employer in writing of the special procedures which will be required in the coming year. The notification shall state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary alien agricultural labor certification, and shall offer the employer an opportunity to request an administrative review or a *de novo* hearing before an administrative law judge. If an administrative review or *de novo* hearing is requested, the procedures prescribed in §655.112 of this part shall apply.

(2) *Failure to comply with special procedures.* If the RA determines that the employer has failed to comply with special procedures required pursuant to paragraph (c)(1) of this section, the RA shall send a written notice to the employer, stating that the employer's otherwise affirmative temporary alien agricultural labor certification determination will be reduced by twenty-five percent of the total number of H-2A aliens requested (which cannot be more than those requested in the previous year) for a period of one year. Notice of such a reduction in the number of workers requested shall be conveyed to the employer by the RA in the RA's written temporary alien agricultural labor certification determination required by §655.101 of this part (with the concurrence of the Director). The notice shall offer the employer an opportunity to request an administrative review or a *de novo* hearing before an administrative law judge. If an administrative review or *de novo* hearing is requested, the procedures prescribed in §655.112 of this part shall apply, provided that if the administrative law judge affirms the RA's determination that the employer has failed to comply with special procedures required by paragraph (c)(1) of this section, the reduction in the number of workers requested shall be twenty-five percent of the total number of H-2A aliens requested (which cannot be more than those requested in the previous year) for a period of one year.

(d) *Penalties involving members of associations.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an individual producer member of a joint employer association is determined to have committed the violation, the denial of temporary alien agricultural labor certification penalty prescribed in paragraph (a) shall apply only to that member of the association unless the RA determines that the association or other association member participated in, had knowledge of, or had reason to know of the violation, in which case the penalty shall be invoked

against the association or other association member as well.

(e) *Penalties involving associations acting as joint employers.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an association acting as a joint employer with its members is determined to have committed the violation, the denial of temporary alien agricultural labor certification penalty prescribed in paragraph (a) of this section shall apply only to the association, and shall not be applied to any individual producer member of the association unless the RA determines that the member participated in, had knowledge of, or reason to know of the violation, in which case the penalty shall be invoked against the association member as well.

(f) *Penalties involving associations acting as sole employers.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the RA determines that a substantial violation has occurred, and if an association acting as a sole employer is determined to have committed the violation, no individual producer member of the association shall be permitted to employ certified H-2A workers in the crop and occupation for which the H-2A workers had been previously certified for the sole employer association unless the producer member applies for temporary alien agricultural labor certification under the provisions of this subpart in the capacity of an individual employer/applicant or as a member of a joint employer association, and is granted temporary alien agricultural labor certification by the RA.

(g) *Types of violations—(1) Substantial violation.* For the purposes of this subpart, a substantial violation is one or more actions of commission or omission on the part of the employer or the employer's agent, with respect to which the RA determines:

(i)(A) That the action(s) is/are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's U.S. and/or H-2A workforce; and that:

(1) With respect to the action(s), the employer has failed to comply with one or more penalties imposed by the Employment Standards Administration for violation(s) of contractual obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court pursuant to §216 of the INA (8 U.S.C. 1186), this subpart, or 29 CFR part 501 (Employment Standards Administration enforcement of contractual obligations); or

(2) The employer has engaged in a pattern or practice of actions which are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's U.S. and/or H-2A workforce;

(B) That the action(s) involve(s) impeding an investigation of an employer pursuant to §216 of the INA (8 U.S.C. 1186), this subpart, or 29 CFR part 501 (Employment Standards Administration enforcement of contractual obligations);

(C) That the employer has not paid the necessary fee in a timely manner;

(D) That the employer is not currently eligible to apply for a temporary alien agricultural labor certification pursuant to §655.210 of this part (failure of an employer to comply with the terms of a temporary alien agricultural labor certification in which the application was filed under subpart C of this part prior to June 1, 1987); or

(E) That there was fraud involving the application for temporary alien agricultural labor certification of that the employer made a material misrepresentation of fact during the application process; and

(ii) That there are no extenuating circumstances involved with the action(s) described in paragraph (g)(1)(i) of this section (as determined by the RA).

(2) *Less than substantial violation.* For the purposes of this subpart, a less than substantial violation is an action of commission or omission on the part of the employer or the employer's agent which violates a requirement of

this subpart, but is not a substantial violation.

**§655.111 Petition for higher meal charges.**

(a) *Filing petitions.* Until a new amount is set pursuant to this paragraph (a), the RA may permit an employer to charge workers up to \$6.58 for providing them with three meals per day, if the employer justifies the charge and submits to the RA the documentation required by paragraph (b) of this section. In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal such denial. Such appeals shall be filed with the Chief Administrative Law Judge. Administrative law judges shall hear such appeals according to the procedures in 29 CFR part 18, except that the appeal shall not be considered as a complaint to which an answer is required. The decision of the administrative law judge shall be the final decision of the Secretary. Each year the maximum charge allowed by this paragraph (a) will be changed by the same percentage as the twelve-month percent change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Director as a notice in the FEDERAL REGISTER. However, an employer may not impose such a charge on a worker prior to the effective date contained in the RA's written confirmation of the amount to be charged.

(b) *Required documentation.* Documentation submitted shall include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation.

Charges for transportation, depreciation, overhead and similar charges may not be included. Receipts and other cost records for a representative pay period shall be available for inspection by the RA for a period of one year.

**§ 655.112 Administrative review and de novo hearing before an administrative law judge.**

(a) *Administrative review*—(1) *Consideration*. Whenever an employer has requested an administrative review before an administrative law judge of a decision not to accept for consideration a temporary alien agricultural labor certification application, of the denial of a temporary alien agricultural labor certification, or of a penalty under § 655.110 of this part, the RA shall send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge shall immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by part 656 of this chapter, but which shall hear and decide the appeal as set forth in this section) to review the record for legal sufficiency. The administrative law judge shall not remand the case and shall not receive additional evidence.

(2) *Decision*. Within five working days after receipt of the case file the administrative law judge shall, on the basis of the written record and after due consideration of any written submissions submitted from the parties involved or *amici curiae*, either affirm, reverse, or modify the RA's denial by written decision. The decision of the administrative law judge shall specify the reasons for the action taken and shall be immediately provided to the employer, RA, the Director, and INS by means normally assuring next-day delivery. The administrative law judge's decision shall be the final decision of the Secretary and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL official.

(b) *De novo hearing*—(1) *Request for hearing; conduct of hearing*. Whenever an employer has requested a *de novo* hearing before an administrative law judge of a decision not to accept for consideration a temporary alien agricultural labor certification application, of the denial of a temporary alien agricultural labor certification, or of a penalty under § 655.110 of this part, the RA shall send a certified copy of the case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge shall immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by part 656 of this chapter, but which shall hear and decide the appeal as set forth in this section) to conduct the *de novo* hearing. The procedures contained in 29 CFR part 18 shall apply to such hearings, except that:

(i) The appeal shall not be considered to be a complaint to which an answer is required,

(ii) The administrative law judge shall ensure that, at the request of the employer, the hearing is scheduled to take place within five working days after the administrative law judge's receipt of the case file, and

(iii) The administrative law judge's decision shall be rendered within ten working days after the hearing.

(2) *Decision*. After a *de novo* hearing, the administrative law judge shall either affirm, reverse, or modify the RA's determination, and the administrative law judge's decision shall be provided immediately to the employer, RA, Director, and INS by means normally assuring next-day delivery. The administrative law judge's decision shall be the final decision of the Secretary, and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL official.

[52 FR 20507, June 1, 1987, as amended at 59 FR 41876, Aug. 15, 1994]

EFFECTIVE DATE NOTE: At 65 FR 43544, July 13, 2000, § 655.112(a)(1) was amended by removing from the first sentence the phrase "of

the denial of the temporary alien agricultural labor certification" and adding in lieu thereof the phrase "of the denial of the temporary alien agricultural labor certification, the H-2A petition, or the revocation of an H-2A petition", effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001.

**§ 655.113**

**tem; enforcement of work contracts.**

Complaints arising under this subpart may be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E. Complaints which involve worker contracts shall be referred by the local office to the Employment Standards Administration for appropriate handling and resolution. See 29 CFR part 501. As part of this process, the Employment Standards Administration may report the results of its investigation to ETA for consideration of employer penalties under § 655.110 of this part or such other action as may be appropriate.

**§ 655.114 Revocation of H-2A petition approval.**

Determinations to revoke an approved H-2A petition shall be made by the RA in accordance with accordance with the criteria established by the Immigration and Naturalization Service at 8 CFR 214.2(h).

EFFECTIVE DATE NOTE: At 65 FR 43544, July 13, 2000, § 655.114 was added, effective Nov. 13, 2000. At 65 FR 67628, Nov. 13, 2000, the effective date was delayed until Oct. 1, 2001. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001.

**Subpart C- Labor Certification Process for Logging Employment and Non-H-2A Agricultural Employment**

SOURCE: 43 FR 10313, Mar. 10, 1978, unless otherwise noted.

**§ 655.200 General description of this subpart and definition of terms.**

(a) This subpart applies to applications for temporary alien agricultural labor certification filed before June 1, 1987, and to applications for temporary alien labor certification for logging employment.

(b) An employer who desires to use foreign workers for temporary employment must file a temporary labor certification application including a job offer for U.S. workers with a local office of a State employment service agency. The employer should file an application a minimum of 80 days before the estimated date of need for the workers. If filed 80 days before need, sufficient time is allowed for the 60-day recruitment period required by the regulations and a determination by the Regional Administrator (RA) as to the availability of U.S. workers 20 days before the date of need. Shortly after the application has been filed, the RA makes a determination as to whether or not the application has been filed in enough time to recruit U.S. workers and whether or not the job offer for U.S. workers offers wages and working conditions which will not adversely affect the wages and working conditions of similarly employed U.S. workers, as prescribed in the regulations in this subpart. If the application does not meet the regulatory wage and working condition standards, the RA shall deny the temporary labor certification application and offer the employer an administrative-judicial review of the denial by a Department of Labor Hearing Officer. If the application is not timely, the RA has discretion, as set forth in these regulations, to either deny the application or permit the process to proceed reasonably with the employer recruiting U.S. workers upon such terms as will accomplish the purposes of the INA and the INS regulations. Where the application is timely and meets the regulatory standards, the State employment service agency, the employer, and the Department of Labor recruit U.S. workers for 60 days. At the end of the 60 days, the RA grants the temporary labor certification if the RA finds that (1) the employer has not offered foreign workers higher wages or better working conditions (or less restrictions) than that offered to U.S. workers, and (2) U.S. workers are not available for the employer's job opportunities. If the temporary labor certification is denied, the employer may seek an administrative-judicial review of the denial by a Department of Labor Hearing Officer as

provided in these regulations. The Department of Labor thereafter advises the Immigration and Naturalization Service (INS) of approvals and denials of temporary labor certifications. The INS may accept or reject this advice. 8 CFR 214.2(h)(3). The INS makes the final decision as to whether or not to grant visas to the foreign workers. 8 U.S.C. 1184(a).

(c) *Definitions for terms used in this subpart.* *Administrator* means the chief official of the United States Employment Service or the Administrator's designee.

*Adverse effect rate* means the wage rate which the Administrator has determined must be offered and paid to foreign and U.S. workers for a particular occupation and/or area so that the wages of similarly employed U.S. workers will not be adversely affected. The Administrator may determine that the prevailing wage rate in the area and/or occupation is the adverse effect rate, if the use (or non-use) of aliens has not depressed the wages of similarly employed U.S. workers. The Administrator may determine that a wage rate higher than the prevailing wage rate is the adverse effect rate if the Administrator determines that the use of aliens has depressed the wages of similarly employed U.S. workers.

*Agent* means a legal person, such as an association of employers, which (1) is authorized to act as an agent of the employer for temporary labor certification purposes, and (2) which is not itself an employer, or a joint employer, as defined in this section.

*Area of intended employment* means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Standard Metropolitan Statistical Area (SMSA), any place within the SMSA is deemed to be within normal commuting distance of the place of intended employment.

*Employer* means a person, firm, corporation or other association or organization (1) which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a worker at a place within the United States and (2) which has an employer relationship with respect to em-

ployees under this subpart as indicated by the fact that it hires, pays, fires, supervises and otherwise controls the work of such employees. An association of employers shall be considered an employer if it has all of the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with the employer member if it shares with the employer member one or more of the definitional indicia.

*Employment and Training Administration (ETA)* means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

*Hearing Officer* means a Department of Labor official, whether Administrative Law Judge or Hearing Officer, who is authorized to conduct administrative hearings.

*Immigration and Naturalization Service (INS)* means the component of the U.S. Department of Justice which makes the determination under the Immigration and Nationality Act (INA) on whether or not to grant a visa to an alien seeking to perform temporary agricultural or logging work in the United States.

*Job opportunity* means a job opening for temporary, full-time employment at a place in the United States to which U.S. workers can be referred.

*Local office* means an office of a State employment service agency which serves a particular geographic area within a State.

*Regional Administrator, Employment and Training Administration (RA)* means the chief official of the Employment and Training Administration (ETA) in a Department of Labor (DOL) regional office.

*Secretary* means the Secretary of Labor or the Secretary's designee.

*State agency* means the State employment service agency.

*Temporary labor certification* means the advice given by the Secretary of Labor to the Immigration and Naturalization Service, pursuant to the regulations of that agency at 8 CFR 214.2(h)(3)(i), that (1) there are not sufficient U.S. workers who are qualified and available to perform the work and (2) the employment of the alien will not adversely affect the wages and



working conditions of similarly employed U.S. workers.

*United States Employment Service (USES)* means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act of 1933, which is charged with administering the national system of public employment offices and carrying out the functions of the Secretary under the Immigration and Nationality Act.

*United States workers* means any worker who, whether U.S. national, citizen or alien, is legally permitted to work permanently within the United States.

(Approved by the Office of Management and Budget under control number 1205-0015)

[43 FR 10313, Mar. 10, 1978, as amended at 49 FR 18295, Apr. 30, 1984; 52 FR 20524, June 1, 1987]

**§ 655.201 Temporary labor certification applications.**

(a) (1) An employer who anticipates a labor shortage of workers for agricultural or logging employment may request a temporary labor certification for temporary foreign workers by filing, or by having an agent file, in duplicate, a temporary labor certification application, signed by the employer, with a local office in the area of intended employment.

(2) If the temporary labor certification application is filed by an agent, however, the agent may sign the application if the application is accompanied by a letter from each employer the agent represents, signed by the employer, which authorizes the agent to act on the employer's behalf and which states that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf, and for the fulfillment of all legal requirements arising under this subpart.

(3) If an association of employers files the application, the association shall identify and submit documents to verify whether, in accordance with the definitions at § 655.200, it is: (i) The employer, (ii) a joint employer with its member employers, or (iii) the agent of its employer members.

(b) Every temporary labor certification application shall include:

(1) A copy of the job offer which will be used by the employer (or each employer) for the recruitment of both U.S. and foreign workers. The job offer for each employer shall state the number of workers needed by the employer, and shall be signed by the employer. The job offer shall comply with the requirements of §§ 655.202 and 653.108 of this chapter;

(2) The assurances required by § 655.203; and

(3) The specific estimated date of need of workers.

(c) The entire temporary labor certification application shall be filed with the local office in duplicate and in sufficient time to allow the State agency to attempt to recruit U.S. workers locally and through the Employment Service intrastate and interstate clearance system for 60 calendar days prior to the estimated date of need. Section 655.206 requires the RA to grant or deny the temporary labor certification application by the end of the 60 calendar days, or 20 days from the estimated date of need, whichever is later. That section also requires the RA to offer employers an expedited administrative-judicial review in cases of denials of the temporary labor certification applications. Following an administrative-judicial review, the employer has a right to contest any denial before the INS pursuant to 8 CFR 214.2(h)(3)(i). Finally, employers need time, after the temporary labor certification determination, to complete the process for bringing foreign workers into the United States, or to bring an appeal of a denial of an application for the labor certification. Therefore, employers should file their temporary labor certification applications at least 80 days before the estimated date of need specified in the application.

(d) Applications may be amended at any time prior to RA determination to increase the number of workers requested in the original application for labor certification by not more than 15 percent without requiring an additional recruitment period for U.S. workers. Requests for increases beyond 15 percent may be approved only when it is determined that, based on past experience, the need for additional workers could not be foreseen and that a

critical need for the workers would exist prior to the expiration of an additional recruitment period.

(e) If a temporary labor certification application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the local office shall immediately send both copies directly to the appropriate Regional Administrator (RA). The RA may then advise the employer and the INS in writing that the temporary labor certification cannot be granted because, pursuant to the regulations at paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial to the employer shall inform the employer of the right to administrative-judicial review and to ultimately petition INS for the admission of the aliens. In emergency situations, however, the RA may waive the time period specified in this section on behalf of employers who have not made use of temporary alien workers for the prior year's harvest or for other good and substantial cause, provided the RA has sufficient labor market information to make the labor certification determinations required by 8 CFR 214.2(h)(3)(i).

(Approved by the Office of Management and Budget under control number 1205-0015)

[43 FR 10313, Mar. 10, 1978, as amended at 49 FR 18295, Apr. 30, 1984]

**§ 655.202 Contents of job offers.**

(a) So that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers, each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits which the employer is offering, intends to offer, or will afford, to temporary foreign workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's foreign workers. For example, if the employer intends to advance transportation costs to foreign workers either directly or indirectly (by having them paid by the foreign government involved), the employer must offer to ad-

vance the transportation costs of U.S. workers.

(b) Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, the Administrator has determined that, in order to protect similarly employed U.S. workers from adverse effect with respect to wages and working conditions, every job offer for U.S. workers must always include the following minimal benefit, wage, and working condition provisions:

(1) The employer will provide the worker with housing without charge to the worker. The housing will meet the full set of standards set forth at 29 CFR 1910.142 or the full set of standards set forth at part 654, subpart E of this chapter, whichever is applicable under the criteria of 20 CFR 654.401; except that, for mobile range housing for sheepherders, the housing shall meet existing Departmental guidelines. When it is the prevailing practice in the area of intended employment to provide family housing, the employer will provide such housing to such workers.

(2) (i) If the job opportunity is covered by the State workers' compensation law, the worker will be eligible for workers' compensation for injury and disease arising out of and in the course of worker's employment; or

(ii) If the job opportunity is not covered by the State workers' compensation law, the employer will provide at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment;

(3) The employer will provide without cost to the worker all tools, supplies and equipment required to perform the duties assigned and, if any of these items are provided by the worker, the employer will reimburse the worker for the cost of those so provided;

(4) The employer will provide the worker with three meals a day, except that where under prevailing practice or longstanding arrangement at the establishment workers prepare their meals, employers need furnish only

free and convenient cooking and kitchen facilities. Where the employer provides the meals, the job offer shall state the cost to the worker for such meals. Until a new amount is set pursuant to this paragraph (b)(4), the cost shall not be more than \$4.94 per day unless the RA has approved a higher cost pursuant to §655.211 of this part. Each year the charge allowed by this paragraph (b)(4) will be changed by the 12-month percent change for the Consumer Price Index for All Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on their publication by the Administrator in the FEDERAL REGISTER.

(5) (i) The employer will provide or pay for the worker's transportation and daily subsistence from the place, from which the worker, without intervening employment, will come to work for the employer, to the place of employment, subject to the deductions allowed by paragraph (b)(13) of this section. The amount of the daily subsistence payment shall be at least as much as the amount the employer will charge the worker for providing the worker with three meals a day during employment;

(ii) If the worker completes the work contract period, the employer will provide or pay for the worker's transportation and daily subsistence from the place of employment to the place, from which the worker, without intervening employment, came to work for the employer, unless the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite; and

(iii) The employer will provide transportation between the worker's living quarters and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations;

(6) (i) The employer guarantees to offer the worker employment for at least three-fourths of the workdays of the total period during which the work contract and all extensions thereof are

in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the termination date specified in the work contract, or in its extensions if any. For purposes of this paragraph, a workday shall mean any period consisting of 8 hours of work time. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays. The work must be offered for at least three-fourths of the 8 hour workdays. (That is,  $\frac{3}{4} \times$  (number of days  $\times$  8 hours.)) Therefore, if, for example, the contract contains 20 workdays, the worker must be offered employment for 120 hours during the 20 workdays. A worker may be offered more than 8 hours of work on a single workday. For purposes of meeting the guarantee, however, the worker may not be required to work for more than 8 hours per workday, or on the worker's Sabbath or Federal holidays;

(ii) If the worker will be paid on a piece rate basis, the employer will use the worker's average hourly earnings to calculate the amount due under the guarantee; and

(iii) Any hours which the worker fails to work when the worker has been offered an opportunity to do so pursuant to paragraph (b)(6)(i) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday, or on the worker's Sabbath or Federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met;

(7) (i) The employer will keep accurate and adequate records with respect to the workers' earnings, including field tally records, supporting summary payroll records, and records showing: The nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with, and over and above, the guarantee); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay; the worker's earnings per pay period; and the amount of and reasons for any and

all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the guarantee, the records will state the reason or reasons therefor;

(iii) The records, including field tally records and supporting summary payroll records, will be made available for inspection and copying by representatives of the Secretary of Labor, and by the worker and the worker's representatives; and

(iv) The employer will retain the records for not less than three years after the completion of the contract;

(8) The employer will furnish to the worker at or before each payday, in one or more written statements:

(i) The worker's total earnings for the pay period;

(ii) The worker's hourly rate or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with, and over and above, the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily;

(9) (i) If the worker will be paid by the hour, the employer will pay the worker at least the adverse effect rate; or

(ii)(A) If the worker will be paid on a piece rate basis, and the piece rate does not result at the end of the pay period in average hourly earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the adverse effect rate, the worker's pay will be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the adverse effect rate.

(B) If the employer who pays on a piece rate basis requires one or more minimum productivity standards of workers as a condition of job retention, (1) such standards shall be no more than those applied by the employer in 1977, unless the RA approves a higher minimum; or (2) if the employer first

applied for temporary labor certification after 1977, such standards shall be no more than those normally required (at the time of that first application) by other employers for the activity in the area of intended employment, unless the RA approves a higher minimum.

(10) The frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least bi-weekly whichever is more frequent);

(11) If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section;

(12) If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire or other Act of God which makes the fulfillment of the contract impossible, and the RA so certifies, the employer may terminate the work contract. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the worker (i) will be returned to the place from which the worker, without intervening employment, came to work for the employer at the employer's expense; and

(ii) Will be reimbursed the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment borne directly or indirectly by the employer;

(13) The employer will make those deductions from the worker's paycheck which are required by law. The job offer shall specify all deductions, not required by law, which the employer will make from the worker's paycheck. All deductions shall be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by

the employer; in such cases, however, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period; and

(14) The employer will provide the worker a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section.

(Approved by the Office of Management and Budget under control number 1205-0015)

[43 FR 10313, Mar. 10, 1978, as amended at 45 FR 14185, Mar. 4, 1980; 49 FR 18295, Apr. 30, 1984; 51 FR 30351, Aug. 26, 1986; 52 FR 11466, Apr. 9, 1987]

**§ 655.203 Assurances.**

As part of the temporary labor certification application, the employer shall include assurances, signed by the employer, that:

(a) The job opportunity is not:

(1) Vacant because the former occupant is on strike or being locked out in the course of a labor dispute; or

(2) At issue in a labor dispute involving a work stoppage;

(b) During the period for which the temporary labor certification is granted, the employer will comply with applicable Federal, State and local employment-related laws, including employment related health and safety laws;

(c) The job opportunity is open to all qualified U.S. workers without regard to race, color, national origin, sex, or religion, and is open to U.S. workers with handicaps who are qualified to perform the work. No U.S. worker will be rejected for employment for other than a lawful job related reason;

(d) The employer will cooperate with the employment service system in the active recruitment of U.S. workers until the foreign workers have departed for the employer's place of employment by;

(1) Allowing the employment service system to prepare local, intrastate and interstate job orders using the information supplied on the employer's job offer;

(2) Placing at least two advertisements for the job opportunities in local newspapers of general circulation.

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the ¾ guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid for by the employer;

(ii) Each advertisement shall direct interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the employment service system in contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone;

(4) Cooperating with the employment service system in contacting schools, business and labor organizations, fraternal and veterans organizations, and non-profit organizations and public agencies such as sponsors of programs under the Comprehensive Employment and Training Act, throughout the area of intended employment, in order to enlist them in helping to find U.S. workers; and

(5) If the employer, or an association of employers of which the employer is a member, intends to negotiate and/or contract with the Government of a foreign nation or any foreign association, corporation or organization in order to secure foreign workers, making the same kind and degree of efforts to secure U.S. workers;

(e) From the time the foreign workers depart for the employer's place of employment, the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer will offer to provide housing, and the other benefits, wages, and working conditions required by §655.202, to any such U.S. worker; and

(f) Performing the other specific recruitment activities specified in the notice from the RA required by §655.205(a).

**§ 655.204 Determinations based on temporary labor certification applications.**

(a) Within two working days after the temporary labor certification application has been filed with it, the local office shall mail the duplicate application directly to the appropriate RA.

(b) The local office, using the job offer portion of its copy of the temporary labor certification application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment.

(c) The RA, upon receipt of the duplicate temporary labor certification application, shall promptly review the application to determine whether it meets the requirements of §§ 655.201-655.203 in order to determine whether the employer's application is (1) timely, and (2) contains offers of wages, benefits, and working conditions required to ensure that similarly employed U.S. workers will not be adversely affected. If the RA determines that the temporary labor certification application is not timely in accordance with § 655.201 of this subpart, the RA may promptly deny the temporary labor certification on the grounds that, in accordance with that regulation, there is not sufficient time to adequately test the availability of U.S. workers. If the RA determines that the application does not meet the requirements of §§ 655.202-655.203 because the wages, working conditions, benefits, assurances, job offer, etc. are not as required, the RA shall deny the certification on the grounds that the availability of U.S. workers cannot be adequately tested because the wages or benefits, etc. do not meet the adverse effect criteria.

(d) If the certification is denied, the RA shall notify the employer in writing of the determination, with a copy to the local office and the Administrator. The notice shall:

(1) State the reasons for the denial, citing the relevant regulations; and

(2) Offer the employer an opportunity to request an expedited administrative-judicial review of the denial by a Department of Labor (DOL) Hearing Officer. The notice shall state that in order

to obtain such a review, the employer must, within five calendar days of the date of the notice, file by facsimile (fax), telegram, or other means normally assuring next day delivery a written request for such a review to the Chief Administrative Law Judge of the Department of Labor (giving the address) and simultaneously serve a copy on the Regional Administrator. The notice shall also state that the employer's request for review should contain any legal arguments which the employer believes will rebut the basis of the RA's denial of certification; and

(3) State that, if the employer does not request an expedited administrative-judicial review before a DOL Hearing Officer within the five days:

(i) The RA will advise the INS that the certification cannot be granted, giving the reasons therefor, and that an administrative-judicial review of the denial was offered to the employer but not accepted, and enclosing, for INS review, the entire temporary labor certification application file; and

(ii) The employer has the opportunity to submit evidence to the INS to rebut the bases of the RA's determination in accordance with the INS regulation at 8 CFR 214.2(h)(3)(i) but that no further review of the employer's application for temporary labor certification may be made by any Department of Labor official.

(e) If the employer timely requests an expedited administrative-judicial review pursuant to paragraph (d)(2) of this section, the procedures of § 655.212 shall be followed.

[43 FR 10313, Mar. 10, 1978, as amended at 59 FR 41876, Aug. 15, 1994]

**§ 655.205 Recruitment period.**

(a) If the RA determines that the temporary labor certification application meets the requirements of §§ 655.201 through 655.203, the RA shall promptly notify the employer in writing, with copies to the State agency and local office. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in § 655.203 with respect to the recruitment of U.S. workers. The notice shall require that the job

order be placed both into intrastate clearance and into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers.

(b) Thereafter, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall provide overall direction to the employer and the State agency with respect to the recruitment of U.S. workers.

(c) By the 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, the RA, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in §655.203. If the RA concludes that the employer has not satisfied the requirement for recruitment of U.S. workers, the RA shall deny the temporary labor certification, and shall immediately notify the employer in writing with a copy to the State agency and local office. The notice shall contain the statements specified in §655.204(d).

(d) If the employer timely requests an expedited administrative-judicial review before a DOL Hearing Officer, the procedures in §655.212 shall be followed.

**§ 655.206 Determinations of U.S. worker availability and adverse effect on U.S. workers.**

(a) If the RA, in accordance with §655.205 has determined that the employer has complied with the recruitment assurances, the RA, by 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, shall grant the temporary labor certification for enough aliens to fill the employer's job opportunities for which U.S. workers are not available. In making this determination the RA shall consider as available for a job opportunity any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads; such a firm commitment shall be con-

sidered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the RA determines are very likely to sign such a work contract. The RA shall also count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons unless the RA determines that:

(1) Enough qualified U.S. workers have been found to fill all the employer's job opportunities; or

(2) The employer, since the time of the initial determination under §655.204, has adversely affected U.S. workers by offering to, or agreeing to provide to, alien workers better wages, working conditions, or benefits (or by offering or agreeing to impose on alien workers less obligations and restrictions) than that offered to U.S. workers.

(b) (1) Temporary labor certifications shall be considered subject to the conditions and assurances made during the application process. Temporary labor certifications shall be for a limited duration such as for "the 1978 apple harvest season" or "until November 1, 1978", and they shall never be for more than eleven months. They shall be limited to the employer's specific job opportunities; therefore, they may not be transferred from one employer to another.

(2) If an association of employers is itself the employer, as defined in §655.200, certifications shall be made to the association and may be used for any of the job opportunities of its employer members and workers may be transferred among employer members.

(3) If an association of employers is a joint employer with its employer members, as defined in §655.200, the certification shall be made jointly to the association and the employer members. In such cases workers may be transferred among the employer members provided the employer members and the association agree in writing to be jointly and severally liable for compliance with the temporary labor certification obligations set forth in this subpart.

(c) If the RA denies the temporary labor certification in whole or part, the RA shall notify the employer in writing by means normally assuring next-day delivery. The notice shall contain all of the statements required in § 655.204(d). If a timely request is made for an administrative-judicial review by a DOL Hearing Officer, the procedures of § 655.212 shall be followed.

(d) (1) After a temporary labor certification has been granted, the employer shall continue its efforts to actively recruit U.S. workers until the foreign workers have departed for the employer's place of employment. The employer, however, must keep an active job order on file until the assurance at § 655.203(e) is met.

(2) The ES system shall continue to actively recruit and refer U.S. workers as long as there is an active job order on file.

[43 FR 10313, Mar. 10, 1978, as amended at 59 FR 41876, Aug. 15, 1995]

#### § 655.207 Adverse effect rates.

(a) Except as otherwise provided in this section, the adverse effect rates for all agricultural and logging employment shall be the prevailing wage rates in the area of intended employment.

(b)(1) For agricultural employment (except shepherding) in the States listed in paragraph (b)(2) of this section, and for Florida sugarcane work, the adverse effect rate for each year shall be computed by adjusting the prior year's adverse effect rate by the percentage change (from the second year previous to the prior year) in the U.S. Department of Agriculture's (USDA's) average hourly wage rates for field and livestock workers (combined) based on the USDA Quarterly Wage Survey. The Administrator shall publish, at least once in each calendar year, on a date or dates he shall determine, adverse effect rates calculated pursuant to this paragraph (b) as a notice or notices in the FEDERAL REGISTER.

(2) *List of States.* Arizona, Colorado, Connecticut, Florida (other than sugarcane work), Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Texas, Vermont, Vir-

ginia, and West Virginia. Other States may be added as appropriate.

(3) *Transition.* Notwithstanding paragraphs (b) (1) and (2) of this section, the 1986 adverse effect rate for agricultural employment (except shepherding) in the following States, and for Florida sugarcane work, shall be computed by adjusting the 1981 adverse effect rate (computed pursuant to 20 CFR 655.207(b)(1), 43 FR 10317; March 10, 1978) by the percentage change between 1980 and 1985 in the U.S. Department of Agriculture annual average hourly wage rates for field and livestock workers (combined) based on the USDA Quarterly survey: The States listed at 20 CFR 655.207(b)(2) (1985).

(c) In no event shall an adverse effect rate for any year be lower than the hourly wage rate published in 29 U.S.C. 206(a)(1) and currently in effect.

[43 FR 10313, Mar. 10, 1978, as amended at 44 FR 32212, June 5, 1979; 48 FR 40175, Sept. 2, 1983; 50 FR 25708, June 21, 1985; 51 FR 24141, July 2, 1986; 52 FR 11466, Apr. 9, 1987]

#### § 655.208 Temporary labor certification applications involving fraud or willful misrepresentation.

(a) If possible fraud or willful misrepresentation involving a temporary labor certification application is discovered prior to a final temporary labor certification determination, or if it is learned that the employer or agent (with respect to an application) is the subject of a criminal indictment or information filed in a court, the RA shall refer the matter to the INS for investigation and shall notify the employer or agent in writing of this referral. The RA shall continue to process the application and may issue a qualified temporary labor certification.

(b) If a court finds an employer or agent innocent of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the RA shall not deny the temporary labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) If a court or the INS determines that there was fraud or willful misrepresentation involving a temporary



labor certification application, the application shall be deemed invalidated, processing shall be terminated, and the application shall be returned to the employer or agent with the reasons therefor stated in writing.

**§ 655.209 Invalidation of temporary labor certifications.**

After issuance, temporary labor certifications are subject to invalidation by the INS upon a determination, made in accordance with that agency's procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the temporary labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator as appropriate, shall notify the INS in writing.

**§ 655.210 Failure of employers to comply with the terms of a temporary labor certification.**

(a) If, after the granting of a temporary labor certification, the RA has probable cause to believe that an employer has not lived up to the terms of the temporary labor certification, the RA shall investigate the matter. If the RA concludes that the employer has not complied with the terms of the labor certification, the RA may notify the employer that it will not be eligible to apply for a temporary labor certification in the coming year. The notice shall be in writing, shall state the reasons for the determination, and shall offer the employer an opportunity to request a hearing within 30 days of the date of the notice. If the employer requests a hearing within the 30-day period, the RA shall follow the procedures set forth at §658.421(i) (1), (2) and (3) of this chapter. The procedures contained in §§ 658.421(j), 658.422 and 658.423 of this chapter shall apply to such hearings.

(b) No other penalty shall be imposed by the employment service on such an employer other than as set forth in paragraph (a) of this section.

**§ 655.211 Petition for higher meal charges.**

(a) Until a new amount is set pursuant to this paragraph (a), the RA may permit an employer to charge workers up to \$6.17 for providing them with three meals per day, if the employer justifies the charge and submits to the RA the documentary evidence required by paragraph (b) of this section. A denial in whole or in part shall be reviewable as provided in §655.212 of this part. Each year the maximum charge allowed by this paragraph (a) will be changed by the 12-month percent change for the Consumer Price Index for All Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on their publication by the Administrator in the FEDERAL REGISTER.

(b) Evidence submitted shall include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service operations; other costs directly related to the food service operation. Charges for transportation, depreciation, overhead, and similar charges may not be included. Receipts and other cost records for a representative pay period shall be available for inspection by the Secretary's representatives for a period of one year.

(Approved by the Office of Management and Budget under control number 1205-0015)

[43 FR 10313, Mar. 10, 1978, as amended at 49 FR 18295, Apr. 30, 1984; 51 FR 30351, Aug. 26, 1986]

**§ 655.212 Administrative-judicial reviews.**

(a) Whenever an employer has requested an administrative-judicial review of a denial of an application or a petition in accordance with

§§ 655.204(d), 655.205(d), 655.206(c), or 655.211, the Chief Administrative Law Judge shall immediately assign a Hearing Officer to review the record for legal sufficiency, and the Regional Administrator shall send a certified copy of the case file to the Chief Administrative Law Judge by means normally assuring next day delivery. The Hearing Officer shall not have authority to remand the case and shall not receive additional evidence. Any countervailing evidence advanced after decision by the Regional Administrator shall be subject to provisions of 8 CFR 214.2(h)(3)(i).

(b) The Hearing Officer, within five working days after receipt of the case file shall, on the basis of the written record and due consideration of any written memorandums of law submitted, either affirm, reverse or modify the RA's denial by written decision. The decision of the Hearing Officer shall specify the reasons for the action taken and shall be immediately provided to the employer, RA, Administrator, and INS by means normally assuring next-day delivery. The Hearing Officer's decision shall be the final decision of the Department of Labor and no further review shall be given to the temporary labor certification determination by any Department of Labor official.

[59 FR 41876, Aug. 15, 1994]

**§ 655.215 Territory of Guam.**

Subpart C of this part does not apply to temporary employment in the Territory of Guam, and the Department of Labor does not certify to the Immigration and Naturalization Service (INS) the temporary employment of nonimmigrant aliens under H-2B visas in the Territory of Guam. Pursuant to INS regulations, that function is performed by the Governor of Guam, or the Governor's designated representative within the Territorial Government.

[56 FR 56876, Nov. 6, 1991]

**Subpart D- Attestations by Facilities Using Nonimmigrant Aliens as Registered Nurses**

SOURCE: 59 FR 882, 897, Jan. 6, 1994, unless otherwise noted.

**§ 655.300 Purpose and scope of subparts D and E.**

(a) *Purpose.* The Immigration and Nationality Act (INA) establishes the H-1A program to provide relief for the nursing shortage crisis. Subpart D of this part sets forth the procedure by which health care facilities seeking to use nonimmigrant registered nurses may submit attestations to the Department of Labor relating to the effects of the nursing shortage on their operations, their efforts to recruit and retain United States workers as registered nurses and certain information on wages and working conditions for nurses at the facility. Subpart E of this part sets forth complaint, investigation, and penalty provisions with respect to such attestations.

(b) *Procedure.* The INA establishes a procedure for health care facilities to follow in seeking admission to the United States for, or use of, nonimmigrant nurses under H-1A visas. The procedure is designed to reduce reliance on nonimmigrant nurses in the future, and calls of the health care facility to attest, and be able to demonstrate, that, *e.g.*, there would be substantial disruption to health services without the nonimmigrant nurses and that it is taking timely and significant steps to develop, recruit, and retain U.S. nurses. Subparts D and E of this part set forth the specific requirements for those procedures.

(c) *Applicability.* (1) Subparts D and E of this part apply to all facilities that seek the temporary admission or use of nonimmigrants as registered nurses.

(2) During the period that the provisions of appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, subparts D and E of this part shall apply to the entry of a nonimmigrant who is a citizen of Mexico under and pursuant to

the provisions of section D of Annex 1603 of NAFTA.

**§655.301 Overview of process.**

This section provides a context for the attestation process, to facilitate understanding by health care facilities that may seek nonimmigrant nurses under H-1A visas.

(a) *Federal agencies' responsibilities.* The United States Department of Labor (DOL), Department of Justice, and Department of State are involved in the H-1A visa process. Within DOL, the Employment and Training Administration (ETA) and the Employment Standards Administration (ESA) have responsibility for different aspects of the process.

(b) *Health care facility's attestation responsibilities.* Each health care facility seeking one or more H-1A nurses shall, as the first step, submit an attestation on *Form ETA 9029*, as described in §655.310 of this part, to the designated regional office of the Employment and Training Administration (ETA) of DOL. If the attestation is found to meet the requirements set at §655.310 (a) through (k) of this part, ETA shall accept the attestation for filing, shall return the cover form of the accepted attestation to the health care facility, and shall notify the Immigration and Naturalization Service (INS) of the Department of Justice of the filing. As discussed in §655.310 of this part, if the facility proposes to utilize alternative methods to comply with Attestation Elements I and/or IV, or asserts that taking a second timely and significant step under Element IV would be unreasonable, or claims a bona fide medical emergency exemption from Element IV as a worksite using one or more H-1A nurses through a nursing contractor only, additional supporting information and ETA review shall be required.

(c) *Visa petitions.* Upon ETA's acceptance of the filing, the health care facility may then file with INS H-1A visa petitions for the admission of H-1A nurses, or to extend the stay of alien nurses currently working at the facility. The facility shall attach a copy of the accepted attestation form (Form ETA 9029) to the visa petition filed with INS. At the same time that the facility files a visa petition with INS,

it shall also send a copy of the visa petition with INS, it shall also send a copy of the visa petition to the Chief, Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., room N-4456, Washington, DC 20210.

(d) *Visa issuance.* INS assures that the nonimmigrants possess the required qualifications and credentials to be employed as nurses. See 8 U.S.C. 1182(m)(1). The Department of State is responsible for issuing the visa.

(e) *Board of Alien Labor Certification Appeals (BALCA) review of attestations accepted and not accepted for filing.* The decision whether or not to accept for filing an attestation which ETA has reviewed, that is: an attestation where the facility is attesting to alternative methods of compliance with Element I and/or Element IV; an attestation where the facility is claiming that taking a second timely and significant step would not be reasonable; and/or an attestation where a facility that is not an employer of H-1A nurses is claiming a bona fide medical emergency as the basis for requesting a waiver of Element IV; may be appealed by any interested party to the BALCA.

(f) *Complaints.* Complaints concerning misrepresentation in the attestation or failure of the health care facility to carry out the terms of the attestation may be filed with the Wage and Hour Division (Division), Employment Standards Administration (ESA) of DOL, according to the procedures set forth in subpart E of this part. Complaints of "misrepresentation" may include assertions that a facility's attestations of compliance failed to meet the regulatory standards for attestation elements under which the attestation was accepted by ETA for filing without ETA review. The Division shall then investigate, and, where appropriate, after an opportunity for a hearing, assess sanctions and penalties. Subpart E of this part also provides that interested parties may obtain an administrative law judge hearing and may seek the Secretary's review of the administrative law judge's decision.

(2) Have passed the examination given by the Commission on Graduates for Foreign Nursing Schools (CGFNS), or have obtained a full and unrestricted (permanent) license to practice as a registered nurse in the state of intended employment, or have obtained a full and unrestricted (permanent) license in any state or territory of the United States and received temporary authorization to practice as a registered nurse in the state of intended employment; and,

(3) Be fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to practice as a registered nurse immediately upon admission to the United States, and be authorized under such laws to be employed by the employer. For purposes of this paragraph, the temporary or interim licensing may be obtained immediately after the alien enters the United States and registers to take the first available examination for permanent licensure.

*Nursing contractor* means an entity that employs registered nurses and supplies these nurses, on a temporary basis and for a fee, to health care facilities or private homes.

*Prevailing wage* means the average wage paid to similarly employed registered nurses within the geographic area.

*Secretary* means the Secretary of Labor or the Secretary's designee.

*Similarly employed* means employed by the same type of facility (acute care or long-term care) and working under like conditions, such as the same shift, on the same days of the week, and in the same specialty area.

*State* means one of the 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam.

*State employment security agency (SESA)* means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with USES in the operation of the national system of public employment offices.

*Strike* means a labor dispute wherein employees engage in a concerted stoppage or work (including stoppage by reason of the expiration of a collective -

bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operations.

*United States Employment Service (USES)* means the agency of the Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices.

*United States (U.S.) nurse* means any nurse who is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is granted the status of an alien admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

*United States (U.S.) worker* means any worker who is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

*United States* is defined at 8 U.S.C. 1101(a)(38).

*Worksite* means the health care facility or home where the nurse is involved in the practice of nursing. It is possible, in the case of nursing contractors, that the employer's physical location and the worksite facility's physical location will differ.

#### § 655.310 Attestations.

(a) *Who may submit attestations?* Any entity meeting the definition of "facility" in § 655.302, may submit an attestation. The attestation shall include: a completed Form ETA 9029, which shall be signed by the chief executive officer of the facility (or the chief executive officer's designee); and explanatory statements prescribed in paragraphs (c) through (k) of this section. A nursing contractor that seeks to employ non-immigrant nurses shall file its own attestation (including Form ETA 9029 and explanatory statements) as prescribed by this section, and, as part of its own attestation, shall attest that it shall refer H-1A nurses only to facilities that, with the exception of private households which themselves do not employ H-1A nurses, have current and

valid attestations on file with ETA. Subparts D and E of this part shall apply both to the nursing contractor and to the worksite facility.

(b) *Where should attestations be submitted?* Attestations shall be submitted, by U.S. mail or private carrier, to the U.S. Department of Labor ETA Regional Office which has jurisdiction over the geographic area where the H-1A nurse will be employed, as designated by the Chief, Division of Foreign Labor Certifications, USES. The addresses of the Certifying Officers are set forth in the instructions to *Form ETA 9029*.

(c) *What should be submitted?*—(1) *Form ETA 9029* and explanatory statements.

(i) A completed and dated original *Form ETA 9029*, containing the required attestation elements and the original signature of the chief executive officer of the facility, shall be submitted, along with two copies of the completed, (signed, and dated) *Form ETA 9029*. (Copies of *Form ETA 9029* are available at the address listed in paragraph (b) of this section.) In addition, explanations, where required, for the required attestation elements as to what documentation is available at the facility and how such documentation indicates compliance with the regulatory standards as prescribed in paragraphs (d) through (i) of this section. In addition,

(A) If the facility is a nursing contractor, the special attestation element in paragraph (j) of this section; or

(B) If the facility is a worksite (other than a private household which itself does not employ, seek to employ, or file a visa petition on behalf of an H-1A nurse), which will use H-1A nurses only through a nursing contractor, the special attestation element in paragraph (k) of this section, shall be submitted in triplicate with the *Form ETA 9029*.

(ii) If the facility is proposing to meet alternative standards for substantial disruption (Element I) and/or the taking of timely and significant steps (Element IV), an explanation of the standards being proposed and an explanation of how these proposed standards are of comparable significance to those set forth in the statute shall be submitted in triplicate. If the facility is attesting that it can only take one

timely and significant step (Element IV), it shall submit an explanation, in triplicate, demonstrating that taking a second step is unreasonable. If the facility uses H-1A nurses only through a nursing contractor, but claims a bona fide medical emergency exemption from Element IV, it shall submit a written explanation, in triplicate, demonstrating the existence of such an emergency. DOL may request additional explanation and/or documentation from a facility in the process of determining acceptability in cases described in this paragraph (c)(1)(ii).

(2) *Attestation elements.* The attestation elements referenced in paragraph (c)(1) of this section are mandated by section 212(m)(2)(A) of the Act (8 U.S.C. 1182(m)(2)(A)). Section 212(m)(2)(A) of the Act requires covered facilities to attest as follows:

(i) The attestation referred to in section 101(a)(15)(H)(i)(a) of the Act, with respect to a facility for which an alien will perform services, is an attestation as to the following:

(A) There would be a substantial disruption through no fault of the facility in the delivery of health care services of the facility without the services of such an alien or aliens.

(B) The employment of the aliens will not adversely affect the wages and working conditions of registered nurses similarly employed.

(C) The aliens employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.

(D) Either—(1) The facility has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses, or

(2) The facility is subject to an approved State plan for the recruitment and retention of nurses (described in section 212(m)(3) of the Act; 8 U.S.C. 1182(m)(3)).

(E) There is not a strike or lockout in the course of a labor dispute, and the employment of such an alien is not intended or designed to influence an

**§ 655.302 Definitions.**

For the purposes of subparts D and E of this part:

*Accepted for filing* means that the attestation and supporting documentation submitted by the health care facility have been received by the Employment and Training Administration of the Department of Labor (DOL) and have been found to be in compliance with the attestation requirements in § 655.310 of this part.

*Act* and *INA* mean the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

*Administrative law judge* means an official appointed pursuant to 5 U.S.C. 3105.

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under subparts D and E of this part.

*Attorney General* means the chief official of the U.S. Department of Justice or the Attorney General's designee.

*Board of Alien Labor Certification Appeals (BALCA)* means a panel of one or more administrative law judges who serve on the permanent Board of Alien Labor Certification Appeals established by 20 CFR Part 656. BALCA consists of administrative law judges assigned to the Department of Labor and designated by the Chief Administrative Law Judge to be members of the Board of Alien Labor Certification Appeals.

*Bona fide medical emergency* means a situation in which the services of one or more H-1A contract nurses are necessary at a worksite facility (which itself does not employ an H-1A nurse) to prevent death or serious impairment of health, and, because of the danger to life or health, nursing services for such situation are not elsewhere available in the geographic area.

*Certifying Officer* means a Department of Labor official, or such official's designee, who makes determinations about whether or not H-1A attestations are acceptable for filing.

*Chief Administrative Law Judge* means the chief official of the Office of the Administrative Law Judges of the De-

partment of Labor or the Chief Administrative Law Judge's designee.

*Chief, Division of Foreign Labor Certifications, USES* means the chief official of the Division of Foreign Labor Certifications within the United States Employment Service, Employment and Training Administration, Department of Labor, or the designee of the Chief, Division of Foreign Labor Certifications, USES.

*Date of filing* means the date an attestation is "accepted for filing" by ETA.

*Department* and *DOL* mean the United States Department of Labor.

*Director* means the chief official of the United States Employment Service (USES), Employment and Training Administration, Department of Labor, or the Director's designee.

*Division* means the Wage and Hour Division of the Employment Standards Administration, DOL.

*Employer* means a person, firm, corporation, or other association or organization involved in the direct provision of health care services, which:

(1) Suffers or permits a person to work;

(2) Has a location within the United States to which U.S. workers may be referred for employment;

(3) Proposes to employ workers at a place within the United States; and

(4) Has an employer-employee relationship with respect to employees under subpart D and E of this part, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of such employee.

*Employment* means full-time work by an employee for an employer/health care facility other than oneself. "Full-time work" means work where the nurse is regularly scheduled to work 40 hours or more per week, unless the facility documents as part of its attestation that it is common practice for the occupation at the facility or for the occupation in the geographic area for nurses to work fewer hours per week.

*Employment and Training Administration (ETA)* means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

*Employment Standards Administration (ESA)* means the agency within the Department of Labor (DOL) which includes the Wage and Hour Division.

*Facility* means a user of nursing services with either a single site or a group of contiguous locations at which it provides health care services. "Facility" includes an employer of registered nurses which provides health care services in a home or other setting, such as a hospital, nursing home, or other site of employment, not owned or operated by the employer (e.g., a visiting nurse association or a nursing contractor). "Facility" also includes a private household which employs or seeks to employ one or more H-1A nurses, but does not include a private household which uses H-1A nurses only through a nursing contractor. Groups of structures which form a campus or separate buildings across the street from one another are a single facility. However, separate buildings or areas which are not physically connected or in immediate proximity are a single health care facility if they are in reasonable geographic proximity, used for the same purpose, and share the same nursing staff and equipment. An example is an entity which manages a nursing home and a hospital in the same area and which regularly shifts or rotates the nurses between the two. Non-contiguous sites, even within the same geographic area, which do not share the same nursing staff and operational purposes are not a single facility. For example, hospitals which are located on opposite sides of a municipality, but which are managed or owned by a single entity, are separate facilities if they do not regularly share nursing staff and operational purpose.

*Geographic area* means the area within normal commuting distance of the place (address) of the intended worksite. If the geographic area does not include a sufficient number of facilities to make a prevailing wage determination, the term "geographic area" shall be expanded (by the State employment service, unless directed not to do so by the Director) with respect to the attesting facility to include a sufficient number of facilities to permit a prevailing wage determination to be made. If the place of the intended

worksite is within a Metropolitan Statistical Area (MSA), any place within the MSA may be deemed to be within normal commuting distance of the place of intended employment.

*Governor* means the chief elected official of a State or the Governor's designee.

*H-1A nurse* means any nonimmigrant alien admitted to the United States to perform services as a nurse under section 101(a)(15)(H)(i)(a) of the Act (8 U.S.C. 1101(a)(15)(H)(i)(a)).

*Immigration and Naturalization Service (INS)* means the component of the Department of Justice which makes the determination under the Act on whether to grant visa petitions to petitioners seeking the admission of non-immigrant nurses under H-1A visas.

*Layoff* means any involuntary separation of one or more staff nurses without cause/prejudice. If a staff nurse is separated from one specialized activity and is offered retraining and retention at the same facility in another activity involving direct patient care at the same wage and status, but refuses such training and retention, such separation shall not constitute a layoff. The layoff provision applies to staff nurses only, not to other health occupations. If the position occupied by the staff nurse is covered by a collective bargaining agreement, the collective bargaining agreement definition of "layoff" (if any) shall apply to that position.

*Lockout* means a labor dispute involving a work stoppage, wherein an employer withholds work from its employees in order to gain a concession from them.

*Nurse* means a person who is or will be authorized by a State Board of Nursing to engage in registered nursing practice in a State or U.S. territory or possession at a facility which provides health care services. A staff nurse means a nurse who provides nursing care directly to patients. In order to qualify under this definition of "nurse" the alien shall:

(1) Have obtained a full and unrestricted license to practice nursing in the country where the alien obtained nursing education, or have received nursing education in the United States or Canada;

(2) Have passed the examination given by the Commission on Graduates for Foreign Nursing Schools (CGFNS), or have obtained a full and unrestricted (permanent) license to practice as a registered nurse in the state of intended employment, or have obtained a full and unrestricted (permanent) license in any state or territory of the United States and received temporary authorization to practice as a registered nurse in the state of intended employment; and,

(3) Be fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to practice as a registered nurse immediately upon admission to the United States, and be authorized under such laws to be employed by the employer. For purposes of this paragraph, the temporary or interim licensing may be obtained immediately after the alien enters the United States and registers to take the first available examination for permanent licensure.

*Nursing contractor* means an entity that employs registered nurses and supplies these nurses, on a temporary basis and for a fee, to health care facilities or private homes.

*Prevailing wage* means the average wage paid to similarly employed registered nurses within the geographic area.

*Secretary* means the Secretary of Labor or the Secretary's designee.

*Similarly employed* means employed by the same type of facility (acute care or long-term care) and working under like conditions, such as the same shift, on the same days of the week, and in the same specialty area.

*State* means one of the 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam.

*State employment security agency (SESA)* means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with USES in the operation of the national system of public employment offices.

*Strike* means a labor dispute wherein employees engage in a concerted stoppage or work (including stoppage by reason of the expiration of a collective -

bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operations.

*United States Employment Service (USES)* means the agency of the Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices.

*United States (U.S.) nurse* means any nurse who is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is granted the status of an alien admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

*United States (U.S.) worker* means any worker who is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

*United States* is defined at 8 U.S.C. 1101(a)(38).

*Worksite* means the health care facility or home where the nurse is involved in the practice of nursing. It is possible, in the case of nursing contractors, that the employer's physical location and the worksite facility's physical location will differ.

**§655.310 Attestations.**

(a) *Who may submit attestations?* Any entity meeting the definition of "facility" in §655.302, may submit an attestation. The attestation shall include: a completed Form ETA 9029, which shall be signed by the chief executive officer of the facility (or the chief executive officer's designee); and explanatory statements prescribed in paragraphs (c) through (k) of this section. A nursing contractor that seeks to employ non-immigrant nurses shall file its own attestation (including Form ETA 9029 and explanatory statements) as prescribed by this section, and, as part of its own attestation, shall attest that it shall refer H-1A nurses only to facilities that, with the exception of private households which themselves do not employ H-1A nurses, have current and



election for a bargaining representative for registered nurses of the facility.

(F) At the time of the filing of the petition for registered nurses under section 101(a)(15)(H)(i)(a) of the Act, notice of the filing has been provided by the facility to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to registered nurses at the facility through posting in conspicuous locations.

(ii) A facility is considered not to meet paragraph (c)(2)(i)(A) of this section (relating to an attestation of a substantial disruption in delivery of health care services) if the facility, within the previous year, has laid off registered nurses. A facility which lays off a registered nurse *other than a staff nurse* still meets the "no layoff" requirement if, in its attestation, it attests that it will not replace the nurse with an H-1A nurse (either through promotion or otherwise) for a period of 1 year after the date of the layoff. Nothing in paragraph (c)(2)(i)(D) of this section shall be construed as requiring a facility to have taken significant steps described in such paragraph before December 18, 1989 (*i.e.*, the date of enactment of the Immigration Nursing Relief Act of 1989).

(d) *The first attestation element: substantial disruption.* The facility shall attest that "there would be substantial disruption through no fault of the facility in the delivery of health care services of the facility without the services of such an alien or aliens." This element shall be met if the facility provides the following information:

(1) *Layoffs.* The facility shall attest that it has not laid off nurses during the 12-month period prior to submitting the attestation. A facility which lays off a registered nurse *other than a staff nurse* still meets the "no layoff" requirement if, in its attestation it attests that it will not replace the nurse with an H-1A nurse (either through promotion or otherwise) for a period of 1 year after the date of the layoff.

(2) *Nursing shortage.* (i) The facility shall attest to one of the following:

(A) It has a current nurse vacancy rate of 7 percent or more. An explanatory

statement does not have to be submitted for this attestation element, but documentation to support this attestation shall be maintained at the facility and shall be available for review in accordance with § 655.350(b).

(B) It is unable to utilize 7 percent or more of its total beds due to a shortage of nurses. An explanatory statement does not have to be submitted for this attestation element, but supporting documentation for this attestation shall be maintained at the facility and shall be available for review in accordance with § 655.350(b).

(C) It has had to eliminate or curtail the delivery of essential health care services due to a shortage of nurses, and provide brief explanatory information about the essential services eliminated or curtailed by the facility due to a nursing shortage, what documentation is available at the facility to substantiate this attestation, where this documentation is located and can be reviewed, and the applicable time period of the documentation.

(D) It has been unable to effect established plans to provide needed new health care services in the community due to a shortage of nurses, and provide brief explanatory information about needed new services that have not been implemented by the facility due to a nursing shortage and which will be implemented with the availability of H-1A nurses, what documentation is available at the facility to substantiate this attestation, where this documentation is located and can be reviewed, and the applicable time period of the documentation.

(ii) *Other substantial disruption.* When an attesting facility finds that the indicators in paragraphs (d)(2)(i) (A) through (D) of this section cannot be demonstrated, or that such indicators are inappropriate to that facility, but that without the services of H-1A nurses, substantial disruption in the delivery of health care services of the facility still would occur due to a shortage of nurses, the facility shall provide an explanation of how a shortage of nurses has caused a "substantial disruption" in the delivery of its health care services. Such explanation shall be sufficient to provide a clear showing of "substantial disruption" in

the delivery of specific health care services due to a shortage of nurses, and shall clearly explain why the indicators in paragraphs (d)(2)(i) (A) through (D) of this section cannot be met by or are inappropriate to that facility. In addition to the documentation required to be maintained by attesting facilities described in paragraph (d)(3) of this section, facilities attesting under this paragraph also shall maintain and make available for inspection (as described elsewhere in this section) such additional documentation as is necessary to substantiate such claim of substantial disruption.

(3) *Documentation of facility's nursing positions.* The attesting facility shall maintain and make available for inspection (as described in §655.350(b)) documentation substantiating:

(i) The total number of nursing positions at the facility;

(ii) The number of nursing vacancies at the facility during a 12-month period ending no later than 3 months prior to submittal of the attestation;

(iii) The number of nurses who left the facility during the same 12-month period;

(iv) The number of nurses hired by the facility during the same 12-month period;

(v) The overall staffing pattern for nursing positions at the facility; and

(vi) A description of the facility's efforts to recruit U.S. nurses during the same 12-month period. The documentation on numbers of nurses, maintained for the purposes of this paragraph (d)(3), shall be broken out by numbers of U.S. nurses, nurses admitted under H-1 visas, nurses admitted under H-1A visas, nurses admitted under other nonimmigrant visas, and other nurses.

(e) *The second attestation element: no adverse effect.* The facility shall attest that "the employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed."

(1) *Wages.* To meet the requirement of no adverse effect on wages, the facility shall attest that it shall pay each nurse of the facility at least the prevailing wage for the occupation in the geographic area. The facility shall pay the higher of the wage required pursu-

ant to this paragraph (e) or the wage required pursuant to paragraph (f) of this section (*i.e.*, the third attestation element: facility wage).

(i) *State employment security determination.* The facility does not independently determine the prevailing wage. The State employment security agency (SESA) shall determine the prevailing wage for similarly employed nurses in the geographic area in accordance with administrative guidelines or regulations issued by ETA. The facility shall request the appropriate prevailing wage from the SESA not more than 90 days prior to the date the attestation is submitted to ETA. Once a facility obtains a prevailing wage determination from the SESA and files an attestation supported by that prevailing wage determination, the facility shall be deemed to have accepted the prevailing wage determination as accurate and appropriate (both to the occupational classification and wage) and thereafter shall not contest the legitimacy of the prevailing wage determination in an investigation or enforcement action. A facility may challenge a SESA prevailing wage determination through the Employment Service complaint system. See 20 CFR part 658, Subpart E. A facility which challenges a SESA prevailing wage determination shall obtain in final ruling from the Employment Service prior to filing an attestation. Any such challenge shall not require the SESA to divulge any employer wage data which was collected under the promise of confidentiality.

(ii) *Collectively bargained wage rates.* Where wage rates for nurses at a facility are the result of arms-length collective bargaining, those rates shall be considered "prevailing" for that facility for the purposes of this subpart.

(iii) *Total compensation package.* The prevailing wage finding under this paragraph (e)(1) relates to wages only. However, each item in the total compensation package for U.S., H-1A, and other nurses employed by the facility shall be the same within a given facility, including such items as housing assistance and other perquisites.

(iv) *Documentation of pay and total compensation.* The facility shall maintain documentation summarizing its

pay schedule and compensation package for nurses. See §655.350(b). The summary shall cover each category of nursing position in which H-1A nurses are or will be hired or promoted into and each category of nursing position in which H-1A nurses (or nurses admitted on H-1 visas) have been hired or promoted into. Categories of nursing positions not covered by the documentation shall not be covered by the attestation, and, therefore, such positions shall not be filled or held by H-1A nurses.

(2) *Working conditions.* To meet the requirement of no adverse effect on working conditions, the facility shall attest that it shall afford equal treatment to U.S. and H-1A nurses with the same seniority, with respect to such working conditions as the number and scheduling of hours worked (including shifts, straight days, weekends); vacations; wards and clinical rotations; and overall staffing-patient patterns.

(f) *The third attestation element: facility/employer wage.* The facility employing or seeking to employ the alien shall attest that “the alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.” The facility shall maintain documentation substantiating compliance with this attestation which shall include a description of the factors taken into consideration by the facility in making compensation decisions for nurses and the facility pay schedule for nurses maintained pursuant to paragraph (e)(1) of this section. See §655.350(b). The facility shall pay the higher of the wage required pursuant to this paragraph (f) or the wage required pursuant to paragraph (e) of this section (*i.e.*, the second attestation element: no adverse effect).

(g) *The fourth attestation element: timely and significant steps; or State plan.* The facility may satisfy the fourth attestation element by satisfying Alternative I in paragraph (g)(1) of this section or by satisfying Alternative II in paragraph (g)(2) of this section.

(1) *Alternative I: Timely and significant steps.* The facility shall attest that it “has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or im-

migrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on non-immigrant registered nurses.” The facility shall take at least two such steps, unless it demonstrates that taking a second step is not reasonable. The steps described in this paragraph (g)(1) shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of this paragraph (g)(1). Nothing in this subpart or subpart E of this part shall require a facility to take more than one step, if the facility can demonstrate that taking a second step is not reasonable. The facility is not required to have taken any of these steps prior to December 18, 1989. A facility choosing to take timely and significant steps other than those specifically described in paragraph (g)(1)(i)(A) of this section shall submit with its attestation a description of the steps it is proposing to take and an explanation of how the proposed steps are of comparable timeliness and significance to those described in paragraph (g)(1)(i)(A) of this section. A facility claiming that a second step is unreasonable shall submit an explanation of why such second step would be unreasonable.

(i) *Descriptions of steps—(A) Statutory steps.* Each of the actions described in this paragraph (g)(1)(i)(A) shall be considered a significant step reasonably designed to recruit and retain U.S. nurses. A facility choosing any one of the following steps shall attest that its program(s) meets the regulatory requirements set forth for each and provide an explanation of how the requirements are satisfied by the program(s). In addition, the attesting facility shall maintain and make available for inspection (as described in §655.350(b) of this part) documentation specified in the particular step selected and/or documentation which provides a complete description of the nature and operation of its program(s) sufficient to substantiate its attestation and full compliance with the requirements for the particular step selected. Section 212(m)(2)(E) of the INA provides that a violation shall be found if a facility fails to meet a condition attested to.

Thus, a facility shall be held responsible for all timely and significant steps to which it attests.

(1) *Step One: "Operating a training program for registered nurses at the facility or financing (or providing participation in) a training program for registered nurses elsewhere."* Training programs may include either courses leading to a higher degree (*i.e.*, beyond an associate or a baccalaureate degree), or continuing education courses. If the program includes courses leading to a higher degree, they shall be courses which are part of a program accepted for degree credit by a college or university and accredited by a State Board of Nursing or a State Board of Higher Education (or its equivalent), as appropriate. If the program includes continuing education courses, they shall be courses which meet criteria established to qualify the nurses taking the courses to earn continuing education units accepted by a State Board of Nursing (or its equivalent). In either type of program, financing by the facility, either directly or arranged through a third party, shall cover the total tuition costs of such training. The number of U.S. nurses for whom such training actually is provided shall be no less than half of the number of nurses who left the facility during the 12-month period prior to submission of the attestation. (U.S. nurses to whom such training was offered, but who rejected such training, may be counted towards those provided training, but the facility, in such case, shall maintain documentation of such offer and rejection). See § 655.350(b).

(2) *Step Two: "Providing career development programs and other methods of facilitating health care workers to become registered nurses."* This may include programs leading directly to a degree in nursing, or career ladder/career path programs which could ultimately lead to a degree in nursing. A facility choosing this step shall maintain as documentation a description of the content and eligibility requirements for both types of programs and an explanation of how the requirements of this paragraph (g)(1)(i)(A)(2) are satisfied by each program. Any such degree program shall be, at a minimum, either through an accredited community col-

lege (leading to an associate's degree), 4-year college (a bachelor's degree), or diploma school, and the course of study shall be one accredited by a State Board of Nursing (or its equivalent). For career ladder or career path programs, the facility shall maintain documentation that the programs are normally part of a course of study or training which prepares a U.S. worker for enrolling in formal direct training leading to a degree in nursing, either through an accredited community college, a 4-year college, or a diploma school. See § 655.350(b) of this part. Financing by the facility, either directly or arranged through a third party, shall cover the total costs of such programs. U.S. workers participating in such programs shall be working or have worked in health care occupations or health care facilities. The number of U.S. workers for whom such training is provided shall be equal to no less than half the average number of vacancies for nurses during the 12-month period prior to the submission of the attestation.

(3) *Step Three: "Paying registered nurses wages at a rate higher than currently being paid to registered nurses similarly employed in the geographic area."* A facility choosing this step shall maintain documentation showing that its entire schedule of wages for nurses is at least 5 percent higher than the prevailing wages as determined by the SESA pursuant to paragraph (e)(1)(i) of this section, and it shall attest that such differentials shall be maintained throughout the period of the attestation's effectiveness.

(4) *Step Four: "Providing adequate support services to free registered nurses from administrative and other non-nursing duties."* Non-nursing duties include such activities as housekeeping duties; food preparation and delivery; transporting patients; providing occupational and respiratory therapy; answering telephones; running errands for patients; and clerical tasks. A facility choosing this step shall not require nurses at the facility to perform non-nursing duties. However, it is understood that on an infrequent non-recurring basis, nurses at the facility may perform one or more of the tasks encompassed by the duties listed above in this paragraph

(g)(1)(i)(A)(4) or other non-nursing duties. Facilities choosing this step shall maintain documentation showing what steps they have taken to ensure that nursing jobs do not include any of these duties and that such activity by nurses at the facility occurs without regularity and infrequently. Such a facility also shall maintain documentation with respect to any other steps being taken to relieve nurses from non-nursing duties, or to enhance the nursing function, such as computerizing certain writing and routine functions performed by nurses.

(5) *Step Five: "Providing reasonable opportunities for meaningful salary advancement by registered nurses."* Documentation for this step shall include documentation of systems for salary advancement based on factors such as merit, education, and specialty, and/or salary advancement based on length of service with other bases for wage differentials remaining constant.

(i) *Merit, education, and specialty.* For salary advancement based on factors such as merit, education, and specialty, the facility shall maintain and make available for inspection documentation that it provides opportunities for professional development of its nurses which lead to salary advancement, *e.g.*, opportunities for continuing education; in-house educational instruction; special committees, task forces, or projects considered of a professional development nature; participation in professional organizations; and writing for professional publications. Such opportunities shall be available to all the facility's nurses.

(ii) *Length of service.* For salary advancement based on length of service, the facility shall maintain and make available for inspection documentation that it has clinical ladders in place which provide, annually, salary increases of 3 percent or more for a period of no less than 10 years, over and above the costs of living and merit, education, and specialty increases and differentials.

(B) *Other possible steps.* The Act indicates that the five steps described in paragraphs (g)(1)(i)(A) (1) through (5) of this section are not an exclusive list of timely and significant steps which might qualify. Facilities are encour-

aged to be innovative in devising other timely and significant steps, but these shall be of timeliness and significance comparable to those in paragraphs (g)(1)(i)(A) (1) through (5) of this section to qualify. A facility may attest that it has taken and is taking other such steps and explain in its attestation what these steps are, their nature and scope, how they are effected and how they meet the statutory test of timeliness and significance comparable to those Steps One through Five described above. A facility choosing alternative steps shall attest that its program(s) meet(s) the statutory requirements of timeliness and significance in promoting the development, recruitment and retention of U.S. nurses, explaining how these requirements are satisfied by such program(s). In addition, the attesting facility shall maintain and make available for inspection (as described in §655.350(b)) documentation which provides a complete description of the nature and operation of its program(s) sufficient to substantiate its attestation and full compliance with the requirements of this paragraph (g)(1)(i)(B). Examples of such steps which—depending on the circumstances, the size and nature of the attesting facility, the nature and scope of the step(s) described, the number of persons affected, and other such factors—may meet these requirements are:

(1) *Monetary incentives*—providing monetary incentives to nurses, through bonuses and merit pay plans not included in the base compensation package, for additional education, and for efforts leading to increased recruitment and retention of U.S. nurses. Such monetary incentives can be based on actions by nurses such as: Innovations to achieve better patient care, increased productivity, reduced waste, better safety; obtaining additional certification in a nursing specialty; unused sick leave; recruiting other U.S. nurses; staying with the facility for a given number of years; taking less desirable assignments (other than shift differential); participating in professional organizations, on task forces and on special committees; or contributing to professional publications. Facilities attesting to this step shall have

a documented system for providing significant financial rewards in the form of bonuses or salary advancement to nurses participating in the activities described in this paragraph.

(2) *Special perquisites*—providing nurses with special perquisites for dependent care or housing assistance of a nature and/or extent that constitute a “significant” factor in inducing employment and retention of U.S. nurses.

(3) *Work schedule options*—providing nurses with non-mandatory work schedule options for part-time work, job-sharing, compressed work week or non-rotating shifts (provided, however, that H-1A nurses are employed only in full-time work) of a nature and/or extent that constitute a “significant” factor in inducing employment and retention of U.S. nurses.

(4) *Other training options*—providing training opportunities to become registered nurses to U.S. workers not currently in health care occupations by means of financial assistance (e.g., scholarship, loan or pay-back programs) to such persons.

(ii) *Unreasonableness of second step.* The steps described in this paragraph (g)(1) shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of this paragraph (g)(1). Nothing in this subpart or subpart E of this part shall require a facility to take more than one step, if the facility can demonstrate that taking a second step is not reasonable. However, a facility shall make every effort to take at least two steps. A facility taking only one step shall provide an explanation with its attestation, and maintain documentation at the facility, relating to why taking a second step is not reasonable. The taking of a second step may be considered unreasonable if it would result in the facility’s financial inability to continue providing the same quality and quantity of health care or if the provision of nursing services would otherwise be jeopardized by the taking of such a step. If the single step which is taken is one of the statutorily defined steps described in paragraphs (g)(1)(i)(A)(1) through (g)(1)(i)(A)(5) of this section, the facility shall explain with its attestation, and maintain documentation at the facility, with re-

spect to each of the four statutory steps (described in paragraphs (g)(1)(i)(A)(1) through (g)(1)(i)(A)(5) of this section) not taken, relating to why it would be unreasonable for the facility to take such step and also shall explain with its attestation, and shall maintain and make available for inspection (as described in §655.350(b)) documentation demonstrating why it would be unreasonable for the facility to take any other steps designed to recruit, develop and retain sufficient U.S. nurses to meet its staffing needs. If the single step which is taken is not one of the five statutory steps described in paragraphs (g)(1)(i)(A)(1) through (g)(1)(i)(A)(5) of this section, the facility shall, with respect to each of the five statutory steps not taken, explain with its attestation, and maintain documentation and make available for inspection (as described in §655.350(b)) documentation, demonstrating why it would be unreasonable for the facility to take such step; the facility also shall explain with its attestation, and make available for inspection (as described in §655.350(b)) documentation demonstrating why it would be unreasonable for the facility to take any other steps designed to recruit and retain sufficient U.S. nurses to meet its staffing needs. On the basis of the explanation submitted by the facility, the Certifying Officer shall determine whether the requirements of this paragraph (g)(1)(ii) have been met. See paragraph (m) of this section regarding such determinations and administrative appeals therefrom.

(iii) *Alternative to criteria for each specific step.* Instead of complying with the specific criteria for each of the steps in the second and succeeding years, a facility may include in its prior year’s attestation, in addition to the actions taken under Steps One through Five, that it shall reduce the number of alien (H-1 and H-1A visaholders) nurses it utilizes within 1 year from the date of attestation by at least 10 percent, without reducing the quality or quantity of services provided. If this goal is achieved (as demonstrated by documentation maintained by the facility and made available for inspection, and indicated in its subsequent year’s attestation), the facility’s subsequent

year's attestation may simply include the *Form ETA 9029*, an explanation demonstrating that this goal has been achieved and an attestation that it shall again reduce the number of alien nurses it utilizes within 1 year from the date of attestation by at least 10 percent. This alternative is designed to permit a facility to achieve the objectives of the Act, without subjecting the facility to detailed requirements and criteria as to the specific means of achieving that objective. The first, second, and succeeding years shall be consecutive.

(2) *Alternative II: subject to approved annual State plan.* As an alternative to attesting to the timely and significant steps set forth in paragraph (g)(1) of this section, the facility may attest that it "is subject to an approved State plan for the recruitment and retention of nurses." The contents of the annual State plan are described in more detail in § 655.315. For an individual facility to meet the requirements of this paragraph (g)(2), the annual State plan shall provide for the taking of timely and significant steps by that facility, and the facility shall maintain appropriate documentation with respect to those steps. See § 655.350(b). To qualify for this Alternative II, the annual State plan shall have been approved prior to the date the facility submits its attestation to ETA for filing.

(h) *The fifth attestation element: No strike or lockout; no intention or design to influence bargaining representative election.* The facility shall attest that "there is not a strike or lockout in the course of a labor dispute, and the employment of such an alien is not intended or designated to influence an election for a bargaining representative for registered nurses of the facility." Labor disputes for purposes for this attestation element relate only to those involving nurses providing nursing services; other health service occupations are not included. This attestation element applies to strikes and lockouts and elections of bargaining representatives at both the facility employing the nurse and, in the case of nursing contractors, at the worksite facility.

(1) *Notice of strike or lockout.* In order to remain in compliance with the no

strike or lockout portion of this attestation element, if a strike or lockout of nurses at the facility occurs during the 1 year's validity of the attestation, the facility, within 3 days of the occurrence of the strike or lockout, shall submit to the ETA National Office, by U.S. mail or private carrier, written notice of the strike or lockout.

(2) *ETA notice to INS.* Upon receiving from a facility a notice described in paragraph (h)(1) of this section, ETA shall examine the documentation, and may consult with the union at the facility or other appropriate entities. If ETA determines that the strike or lockout is covered under 8 CFR 214.2(h)(17), INS's *Effect of strike* regulation for "H" visaholders, ETA shall certify to INS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of nurses is in progress at the facility.

(i) *The sixth attestation element: notice of filing.* The facility shall attest that at the time of filing of the petition for registered nurses under section 101(a)(15)(H)(i)(a) of the Act, notice of filing has been provided by the facility to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to registered nurses at the facility through posting in conspicuous locations. The requirement applies to providing notice of filing both for attestations submitted to ETA and for visa petitions filed with INS.

(1) *Notification of bargaining representative.* No later than the date the attestation is mailed to DOL to be considered for filing, the facility shall notify the bargaining representative (if any) for nurses at the facility that the attestation is being submitted to DOL, and shall state in that notice that the attestation is available at the facility (explaining how it can be inspected or obtained) and at the national office of ETA for review by interested parties. No later than the date the facility transmits a visa petition for H-1A nurses to INS, the facility shall notify the bargaining representative (if any) for nurses at the facility that the visa petition is being submitted to INS, and

shall state in that notice that the attestation and visa petition are available at the facility (explaining how they can be inspected or obtained) and at the national office of ETA for review by interested parties. Notices under this paragraph (i)(1) shall include the following statement: "Complaints alleging misrepresentation of material facts in the attestation or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor."

(2) *Posting notice.* If there is no bargaining representative for nurses at the facility, when the facility submits and attestation to ETA, and each time the facility files an H-1A visa petition with INS, the facility shall post a written notice at the facility (and, in addition, at the worksite facility, if at a different location, such as in the case of nursing contractors), stating that the attestation and/or visa petition(s) have been filed and are available at the facility (explaining how these documents can be inspected or obtained) and at the national office of ETA for review by interested parties. In order for the facility to remain in compliance with this paragraph (i)(2), all such notices shall remain posted during the validity period of the attestation and the attestations and petitions shall be available for examination at the facility throughout this period of time. The notice of posting shall provide information concerning the availability of these documents for examination at the facility and at the national office of ETA, and shall include the following statement: "Complaints alleging misrepresentation of material facts in the attestation or failure to comply with the terms of the attestation may be filed with any office the Wage and Hour Division of the United States Department of Labor." Such posted notices shall be clearly visible and unobstructed while posted, shall be posted in conspicuous places, where the facility's U.S. nurses readily can read the posted notice on the way to or from their duties. Appropriate locations for posting such notices include locations in the immediate proximity of mandatory Fair Labor Standards Act wage and hour notices and Occupational

Safety and Health Act occupational safety and health notices.

(j) *Special provisions for nursing contractors.* A nursing contractor submitting an attestation for filing as a facility shall attest, in addition to the first through sixth attestation elements, that it will refer H-1A nurses only to facilities that (with the exception of private households which themselves do not employ H-1A nurses) have valid attestations on file with ETA. The nursing contractor shall obtain from each such worksite facility a copy of that facility's *Form ETA 9029*, accepted for filing by ETA and then currently on file with ETA. The nursing contractor shall maintain a copy of such worksite facility's accepted attestation on file at the nursing contractor's principal office during the validity period of the nursing contractor's attestation or the period of time that any H-1A nurse in its employ is providing nursing services at the worksite facility, whichever is longer.

(k) *Special provisions for worksite facilities which are not employers of H-1A nurses and are not controlled by employers of H-1A nurses.* A facility (other than a private household) which obtains the services of an H-1A nurse by contracting with a nursing contractor, but which is itself neither the employer of any H-1A nurse nor controlled by the employer of any H-1A nurse (see paragraph (k)(1) of this section), shall file an attestation with ETA pursuant to this subpart. Such a worksite facility may request from ETA a waiver of specific elements of the attestation to avoid duplicative attestations, in cases of temporary, emergency circumstances, with respect to information not within the knowledge of the attester, or for other good cause. The attesting worksite facility shall be to ably demonstrate the existence of the circumstances or good cause which are asserted as the basis(es) for the request for a waiver of a particular element of the attestation, but need not submit such evidence with its request for waiver, except evidence with respect to a bona fide medical emergency (see paragraph (k)(3)(iii) of this section).

(1) *Worksites employing, seeking to employ, or filing visa petitions on behalf of*



*H-1A nurses.* An attestation with respect to which waiver is requested or granted pursuant to this paragraph (k) is not valid (*i.e.*, is not “on file and in effect”) for a worksite facility employing, seeking to employ, or filing a visa petition on behalf of H-1A nurses. Only an attestation meeting the requirements of paragraphs (a) through (i) of this section (and paragraph (j) of this section, in the case of a nursing contractor) can serve as the basis for a petition for an H-1A visa. A worksite facility which uses H-1A nurses only through a nursing contractor and, as part of its attestation, requests waiver of one or more attestation elements nevertheless shall file a complete attestation in order to be able to use such attestation as a basis for itself filing a visa petition for an H-1A nurse. Thus, a worksite facility should consider its future needs for H-1A nurses in filing attestations and requests for waiver pursuant to this paragraph (k).

(2) *Inapplicability of third attestation element: facility/employer wage.* If a worksite facility uses H-1A nurses only through a nursing contractor, the third attestation element (facility/employer wage; see paragraph (f) of this section) is not applicable to that facility, since the worksite facility is not the employer of the H-1A nurse and does not guarantee the H-1A nurse’s wage. The third attestation element is required only for the employer of the H-1A nurse(s), *i.e.*, the third attestation element shall be included in the attestation of and met by the H-1A nurse’s employer (*i.e.*, the nursing contractor).

(3) *Waiver of attestation elements.* ETA may consider, pursuant to this paragraph (k)(3) requests for waiver of certain attestation elements by a worksite facility which uses or will use an H-1A nurse provided by a nursing contractor (*i.e.*, an “H-1A contract nurse”), but which worksite facility itself does not employ, seek to employ, or file a visa petition on behalf of an H-1A nurse. Paragraphs (k)(3) (i) through (iii) of this section set forth different conditions for waiver depending on the number of workdays of H-1A contract nurse services the worksite facility will use. For the purposes of this paragraph (k)(3), a “workday” shall consist of one H-1A contract nurse working for

one normal shift in a day. Thus, for example, three normal shifts worked by each of a group of five H-1A contract nurses totals 15 workdays.

(i) *Minimal use of H-1A contract nurses by a worksite.* Where the attesting worksite facility attests in its request for waiver pursuant to this paragraph (k)(3) that it will use no more than a total of 15 workdays of H-1A contract nurse services in any 3-month period of the attestation’s 1-year period of validity to meet emergency needs on a temporary basis, ETA may waive the first (substantial disruption), second (adverse effect), and fourth (timely and significant steps or State plan) elements of the attesting worksite facility’s attestation. See paragraphs (d), (e), and (g) of this section; see also paragraphs (f) and (k)(2) of this section, with respect to the inapplicability of third attestation element (facility/employer wage). ETA shall not waive pursuant to this paragraph (k)(3)(i) the fifth attestation element (strike, lockout, or intent or design to influence bargaining representative election) or the sixth attestation element (notice). See paragraphs (h) and (i) of this section.

(ii) *Short-term use of H-1A contract nurses.* Where the attesting worksite facility attests in its request for waiver pursuant to this paragraph (k)(3) that it will use no more than a total of 60 workdays of H-1A contract nurse services in any 3-month period of the attestation’s 1-year period of validity to meet temporary needs, ETA may waive the nursing shortage component of the first element (substantial disruption; see paragraphs (d)(2) and (d)(3) of this section) and may waive the fourth (timely and significant steps or State plan; see paragraph (g) of this section) element of the attesting worksite facility’s attestation. See also paragraphs (f) and (k)(2) of this section, with respect to the inapplicability of third attestation element (facility/employer wage). ETA shall not waive pursuant to this paragraph (k)(3)(ii) the no-layoff component of the first attestation element (substantial disruption; see paragraph (d)(1) of this section); the second attestation element (adverse effect); the fifth attestation element (strike, lockout, or intent to influence

a bargaining representative election); or the sixth attestation element (notice). See paragraphs (d), (e), (h), and (i) of this section.

(iii) *Long-term use of H-1A contract nurse services.* Where the attesting worksite facility attests in its request for waiver pursuant to this paragraph (k)(3) that it will use more than 60 workdays of H-1A contract nurse services in any 3-month period of the attestation's 1-year period of validity, ETA shall not waive any attestation element, except that, if the attestor documents a bona fide medical emergency warranting a waiver of the fourth attestation element (timely and significant steps or State plan) ETA may waive such element. See paragraph (g) of this section.

(l) *Agents of worksite facilities.* A worksite facility (including a worksite facility which itself employs or seeks to employ an H-1A nurse) may authorize a nursing contractor to act as its agent in preparing and filing the worksite facility's attestation; however, a worksite facility using an agent for preparation and filing of the attestation is responsible for the contents of such attestation and remains liable for any violations which may be disclosed in any investigation under Subpart E of this Part, and the chief executive officer of the worksite facility shall sign the original attestation, as required by paragraph (c)(1)(i) of this section.

(m) *Actions on attestations submitted for filing.* An attestation which meets the established criteria set forth in this §655.310 shall be accepted for filing by ETA on the date it is signed by the Certifying Officer. ETA shall then follow the procedures set forth in paragraph (m)(1) of this section. An attestation submitted by a facility proposing alternative criteria or steps for the first and/or the fourth attestation elements, and/or proposing to take only one timely and significant step, and/or claiming a bona fide medical emergency exemption from the fourth attestation element shall be reviewed by ETA, and a determination shall be made by the Certifying Officer whether to accept or reject the attestation for filing. See paragraphs (d)(2)(ii), (g)(1)(i)(B), (g)(1)(ii), and (k)(3)(iii) of this section. The Certifying Officer

may request additional explanation and/or documentation from the facility in making this determination. If the Certifying Officer does not contact the facility for such information or make any determination within 30 days of receiving the attestation, the attestation shall become accepted for filing. Upon the facility's submitting the attestation to ETA and providing the notice required by the sixth attestation element (see §655.310(i)), the attestation shall be available for public examination at the health care facility itself. When ETA accepts the attestation for filing, the Certifying Officer shall forward the attestation to the ETA National Office, where it shall be available for public examination. Information contesting an attestation received by ETA prior to the determination to accept or reject the attestation for filing shall not be made part of ETA's administrative record on the attestation, but shall be referred to ESA to be processed as a complaint pursuant to Subpart E of this part, and, if such attestation nevertheless is accepted by ETA for filing, the complaint will be handled by ESA under that subpart.

(1) *Acceptance.* (i) If the attestation (and any explanatory statements that may be required) meet the requirements of this subpart, ETA shall accept the attestation for filing, shall, in the case of a facility intending to file a visa petition as the employer of an H-1A nurse, notify INS in writing of the filing, shall return to the facility one copy of the attestation form submitted by the facility, with ETA's acceptance indicated thereon, and shall forward one copy of the attestation with ETA's acceptance indicated thereon to the ETA National Office. The facility may then file a visa petition with INS for alien nurses in accordance with INS regulations.

(ii) DOL is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing.

(2) *Appeals of acceptances.* If an attestation which is subject to a determination under paragraph (d)(2)(ii), (g)(1)(i)(B), (g)(1)(ii), or (k)(3)(iii) of this section is accepted for filing, any interested party may appeal ETA's determination(s) on the element(s) that

have been reviewed. Appeals of acceptances shall be filed with the BALCA, no later than 30 days after the date of acceptance, and will be considered under the procedures set forth at §655.320.

(3) *Appeals of rejections.* If the attestation is not accepted for filing, which may occur as a result of a determination under paragraph (d)(2)(ii), (g)(1)(i)(B), (g)(1)(ii), or (k)(3)(iii) of this section, ETA shall notify the facility in writing, specifying the reasons for rejection and quoting the language of §655.320(a)(1). Any interested party may appeal such rejection to the BALCA, no later than 30 days after the date of rejection. Appeals of rejections shall be filed and considered under the procedures set forth at §655.320.

(n) *Effective date and validity of filed attestations.* An attestation becomes filed and effective as of the date it is accepted and signed by the Certifying Officer and accepted thereby for filing. Such attestation is valid for the 12-month period beginning on the date of acceptance for filing, unless suspended or invalidated pursuant to §655.320 or subpart E. The filed attestation expires at the end of the 12-month period of validity.

(o) *Suspension or invalidation of filed attestation.* Suspension or invalidation of an attestation may result from a BALCA decision reversing an ETA acceptance for filing; from investigations by the Administrator, Wage and Hour Division, of the facility's misrepresentation in or failure to carry out its attestation; or from a discovery by ETA that it made an error in its review of the attestation (in those cases where ETA performs such review pursuant to paragraph (d)(2)(ii), (g)(1)(i)(B), (g)(1)(ii), (k)(3)(iii) of this section) and that the explanation and documentation provided and maintained by the facility does not or did not meet the criteria set forth at §655.310 (a) through (k). If an attestation is suspended or invalidated, DOL shall notify INS.

(1) *Result of BALCA or Wage and Hour Division action.* If an attestation is suspended or invalidated as a result of a BALCA decision overruling an acceptance of the attestation for filing, or is suspended or invalidated as a result of a Wage and Hour Division action pur-

suant to subpart E, such suspension or invalidation may not be separately appealed, but shall be merged with appeals of BALCA's or the Wage and Hour Division's determination on the underlying violation.

(2) *Result of ETA action.* If, after accepting an attestation for filing, ETA discovers that it erroneously accepted that attestation for filing, and, as a result, ETA suspends or invalidates that acceptance, the facility may appeal such suspension or invalidation pursuant to §655.320 as if that suspension or invalidation were a decision to reject the attestation for filing.

(p) *Facility's responsibilities during suspension and after invalidation or expiration of filed attestation.* A facility shall comply with the terms of its attestation, even if such attestation is suspended, invalidated, or expired, as long as any H-1A nurse is at the facility, unless the attestation is superseded by a subsequent attestation accepted for filing by ETA.

(q) *Facilities subject to penalties.* No attestation shall be accepted for filing from a nursing contractor or other facility which has failed to comply with any penalty, sanction, or other remedy assessed in a final agency action following an investigation by the Wage and Hour Division pursuant to subpart E.

(Approved by the Office of Management and Budget under control number 1205-0305)

[59 FR 882, 897, Jan. 6, 1994, as amended at 59 FR 5487, Feb. 4, 1994]

#### § 655.315 State plans.

A State may submit an annual plan for the recruitment and retention of U.S. citizens and permanent resident aliens who are authorized to perform nursing services in the State.

(a) *Who should prepare and file the annual plan?* The Governor of each State that chooses to submit an annual State plan shall be responsible for the preparation and filing of the annual plan. The Governor may designate any public and/or private organization(s) to assist the Governor in the development of the annual plan.

(b) *When and where should the annual plan be filed?* If a State determines to file an annual State plan, the Governor shall submit the original plan, signed

by the Governor, by U.S. mail or private carrier, to ETA at the following address: Director, U.S. Employment Service, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., room N-4456, Washington, DC 20210. An annual State plan may be filed with ETA at any time. However, for an individual facility legitimately to attest to being subject to an annual State plan for the purposes of the fourth attestation element, Alternative II (see §655.310(g)(2)), such annual State plan shall have been approved prior to the date the attestation was submitted to ETA for filing and be in current effect. Therefore, if the Governor is aware that a facility within the State plans to submit an attestation for filing with ETA, the annual State plan should be mailed to ETA at least 35 days prior to the facility's submission of its attestation to ETA.

(c) *What overall issues shall the annual State plan address?* The annual State plan shall address the overall issue of supply of and demand for nurses within the State, with particular emphasis on measures to develop a sufficient supply of U.S. nurses to meet projected demand. The State, as opposed to individual facilities, is in a position to—and may be expected to—address broad issues and perform such functions as conducting a Statewide needs assessment; overall management, facilitation and coordination among various interested entities within the State; and undertaking more regionally based approaches. The State is also in a position to devote resources which individual facilities may be lacking.

(d) *How should the annual State plan address the timely and significant steps?* The annual State plan shall address all of the timely and significant steps in §655.310(g)(1)(i)(A)(1) through (g)(1)(i)(A)(5) generically, without regard to the specific criteria therein, on a Statewide basis. However, for the annual State plan to satisfy Alternative II of the fourth attestation requirement for an individual facility (see §655.310(g)(2)), the annual State plan shall indicate which of those timely and significant steps relate to individual facilities, and that each individual facility shall take such a step

(either one step or more, as appropriate) to meet the appropriate specific criteria as set forth in §655.310(g)(1).

(e) *What other components may the annual State plan include?* An annual State plan may include the following components:

(1) The cooperation of high schools and colleges may be enlisted in counseling health workers and other individuals to enter the nursing profession.

(2) Geographic and salary data may be made available to assist in linking nurses to facilities.

(3) Publications of vacancies and programs may be made in industry and State newsletters.

(4) Training films and videotapes, as well as information on housing and relocation services, may be developed and distributed.

(5) Measures may be taken to encourage other health professionals to become nurses, such as: setting up home study programs with State licensing boards to allow work credits for purposes of meeting educational or State clinical requirements; entering into cooperative agreements for providing health care insurance and other job-related elements which would allow greater flexibility for those attempting to combine careers and school; providing monetary grants or long-term loans to persons preparing to become nurses.

(6) Steps may be taken to encourage nurses who have left the nursing field to return to nursing, by providing such inducements as child care, holiday schedule adjustments, and substantial salary increases.

(7) The State may profile and publicize those facilities with special model programs.

(8) The annual State plan may place demands on facilities for comprehensive plans to reduce reliance on foreign nurses.

(f) *Approval and disapproval of annual State plans.* Determinations of approval and disapproval of annual State plans shall be made by the Director, USES. The annual State plan shall be reviewed by ETA, in consultation with the Department of Health and Human Services, and a determination to approve or disapprove the annual State

plan made within 30 calendar days of ETA's receipt of the plan.

(1) If the annual State plan is approved, the Director shall notify the Governor in writing.

(2) If the annual State plan is disapproved, the Director shall notify the Governor in writing, specifying the reason(s) for disapproval. The notice shall state that within 30 calendar days of the date of the notice of disapproval, the Governor may correct the deficiencies noted in the disapproval and resubmit the annual State plan to ETA; and shall inform the state of its right to an appeal, by quoting the language of § 655.320(a).

(g) An approved annual State plan shall be valid for 12-month period beginning on the date of its approval by DOL.

(Approved by the Office of Management and Budget under control number 1205-0305)

**§ 655.320 Appeals of acceptance and rejection of attestations submitted for filing and of State plans.**

(a) *Appeal right*—(1) *Attestations; when to file appeals from acceptances and rejections.* On the basis that the explanation and documentation provided and maintained by the facility does not or did not meet the criteria set forth at § 655.310(d)(2)(ii), (g)(1)(i)(B)(5), (g)(1)(ii), or (k)(3)(iii), an interested party may appeal an acceptance or rejection by ETA of an attestation submitted by a facility for filing in those cases where DOL performed an attestation review function under those provisions. The appeal shall be limited to ETA's determinations on the element(s) reviewed and shall not be an appeal as to any other element(s) in the attestation. An interested party may also appeal ETA's invalidation or suspension of a filed attestation due to a discovery by ETA that it made an error in its reviewing of the attestation (see § 655.310(o)). In the case of an appeal of an acceptance, the facility shall be a party to the appeal; in the case of the appeal of a rejection, invalidation, or suspension, the collective bargaining representative (if any) representing nurses at the facility shall be a party to the appeal. Appeals shall be in writing; shall set forth the grounds for the appeal; shall state if *de novo* consideration by

BALCA is requested; and shall be mailed by certified mail within 30 calendar days of the date of the action from which the appeal is taken (*i.e.*, the acceptance, rejection, suspension or invalidation of the attestation).

(2) *Annual State plans; when to file appeals from disapprovals.* A Governor of a State may appeal ETA's disapproval of an annual State plan. Individual facilities in the State may file briefs as *amici curiae*. Appeals shall be in writing and shall be mailed by certified mail within 30 calendar days of the disapproval of the annual State plan.

(3) *Where to file appeals.* Appeals made pursuant to this section shall be in writing and shall be mailed by certified mail to: Director, U.S. Employment Service, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., Room N-4456, Washington, DC 20210.

(4) *Complaints.* Appeals under this paragraph (a) shall not encompass questions of misrepresentation by a health care facility or nonperformance by such a facility of its attestation. Such complaints shall be filed with an office of the Wage and Hour Division, United States Department of Labor.

(b) *Transmittal to BALCA; case file.* Upon receipt of an appeal pursuant to this section, the Certifying Officer (or, in the case of State plans, the Director, USES), shall send to BALCA a certified copy of the ETA case file, containing the attestation and supporting documentation and any other information or data considered by ETA in taking the action being appealed. The administrative law judge chairing BALCA shall assign a panel of one or more administrative law judges who serve on BALCA to review the record for legal sufficiency and to consider and rule on the appeal.

(c) *Consideration on the record; de novo hearings*—(1) *General.* BALCA shall not remand, dismiss, or stay the case, except as provided in paragraph (c)(2) of this section, but may otherwise consider the appeal on the record or in a *de novo* hearing (on its own motion or on a party's request). Interested parties and *amici curiae* may submit briefs in accordance with a schedule set by BALCA. The ETA official making the determination from which the appeal

was taken shall be represented by the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, Department of Labor, or the Associate Solicitor's designee. If BALCA determines to hear the appeal on the record without a *de novo* hearing, BALCA shall render a decision within 30 calendar days after BALCA's receipt of the case file. If BALCA determines to hear the appeal through a *de novo* hearing, the procedures contained in 29 CFR part 18 shall apply to such hearings, except that:

(i) The appeal shall not be considered to be a complaint to which an answer is required;

(ii) BALCA shall ensure that, at the request of the appellant, the hearing is scheduled to take place within a reasonable period after BALCA's receipt of the case file (see also the time period described in paragraph (c)(1)(iv) of this section);

(iii) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B), shall not apply to any hearing conducted pursuant to this subpart, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by BALCA in conducting the hearing; BALCA may exclude irrelevant, immaterial, or unduly repetitious evidence; the certified copy of the case file transmitted to BALCA by the Certifying Officer (or, in the case of State plans, the Director, USES), shall be part of the evidentiary record of the case and need not be removed into evidence; and

(iv) BALCA's decision shall be rendered within 120 calendar days after BALCA's receipt of the case file.

(2) *Dismissals and stays.* If the BALCA determines that the appeal is solely a question of misrepresentation by the facility or is solely a complaint of the facility's nonperformance of the attestation, BALCA shall dismiss the case and refer the matter to the Administrator, Wage and Hour Division, for action under subpart E. If the BALCA de-

termines that the appeal is partially a question of misrepresentation by the facility or is partially a complaint of the facility's nonperformance of the attestation, BALCA shall refer the matter to the Administrator, Wage and Hour Division, for action under Subpart E of this part and shall stay BALCA consideration of the case pending final agency action on such referral. During such stay, the 120-day period described in paragraph (c)(1)(iv) of this section shall be suspended.

(d) *BALCA's decision.* After consideration on the record or a *de novo* hearing, BALCA shall either affirm or reverse ETA's decision, and shall so notify the appellant; the Director, if the affirmation or denial involves a State plan; Certifying Officer; Chief, Division of Foreign Labor Certifications; and any other parties. See § 655.450 custody of the record of the appeal.

(e) *Decisions on attestations.* With respect to an appeal of the acceptance, rejection, suspension or invalidation of an attestation, the decision of BALCA shall be the final decision of the Secretary, and no further review shall be given to the matter by any DOL official.

(f) *Decisions on annual State plans.* With respect to an appeal of the disapproval of an annual State plan, the decision of BALCA shall be the final decision by the Secretary, unless a petition for review of the BALCA decision is filed with the Secretary and the Secretary determines to review the decision.

(1) *Filing of petition for review.* The Director or the State desiring review of the decision and order of BALCA may petition the Secretary to review the decision and order. To be effective, such petition shall be received by the Secretary within 30 days of the date of the decision and order. Copies of the petition shall be served on all parties and on BALCA.

(2) *Form of petition for review.* No particular form is prescribed for any petition for Secretary's review permitted by this paragraph (f). However, any such petition shall:

(i) Be dated;

(ii) Be typewritten or legibly written;

(iii) Specify the issue or issues stated in the BALCA decision and order giving rise to such petition;

(iv) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(v) Be signed by the party filing the petition or by an authorized representative of such party;

(vi) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(vii) Attach copies of BALCA's decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(3) *Notice of determination to review.* Whenever the Secretary determines to review the decision and order of BALCA on an annual State plan, a notice of the Secretary's determination to do so shall be served upon BALCA and upon all parties to the proceeding within 30 days after the Secretary's receipt of the petition for review.

(4) *Hearing record.* Upon receipt of the Secretary's notice, BALCA shall within 15 days forward the complete hearing record to the Secretary.

(5) *Contents of Secretary's notice.* The Secretary's notice shall specify:

- (i) The issue or issues to be reviewed;
- (ii) The form in which submissions shall be made by the parties; and
- (iii) The time within which such submissions shall be made.

(6) *Filing of documents.* All documents submitted to the Secretary pursuant to this paragraph (f) shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, Room S-4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, shall be received by the Secretary either on or before the due date.

(7) *Service of documents.* Copies of all documents filed with the Secretary pursuant to this paragraph (f) shall be served simultaneously upon all other parties involved in the proceeding.

Service upon the Director shall be in accordance with paragraph (a)(3) of this section.

(8) *Secretary's decision.* The Secretary's final decision pursuant to this paragraph (f) shall be issued within 180 days from the date of the notice of intent to review. The Secretary's decision shall be served upon all parties and BALCA.

(9) *Transmittal of record.* Upon issuance of the Secretary's decision under this paragraph (f), the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to §655.450.

#### § 655.350 Public access.

(a) *Public examination at ETA.* ETA shall make available for public examination in Washington, DC, a list of facilities which have filed attestations, and such facilities' visa petitions (if any) for H-1A nurses, and for each such facility, a copy of the facility's attestation and any explanatory statements it has received; the annual State plan (if any) which relates to the facility's attestation; and a copy of each of the facility's H-1A visa petitions (if any) to INS. A copy of the latter shall be transmitted to ETA by the facility at the same time it is submitted to INS. The facility shall also forward to ETA a copy of the INS visa petition approval notice within 5 days after it is received from INS.

(b) *Public examination at facility.* For the duration of the attestation's validity and thereafter for so long as the facility uses any H-1 or H-1A nurse under the attestation, the facility shall maintain a separate file containing the attestation and required documentation, and shall make this file available to any interested parties within 72 hours upon written or oral request. If a party requests a copy of the file, the facility shall provide it and any charge for such copy shall not exceed the cost of reproduction.

(c) *Notice to public.* ETA periodically shall publish a notice in the FEDERAL REGISTER announcing the names and addresses of facilities which have submitted attestations; facilities which have attestations on file; facilities which have submitted attestations

which have been rejected for filing; facilities which have had attestations suspended; States which have submitted annual State plans; States which have approved annual State plans; and States which have submitted annual State plans which were disapproved.

(Approved by the Office of Management and Budget under control number 1205-0305)

[59 FR 882, 897, Jan. 6, 1994, as amended at 59 FR 5487, Feb. 4, 1994]

#### Subpart E- Enforcement of H-1A Attestations

SOURCE: 59 FR 882, 897, Jan. 6, 1994, unless otherwise noted.

#### § 655.400 Enforcement authority of Administrator, Wage and Hour Division.

(a) The Administrator shall perform all the Secretary's investigative and enforcement functions under 8 U.S.C. 1182(m) and subparts D and E of this part.

(b) The Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters to which a health care facility has attested under section 212(m) of the INA (8 U.S.C. 1182(m)) and subparts D and E of this part.

(c) A facility being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No facility shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1182(m) or subparts D or E of this part. In the event of such interference, the Administrator may deem the interference to be a violation and take such further actions as the Administrator considers appropriate. (*Note:* Federal criminal statutes prohibit certain interference with a

Federal officer in the performance of official duties. 18 U.S.C. 111 and 1114.)

(d) A facility subject to subparts D and E of this part shall at all times cooperate in administrative and enforcement proceedings. No facility shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person because such person has:

(1) Filed a complaint or appeal under or related to section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart D or E of this part;

(2) Testified or is about to testify in any proceeding under or related to section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart D or E of this part;

(3) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart D or E of this part.

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to the Act or to subparts D or E of this part or any other DOL regulation promulgated pursuant to 8 U.S.C. 1182(m).

In the event of such intimidation or restraint as are described in paragraph (d)(1), (2), (3), or (4) of this section, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate.

(e) A facility subject to subpart D and E of this part shall maintain a separate file containing its attestation and required documentation, and shall make that file or copies thereof available to interested parties, as required by §655.350(b). In the event of a facility's failure to maintain the file, to provide access, or to provide copies, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate.

(f) No health care facility shall seek to have an H-1A nurse, or any other nurse similarly employed by the employer, or any other employee waive rights conferred under the Act or under subpart D or E of this part. In the event of such waiver, the Administrator may deem the conduct to be a violation and take such further actions



as the Administrator considers appropriate. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the Act or subpart D or E of this part may be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act or subpart D and E of this part. This prohibition of waivers does not prevent agreements to settle litigation among private parties.

(g) The Administrator shall, to the extent possible under existing law, protect the confidentiality of any complainant or other person who provides information to the Department.

**§ 655.405 Complaints and investigative procedures.**

(a) The Administrator, through investigation, shall determine whether a facility has failed to perform any attested conditions, misrepresented any material facts in an attestation (including misrepresentation as to compliance with regulatory standards), or otherwise violated the Act or subpart D or E of this part.

(NOTE: Federal criminal statutes provide penalties of up to \$10,000 and/or imprisonment of up to 5 years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546).

(b) Any aggrieved person or organization may file a complaint of a violation of the provisions of section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart D or E of this part. No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint. The complaint shall set forth sufficient facts for the Administrator to determine what part or parts of the attestation or regulations have allegedly been violated. Upon the request of the complainant, the Administrator shall, to the extent possible under existing law, maintain confidentiality regarding the complainant's identity; if the complainant wishes to be a party to the administrative hearing proceedings under this subpart, the complainant shall then waive confidentiality. The complaint may be sub-

mitted to any local Wage and Hour Division office; the addresses of such offices are found in local telephone directories. Inquiries concerning the enforcement program and requests for technical assistance regarding compliance may also be submitted to the local Wage and Hour Division office.

(c) The Administrator shall determine whether there is reasonable cause to believe that the complaint warrants investigation and, if so, shall conduct an investigation, within 180 days of the receipt of a complaint. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary.

(d) When an investigation has been conducted, the Administrator shall, within 180 days of the receipt of a complaint, issue a written determination, stating whether a basis exists to make a finding that the facility failed to meet a condition of its attestation, or made a misrepresentation of a material fact therein, or otherwise violated the Act or subpart D or E. The determination shall specify any sanctions imposed due to violations. The Administrator shall provide a notice of such determination to the interested parties and shall inform them of the opportunity for a hearing pursuant to § 655.420.

**§ 655.410 Civil money penalties and other remedies.**

(a) The Administrator may assess a civil money penalty not to exceed \$1,000 for each affected person with respect to whom there has been a violation of the attestation or subpart D or E of this part of and with respect to each instance in which such violation occurred. The Administrator also shall impose appropriate remedies, including the payment of back wages and the performance of attested obligations such as providing training.

(b) In determining the amount of civil money penalty to be assessed for any violation, the Administrator shall consider the type of violation committed and other relevant factors. The

matters which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the facility under the Act and subpart D or E of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the violator in good faith to comply with the attestation or the State plan as provided in the Act and Subparts D and E of this part;

(5) The violator's explanation of the violation or violations;

(6) The violator's commitment to future compliance, taking into account the public health, interest or safety; and

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury or adverse effect upon the workers.

(c) The civil money penalty, back wages, and any other remedy determined by the Administrator to be appropriate, are immediately due for payment or performance upon the assessment by the Administrator, or the decision by an administrative law judge where a hearing is requested, or the decision by the Secretary where review is granted. The facility shall remit the amount of the civil money penalty, by certified check or money order made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violations occurred. The payment of back wages, monetary relief, and/or the performance or any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. The facility's failure to pay the civil money penalty, back wages, or other monetary relief, or to perform any other assessed remedy, shall result in the rejection by ETA of any future attestation submitted by the facility, until such payment or performance is accomplished.

**§ 655.415 Written notice and service of Administrator's determination.**

(a) The Administrator's determination, issued pursuant to § 655.405(d), shall be served on the complainant, the facility, and other interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail. Where the complainant has requested confidentiality, the Administrator shall serve the determination in a manner which will not breach that confidentiality.

(b) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and the Administrator's determination.

(c) The Administrator's written determination required by § 655.405(c) shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor; prescribe any remedies or penalties including the amount of any unpaid wages due, the actions required for compliance with the facility attestation and/or State plan, and the amount of any civil money penalty assessment and the reason or reasons therefor.

(2) Inform the interested parties that they may request a hearing pursuant to § 655.420.

(3) Inform the interested parties that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 10 days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, and give the address of the Chief Administrative Law Judge.

(5) Inform the parties that, pursuant to § 655.455, the Administrator shall notify the Attorney General and ETA of the occurrence of a violation by the employer.

**§ 655.420 Request for hearing.**

(a) Any interested party desiring to request an administrative hearing on a determination issued pursuant to

§ 655.405(d) shall make such request in writing to the Chief Administrative Law Judge at the address stated in the notice of determination.

(b) An interested party may request a hearing in the following circumstances:

(1) Where the Administrator determines that there is no basis for a finding of violation, the complainant or other interested party may request a hearing. In such a proceeding, the party requesting the hearing shall be the prosecuting party and the facility shall be the respondent; the Administrator may intervene as a party or appear as *amicus curiae* at any time in the proceeding, at the Administrator's discretion.

(2) Where the Administrator determines that there is a basis for a finding of violation, the facility or other interested party may request a hearing. In such a proceeding, the Administrator shall be the prosecuting party and the facility shall be the respondent.

(c) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the notice of determination given rise to such request;
- (4) State the specific reason or reasons why the party requesting the hearing believes such determination is in error;
- (5) Be signed by the party making the request or by an authorized representative of such party; and
- (6) Include the address at which such party or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing shall be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 10 days after the date of the determination. An interested party which fails to meet this 10-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party pursuant to 29 CFR 18.10 (b) through (d) or through

participation as an *amicus curiae* pursuant to 29 CFR 18.12.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is filed by mail, it should be certified mail. If the request is filed by facsimile transmission, the original of the request, signed by the requestor or authorized representative, shall be filed within 10 days of the date of the Administrator's notice of determination.

(f) Copies of the request for a hearing shall be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

**§ 655.425 Rules of practice for administrative law judge proceedings.**

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the *Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges* (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

**§ 655.430 Service and computation of time.**

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service is complete upon mailing to the last known address. No additional time for filing or response is

authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, and one copy on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

**§ 655.435 Administrative law judge proceedings.**

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.420, the Chief Administrative Law Judge shall appoint an administrative law judge to hear the case.

(b) Within 7 days following the assignment of the case, the administrative law judge shall notify all interested parties of the date, time and place of the hearing. All parties shall be given at least 5 days notice of such hearing.

(c) The date of the hearing shall be not more than 60 days from the date of the Administrator's determination. Because of the time constraints imposed by the Act, no requests for postponement shall be granted except for compelling reasons and by consent of all the parties to the proceeding.

(d) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § 655.430. Posthearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited

to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party in accordance with § 655.430.

**§ 655.440 Decision and order of administrative law judge.**

(a) Within 90 days after receipt of the transcript of the hearing, the administrative law judge shall issue a decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision. The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision shall be served on all parties in person or by certified or regular mail.

**§ 655.445 Secretary's review of administrative law judge's decision.**

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge shall petition the Secretary to review the decision and order. To be effective, such petition shall be received by the Secretary within 30 days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for Secretary's review permitted by this subpart. However, any such petition shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(c) Whenever the Secretary determines to review the decision and order of an administrative law judge, a notice of the Secretary's determination shall be served upon the administrative law judge and upon all parties to the proceeding within 30 days after the Secretary's receipt of the petition for review.

(d) Upon receipt of the Secretary's notice, the Office of Administrative Law Judges shall within 15 days forward the complete hearing record to the Secretary.

(e) The Secretary's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (*e.g.*, briefs, oral argument);

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, room S-4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, shall be received by the Secretary either on or before the due date.

(g) Copies of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § 655.430(b).

(h) The Secretary's final decision shall be issued within 180 days from the date of the notice of intent to review. The Secretary's decision shall be

served upon all parties and the administrative law judge.

(i) Upon issuance of the Secretary's decision, the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.450.

**§ 655.450 Administrative record.**

The official record of every completed administrative hearing procedure provided by subparts D and E of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

**§ 655.455 Notice to the Attorney General and the Employment and Training Administration.**

(a) The Administrator shall promptly notify the Attorney General and ETA of the final determination of a violation by an employer upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made pursuant to § 655.420; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer; or

(3) Where the administrative law judge finds that there was no violation, and the Secretary, upon review, issues a decision pursuant to § 655.445, holding that a violation was committed by an employer.

(b) The Attorney General, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall not approve petitions filed with respect to that employer under section 212(m) of the INA (8 U.S.C. 1182(m)) during a period of at least 12 months from the date of receipt of the Administrator's notification.

(c) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall suspend the employer's attestation under subparts

D and E of this part, and shall not accept for filing any attestation submitted by the employer under subparts D and E of this part, for a period of 12 months from the date of receipt of the Administrator's notification or for a longer period if such is specified by the Attorney General for visa petitions filed by that employer under section 212(m) of the INA.

**§ 655.460 Non-applicability of the Equal Access to Justice Act.**

A proceeding under subpart D or E of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

**Subpart F- Attestations by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports**

SOURCE: 60 FR 3956, 3976, Jan. 19, 1995, unless otherwise noted.

GENERAL PROVISIONS

**§ 655.500 Purpose, procedure and applicability of subparts F and G of this part.**

(a) *Purpose.* (1) Section 258 of the Immigration and Nationality Act ("Act") prohibits nonimmigrant alien crewmembers admitted to the United States on D-visas from performing longshore work at U.S. ports except in five specific instances:

(i) Where the vessel's country of registration does not prohibit U.S. crewmembers from performing longshore work in that country's ports and nationals of a country (or countries) which does not prohibit U.S. crewmembers from performing longshore work in that country's ports hold a majority of the ownership interest in the vessel, as determined by the Secretary of State (henceforth referred to as the "reciprocity exception");

(ii) Where there is in effect in a local port one or more collective bargaining agreement(s), each covering at least thirty percent of the longshore work-

ers, and each permitting the activity to be performed under the terms of such agreement(s);

(iii) Where there is no collective bargaining agreement covering at least thirty percent of the longshore workers at the particular port and an attestation with accompanying documentation has been filed with the Department of Labor attesting that, among other things, the use of alien crewmembers to perform a particular activity of longshore work is permitted under the prevailing practice of the particular port (henceforth referred to as the "prevailing practice exception");

(iv) Where the longshore work is to be performed at a particular location in the State of Alaska and an attestation with accompanying documentation has been filed with the Department of Labor attesting that, among other things, before using alien crewmembers to perform the activity specified in the attestation, the employer will make a bona fide request for and employ United States longshore workers who are qualified and available in sufficient numbers from contract stevedoring companies, labor organizations recognized as exclusive bargaining representatives of United States longshore workers, and private dock operators (henceforth referred to as the "Alaska exception"); or

(v) Where the longshore work involves an automated self-unloading conveyor belt or vacuum-actuated system on a vessel and the Administrator has not previously determined that an attestation must be filed pursuant to this part as a basis for performing those functions (henceforth referred to as the "automated vessel exception").

(2) The term "longshore work" does not include the loading or unloading of hazardous cargo, as determined by the Secretary of Transportation, for safety and environmental protection. The Department of Justice, through the Immigration and Naturalization Service (INS), determines whether an employer may use alien crewmembers for longshore work at U.S. ports. In those cases where an employer must file an attestation in order to perform such work, the Department of Labor shall be responsible for accepting the filing of

such attestations. Subpart F of this part sets forth the procedure for filing attestations with the Department of Labor for employers proposing to use alien crewmembers for longshore work at U.S. ports under the prevailing practice exception, the Alaska exception, and where it has been determined that an attestation is required under the automated vessel exception listed in paragraph (a)(1)(iv) of this section. Subpart G of this part sets forth complaint, investigation, and penalty provisions with respect to such attestations.

(b) *Procedure.* (1) Under the prevailing practice exception in sec. 258(c) of the Act, and in those cases where it has been determined that an attestation is required under the automated vessel exception for longshore work to be performed at locations other than in the State of Alaska, the procedure involves filing an attestation with the Department of Labor attesting that:

(i) The use of alien crewmembers for a particular activity of longshore work is the prevailing practice at the particular port;

(ii) The use of alien crewmembers is not during a strike or lockout nor designed to influence the election of a collective bargaining representative; and

(iii) Notice of the attestation has been provided to the bargaining representative of longshore workers in the local port, or, where there is none, notice has been provided to longshore workers employed at the local port.

(2) Under the automated vessel exception in sec. 258(c) of the Act, no attestation is required in cases where longshore activity consists of the use of an automated self-unloading conveyor belt or vacuum-actuated system on a vessel. The legislation creates a rebuttable presumption that the use of alien crewmembers for the operation of such automated systems is the prevailing practice. In order to overcome such presumption, it must be shown by the preponderance of the evidence submitted by any interested party, that the use of alien crewmembers for such activity is not the prevailing practice at the particular port, that it is during a strike or lockout, or that it is intended or designed to influence an elec-

tion of a bargaining representative for workers in the local port.

(3) Under the Alaska exception in sec. 258(d) of the Act, and in those cases where it has been determined that an attestation is required under the automated vessel exception consisting of the use of such equipment for longshore work to be performed in the State of Alaska, the procedure involves filing an attestation with the Department of Labor attesting that:

(i) The employer will make a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the activity at the particular time and location from the parties to whom notice has been provided under paragraph (b)(3)(iv) (B) and (C) of this section, except that:

(A) Wherever two or more contract stevedoring companies which meet the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) have signed a joint collective bargaining agreement with a single labor organization recognized as an exclusive bargaining representative of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*), the employer may request longshore workers from only one such contract stevedoring company, and

(B) A request for longshore workers to an operator of a private dock may be made only for longshore work to be performed at that dock and only if the operator meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932);

(ii) The employer will employ all United States longshore workers made available in response to the request made pursuant to paragraph (b)(3)(i) of this section who are qualified and available in sufficient numbers and who are needed to perform the longshore activity at the particular time and location attested to;

(iii) The use of alien crewmembers for such activity is not intended or designed to influence and election of a bargaining representative of workers in the State of Alaska; and

(iv) Notice of the attestation has been provided to:

(A) Labor organizations which have been recognized as exclusive bargaining representatives of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which make available or intend to make available workers to the particular location where the longshore work is to be performed;

(B) Contract stevedoring companies which employ or intend to employ United States longshore workers at that location; and

(C) Operators of private docks at which the employer will use longshore workers.

(c) *Applicability.* Subparts F and G of this part apply to all employers who seek to employ alien crewmembers for longshore work at U.S. ports under the prevailing practice exception, to all employers who seek to employ alien crewmembers for longshore work at locations in the State of Alaska under the Alaska exception, to all employers claiming the automated vessel exception, and to those cases where it has been determined that an attestation is required under the automated vessel exception.

**§ 655.501 Overview of responsibilities.**

This section provides a context for the attestation process, to facilitate understanding by employers that may seek to employ alien crewmembers for longshore work under the prevailing practice exception, under the Alaska exception, and in those cases where an attestation is necessary under the automated vessel exception.

(a) *Department of Labor's responsibilities.* The United States Department of Labor (DOL) administers the attestation process. Within DOL, the Employment and Training Administration (ETA) shall have responsibility for setting up and operating the attestation process; the Employment Standards Administration's Wage and Hour Division shall be responsible for investigating and resolving any complaints filed concerning such attestations.

(b) *Employer attestation responsibilities.*

(1) Each employer seeking to use alien crewmembers for longshore work at a

local U.S. port pursuant to the prevailing practice exception or where an attestation is required under the automated vessel exception for longshore work to be performed at locations other than in the State of Alaska shall, as the first step, submit an attestation on Form ETA 9033, as described in §655.510 of this part, to ETA at the address set forth at §655.510(b) of this part. If ETA accepts the attestation for filing, pursuant to §655.510 of this part, ETA shall return the cover form of the accepted attestation to the employer, and, at the same time, shall provide notice of the filing to the Immigration and Naturalization Service (INS) office having jurisdiction over the port where longshore work will be performed.

(2) Each employer seeking to use alien crewmembers for longshore work at a particular location in the State of Alaska pursuant to the Alaska exception or where an attestation is required under the automated vessel exception for longshore work to be performed at a particular location in Alaska shall submit, as a first step, an attestation on Form ETA 9033-A, as described in §655.533 of this part, to ETA at the address of the Seattle regional office as set forth at §655.532 of this part. The address appears in the instructions to Form ETA 9033-A. ETA shall return the cover form of the accepted attestation to the employer, and, at the same time, shall provide notice of the filing to the INS office having jurisdiction over the location where longshore work will be performed.

(c) *Complaints.* Complaints concerning misrepresentation in the attestation, failure of the employer to carry out the terms of the attestation, or complaints that an employer is required to file an attestation under the automated vessel exception, may be filed with the Wage and Hour Division, according to the procedures set forth in subpart G of this part. Complaints of "misrepresentation" may include assertions that an employer has attested to the use of alien crewmembers only for a particular activity of longshore work and has thereafter used such alien crewmembers for another activity of longshore work. If the Division determines that the complaint presents



reasonable cause to warrant an investigation, the Division shall then investigate, and, where appropriate, after an opportunity for a hearing, assess sanctions and penalties. Subpart G of this part further provides that interested parties may obtain an administrative law judge hearing on the Division's determination after an investigation and may seek the Secretary's review of the administrative law judge's decision. Subpart G of this part also provides that a complainant may request that the Wage and Hour Administrator issue a cease and desist order in the case of either alleged violation(s) of an attestation or longshore work by alien crewmember(s) employed by an employer allegedly not qualified for the claimed automated vessel exception. Upon the receipt of such a request, the Division shall notify the employer, provide an opportunity for a response and an informal meeting, and then rule on the request, which shall be granted if the preponderance of the evidence submitted supports the complainant's position.

**§ 655.502 Definitions.**

For the purposes of subparts F and G of this part:

*Accepted for filing* means that a properly completed attestation on Form ETA 9033, including accompanying documentation for each of the requirements in §655.510 (d) through (f) of this part, or a properly completed attestation on Form ETA 9033-A, including accompanying documentation for the requirement in §655.537 of this part in the case of an attestation under the Alaska exception, submitted by the employer or its designated agent or representative has been received and filed by the Employment and Training Administration of the Department of Labor (DOL). (Unacceptable attestations under the prevailing practice exception are described at §655.510(g)(2) of this part. Unacceptable attestations under the Alaska exception are described at §655.538(b) of this part.)

*Act* and *INA* mean the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

*Activity* means any activity relating to loading cargo; unloading cargo; op-

eration of cargo-related equipment; or handling of mooring lines on the dock when a vessel is made fast or let go.

*Administrative law judge* means an official appointed pursuant to 5 U.S.C. 3105.

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, or such authorized representatives as may be designated to perform any of the functions of the Administrator under subparts F and G of this part.

*Attestation* means documents submitted by an employer attesting to and providing accompanying documentation to show that, under the prevailing practice exception, the use of alien crewmembers for a particular activity of longshore work at a particular U.S. port is the prevailing practice, and is not during a strike or lockout nor intended to influence an election of a bargaining representative for workers; and that notice of the attestation has been provided to the bargaining representative, or, where there is none, to the longshore workers at the local port. Under the Alaska exception, such documents shall show that, before using alien crewmen to perform longshore work, the employer will make bona fide requests for dispatch of United States longshore workers who are qualified and available in sufficient numbers and that the employer will employ all such United States longshore workers in response to such a request for dispatch; that the use of alien crewmembers is not intended or designed to influence an election of a bargaining representative for workers in the State of Alaska; and that notice of the attestation has been provided to labor organizations recognized as exclusive bargaining representatives of United States longshore workers, contract stevedoring companies, and operators of private docks at which the employer will use longshore workers.

*Attesting employer* means an employer who has filed an attestation.

*Attorney General* means the chief official of the U.S. Department of Justice or the Attorney General's designee.

*Automated vessel* means a vessel equipped with an automated self-unloading conveyor belt or vacuum-actuated system which is utilized for loading or unloading cargo between the vessel and the dock.

*Certifying Officer* means a Department of Labor official who makes determinations about whether or not to accept attestations:

- (1) A regional Certifying Officer designated by a Regional Administrator, Employment and Training Administration (RA) makes such determinations in a regional office of the Department;
- (2) A national Certifying Officer makes such determinations in the national office of the USES.

*Chief, Division of Foreign Labor Certifications, USES* means the chief official of the Division of Foreign Labor Certifications within the United States Employment Service, Employment and Training Administration, Department of Labor, or the designee of the Chief, Division of Foreign Labor Certifications, USES.

*Chief Administrative Law Judge* means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

*Contract stevedoring company* means a stevedoring company which is licensed to do business in the State of Alaska and which meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932).

*Crewmember* means any non-immigrant alien admitted to the United States to perform services under sec. 101(a)(15)(D)(i) of the Act (8 U.S.C. 1101(a)(15)(D)(i)).

*Date of filing* means the date an attestation is accepted for filing by ETA.

*Department* and *DOL* mean the United States Department of Labor.

*Director* means the chief official of the United States Employment Service (USES), Employment and Training Administration, Department of Labor, or the Director's designee.

*Division* means the Wage and Hour Division of the Employment Standards Administration, DOL.

*Employer* means a person, firm, corporation, or other association or organization, which suffers or permits, or

proposes to suffer or permit, alien crewmembers to perform longshore work at a port within the U.S. For purposes of §§ 655.530 through 655.541, which govern the performance of longshore activities by alien crewmembers under the Alaska exception, "employer" includes any agent or representative designated by the employer.

*Employment and Training Administration (ETA)* means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

*Employment Standards Administration (ESA)* means the agency within the Department of Labor (DOL) which includes the Wage and Hour Division.

*Immigration and Naturalization Service (INS)* means the component of the Department of Justice which makes the determination under the Act on whether an employer of alien crewmembers may use such crewmembers for longshore work at a U.S. port.

*Lockout* means a labor dispute involving a work stoppage, wherein an employer withholds work from its employees in order to gain a concession from them.

*Longshore work* means any activity (except safety and environmental protection work as described in sec. 258(b)(2) of the Act) relating to the loading or unloading of cargo, the operation of cargo related equipment (whether or not integral to the vessel), or the handling of mooring lines on the dock when the vessel is made fast or let go, in the United States or the coastal waters thereof.

*Longshore worker* means a U.S. worker who performs longshore work.

*Port* means a geographic area, either on a seacoast, lake, river or any other navigable body of water, which contains one or more publicly or privately owned terminals, piers, docks, or maritime facilities, which is commonly thought of as a port by other government maritime-related agencies, such as the Maritime Administration. U.S. ports include, but are not limited to, those listed in Appendix A to this subpart.

*Qualified and available in sufficient numbers* means the full complement of qualified longshore workers needed to

perform the longshore activity, as determined by industry standards in the State of Alaska, including safety considerations.

*Regional Administrator, Employment and Training Administration (RA)* means the chief official of the Employment and Training Administration (ETA) in a Department of Labor (DOL) regional office.

*Secretary* means the Secretary of Labor or the Secretary's designee.

*Strike* means a labor dispute wherein employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operations.

*Unanticipated emergency* means an unexpected and unavoidable situation, such as one involving severe weather conditions, natural disaster, or mechanical breakdown, where cargo must be immediately loaded on, or unloaded from, a vessel.

*United States* is defined at 8 U.S.C. 1101(a)(38).

*United States Employment Service (USES)* means the agency of the Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices.

*United States (U.S.) worker* means a worker who is a U.S. citizen, a U.S. national, a permanent resident alien, or any other worker legally permitted to work indefinitely in the United States.

**§ 655.510 Employer attestations.**

(a) *Who may submit attestations?* An employer (or the employer's designated U.S. agent or representative) seeking to employ alien crewmembers for a particular activity of longshore work under the prevailing practice exception shall submit an attestation, provided there is not in effect in the local port any collective bargaining agreement covering at least 30 percent of the longshore workers. An attestation is required for each port at which the employer intends to use alien crewmembers for longshore work. The attestation shall include: A completed Form ETA 9033, which shall be signed by the employer (or the employer's des-

ignated agent or representative); and facts and evidence prescribed in paragraphs (d) through (f) of this section. This § 655.510 shall not apply in the case of longshore work performed at a particular location in the State of Alaska. The procedures governing the filing of attestations under the Alaska exception are set forth at §§ 655.530 through 655.541.

(b) *Where and when should attestations be submitted?* (1) Attestations must be submitted, by U.S. mail, private carrier, or facsimile transmission to the U.S. Department of Labor ETA Regional Office(s) which are designated by the Chief, Division of Foreign Labor Certifications, USES. Attestations must be received and date-stamped by DOL at least 14 calendar days prior to the date of the first performance of the intended longshore activity, and shall be accepted for filing or returned by ETA in accordance with paragraph (g) of this section within 14 calendar days of the date received by ETA. An attestation which is accepted by ETA solely because it was not reviewed within 14 days is subject to subsequent invalidation pursuant to paragraph (i) of this section. Every employer filing an attestation shall have an agent or representative with a United States address. Such address shall be clearly indicated on the Form ETA 9033. In order to ensure that an attestation has been accepted for filing prior to the date of the performance of the longshore activity, employers are advised to take mailing time into account to make sure that ETA receives the attestation at least 14 days prior to the first performance of the longshore activity.

(2) *Unanticipated Emergencies.* ETA may accept for filing attestations received after the 14-day deadline when due to an unanticipated emergency, as defined in § 655.502 of this part. When an employer is claiming an unanticipated emergency, it shall submit documentation to support such a claim. ETA shall then make a determination on the validity of the claim, and shall accept the attestation for filing or return it in accordance with paragraph (g) of this section. ETA shall in no case accept an attestation received later than the date of the first performance of the activity.

(c) *What should be submitted?* (1) *Form ETA 9033 with accompanying documentation.* For each port, a completed and dated original Form ETA 9033, or facsimile transmission thereof, containing the required attestation elements and the original signature of the employer (or the employer's designated agent or representative) shall be submitted, along with two copies of the completed, signed, and dated Form ETA 9033. (If the attestation is submitted by facsimile transmission, the attestation containing the original signature shall be maintained at the U.S. business address of the employer's designated agent or representative). Copies of Form ETA 9033 are available at all Department of Labor ETA Regional Offices and at the National Office. In addition, the employer shall submit two sets of all facts and evidence to show compliance with each of the attestation elements as prescribed by the regulatory standards in paragraphs (d) through (f) of this section. In the case of an investigation pursuant to subpart G of this part, the employer shall have the burden of proof to establish the validity of each attestation. The employer shall maintain in its records at the office of its U.S. agent, for a period of at least 3 years from the date of filing, sufficient documentation to meet its burden of proof, which shall at a minimum include the documentation described in this §655.510, and shall make the documents available to Department of Labor officials upon request.

Whenever any document is submitted to a Federal agency or retained in the employer's records pursuant to this part, the document either shall be in the English language or shall be accompanied by a written translation into the English language certified by the translator as to the accuracy of the translation and his/her competency to translate.

(2) *Statutory precondition regarding collective bargaining agreements.* (i) The employer may file an attestation only when there is no collective bargaining agreement in effect in the port covering 30 percent or more of the longshore workers in the port. The employer shall attest on the Form ETA 9033 that no such collective bargaining

agreement exists at the port at the time that the attestation is filed.

(ii) The employer is not required to submit with the Form ETA 9033 documentation substantiating that there is no collective bargaining agreement in effect in the port covering 30 percent or more of the longshore workers. If a complaint is filed which presents reasonable cause to believe that such an agreement exists, the Department shall conduct an investigation. In such an investigation, the employer shall have the burden of proving that no such collective bargaining agreement exists.

(3) *Ports for which attestations may be filed.* Employers may file an attestation for a port which is listed in appendix A (U.S. Seaports) to this subpart. Employers may also file an attestation for a particular location not in appendix A to this subpart if additional facts and evidence are submitted with the attestation to demonstrate that the location is a port, meeting all of the criteria as defined by §655.502 of this part.

(4) *Attestation elements.* The attestation elements referenced in paragraph (c)(1) of this section are mandated by sec. 258(c)(1)(B) of the Act (8 U.S.C. 1288(c)(1)(B)). Section 258(c)(1)(B) of the Act requires employers who seek to have alien crewmembers engage in a longshore activity to attest as follows:

(i) The performance of the activity by alien crewmembers is permitted under the prevailing practice of the particular port as of the date of filing of the attestation;

(ii) The use of the alien crewmembers for such activity is not during a strike or lockout in the course of a labor dispute, and is not intended or designed to influence an election of a bargaining representative for workers in the local port; and

(iii) Notice of the attestation has been provided by the owner, agent, consignee, master, or commanding officer to the bargaining representative of longshore workers in the local port, or, where there is no such bargaining representative, notice has been provided to longshore workers employed at the local port.

(d) *The first attestation element: prevailing practice.* For an employer to be in compliance with the first attestation element, it is required to have

been the prevailing practice during the 12-month period preceding the filing of the attestation, for a particular activity of longshore work at the particular port to be performed by alien crewmembers. For each port, a prevailing practice can exist for any of four different types of longshore work: loading of cargo, unloading of cargo, operation of cargo-related equipment, or handling of mooring lines. It is thus possible that at a particular port it is the prevailing practice for alien crewmembers to unload vessels but not the prevailing practice to load them. An employer shall indicate on the attestation form which of the four longshore activities it is claiming is the prevailing practice for such work to be performed by alien crewmembers.

(1) *Establishing a prevailing practice.*

(i) In establishing that a particular activity of longshore work is the prevailing practice at a particular port, an employer shall submit facts and evidence to show that in the 12-month period preceding the filing of the attestation, one of the following conditions existed:

(A) Over fifty percent of vessels docking at the port used alien crewmembers for the activity; or

(B) Alien crewmembers made up over fifty percent of the workers in the port who engaged in the activity.

(ii) *Prevailing practice after Secretary of State determination of non-reciprocity.* Section 258(d) of the Act provides a reciprocity exception (separate from the prevailing practice exception) to the prohibition on performance of longshore work by alien crewmembers in U.S. ports. However, this reciprocity exception becomes nonapplicable where the Secretary of State determines that, for a particular activity of longshore work, a particular country (by law, regulation, or practice) prohibits such activity by U.S. crewmembers in its ports. When the Secretary of State places a country on the non-reciprocity list (which means, for the purposes of this section, *Prohibitions on longshore work by U.S. nationals; listing by country* at 22 CFR 89.1), crewmembers on vessels from that country (that is, vessels that are registered in that country or vessels whose majority ownership interest is held by nationals of that

country) are not permitted to perform longshore work in U.S. waters, absent applicability of some exception other than the reciprocity exception. The Secretary of State's determination has the following effects in the establishment of a prevailing practice for a particular longshore activity at a particular U.S. port for purposes of the prevailing practice exception.

(A) An employer from any country, other than the country which is placed on the non-reciprocity list, may include the longshore activities performed by alien crewmembers on all vessels in establishing the prevailing practice for a particular longshore activity in a particular port.

(B) An employer from a country which is placed on the non-reciprocity list may file an attestation for the prevailing practice exception under the standards and requirements established in this subpart F (except as provided in paragraph (d)(1)(ii)(C) of this section), provided that the attestation is filed at least 12 months after the date on which the employer's country is placed on the list.

(C) An employer from a country which is placed on the non-reciprocity list may file an attestation pursuant to the prevailing practice exception earlier than 12 months from the date on which the employer's country is placed on the list, except that the following restrictions shall apply to such attestation:

(1) The employer shall submit facts and evidence to show that, for the 12-month period preceding the date of the attestation, the use of alien crewmembers to perform a particular activity of longshore work was permitted by the prevailing practice in the port (as defined in paragraph (d)(1)(i) of this section) without considering or including such activity by crewmembers on vessels from the employer's country; or

(2) The employer shall submit facts and evidence (including data on activities performed by crewmembers on vessels from the employer's country) to show that the use of alien crewmembers to perform a particular activity of longshore work was permitted by the prevailing practice in the port (as defined in paragraph (d)(1)(i) of this section) for one of two periods—

(i) For the employer whose country has not previously been on the non-reciprocity list, the period is the continuous 12-month period prior to May 28, 1991 (the effective date of section 258 of the Act); or

(ii) For the employer whose country was at some time on the non-reciprocity list, but was subsequently removed from the non-reciprocity list and then restored to the non-reciprocity list (on one or more occasions), the period is the last continuous 12-month period during which the employer's country was not under the reciprocity exception (that is, was listed on the non-reciprocity list).

(iii) For purposes of this paragraph (d)(1):

(A) "Workers in the port engaged in the activity" means any person who performed the activity in any calendar day;

(B) Vessels shall be counted each time they dock at the particular port);

(C) Vessels exempt from section 258 of the INA for safety and environmental protection shall not be included in counting the number of vessels which dock at the port (see Department of Transportation Regulations); and

(D) Automated vessels shall not be included in counting the number of vessels which dock at the port. For establishing a prevailing practice under the automated vessel exception see §655.520 of this part.

(2) *Documentation.* In assembling the facts and evidence required by paragraph (d)(1) of this section, the employer may consult with the port authority which has jurisdiction over the local port, the collective bargaining representative(s) of longshore workers at the local port, other employers, or any other entity which is familiar with the practices at the port. Such documentation shall include a written summary of a survey of the experience of shipmasters who entered the local port in the previous year; or a letter, affidavit, or other written statement from an appropriate local port authority regarding the use of alien crewmembers to perform the longshore activity at the port in the previous year; or other documentation of comparable weight. Written statements from collective

bargaining representatives and/or shipping agents with direct knowledge of practices regarding the use of alien crewmembers in the local port may also be pertinent. Such documentation shall accompany the Form ETA 9033, and any underlying documentation which supports the employer's burden of proof shall be maintained in the employer's records at the office of the U.S. agent as required by paragraph (c)(1) of this section.

(e) *The second attestation element: no strike or lockout; no intention or design to influence bargaining representative election.* (1) The employer shall attest that, at the time of submitting the attestation, there is not a strike or lockout in the course of a labor dispute covering the employer's activity, and that it will not use alien crewmembers during a strike or lockout after filing the attestation. The employer shall also attest that the employment of such aliens is not intended or designed to influence an election for a bargaining representative for workers in the local port. Labor disputes for purposes of this attestation element relate only to those involving longshore workers at the port of intended employment. This attestation element applies to strikes and lockouts and elections of bargaining representatives at the local port where the use of alien crewmembers for longshore work is intended.

(2) *Documentation.* As documentation to substantiate the requirement in paragraph (e)(1) of this section, an employer may submit a statement of the good faith efforts made to determine whether there is a strike or lockout at the particular port, as, for example, by contacting the port authority or the collective bargaining representative for longshore workers at the particular port.

(f) *The third attestation element: notice of filing.* The employer of alien crewmembers shall attest that at the time of filing the attestation, notice of filing has been provided to the bargaining representative of the longshore workers in the local port, or, where there is no such bargaining representative, notice of the filing has been provided to longshore workers employed at the

local port through posting in conspicuous locations and through other appropriate means.

(1) *Notification of bargaining representative.* No later than the date the attestation is received by DOL to be considered for filing, the employer of alien crewmembers shall notify the bargaining representative (if any) of longshore workers at the local port that the attestation is being submitted to DOL. The notice shall include a copy of the Form ETA 9033, shall state the activity(ies) for which the attestation is submitted, and shall state in that notice that the attestation and accompanying documentation are available at the national office of ETA for review by interested parties. The employer may have its owner, agent, consignee, master, or commanding officer provide such notice. Notices under this paragraph (f)(1) shall include the following statement: "Complaints alleging misrepresentation of material facts in the attestation and/or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor."

(2) *Posting notice where there is no bargaining representative.* If there is no bargaining representative of longshore workers at the local port when the employer submits an attestation to ETA, the employer shall provide written notice to the port authority for distribution to the public on request. In addition, the employer shall post one or more written notices at the local port, stating that the attestation with accompanying documentation has been submitted, the activity(ies) for which the attestation has been submitted, and that the attestation and accompanying documentation are available at the national office of ETA for review by interested parties. Such posted notice shall be clearly visible and unobstructed, and shall be posted in conspicuous places where the longshore workers readily can read the posted notice on the way to or from their duties. Appropriate locations for posting such notices include locations in the immediate proximity of mandatory Fair Labor Standards Act wage and hour notices and Occupational Safety and Health Act occupational safety and

health notices. The notice shall include a copy of the Form ETA 9033 filed with DOL, shall provide information concerning the availability of supporting documents for examination at the national office of ETA, and shall include the following statement: "Complaints alleging misrepresentation of material facts in the attestation and/or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor."

(3) *Documentation.* The employer shall provide a statement setting forth the name and address of the person to whom the notice was provided and where and when the notice was posted and shall attach a copy of the notice.

(g) *Actions on attestations submitted for filing.* Once an attestation has been received from an employer, a determination shall be made by the regional Certifying Officer whether to accept the attestation for filing or return it. The regional Certifying Officer may request additional explanation and/or documentation from the employer in making this determination. An attestation which is properly filled out and which includes accompanying documentation for each of the requirements set forth at §655.510(d) through (f) shall be accepted for filing by ETA on the date it is signed by the regional Certifying Officer unless it falls within one of the categories set forth in paragraph (g)(2) of this section. Once an attestation is accepted for filing, ETA shall then follow the procedures set forth in paragraph (g)(1) of this section. Upon acceptance of the employer's attestation by ETA, the attestation and accompanying documentation will be forwarded and shall be available in a timely manner for public examination at the ETA national office. ETA shall not consider information contesting an attestation received by ETA prior to the determination to accept or return the attestation for filing. Such information shall not be made part of ETA's administrative record on the attestation, but shall be referred to ESA to be processed as a complaint pursuant to subpart G of this part if the attestation is accepted by ETA for filing.

(1) *Acceptance.* (i) If the attestation is properly filled out and includes accompanying documentation for each of the requirements at §655.510(d) through (f), and does not fall within one of the categories set forth at paragraph (g)(2) of this section, ETA shall accept the attestation for filing, provide notification to the INS office having jurisdiction over the port where longshore work will be performed, and return to the employer, or the employer's agent or representative at a U.S. address, one copy of the attestation form submitted by the employer, with ETA's acceptance indicated thereon. The employer may then use alien crewmembers for the particular activity of longshore work at the U.S. port cited in the attestation in accordance with INS regulations.

(ii) DOL is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing.

(2) *Unacceptable attestations.* ETA shall not accept an attestation for filing and shall return such attestation to the employer, or the employer's agent or representative at a U.S. address, when one of the following conditions exists:

(i) When the Form ETA 9033 is not properly filled out. Examples of improperly filled out Form ETA 9033's include instances where the employer has neglected to check all the necessary boxes, or where the employer has failed to include the name of the port where it intends to use the alien crewmembers for longshore work, or where the employer has named a port that is not listed in appendix A and has failed to submit facts and evidence to support a showing that the location is a port as defined by §655.502, or when the employer has failed to sign the attestation or to designate an agent in the United States;

(ii) When the Form ETA 9033 with accompanying documentation is not received by ETA at least 14 days prior to the date of performance of the first activity indicated on the Form ETA 9033; unless the employer is claiming an unanticipated emergency, has included documentation which supports such claim, and ETA has found the claim to be valid;

(iii) When the Form ETA 9033 does not include accompanying documentation for each of the requirements set forth at §655.510 (d) through (f);

(iv) When the accompanying documentation required by paragraph (c) of this section submitted by the employer, on its face, is inconsistent with the requirements set forth at §655.510 (d) through (f). Examples of such a situation include instances where the Form ETA 9033 pertains to one port and the accompanying documentation to another; where the Form ETA 9033 pertains to one activity of longshore work and the accompanying documentation obviously refers to another; or where the documentation clearly indicates that only thirty percent, instead of the required fifty percent, of the activity attested to is performed by alien crewmembers;

(v) When the Administrator, Wage and Hour Division, has notified ETA, in writing, after an investigation pursuant to subpart G of this part, that the particular activity of longshore work which the employer has attested is the prevailing practice at a particular port, is not, in fact, the prevailing practice at the particular port;

(vi) When the Administrator, Wage and Hour Division, has notified ETA, in writing, that a cease and desist order has been issued pursuant to subpart G of this part, with respect to the attesting employer's performance of the particular activity and port, in violation of a previously accepted attestation;

(vii) When the Administrator, Wage and Hour Division, has notified ETA, in writing, after an investigation pursuant to subpart G of this part, that the particular employer has misrepresented or failed to comply with an attestation previously submitted and accepted for filing, but in no case for a period of more than one year after the date of the Administrator's notice and provided that INS has not advised ETA that the prohibition is in effect for a lesser period; or

(viii) When the Administrator, Wage and Hour Division, has notified ETA, in writing, that the employer has failed to comply with any penalty, sanction, or other remedy assessed in a final



agency action following an investigation by the Wage and Hour Division pursuant to subpart G of this part.

(3) *Resubmission.* If the attestation is not accepted for filing pursuant to the categories set forth in paragraph (g)(2) of this section, ETA shall return to the employer, or the employer's agent or representative, at a U.S. address, the attestation form and accompanying documentation submitted by the employer. ETA shall notify the employer, in writing, of the reason(s) that the attestation is unacceptable. When an attestation is found to be unacceptable pursuant to paragraphs (g)(2) (i) through (iv) of this section, the employer may resubmit the attestation with the proper documentation. When an attestation is found to be unacceptable pursuant to paragraphs (g)(2) (v) through (viii) of this section and returned, such action shall be the final decision of the Secretary of Labor.

(h) *Effective date and validity of filed attestations.* An attestation is filed and effective as of the date it is accepted and signed by the regional Certifying Officer. Such attestation is valid for the 12-month period beginning on the date of acceptance for filing, unless suspended or invalidated pursuant to subpart G of this part or paragraph (i) of this section. The filed attestation expires at the end of the 12-month period of validity.

(i) *Suspension or invalidation of filed attestations.* Suspension or invalidation of an attestation may result from enforcement action(s) under subpart G of this part (*i.e.*, investigation(s) conducted by the Administrator or cease and desist order(s) issued by the Administrator regarding the employer's misrepresentation in or failure to carry out its attestation); or from a discovery by ETA that it made an error in accepting the attestation because such attestation falls within one of the categories set forth in paragraph (g)(2) of this section.

(1) *Result of Wage and Hour Division action.* Upon the determination of a violation under subpart G of this part, the Administrator shall, pursuant to §655.660(b), notify the Attorney General of the violation and of the Administrator's notice to ETA.

(2) *Result of ETA action.* If, after accepting an attestation for filing, ETA finds that the attestation is unacceptable because it falls within one of the categories set forth at paragraph (g)(2) of this section, and as a result, ETA suspends or invalidates the attestation, ETA shall notify the Attorney General of such suspension or invalidation and shall return a copy of the attestation form to the employer, or the employer's agent or representative, at a U.S. address. ETA shall notify the employer, in writing, of the reason(s) that the attestation is suspended or invalidated. When an attestation is found to be suspended or invalidated pursuant to paragraphs (g)(2) (i) through (iv) of this section, the employer may resubmit the attestation with the proper documentation. When an attestation is suspended or invalidated because it falls within one of the categories in paragraphs (g)(2) (v) through (viii) of this section, such action shall be the final decision of the Secretary of Labor, except as set forth in subpart G of this part.

(j) *Withdrawal of accepted attestations.* (1) An employer who has submitted an attestation which has been accepted for filing may withdraw such attestation at any time before the 12-month period of its validity terminates, unless the Administrator has found reasonable cause under subpart G to commence an investigation of the particular attestation. Such withdrawal may be advisable, for example, when the employer learns that the particular activity(ies) of longshore work which it has attested is the prevailing practice to perform with alien crewmembers may not, in fact, have been the prevailing practice at the particular port at the time of filing. Requests for such withdrawals shall be in writing and shall be directed to the regional Certifying Officer.

(2) Withdrawal of an attestation shall not affect an employer's liability with respect to any failure to meet the conditions attested to which took place before the withdrawal, or for misrepresentations in an attestation. However, if an employer has not yet performed the particular longshore activity(ies) at the port in question, the Administrator will not find reasonable cause to

investigate unless it is alleged, and there is reasonable cause to believe, that the employer has made misrepresentations in the attestation or documentation thereof, or that the employer has not in fact given the notice attested to.

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**§ 655.520 Special provisions regarding automated vessels.**

In general, an attestation is not required in the case of a particular activity of longshore work consisting of the use of automated self-unloading conveyor belt or vacuum-actuated systems on a vessel. The legislation creates a rebuttable presumption that the use of alien crewmembers for the operation of such automated systems is the prevailing practice. In order to overcome such presumption, it must be shown by the preponderance of the evidence submitted by any interested party, that the use of alien crewmembers for such activity is not the prevailing practice. Longshore work involving the use of such equipment shall be exempt from the attestation requirement only if the activity consists of using that equipment. If the automated equipment is not used in the particular activity of longshore work, an attestation is required as described under § 655.510 of this part if it is the prevailing practice in the port to use alien crewmembers for this work, except that in all cases, where an attestation is required for longshore work to be performed at a particular location in the State of Alaska, an employer shall file such attestation under the Alaska exception pursuant to §§ 655.530 through 655.541 on Form ETA 9033-A. When automated equipment is used in the particular activity of longshore work, an attestation is required only if the Administrator finds, based on a preponderance of the evidence which may be submitted by any interested party, that the performance of the particular activity of longshore work is not the prevailing practice at the port, or was during a strike or lockout or intended to influence an election of a bargaining representative for workers in the local port, or if the Administrator issues a cease and desist order against use of

the automated equipment without such attestation.

(a) *Procedure when attestation is required.* If it is determined pursuant to subpart G of this part that an attestation is required for longshore work consisting of the use of automated equipment at a location other than in the State of Alaska, the employer shall comply with all the requirements set forth at § 655.510 of this part except paragraph (d) of § 655.510. In lieu of complying with § 655.510(d) of this part, the employer shall comply with paragraph (b) of this section. If it is determined pursuant to subpart G of this part that an attestation is required for longshore work consisting of the use of automated equipment at a particular location in the State of Alaska, the employer shall comply with all the requirements set forth at §§ 655.530 through 655.541 of this part.

(b) *The first attestation element: prevailing practice for automated vessels.* For an employer to be in compliance with the first attestation element, it is required to have been the prevailing practice that over fifty percent (as described in paragraph (b)(1) of this section) of a particular activity of longshore work which was performed through the use of automated self-unloading conveyor belt or vacuum-actuated equipment at the particular port during the 12-month period preceding the filing of the attestation, was performed by alien crewmembers. For purposes of this paragraph (b), only automated vessels shall be included in counting the number of vessels which dock at the port.

(1) *Establishing a prevailing practice.*  
(i) In establishing that the use of alien crewmembers to perform a particular activity of longshore work consisting of the use of self-unloading conveyor belt or vacuum-actuated systems on a vessel is the prevailing practice at a particular port, an employer shall submit facts and evidence to show that in the 12-month period preceding the filing of the attestation, one of the following conditions existed:

(A) Over fifty percent of the automated vessels docking at the port used alien crewmembers for the activity (for

purposes of this paragraph (b)(1), a vessel shall be counted each time it docks at the particular port); or

(B) Alien crewmembers made up over fifty percent of the workers who performed the activity with respect to such automated vessels.

(ii) *Prevailing practice after Secretary of State determination of non-reciprocity.* Section 258(d) of the Act provides a reciprocity exception (separate from the prevailing practice exception) to the prohibition on performance of longshore work by alien crewmembers in U.S. ports. However, this reciprocity exception becomes nonapplicable where the Secretary of State determines that, for a particular activity of longshore work, a particular country (by law, regulation, or practice) prohibits such activity by U.S. crewmembers in its ports. When the Secretary of State places a country on the non-reciprocity list (which means, for the purposes of this section, *Prohibitions on longshore work by U.S. nationals; listing by country* at 22 CFR 89.1), crewmembers on vessels from that country (that is, vessels that are registered in that country or vessels whose majority ownership interest is held by nationals of that country) are not permitted to perform longshore work in U.S. waters, absent applicability of some exception other than the reciprocity exception. The Secretary of State's determination has the following effects in the establishment of a prevailing practice for a particular longshore activity at a particular U.S. port for purposes of the prevailing practice exception.

(A) An employer from any country, other than the country which is placed on the non-reciprocity list, may include the longshore activities performed by alien crewmembers on all vessels in establishing the prevailing practice for a particular longshore activity in a particular port.

(B) An employer from a country which is placed on the non-reciprocity list may file an attestation for the prevailing practice exception under the standards and requirements established in this subpart F (except as provided in paragraph (b)(1)(ii)(C) of this section), provided that the attestation is filed at least 12 months after the date on which

the employer's country is placed on the list.

(C) An employer from a country which is placed on the non-reciprocity list may file an attestation pursuant to the prevailing practice exception earlier than 12 months from the date on which the employer's country is placed on the list, except that the following restrictions shall apply to such attestation:

(1) The employer shall submit facts and evidence to show that, for the 12-month period preceding the date of the attestation, the use of alien crewmembers to perform a particular activity of longshore work was permitted by the prevailing practice in the port (as defined in paragraph (d)(1)(i) of this section) without considering or including such activity by crewmembers on vessels from the employer's country; or

(2) The employer shall submit facts and evidence (including data on activities performed by crewmembers on vessels from the employer's country) to show that the use of alien crewmembers to perform a particular activity of longshore work was permitted by the prevailing practice in the port (as defined in paragraph (b)(1)(i) of this section) for one of two periods—

(i) For the employer whose country has not previously been on the non-reciprocity list, the period is the continuous 12-month period prior to May 28, 1991 (the effective date of section 258 of the Act); or

(ii) For the employer whose country was at some time on the non-reciprocity list, but was subsequently removed from the non-reciprocity list and then restored to the non-reciprocity list (on one or more occasions), the period is the last continuous 12-month period during which the employer's country was not under the reciprocity exception (that is, was listed on the non-reciprocity list).

(2) *Documentation.* In assembling the documentation described in paragraph (b)(1) of this section, the employer may consult with the port authority which has jurisdiction over the local port, the collective bargaining representative(s) of longshore workers at the local port, other employers, or any other entity which is familiar with the practices at

the port. The documentation shall include a written summary of a survey of the experience of shipmasters who entered the local port in the previous year; or a letter, affidavit, or other written statement from an appropriate local port authority regarding the use of alien crewmembers to perform the longshore activity at the port in the previous year; or other documentation of comparable weight. Written statements from collective bargaining representatives and/or shipping agents with direct knowledge of practices regarding the use of alien crewmembers may also be pertinent. Such documentation shall accompany the Form ETA 9033, and any underlying documentation which supports the employer's burden of proof shall be maintained in the employer's records at the office of the U.S. agent as required under § 655.510(c)(1) of this part.

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#### ALASKA EXCEPTION

#### **§ 655.530 Special provisions regarding the performance of longshore activities at locations in the State of Alaska.**

*Applicability.* Section § 655.510 of this part shall not apply to longshore work performed at locations in the State of Alaska. The performance of longshore work by alien crewmembers at locations in the State of Alaska shall instead be governed by §§ 655.530 through 655.541. The use of alien crewmembers to perform longshore work in Alaska consisting of the use of an automated self-unloading conveyor belt or vacuum-actuated system on a vessel shall continue to be governed by the provisions of § 655.520 of this part, except that, if the Administrator finds, based on a preponderance of the evidence which may be submitted by any interested party, that an attestation is required because the performance of the particular activity of longshore work is not the prevailing practice at the location in the State of Alaska, or was during a strike or lockout or intended to influence an election of a bargaining representative for workers at that location, or if the Administrator issues a cease and desist order against use of

the automated equipment without such an attestation, the required attestation shall be filed pursuant to the Alaska exception at §§ 655.530 through 655.541 and not the prevailing practice exception at § 655.510.

#### **§ 655.531 Who may submit attestations for locations in Alaska?**

In order to use alien crewmembers to perform longshore activities at a particular location in the State of Alaska an employer shall submit an attestation on Form ETA 9033-A. As noted at § 655.502, "Definitions," for purposes of §§ 655.530 through 655.541, which govern the performance of longshore activities by alien crewmembers under the Alaska exception, "employer" includes any agent or representative designated by the employer. An employer may file a single attestation for multiple locations in the State of Alaska.

#### **§ 655.532 Where and when should attestations be submitted for locations in Alaska?**

(a) Attestations shall be submitted, by U.S. mail, private carrier, or facsimile transmission to the U.S. Department of Labor regional office of the Employment and Training Administration in Seattle, Washington. Except as provided in paragraph (b) of this section, attestations shall be received and date-stamped by the Department at least 30 calendar days prior to the date of the first performance of the longshore activity. The attestation shall be accepted for filing or returned by ETA in accordance with § 655.538 within 14 calendar days of the date received by ETA. An attestation which is accepted by ETA solely because it was not reviewed within 14 days is subject to subsequent invalidation pursuant to § 655.540 of this part. An employer filing an attestation shall have an agent or representative with a United States address. Such address shall be clearly indicated on the Form ETA 9033-A. In order to ensure that an attestation has been accepted for filing prior to the date of the first performance of the longshore activity, employers are advised to take mailing time into account to make sure that ETA receives the attestation at least 30 days prior to

the first performance of the longshore activity.

(b) *Late filings.* ETA may accept for filing attestations received after the 30-day deadline where the employer could not have reasonably anticipated the need to file an attestation for the particular location at that time. When an employer states that it could not have reasonably anticipated the need to file the attestation at that time, it shall submit documentation to ETA to support such a claim. ETA shall then make a determination on the validity of the claim and shall accept the attestation for filing or return it in accordance with §655.538 of this part. ETA in no case shall accept an attestation received less than 24 hours prior to the first performance of the activity.

**§655.533 What should be submitted for locations in Alaska?**

(a) *Form ETA 9033-A with accompanying documentation.* A completed and dated original Form ETA 9033-A, or facsimile transmission thereof, containing the required attestation elements and the original signature of the employer or the employer's agent or designated representative, along with two copies of the completed, signed, and dated Form ETA 9033-A shall be submitted to ETA. (If the attestation is submitted by facsimile transmission, the attestation containing the original signature shall be maintained at the U.S. business address of the employer's designated agent or representative). Copies of Form ETA 9033-A are available at all Department of Labor Regional offices and at the National office. In addition, the employer shall submit two sets of facts and evidence to show compliance with the fourth attestation element at §655.537 of this part. In the case of an investigation pursuant to subpart G of this part, the employer has the burden of proof to establish the validity of each attestation. The employer shall maintain in its records at the office of its U.S. agent, for a period of at least 3 years from the date of filing, sufficient documentation to meet its burden of proof, which shall at a minimum include the documentation described in §§655.530 through ———.541, and shall make the docu-

ments available to Department of Labor officials upon request. Whenever any document is submitted to a Federal agency or retained in the employer's records pursuant to this part, the document shall either be in the English language or shall be accompanied by a written translation into the English language certified by the translator as to the accuracy of the translation and his/her competency to translate.

(b) *Attestation elements.* The attestation elements referenced in §§655.534 through 655.537 of this part are mandated by Sec. 258(d)(1) of the Act (8 U.S.C. 1288(d)(1)). Section 258(d)(1) of the Act requires employers who seek to have alien crewmembers engage in longshore activity at locations in the State of Alaska to attest as follows:

(1) The employer will make a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the activity at the particular time and location from the parties to whom notice has been provided under §655.537(a)(1) (ii) and (iii), except that:

(i) Wherever two or more contract stevedoring companies have signed a joint collective bargaining agreement with a single labor organization recognized as an exclusive bargaining representative of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*), the employer may request longshore workers from only one such contract stevedoring company, and

(ii) A request for longshore workers to an operator of a private dock may be made only for longshore work to be performed at that dock and only if the operator meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932);

(2) The employer will employ all United States longshore workers made available in response to the request made pursuant to §655.534(a)(1) who are qualified and available in sufficient numbers and who are needed to perform the longshore activity at the particular time and location to which the employer has attested;

(3) The use of alien crewmembers for such activity is not intended or designed to influence an election of a bargaining representative for workers in the State of Alaska; and

(4) Notice of the attestation has been provided to:

(i) Labor organizations which have been recognized as exclusive bargaining representatives of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which make available or intend to make available workers to the particular location where the longshore work is to be performed;

(ii) Contract stevedoring companies which employ or intend to employ United States longshore workers at that location; and

(iii) Operators of private docks at which the employer will use longshore workers.

**§ 655.534 The first attestation element for locations in Alaska: Bona fide request for dispatch of United States longshore workers.**

(a) The first attestation element shall be satisfied when the employer signs Form ETA 9033-A, attesting that, before using alien crewmembers to perform longshore work during the validity period of the attestation, the employer will make a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the specified longshore activity from the parties to whom notice is provided under § 655.537(a)(1) (ii) and (iii). Although an employer is required to provide notification of filing to labor organizations recognized as exclusive bargaining representatives of United States longshore workers pursuant to § 655.537(a)(1)(i) of this part, an employer need not request dispatch of United States longshore workers directly from such parties. The requests for dispatch of United States longshore workers pursuant to this section shall be directed to contract stevedoring companies which employ or intend to employ United States longshore workers at that location, and to operators of private docks at which the employer will use longshore workers. An employer is not required

to request dispatch of United States longshore workers from private dock operators or contract stevedoring companies which do not meet the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) or, in the case of contract stevedoring companies, which are not licensed to do business in the State of Alaska.

(1) Wherever two or more contract stevedoring companies have signed a joint collective bargaining agreement with a single qualified labor organization, the employer may request longshore workers from only one of such contract stevedoring companies. A qualified labor organization is one which has been recognized as an exclusive bargaining representative of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which makes available or intends to make available workers to the particular location where the longshore work is to be performed.

(2) A request for longshore workers to an operator of a private dock may be made only for longshore work to be performed at that dock.

(3) An employer shall not be required to request longshore workers from a party if that party has notified the employer in writing that it does not intend to make available United States longshore workers who are qualified and available in sufficient numbers to the time and location at which the longshore work is to be performed.

(4) A party that has provided such written notice to the employer under paragraph (a)(3) of this section may subsequently notify the employer in writing that it is prepared to make available United States longshore workers who are qualified and available in sufficient numbers to perform the longshore activity at the time and location where the longshore work is to be performed. In that event, the employer's obligations to that party under §§ 655.534 and 655.535 of this part shall recommence 60 days after its receipt of such notice.

(5) When a party has provided written notice to the employer under paragraph (a)(3) of this section that it does not intend to dispatch United States

longshore workers to perform the longshore work attested to by the employer, such notice shall expire upon the earliest of the following events:

(i) When the terms of such notice specify an expiration date at which time the employer's obligation to that party under §§ 655.534 and 655.535 of this part shall recommence;

(ii) When retracted pursuant to paragraph (a)(4) of this section; or

(iii) Upon the expiration of the validity of the attestation.

(b) *Documentation.* To substantiate the requirement in paragraph (a) of this section, an employer shall develop and maintain documentation to meet the employer's burden of proof under the first attestation element. The employer shall retain records of all requests for dispatch of United States longshore workers to perform the longshore work attested to. Such documentation shall consist of letters, telephone logs, facsimiles or other memoranda to show that, before using alien crewmembers to perform longshore work, the employer made a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the longshore activity. At a minimum, such documentation shall include the date the request was made, the name and telephone number of the particular individual(s) to whom the request for dispatch was directed, and the number and composition of full work units requested. Further, whenever any party has provided written notice to the employer under paragraph (a)(3) of this section, the employer shall retain the notice for the period of time specified in § 655.533 of this part, and, if appropriate, any subsequent notice by that party that it is prepared to make available United States longshore workers at the times and locations attested to.

**§ 655.535 The second attestation element for locations in Alaska: Employment of United States longshore workers.**

(a) The second attestation element shall be satisfied when the employer signs Form ETA 9033-A, attesting that during the validity period of the attestation, the employer will employ all United States longshore workers made

available in response to the request for dispatch who, in compliance with applicable industry standards in the State of Alaska, including safety considerations, are qualified and available in sufficient numbers and are needed to perform the longshore activity at the particular time and location attested to.

(1) In no case shall an employer filing an attestation be required to hire less than a full work unit of United States longshore workers needed to perform the longshore activity nor be required to provide overnight accommodations for the longshore workers while employed. For purposes of this section, "full work unit" means the full complement of longshore workers needed to perform the longshore activity, as determined by industry standards in the State of Alaska, including safety considerations. Where the makeup of a full work unit is covered by one or more collective bargaining agreements in effect at the time and location where longshore work is to be performed, the provisions of such agreement(s) shall be deemed to be in conformance with industry standards in the State of Alaska.

(2) In no case shall an employer be required to provide transportation to the vessel where the longshore work is to be performed, except where:

(i) Surface transportation is available; for purposes of this section, "surface transportation" means a tugboat or other vessel which is appropriately insured, operated by licensed personnel, and capable of safely transporting U.S. longshore workers from shore to a vessel on which longshore work is to be performed;

(ii) Such transportation may be safely accomplished; and

(iii)(A) Travel time to the vessel does not exceed one-half hour each way; and

(B) Travel distance to the vessel from the point of embarkation does not exceed 5 miles; for purposes of this section, "point of embarkation" means a dock or landing at which U.S. longshore workers may be safely boarded for transport from shore to a vessel on which longshore work is to be performed; or

(C) In the cases of Wide Bay, Alaska, and Klawock/Craig, Alaska, travel time

does not exceed 45 minutes each way and travel distance to the vessel from the point of embarkation does not exceed 7.5 miles, unless the party responding to the request for dispatch agrees to lesser time and distance specifications.

(3) If a United States longshore worker is capable of getting to and from the vessel where longshore work is to be performed when the vessel is beyond the time and distance limitations specified in paragraph (a)(2)(iii) of this section, and where all of the other criteria governing the employment of United States longshore workers under this subpart are met (*e.g.*, “qualified and available in sufficient numbers”), the employer is still obligated to employ the worker to perform the longshore activity. In such instance, however, the employer shall not be required to provide such transportation nor to reimburse the longshore worker for the cost incurred in transport to and from the vessel.

(4) Where an employer is required to provide transportation to the vessel because it is within the time and distance limitations specified in (a)(2)(iii) of this section, the employer also shall be required to provide return transportation to the point of embarkation.

(b) *Documentation.* To substantiate the requirement in paragraph (a) of this section, an employer shall develop and maintain documentation to meet the employer’s burden of proof. Such documentation shall include records of payments to contract stevedoring companies or private dock operators, payroll records for United States longshore workers employed, or other documentation to show clearly that the employer has met its obligation to employ all United States longshore workers made available in response to a request for dispatch who are qualified and available in sufficient numbers. The documentation shall specify the number of full work units employed pursuant to this section, the composition of such full work units (*i.e.*, number of workers by job title), and the date(s) and location(s) where the longshore work was performed. The employer also shall develop and maintain documentation concerning the provision of transportation from the

point of embarkation to the vessel on which longshore work is to be performed. Each time one or more United States longshore workers are dispatched in response to the request under §655.534, the employer shall retain a written record of whether transportation to the vessel was provided and the time and distance from the point of embarkation to the vessel.

**§ 655.536 The third attestation element for locations in Alaska: No intention or design to influence bargaining representative election.**

(a) The employer shall attest that use of alien crewmembers to perform the longshore activity specified on the Form ETA 9033-A is not intended or designed to influence an election of a bargaining representative for workers in the State of Alaska.

(b) *Documentation.* The employer need not develop nor maintain documentation to substantiate the statement referenced in paragraph (a) of this section. In the case of an investigation, however, the employer has the burden of proof to show that the use of alien crewmembers to perform the longshore activity specified on the Form ETA 9033-A was not intended nor designed to influence an election of a bargaining representative for workers in the State of Alaska.

**§ 655.537 The fourth attestation element for locations in Alaska: Notice of filing.**

(a)(1) The employer shall attest that at the time of filing the attestation, notice of filing has been provided to:

(i) Labor organizations which have been recognized as exclusive bargaining representatives of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which make available or intend to make available workers to the particular location where the longshore work is to be performed;

(ii) Contract stevedoring companies which employ or intend to employ United States longshore workers at the location where the longshore work is to be performed; and

(iii) Operators of private docks at which the employer will use longshore workers.



(2) The notices provided under paragraph (a)(1) of this section shall include a copy of the Form ETA 9033-A to be submitted to ETA, shall provide information concerning the availability of supporting documents for public examination at the national office of ETA, and shall include the following statement: "Complaints alleging a misrepresentation of material facts in the attestation and/or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor."

(b) The employer shall request a copy of the Certificate of Compliance issued by the district director of the Office of Workers' Compensation Programs under section 37 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) from the parties to whom notice is provided pursuant to paragraphs (a)(1) (ii) and (iii) of this section. An employer's obligation to make a bona fide request for dispatch of U.S. longshore workers under §655.534 of this part before using alien crewmembers to perform the longshore work attested to shall commence upon receipt of the copy of the Certificate of Compliance.

(c) *Documentation.* The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the statement referenced in paragraphs (a) and (b) of this section and attested to on the Form ETA 9033-A. Such documentation shall include a copy of the notices provided, as required by paragraph (a)(1) of this section, and shall be submitted to ETA along with the Form ETA 9033-A.

**§ 655.538 Actions on attestations submitted for filing for locations in Alaska.**

Once an attestation has been received from an employer, a determination shall be made by the regional certifying officer whether to accept the attestation for filing or return it. The regional certifying officer may request additional explanation and/or documentation from the employer in making this determination. An attestation which is properly filled out and which includes accompanying documentation for the requirement set forth at

§655.537 of this part shall be accepted for filing by ETA on the date it is signed by the regional certifying officer unless it falls within one of the categories set forth in paragraph (b) of this section. Once an attestation is accepted for filing, ETA shall then follow the procedures set forth in paragraph (a)(1) of this section. Upon acceptance of the employer's attestation by ETA, the attestation and accompanying documentation shall be forwarded to and be available for public examination at the ETA national office in a timely manner. ETA shall not consider information contesting an attestation received by ETA prior to the determination to accept or return the attestation for filing. Such information shall not be made a part of ETA's administrative record on the attestation, but shall be referred to ESA to be processed as a complaint pursuant to subpart G of this part if the attestation is accepted by ETA for filing.

(a) *Acceptance.* (1) If the attestation is properly filled out and includes accompanying documentation for the requirement set forth at §655.537, and does not fall within one of the categories set forth at paragraph (b) of this section, ETA shall accept the attestation for filing, provide notification to the INS office having jurisdiction over the location where longshore work will be performed, and return to the employer, or the employer's agent or representative at a U.S. address, one copy of the attestation form submitted by the employer, with ETA's acceptance indicated thereon. Before using alien crewmembers to perform the longshore work attested to on Form ETA 9033-A, the employer shall make a bona fide request for and employ United States longshore workers who are qualified and available in sufficient numbers pursuant to §§655.534 and 655.535. Where such a request for dispatch of United States longshore workers is unsuccessful, either in whole or in part, any use of alien crewmembers to perform longshore activity shall be in accordance with INS regulations.

(2) DOL is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing.

(b) *Unacceptable attestations.* ETA shall not accept an attestation for filing and shall return such attestation to the employer, or the employer's agent or representative at a U.S. address, when any one of the following conditions exists:

(1) When the Form ETA 9033-A is not properly filled out. Examples of improperly filled out Form ETA 9033-A's include instances where the employer has neglected to check all the necessary boxes, where the employer has failed to include the name of any port, city, or other geographical reference point where longshore work is to be performed, or where the employer has failed to sign the attestation or to designate an agent in the United States.

(2) When the Form ETA 9033-A with accompanying documentation is not received by ETA at least 30 days prior to the first performance of the longshore activity, unless the employer is claiming that it could not have reasonably anticipated the need to file the attestation for that location at that time, and has included documentation which supports this contention, and ETA has found the claim to be valid.

(3) When the Form ETA 9033-A does not include accompanying documentation for the requirement set forth at §655.537.

(4) When the accompanying documentation submitted by the employer and required by §655.537, on its face, is inconsistent with that section. Examples of such a situation include an instance where the Form ETA 9033-A indicates that the longshore work will be performed at a particular private dock and the documentation required under the notice attestation element indicates that notice was provided to an operator of a different private dock, or where the longshore work is to be performed at a particular time and location in the State of Alaska and the notice of filing provided to qualified labor organizations and contract stevedoring companies indicates that the longshore work is to be performed at a different time and/or location.

(5) When the Administrator, Wage and Hour Division, has notified ETA, in writing, after an investigation pursuant to subpart G of this part, that a cease and desist order has been issued

pursuant to subpart G of this part, with respect to the attesting employer's performance of longshore work at a particular location in the State of Alaska, in violation of a previously accepted attestation.

(6) When the Administrator, Wage and Hour Division, has notified ETA, in writing, after an investigation pursuant to subpart G of this part, that the particular employer has misrepresented or failed to comply with an attestation previously submitted and accepted for filing, but in no case for a period of more than one year after the date of the Administrator's notice and provided that INS has not advised ETA that the prohibition is in effect for a lesser period.

(7) When the Administrator, Wage and Hour Division, has notified ETA, in writing, that the employer has failed to comply with any penalty, sanction, or other remedy assessed in a final agency action following an investigation by the Wage and Hour Division pursuant to subpart G of this part.

(c) *Resubmission.* If the attestation is not accepted for filing pursuant to paragraph (b) of this section, ETA shall return to the employer, or the employer's agent or representative, at a U.S. address, the attestation form and accompanying documentation submitted by the employer. ETA shall notify the employer, in writing, of the reason(s) that the attestation is unacceptable. When an attestation is found to be unacceptable pursuant to paragraph (b) (1), (2), (3), or (4) of this section, the employer may resubmit the corrected attestation with the proper documentation. When an attestation is found to be unacceptable pursuant to paragraph (b) (5), (6), or (7) of this section and returned, such action shall be the final decision of the Secretary of Labor.

**§655.539 Effective date and validity of filed attestations for locations in Alaska.**

An attestation is filed and effective as of the date it is accepted and signed by the regional certifying officer. Such attestation is valid for the 12-month period beginning on the date of acceptance for filing, unless suspended or invalidated pursuant to §655.540 of this

part. The filed attestation expires at the end of the 12-month period of validity.

**§ 655.540 Suspension or invalidation of filed attestations for locations in Alaska.**

Suspension or invalidation of an attestation may result from enforcement action(s) under subpart G of this part (*i.e.*, investigation(s) conducted by the Administrator or cease and desist order(s) issued by the Administrator regarding the employer's misrepresentation in or failure to carry out its attestation); or from a discovery by ETA that it made an error in accepting the attestation because such attestation falls within one of the categories set forth in § 655.538(b).

(a) *Result of Wage and Hour Division action.* Upon the determination of a violation under subpart G of this part, the Administrator shall, pursuant to § 655.665(b), notify the Attorney General of the violation and of the Administrator's notice to ETA.

(b) *Result of ETA action.* If, after accepting an attestation for filing, ETA finds that the attestation is unacceptable because it falls within one of the categories set forth at § 655.538(b) and, as a result, ETA suspends or invalidates the attestation, ETA shall notify the Attorney General of such suspension or invalidation and shall return a copy of the attestation form to the employer, or the employer's agent or representative at a U.S. address. ETA shall notify the employer, in writing, of the reason(s) that the attestation is suspended or invalidated.

**§ 655.541 Withdrawal of accepted attestations for locations in Alaska.**

(a) An employer who has submitted an attestation which has been accepted for filing may withdraw such attestation at any time before the 12-month period of its validity terminates, unless the Administrator has found reasonable cause under subpart G to commence an investigation of the particular attestation. Such withdrawal may be advisable, for example, when the employer learns that the country in which the vessel is registered and of which nationals of such country hold a majority of the ownership interest in

the vessel has been removed from the non-reciprocity list (which means, for purposes of this section, *Prohibitions on longshore work by U.S. nationals; listing by country* at 22 CFR 89.1). In that event, an attestation would no longer be required under subpart F of this part, since upon being removed from the non-reciprocity list the performance of longshore work by alien crewmembers would be permitted under the reciprocity exception at sec. 258(e) of the Act (8 U.S.C. 1288(e)). Requests for withdrawals shall be in writing and shall be directed to the regional certifying officer.

(b) Withdrawal of an attestation shall not affect an employer's liability with respect to any failure to meet the conditions attested to which took place before the withdrawal, or for misrepresentations in an attestation. However, if an employer has not yet performed the longshore activities at the location(s) in question, the Administrator shall not find reasonable cause to investigate unless it is alleged, and there is reasonable cause to believe, that the employer has made misrepresentations in the attestation or documentation thereof, or that the employer has not in fact given the notice attested to.

PUBLIC ACCESS

**§ 655.550 Public access.**

(a) *Public examination at ETA.* ETA shall make available for public examination in Washington, DC, a list of employers which have filed attestations under this subpart, and for each such employer, a copy of the employer's attestation and accompanying documentation it has received.

(b) *Notice to public.* ETA periodically shall publish a list in the FEDERAL REGISTER identifying under this subpart employers which have submitted attestations; employers which have attestations on file; and employers which have submitted attestations which have been found unacceptable for filing.

(Approved by the Office of Management and Budget under Control No. 1205-0309)

Employment and Training Administration, Labor

Pt. 655, Subpt. F, App. A

APPENDIX A TO SUBPART F OF PART  
655—U.S. SEAPORTS

The list of 224 seaports includes all major and most smaller ports serving ocean and Great Lakes commerce.

NORTH ATLANTIC RANGE

Bucksport, ME  
Eastport, ME  
Portland, ME  
Searsport, ME  
Portsmouth, NH  
Boston, MA  
Fall River, MA  
New Bedford, MA  
Providence, RI  
Bridgeport, CT  
New Haven, CT  
New London, CT  
Albany, NY  
New York, NY/NJ  
Camden, NJ  
Gloucester City, NJ  
Paulsboro, NJ  
Chester, PA  
Marcus Hook, PA  
Philadelphia, PA  
Delaware City, DE  
Wilmington, DE  
Baltimore, MD  
Cambridge, MD  
Alexandria, VA  
Chesapeake, VA  
Hopewell, VA  
Newport News, VA  
Norfolk, VA  
Portsmouth, VA  
Richmond, VA

SOUTH ATLANTIC RANGE

Morehead City, NC  
Southport, NC  
Wilmington, NC  
Charleston, SC  
Georgetown, SC  
Port Royal, SC  
Brunswick, GA  
Savannah, GA  
St. Mary, GA  
Cocoa, FL  
Fernandina Beach, FL  
Fort Lauderdale, FL  
Fort Pierce, FL  
Jacksonville, FL  
Miami, FL  
Palm Beach, FL  
Port Canaveral, FL  
Port Everglades, FL  
Riviera, FL  
Aguadilla, PR  
Ceiba, PR  
Guanica, PR  
Guayanilla, PR  
Humacao, PR  
Jobos, PR

Mayaguez, PR  
Ponce, PR  
San Juan, PR  
Vieques, PR  
Yabucoa, PR  
Alucroix, VI  
Charlotte Amalie, VI  
Christiansted, VI  
Frederiksted, VI  
Limetree Bay, VI

NORTH PACIFIC RANGE

Astoria, OR  
Bandon, OR  
Columbia City, OR  
Coos Bay, OR  
Mapleton, OR  
Newport, OR  
Portland, OR  
Rainier, OR  
Reedsport, OR  
St. Helens, OR  
Toledo, OR  
Anacortes, WA  
Bellingham, WA  
Edmonds (Edwards Point), WA  
Everett, WA  
Ferdale, WA  
Friday Harbor, WA  
Grays Harbor, WA  
Kalama, WA  
Longview, WA  
Olympia, WA  
Point Wells, WA  
Portage, WA  
Port Angeles, WA  
Port Gamble, WA  
Port Townsend, WA  
Raymond, WA  
Seattle, WA  
Tacoma, WA  
Vancouver, WA  
Willapa Harbor, WA  
Winslow, WA

GREAT LAKES RANGE

Duluth, MN  
Silver Bay, MN  
Green Bay, WI  
Kenosha, WI  
Manitowoc, WI  
Milwaukee, WI  
Sheboygan, WI  
Superior, WI  
Alpena, MI  
Bay City, MI  
Detroit, MI  
De Tour Village, MI  
Essexville, MI  
Ferrysburg, MI  
Grand Haven, MI  
Marine City, MI  
Muskegon, MI  
Port Huron, MI  
Presque Isle, MI  
Rogers City, MI

§ 655.600

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Saginaw, MI  
Sault Ste Marie, MI  
Chicago, IL  
Ashtabula, OH  
Cincinnati, OH  
Cleveland, OH  
Conneaut, OH  
Fairport, OH  
Huron, OH  
Lorain, OH  
Sandusky, OH  
Toledo, OH  
Erie, PA  
Buffalo, NY  
Ogdensburg, NY  
Oswego, NY  
Rochester, NY  
Burns Harbor, IN  
E. Chicago, IN  
Gary, IN

GULF COAST RANGE

Panama City, FL  
Pensacola, FL  
Port Manatee, FL  
Port St. Joe, FL  
Tampa, FL  
Mobile, AL  
Gulfport, MS  
Pascagoula, MS  
Baton Rouge, LA  
Gretna, LA  
Lake Charles, LA  
Louisiana Offshore Oil Port, LA  
New Orleans, LA  
Beaumont, TX  
Brownsville, TX  
Corpus Christi, TX  
Freeport, TX  
Galveston, TX  
Harbor Island, TX  
Houston, TX  
Orange, TX  
Port Arthur, TX  
Port Isabel, TX  
Port Lavaca, TX  
Port Neches, TX  
Sabine, TX  
Texas City, TX

SOUTH PACIFIC RANGE

Alameda, CA  
Antioch, CA  
Benicia, CA  
Carlsbad, CA  
Carpinteria, CA  
Crockett, CA  
El Segundo, CA  
Eureka, CA  
Estero Bay, CA  
Gaviota, CA  
Huntington Beach, CA  
Long Beach, CA  
Los Angeles, CA  
Mandalay Beach, CA  
Martinez, CA

Moss Landing, CA  
Oakland, CA  
Pittsburg, CA  
Port Costa, CA  
Port Hueneme, CA  
Port San Luis, CA  
Redwood City, CA  
Richmond, CA  
Sacramento, CA  
San Diego, CA  
San Francisco, CA  
Selby, CA  
Stockton, CA  
Vallejo, CA  
Ventura, CA  
Barbers Point, HI  
Hilo, HI  
Honolulu, HI  
Kahului, HI  
Kaunakakai, HI  
Kawaihae, HI  
Nawiliwili, HI  
Port Allen, HI

**Subpart G— Enforcement of the Limitations Imposed on Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports**

SOURCE: 60 FR 3969, 3977, Jan. 19, 1995, unless otherwise noted.

**§ 655.600 Enforcement authority of Administrator, Wage and Hour Division.**

(a) The Administrator shall perform all the Secretary's investigative and enforcement functions under section 258 of the INA (8 U.S.C. 1288) and subparts F and G of this part.

(b) The Administrator, pursuant to a complaint, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters which are the subject of the investigation.

(c) An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of section 258 of the INA (8 U.S.C. 1288) and subparts F and G of this part shall interfere with

any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1288 or subpart F or G of this part. Any such interference shall be a violation of the attestation and subparts F and G of this part, and the Administrator may take such further actions as the Administrator considers appropriate. (NOTE: Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d)(1) An employer subject to subparts F and G of this part shall at all times cooperate in administrative and enforcement proceedings. No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, retaliate, or in any manner discriminate against any person because such person has:

(i) Filed a complaint or appeal under or related to section 258 of the INA (8 U.S.C. 1288) or subpart F or G of this part;

(ii) Testified or is about to testify in any proceeding under or related to section 258 of the INA (8 U.S.C. 1288) or subpart F or G of this part;

(iii) Exercised or asserted on behalf of himself or herself or others any right or protection afforded by section 258 of the INA (8 U.S.C. 1288) or subpart F or G of this part.

(iv) Consulted with an employee of a legal assistance program or an attorney on matters related to section 258 of the Act or to subpart F or G of this part or any other DOL regulation promulgated pursuant to 8 U.S.C. 1288.

(2) In the event of such intimidation or restraint as are described in paragraph (d)(1) of this section, the conduct shall be a violation of the attestation and subparts F and G of this part, and the Administrator may take such further actions as the Administrator considers appropriate.

(e) The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under subpart F or G of this part. However, confidentiality will not be afforded to the complainant or to information provided by the complainant.

#### § 655.605 Complaints and investigative procedures.

(a) The Administrator, through an investigation, shall determine whether a basis exists to make a finding that:

(1) An attesting employer has—

(i) Failed to meet conditions attested to; or

(ii) Misrepresented a material fact in an attestation.

(NOTE: Federal criminal statutes provide penalties of up to \$10,000 and/or imprisonment of up to 5 years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546.); or

(2) In the case of an employer operating under the automated vessel exception to the prohibition on utilizing alien crewmembers to perform longshore activity(ies) at a U.S. port, the employer—

(i) Is utilizing alien crewmember(s) to perform longshore activity(ies) at a port where the prevailing practice has not been to use such workers for such activity(ies); or

(ii) Is utilizing alien crewmember(s) to perform longshore activities:

(A) During a strike or lockout in the course of a labor dispute at the U.S. port; and/or

(B) With intent or design to influence an election of a bargaining representative for workers at the U.S. port; or

(3) An employer failed to comply in any other manner with the provisions of subpart F or G of this part.

(b) Any aggrieved person or organization may file a complaint of a violation of the provisions of subpart F or G of this part.

(1) No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint.

(2) The complaint shall set forth sufficient facts for the Administrator to determine—

(i) Whether, in the case of an attesting employer, there is reasonable cause to believe that particular part or parts of the attestation or regulations have been violated; or

(ii) Whether, in the case of an employer claiming the automated vessel exception, the preponderance of the evidence submitted by any interested

party shows that conditions exist that would require the employer to file an attestation.

(3) The complaint may be submitted to any local Wage and Hour Division office; the addresses of such offices are found in local telephone directories. The office or person receiving such a complaint shall refer it to the office of the Wage and Hour Division administering the area in which the reported violation is alleged to have occurred.

(c) The Administrator shall determine whether there is reasonable cause to believe that the complaint warrants investigation. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary. There shall be no hearing pursuant to §655.625 for the Administrator's determination not to conduct an investigation. If the Administrator determines that an investigation on the complaint is warranted, the investigation shall be conducted and a determination issued within 180 calendar days of the Administrator's receipt of the complaint, or later for good cause shown.

(d) In conducting an investigation, the Administrator may consider and make part of the investigation file any evidence or materials that have been compiled in any previous investigation regarding the same or a closely related matter.

(e) In conducting an investigation under an attestation, the Administrator shall take into consideration the employer's burden to provide facts and evidence to establish the matters asserted. In conducting an investigation regarding an employer's eligibility for the automated vessel exception, the Administrator shall not impose the burden of proof on the employer, but shall consider all evidence from any interested party in determining whether the employer is not eligible for the exception.

(f) In an investigation regarding the use of alien crewmembers to perform longshore activity(ies) in a U.S. port (whether by an attesting employer or by an employer claiming the auto-

mated vessel exception), the Administrator shall accept as conclusive proof a previous Departmental determination, published in the FEDERAL REGISTER pursuant to §655.670, establishing that such use of alien crewmembers is not the prevailing practice for the activity(ies) and U.S. port at issue. The Administrator shall give appropriate weight to a previous Departmental determination published in the FEDERAL REGISTER pursuant to §655.670, establishing that at the time of such determination, such use of alien crewmembers was the prevailing practice for the activity(ies) and U.S. port at issue.

(g) When an investigation has been conducted, the Administrator shall, within the time period specified in paragraph (c) of this section, issue a written determination as to whether a basis exists to make a finding stated in paragraph (a) of this section. The determination shall be issued and an opportunity for a hearing shall be afforded in accordance with the procedures specified in §655.625(d) of this part.

**§ 655.610 Automated vessel exception to prohibition on utilization of alien crewmember(s) to perform longshore activity(ies) at a U.S. port.**

(a) The Act establishes a rebuttable presumption that the prevailing practice in U.S. ports is for automated vessels (*i.e.*, vessels equipped with automated self-unloading conveyor belts or vacuum-actuated systems) to use alien crewmembers to perform longshore activity(ies) through the use of the self-unloading equipment. An employer claiming the automated vessel exception does not have the burden of establishing eligibility for the exception.

(b) In the event of a complaint asserting that an employer claiming the automated vessel exception is not eligible for such exception, the Administrator shall determine whether the preponderance of the evidence submitted by any interested party shows that:

(1) It is not the prevailing practice at the U.S. port to use alien crewmember(s) to perform the longshore activity(ies) through the use of the self-unloading equipment; or

(2) The employer is using alien crewmembers to perform longshore activity(ies)—

(i) During a strike or lockout in the course of a labor dispute at the U.S. port; and/or

(ii) With intent or design to influence an election of a bargaining representative for workers at the U.S. port.

(c) In making the prevailing practice determination required by paragraph (b)(1) of this section, the Administrator shall determine whether, in the 12-month period preceding the date of the Administrator's receipt of the complaint, one of the following conditions existed:

(1) Over fifty percent of the automated vessels docking at the port used alien crewmembers for the activity (for purposes of this paragraph (c)(1) of this section, a vessel shall be counted each time it docks at the particular port); or

(2) Alien crewmembers made up over fifty percent of the workers who performed the activity with respect to such automated vessels.

(d) An interested party, complaining that the automated vessel exception is not applicable to a particular employer, shall provide to the Administrator evidence such as:

(1) A written summary of a survey of the experience of masters of automated vessels which entered the local port in the previous year, describing the practice in the port as to the use of alien crewmembers;

(2) A letter, affidavit, or other written statement from an appropriate local port authority regarding the use of alien crewmembers to perform the longshore activity at the port in the previous year;

(3) Written statements from collective bargaining representatives and/or shipping agents with direct knowledge of practices regarding the use of alien crewmembers at the port in the previous year.

**§ 655.615 Cease and desist order.**

(a) If the Administrator determines that reasonable cause exists to conduct an investigation with respect to an attestation, the complainant may request that the Administrator enter a cease and desist order against the em-

ployer against whom the complaint is lodged.

(1) The request for a cease and desist order may be filed along with the complaint, or may be filed subsequently. The request, including all accompanying documents, shall be filed in duplicate with the same Wage and Hour Division office that received the complaint.

(2) No particular form is prescribed for a request for a cease and desist order pursuant to this paragraph (a). However, any such request shall:

(i) Be dated;

(ii) Be typewritten or legibly written;

(iii) Specify the attestation provision(s) with respect to which the employer allegedly failed to comply and/or submitted misrepresentation(s) of material fact(s);

(iv) Be accompanied by evidence to substantiate the allegation(s) of non-compliance and/or misrepresentation;

(v) Be signed by the complaining party making the request or by the authorized representative of such party;

(vi) Include the address at which such complaining party or authorized representative desires to receive further communications relating thereto.

(3) Upon receipt of a request for a cease and desist order, the Administrator shall promptly notify the employer of the request. The Administrator's notice shall:

(i) Inform the employer that it may respond to the request and meet with a Wage and Hour Division official within 14 calendar days of the date of the notice;

(ii) Be served upon the employer by facsimile transmission, in person, or by certified or regular mail, at the address of the U.S. agent stated on the employer's attestation;

(iii) Be accompanied by copies of the complaint, the request for a cease and desist order, the evidence submitted by the complainant, and any evidence from other investigation(s) of the same or a closely related matter which the Administrator may incorporate into the record. (Any such evidence from other investigation(s) shall also be made available for examination by the complaining party at the Wage and Hour Division office which issued the notice.)



(4) No particular form is prescribed for the employer's response to the complaining party's request for a cease and desist order under this paragraph (a), however, any such response shall:

- (i) Be dated;
- (ii) Be submitted by facsimile transmission, in person, by certified or regular mail, or by courier service to the Wage and Hour Division office which issued the notice of the request;
- (iii) Be received by the appropriate Wage and Hour Division office no later than 14 calendar days from the date of the notice of the request;
- (iv) Be typewritten or legibly written;
- (v) Explain, in any detail desired by the employer, the employer's grounds or reasons as to why the Administrator should deny the requested cease and desist order;
- (vi) Be accompanied by evidence to substantiate the employer's grounds or reasons as to why the Administrator should deny the requested cease and desist order;
- (vii) Specify whether the employer desires an informal meeting with a Wage and Hour Division official;
- (viii) Be signed by the employer or its authorized representative; and
- (ix) Include the address at which the employer or its authorized representative desires to receive further communications relating thereto, if such address is different from the address of the U.S. agent stated on the attestation.

(5) In the event the employer requests a meeting with a Wage and Hour Division official, the Administrator shall provide the employer and the complaining party, or their authorized representatives, an opportunity for such a meeting to present their views regarding the evidence and arguments submitted by the parties. This shall be an informal meeting, not subject to any procedural rules. The meeting shall be held within the 14 calendar days permitted for the employer's response to the request for the cease and desist order, and shall be held at a time and place set by the Wage and Hour Division official, who shall notify the parties.

(6) After receipt of the employer's timely response and after any informal

meeting which may have been held with the parties, the Administrator shall promptly issue a written determination, either denying the request or issuing a cease and desist order. In making the determination, the Administrator shall consider all the evidence submitted, including any evidence from the same or a closely related matter which the Administrator has incorporated into the record and provided to the employer. If the Administrator determines that the complaining party's position is supported by a preponderance of the evidence submitted, the Administrator shall order that the employer cease the activities specified in the determination, until the completion of the Administrator's investigation and any subsequent proceedings pursuant to § 655.625 of this part, unless the prohibition is lifted by subsequent order of the Administrator because it is later determined that the employer's position was correct. While the cease and desist order is in effect, ETA shall suspend the subject attestation, either in whole or in part, and shall not accept any subsequent attestation from the employer for the activity(ies) and U.S. port or location in the State of Alaska at issue.

(7) The Administrator's cease and desist order shall be served on the employer at the address of its designated U.S. based representative or at the address specified in the employer's response, by facsimile transmission, personal service, or certified mail.

(b) If the Administrator determines that reasonable cause exists to conduct an investigation with respect to a complaint that a non-attesting employer is not entitled to the automated vessel exception to the requirement for the filing of an attestation, a complaining party may request that the Administrator enter a cease and desist order against the employer against whom the complaint is lodged.

(1) The request for a cease and desist order may be filed along with the complaint, or may be filed subsequently. The request, including all accompanying documents, shall be filed in duplicate with the same Wage and Hour Division office that received the complaint.

(2) No particular form is prescribed for a request for a cease and desist order pursuant to this paragraph. However, any such request shall:

- (i) Be dated;
- (ii) Be typewritten or legibly written;
- (iii) Specify the circumstances which allegedly require that the employer be denied the use of the automated vessel exception;
- (iv) Be accompanied by evidence to substantiate the allegation(s);
- (v) Be signed by the complaining party making the request or by the authorized representative of such party; and
- (vi) Include the address at which such complaining party or authorized representative desires to receive further communications relating thereto.

(3) Upon receipt of a request for a cease and desist order, the Administrator shall notify the employer of the request. The Administrator's notice shall:

- (i) Inform the employer that it may respond to the request and meet with a Wage and Hour Division official within 14 calendar days of the date of the notice;
- (ii) Be served upon the employer by facsimile transmission, in person, or by certified or regular mail, at the employer's last known address; and
- (iii) Be accompanied by copies of the complaint, the request for a cease and desist order, the evidence submitted by the complainant, and any evidence from other investigation(s) of the same or a closely related matter which the Administrator may incorporate into the record. (Any such evidence from other investigation(s) shall also be made available for examination by the complaining party at the Wage and Hour Division office which issued the notice.)

(4) No particular form is prescribed for the employer's response to the complaining party's request for a cease and desist order under this paragraph (b). However, any such response shall:

- (i) Be dated;
- (ii) Be submitted by facsimile transmission, in person, by certified or regular mail, or by courier service to the Wage and Hour Division office which issued the notice of the request;

(iii) Be received by the appropriate Wage and Hour Division office no later than 14 calendar days from the date of the notice of the request;

- (iv) Be typewritten or legibly written;
- (v) Explain, in any detail desired by the employer, the employer's grounds or reasons as to why the Administrator should deny the requested cease and desist order;
- (vi) Be accompanied by evidence to substantiate the employer's grounds or reasons as to why the Administrator should deny the requested cease and desist order;

(vii) Specify whether the employer desires an informal meeting with a Wage and Hour Division official;

(viii) Be signed by the employer or its authorized representative; and

(ix) Include the address at which the employer or its authorized representative desires to receive further communications relating thereto.

(5) In the event the employer requests a meeting with a Wage and Hour Division official, the Administrator shall provide the employer and the complaining party, or their authorized representatives, an opportunity for such a meeting to present their views regarding the evidence and arguments submitted by the parties. This shall be an informal meeting, not subject to any procedural rules. The meeting shall be held within the 14 calendar days permitted for the employer's response to the request for the cease and desist order, and shall be held at a time and place set by the Wage and Hour Division official, who shall notify the parties.

(6) After receipt of the employer's timely response and after any informal meeting which may have been held with the parties, the Administrator shall promptly issue a written determination, either denying the request or issuing a cease and desist order. If the Administrator determines that the complaining party's position is supported by a preponderance of the evidence submitted, the Administrator shall order that the employer cease the use of alien crewmembers to perform the longshore activity(ies) specified in the order. In making the determination, the Administrator shall consider

all the evidence submitted, including any evidence from the same or a closely related matter which the Administrator has incorporated into the record and provided to the employer. The order shall remain in effect until the completion of the investigation and any subsequent hearing proceedings pursuant to § 655.625 of this part, unless the employer files and maintains on file with ETA an attestation pursuant to § 655.520 of this part or unless the prohibition is lifted by subsequent order of the Administrator because it is later determined that the employer's position was correct.

(7) The Administrator's cease and desist order shall be served on the employer or its designated representative by facsimile transmission, personal service, or by certified mail at the address specified in the employer's response or, if no such address was specified, at the employer's last known address.

**§ 655.620 Civil money penalties and other remedies.**

(a) The Administrator may assess a civil money penalty not to exceed \$5,000 for each alien crewmember with respect to whom there has been a violation of the attestation or subpart F or G of this part. The Administrator may also impose appropriate remedy(ies).

(b) In determining the amount of civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors. The factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the Act and subpart F or G of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the violator in good faith to comply with the provisions of 8 U.S.C. 1288(c) and subparts F and G of this part;

(5) The violator's explanation of the violation or violations;

(6) The violator's commitment to future compliance; and/or

(7) The extent to which the violator achieved a financial gain due to the

violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

(c) The civil money penalty, and any other remedy determined by the Administrator to be appropriate, are immediately due for payment or performance upon the assessment by the Administrator, or the decision by an administrative law judge where a hearing is requested, or the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty, by certified check or money order made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division office for the area in which the violations occurred. The performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. The employer's failure to pay the civil money penalty, or to perform any other remedy prescribed by the Administrator, shall result in the rejection by ETA of any future attestation submitted by the employer, until such payment or performance is accomplished.

**§ 655.625 Written notice, service and Federal Register publication of Administrator's determination.**

(a) The Administrator's determination, issued pursuant to § 655.605 of this part, shall be served on the complainant, the employer, and other known interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

(b) Where the Administrator determines the prevailing practice regarding the use of alien crewmember(s) to perform longshore activity(ies) in a U.S. port (whether the Administrator's investigation involves an employer operating under an attestation, or under the automated vessel exception), the Administrator shall, simultaneously with issuance of the determination, publish in the FEDERAL REGISTER a notice of the determination. The notice shall identify the activity(ies), the U.S.

port, and the prevailing practice regarding the use of alien crewmembers. The notice shall also inform interested parties that they may request a hearing pursuant to §655.630 of this part, within 15 days of the date of the determination.

(c) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and the Administrator's determination.

(d) The Administrator's written determination required by §655.605 of this part shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor, and in the case of a finding of violation(s) by an attesting employer, prescribe any remedies, including the amount of any civil money penalties assessed and the reason therefor, and/or any other remedies required for compliance with the employer's attestation.

(2) Inform the interested parties that they may request a hearing pursuant to §655.625 of this part.

(3) Inform the interested parties that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, and give the address of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of Labor (upon whom copies of the request must be served).

(5) Inform the parties that, pursuant to §655.665, the Administrator shall notify ETA and the Attorney General of the occurrence of a violation by the attesting employer or of the non-attesting employer's ineligibility for the automated vessel exception.

**§ 655.630 Request for hearing.**

(a) Any interested party desiring to request an administrative hearing on a determination issued pursuant to §§655.605 and 655.625 of this part shall make such request in writing to the Chief Administrative Law Judge at the

address stated in the notice of determination.

(b) Interested parties may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an attesting employer has committed violation(s) or that the employer is eligible for the automated vessel exception. In such a proceeding, the requesting party and the employer shall be parties; the Administrator may intervene as a party or appear as *amicus curiae* at any time in the proceeding, at the Administrator's discretion.

(2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that there is a basis for a finding that an attesting employer has committed violation(s) or that a non-attesting employer is not eligible for the automated vessel exception. In such a proceeding, the Administrator and the employer shall be parties.

(c) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the party requesting the hearing believes such determination is in error;

(5) Be signed by the party making the request or by an authorized representative of such party; and

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing must be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An interested party that fails to

meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party pursuant to 29 CFR 18.10 (b) through (d) or through participation as an amicus curiae pursuant to 18 CFR 18.12.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is filed by mail, it should be by certified mail. If the request is filed by facsimile transmission, the original of the request, signed by the requestor or authorized representative, shall be filed within ten days.

(f) Copies of the request for a hearing shall be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

**§ 655.635 Rules of practice for administrative law judge proceedings.**

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

**§ 655.640 Service and computation of time.**

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address or, in the case of the attesting employer, to the employer's designated representative in the U.S. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, and one copy on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

**§ 655.645 Administrative law judge proceedings.**

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.630 of this part, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) Within seven calendar days following the assignment of the case, the administrative law judge shall notify all interested parties of the date, time and place of the hearing. All parties shall be given at least fourteen calendar days' notice of such hearing.

(c) The date of the hearing shall be not more than 60 calendar days from the date of the Administrator's determination. Because of the time constraints imposed by the Act, no requests for postponement shall be granted except for compelling reasons. Even if such reasons are shown, no extension of the hearing date beyond 60 days

from the date of the Administrator's determination shall be granted except by consent of all the parties to the proceeding.

(d) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § 655.640 of this part. Posthearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party in accordance with § 655.640 of this part.

(e) In reaching a decision, the administrative law judge shall, in accordance with the Act, impose the following burden of proof—

(1) The attesting employer shall have the burden of producing facts and evidence to establish the matters required by the attestation at issue;

(2) The burden of proof as to the applicability of the automated vessel exception shall be on the party to the hearing who is asserting that the employer is not eligible for the exception.

(f) The administrative law judge proceeding shall not be an appeal or review of the Administrator's ruling on a request for a cease and desist order pursuant to § 655.615.

**§ 655.650 Decision and order of administrative law judge.**

(a) Within 90 calendar days after receipt of the transcript of the hearing, the administrative law judge shall issue a decision. If any party desires review of the decision, including judicial review, a petition for Secretary's review thereof shall be filed as provided in § 655.655 of this subpart. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Secretary issues an order affirming the decision, or, unless and until 30 calendar days have passed after the Secretary's receipt of the petition for review and the Secretary has not issued notice to the parties that the Secretary will review

the administrative law judge's decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision. The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision shall be served on all parties in person or by certified or regular mail.

**§ 655.655 Secretary's review of administrative law judge's decision.**

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge shall petition the Secretary to review the decision and order. To be effective, such petition shall be received by the Secretary within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for Secretary's review permitted by this subpart. However, any such petition shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;
- (5) Be signed by the party filing the petition or by an authorized representative of such party;
- (6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and
- (7) Attach copies of the administrative law judge's decision and order, and any other record documents which

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would assist the Secretary in determining whether review is warranted.

(c) Whenever the Secretary determines to review the decision and order of an administrative law judge, a notice of the Secretary's determination shall be served upon the administrative law judge and upon all parties to the proceeding within 30 calendar days after the Secretary's receipt of the petition for review.

(d) Upon receipt of the Secretary's notice, the Office of Administrative Law Judges shall within fifteen calendar days forward the complete hearing record to the Secretary.

(e) The Secretary's notice may specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (*e.g.*, briefs); and

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, room S-4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, shall be received by the Secretary either on or before the due date.

(g) Copies of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § 655.640(b) of this part.

(h) The Secretary's final decision shall be issued within 180 calendar days from the date of the notice of intent to review. The Secretary's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Secretary's decision, the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.660 of this part.

**§ 655.660 Administrative record.**

The official record of every completed administrative hearing proce-

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dures provided by subparts F and G of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

**§ 655.665 Notice to the Attorney General and the Employment and Training Administration.**

(a) The Administrator shall promptly notify the Attorney General and ETA of the entry of a cease and desist order pursuant to § 655.615 of this part. The order shall remain in effect until the completion of the Administrator's investigation and any subsequent proceedings pursuant to § 655.630 of this part, unless the Administrator notifies the Attorney General and ETA of the entry of a subsequent order lifting the prohibition.

(1) The Attorney General, upon receipt of notification from the Administrator that a cease and desist order has been entered against an employer:

(i) Shall not permit the vessels owned or chartered by the attesting employer to use alien crewmembers to perform the longshore activity(ies) at the port or location in the State of Alaska specified in the cease and desist order; and

(ii) Shall, in the case of an employer seeking to utilize the automated vessel exception, require that such employer not use alien crewmembers to perform the longshore activity(ies) at the port or location in the State of Alaska specified in the cease and desist order, without having on file with ETA an attestation pursuant to § 655.520 of this part.

(2) ETA, upon receipt of the Administrator's notice shall, in the case of an attesting employer, suspend the employer's attestation, either in whole or in part, for the activity(ies) and port or location in the State of Alaska specified in the cease and desist order.

(b) The Administrator shall notify the Attorney General and ETA of the final determination of a violation by

an attesting employer or of the ineligibility of an employer for the automated vessel exception, upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an attesting employer or a finding of nonapplicability of the automated vessel exception, and no timely request for hearing is made pursuant to § 655.630 of this part;

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an attesting employer or finding inapplicable the automated vessel exception, and no timely petition for review to the Secretary is made pursuant to § 655.655 of this part; or

(3) Where a petition for review is taken from an administrative law judge's decision finding a violation or finding inapplicable the automated vessel exception, and the Secretary either declines within thirty days to entertain the appeal, pursuant to § 655.655(c) of this part, or the Secretary affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an attesting employer or that the automated vessel exception does apply, and the Secretary, upon review, issues a decision pursuant to § 655.655 of this part, holding that a violation was committed by an attesting employer or holding that the automated vessel exception does not apply.

(c) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (b) of this section:

(1) Shall not permit the vessels owned or chartered by the attesting employer to enter any port of the U.S. for a period of up to one year;

(2) Shall, in the case of an employer determined to be ineligible for the automated vessel exception, thereafter require that such employer not use alien crewmembers(s) to perform the longshore activity(ies) at the specified port or location in the State of Alaska without having on file with ETA an attestation pursuant to § 655.520 of this part; and

(3) Shall, in the event that the Administrator's notice constitutes a con-

clusive determination (pursuant to § 655.670) that the prevailing practice at a particular U.S. port does not permit the use of nonimmigrant alien crewmembers for particular longshore activity(ies), thereafter permit no employer to use alien crewmembers for the particular longshore activity(ies) at that port.

(d) ETA, upon receipt of the Administrator's notice pursuant to paragraph (b) of this section:

(1) Shall, in the case of an attesting employer, suspend the employer's attestation, either in whole or in part, for the port or location at issue and for any other U.S. port, and shall not accept for filing any attestation submitted by the employer for a period of 12 months or for a shorter period if such is specified for that employer by the Attorney General; and

(2) Shall, if the Administrator's notice constitutes a conclusive determination (pursuant to § 655.670) that the prevailing practice at a particular U.S. port does not permit the use of alien crewmembers for the longshore activity(ies), thereafter accept no attestation under the prevailing practice exception on Form ETA 9033 from any employer for the performance of the activity(ies) at that port, and shall invalidate any current attestation under the prevailing practice exception on Form ETA 9033 for any employer for the performance of the activity(ies) at that port.

**§ 655.670 Federal Register notice of determination of prevailing practice.**

(a) Pursuant to § 655.625(b), the Administrator shall publish in the FEDERAL REGISTER a notice of the Administrator's determination of any investigation regarding the prevailing practice for the use of alien crewmembers for particular longshore activity(ies) in a particular U.S. port (whether under an attestation or under the automated vessel exception). Where the Administrator has determined that the prevailing practice in that U.S. port does not permit such use of alien crewmembers, and no timely request for a hearing is filed pursuant to § 655.630, the Administrator's determination shall be the conclusive determination for purposes of the Act and subparts F



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and G of this part; the Attorney General and ETA shall, upon notice from the Administrator, take the actions specified in § 655.665. Where the Administrator has determined that the prevailing practice in that U.S. port at the time of the investigation permits such use of alien crewmembers, the Administrator shall, in any subsequent investigation, give that determination appropriate weight, unless the determination is reversed in proceedings under § 655.630 or § 655.655.

(b) Where an interested party, pursuant to § 655.630, requests a hearing on the Administrator's determination, the Administrator shall, upon the issuance of the decision of the administrative law judge, publish in the FEDERAL REGISTER a notice of the judge's decision as to the prevailing practice for the longshore activity(ies) and U.S. port at issue, if the administrative law judge:

(1) Reversed the determination of the Administrator published in the FEDERAL REGISTER pursuant to paragraph (a) of this section; or

(2) Determines that the prevailing practice for the particular activity in the port does not permit the use of alien crewmembers.

(c) If the administrative law judge determines that the prevailing practice in that port does not permit such use of alien crewmembers, the judge's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part (unless and until reversed by the Secretary on discretionary review pursuant to § 655.655). The Attorney General and ETA shall upon notice from the Administrator, take the actions specified in § 655.665.

(d) In the event that the Secretary, upon discretionary review pursuant to § 655.655, issues a decision that reverses the administrative law judge on a matter on which the Administrator has published notices in the FEDERAL REGISTER pursuant to paragraphs (a) and (b) of this section, the Administrator shall publish in the FEDERAL REGISTER a notice of the Secretary's decision and shall notify the Attorney General and ETA.

(1) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the prevailing practice for the

longshore activity(ies) in the U.S. port at issue does not permit the use of alien crewmembers, the Secretary's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part. Upon notice from the Administrator, the Attorney General and ETA shall take the actions specified in § 655.665.

(2) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the use of alien crewmembers is permitted by the prevailing practice for the longshore activity(ies) in the U.S. port at issue, the judge's decision shall no longer have the conclusive effect specified in paragraph (b) of this section. Upon notice from the Administrator, the Attorney General and ETA shall cease the actions specified in § 655.665.

**§ 655.675 Non-applicability of the Equal Access to Justice Act.**

A proceeding under subpart G of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

**Subpart H—Labor Condition Applications and Requirements for Employers Using Non-immigrants on H-1B Visas in Specialty Occupations and as Fashion Models**

SOURCE: 59 FR 65659, 65676, Dec. 20, 1994, unless otherwise noted.

**§ 655.700 What statutory provisions govern the employment of H-1B nonimmigrants and how do employers apply for an H-1B visa?**

(a) *Statutory provisions.* With respect to nonimmigrant workers entering the United States (U.S.) on H-1B visas, the Immigration and Nationality Act (INA), as amended, provides as follows:

(1) Establishes an annual ceiling (exclusive of spouses and children) on the number of foreign workers who may be issued H-1B visas—

(i) 195,000 in fiscal year 2001;

- (ii) 195,000 in fiscal year 2002;
- (iii) 195,000 in fiscal year 2003; and
- (iv) 65,000 in each succeeding fiscal year;

(2) Defines the scope of eligible occupations for which nonimmigrants may be issued H-1B visas and specifies the qualifications that are required for entry as an H-1B nonimmigrant ;

(3) Requires an employer seeking to employ H-1B nonimmigrants to file a labor condition application (LCA) agreeing to various attestation requirements and have it certified by the Department of Labor (DOL) before a nonimmigrant may be provided H-1B status by the Immigration and Naturalization Service (INS); and

(4) Establishes an enforcement system under which DOL is authorized to determine whether an employer has engaged in misrepresentation or failed to meet a condition of the LCA, and is authorized to impose fines and penalties.

(b) *Procedure for obtaining an H-1B visa classification.* Before a nonimmigrant may be admitted to work in a "specialty occupation" or as a fashion model of distinguished merit and ability in the United States under the H-1B visa classification, there are certain steps which must be followed:

(1) First, an employer shall submit to DOL, and obtain DOL certification of, a labor condition application (LCA). The requirements for obtaining a certified LCA are provided in this subpart. The LCA (Form ETA 9035 or ETA 9035E) and cover page (Form ETA 9035CP, containing the full attestation statements that are incorporated by reference in Form ETA 9035 and ETA 9035E) may be obtained from <http://ows.doleta.gov>, from DOL regional offices, and from the Employment and Training Administration (ETA) national office. Employers are encouraged to utilize the electronic filing system developed by ETA to expedite the certification process (see §655.720).

(2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (INS Form I-129), together with the certified LCA, to INS, requesting H-1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, INS are set forth in INS regulations. The

INS petition (Form I-129) may be obtained from an INS district or area office.

(3) If INS approves the H-1B classification, the nonimmigrant then may apply for an H-1B visa abroad at a consular office of the Department of State. If the nonimmigrant is already in the United States in a status other than H-1B, he/she may apply to the INS for a change of visa status.

(c) *Applicability.* (1) This subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the H-1B visa classification in specialty occupations or as fashion models of distinguished merit and ability.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, this subpart H and subpart I of this part shall apply (except for the provisions relating to the recruitment and displacement of U.S. workers (see §§655.738 and 655.739)) to the entry and employment of a nonimmigrant who is a citizen of Mexico under and pursuant to the provisions of section D or Annex 1603 of NAFTA in the case of all professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA other than registered nurses. Therefore, the references in this part to "H-1B nonimmigrant" apply to any Mexican citizen nonimmigrant who is classified by INS as "TN." In the case of a registered nurse, the following provisions shall apply: subparts D and E of this part or the Nursing Relief for Disadvantaged Areas Act of 1999 (Public Law 106-95) and the regulations issued thereunder, 20 CFR part 655, subparts L and M.

[65 FR 80209, Dec. 20, 2000, as amended at 66 FR 63300, Dec. 5, 2001]

**§ 655.705 What federal agencies are involved in the H-1B program, and what are the responsibilities of those agencies and of employers?**

Three federal agencies (Department of Labor, Department of State, and Department of Justice) are involved in the process relating to H-1B nonimmigrant classification and employment. The employer also has continuing responsibilities under the process. This section briefly describes the

responsibilities of each of these entities.

(a) *Department of Labor (DOL) responsibilities.* DOL administers the labor condition application process and enforcement provisions (exclusive of complaints regarding non-selection of U.S. workers, as described in 8 U.S.C. 1182(n)(1)(G)(i)(II) and 1182(n)(5)). Two DOL agencies have responsibilities:

(1) The Employment and Training Administration (ETA) is responsible for receiving and certifying labor condition applications (LCAs) in accordance with this subpart H. ETA is also responsible for compiling and maintaining a list of LCAs and makes such list available for public examination at the Department of Labor, 200 Constitution Avenue, NW., Room C-4318, Washington, DC 20210.

(2) The Wage and Hour Division of the Employment Standards Administration (ESA) is responsible, in accordance with subpart I of this part, for investigating and determining an employer's misrepresentation in or failure to comply with LCAs in the employment of H-1B nonimmigrants.

(b) *Department of Justice (DOJ) and Department of State (DOS) responsibilities.* The Department of State, through U.S. Embassies and Consulates, is responsible for issuing H-1B visas. The Department of Justice, through the Immigration and Naturalization Service (INS), accepts the employer's petition (INS Form I-129) with the DOL-certified LCA attached. INS is responsible for approving the nonimmigrant's H-1B visa classification. In doing so, the INS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the labor condition application is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification. If the petition is approved, INS will notify the U.S. Consulate where the nonimmigrant intends to apply for the visa unless the nonimmigrant is in the U.S. and eligible to adjust status without leaving this country. See 8 U.S.C. 1255(h)(2)(B)(i). The Department of Justice administers

the system for the enforcement and disposition of complaints regarding an H-1B-dependent employer's or willful violator employer's failure to offer a position filled by an H-1B nonimmigrant to an equally or better qualified United States worker (8 U.S.C. 1182(n)(1)(E), 1182(n)(5)), or such employer's willful misrepresentation of material facts relating to this obligation. The Department of Justice, through the INS, is responsible for disapproving H-1B and other petitions filed by an employer found to have engaged in misrepresentation or failed to meet certain conditions of the labor condition application (8 U.S.C. 1182(n)(2)(C)(i)-(iii); 1182(n)(5)(E)).

(c) *Employer's responsibilities.* Each employer seeking an H-1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities, as described more fully in this subpart and subpart I of this part, including—

(1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035 or Form ETA 9035E in the manner prescribed in § 655.720. By completing and submitting the LCA, and in addition by signing the LCA, the employer makes certain representations and agrees to several attestations regarding an employer's responsibilities, including the wages, working conditions, and benefits to be provided to the H-1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. The LCA contains additional attestations for certain H-1B-dependent employers and employers found to have willfully violated the H-1B program requirements; these attestations impose certain obligations to recruit U.S. workers, to offer positions to U. S. workers who are equally or better qualified than the H-1B nonimmigrant(s), and to avoid the displacement of U.S. workers (either in the employer's workforce, or in the workforce of a second employer with whom the H-1B nonimmigrant(s) is placed, where there are indicia of employment with that second employer (8

U.S.C. 1182(n)(1)(E)-(G)). These additional attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. If the LCA is certified by ETA, notice of the certification will be sent to the employer, either by return FAX (where the Form ETA 9035 was submitted by FAX), by hard copy (where the Form ETA 9035 was submitted by U.S. Mail), or by electronic certification (where the Form ETA 9035E was submitted electronically). The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the Immigration and Naturalization Service in support of the Petition for Nonimmigrant Worker, INS Form I-129, for an H-1B nonimmigrant. See INS regulation 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies that the employer will comply with the terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay.

(2) The employer shall maintain the original signed and certified LCA in its files, and shall make a copy of the LCA, as well as necessary supporting documentation (as identified under this subpart), available for public examination in a public access file at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with ETA.

(3) The employer then may submit a copy of the certified, signed LCA to INS with a completed petition (Form I-129) requesting H-1B classification.

(4) The employer shall not allow the nonimmigrant worker to begin work until INS grants the alien authorization to work in the United States for that employer or, in the case of a nonimmigrant previously afforded H-1B status who is undertaking employment with a new H-1B employer, until the new employer files a nonfrivolous petition (Form I-129) in accordance with INS requirements.

(5) The employer shall develop sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its LCA and the accuracy of information provided, in the event that such statement or information is challenged. The em-

ployer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

[65 FR 80210, Dec. 20, 2000, as amended at 66 FR 63300, Dec. 5, 2001]

**§ 655.710 What is the procedure for filing a complaint?**

(a) Except as provided in paragraph (b) of this section, complaints concerning misrepresentation in the labor condition application or failure of the employer to meet a condition specified in the application shall be filed with the Administrator, Wage and Hour Division (Administrator), ESA, according to the procedures set forth in subpart I of this part. The Administrator shall investigate where appropriate, and after an opportunity for a hearing, assess appropriate sanctions and penalties, as described in subpart I of this part.

(b) Complaints arising under section 212(n)(1)(G)(i)(II) of the INA, 8 U.S.C. 1182(n)(1)(G)(i)(II), alleging failure of the employer to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street & Constitution Avenue, NW., Washington, DC 20530. The Department of Justice shall investigate where appropriate and shall take such further action as may be appropriate under that Department's regulations and procedures.

[65 FR 80210, Dec. 20, 2000]

**§ 655.715 Definitions.**

For the purposes of subparts H and I of this part:

*Actual wage* means the wage rate paid by the employer to all individuals with experience and qualifications similar to the H-1B nonimmigrant's experience and qualifications for the specific employment in question at the place of employment. The actual wage established by the employer is *not* an average of the wage rates paid to all workers employed in the occupation.

*Administrative Law Judge (ALJ)* means an official appointed pursuant to 5 U.S.C. 3105.

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under subpart H or I of this part.

*Aggrieved party* means a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the labor condition application and includes, but is not limited to:

(1) A worker whose job, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;

(2) A bargaining representative for workers whose jobs, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;

(3) A competitor adversely affected by the employer's alleged non-compliance with the labor condition application; and

(4) A government agency which has a program that is impacted by the employer's alleged non-compliance with the labor condition application.

*Area of intended employment* means the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., normal commuting distances might be 20, 30, or 50 miles). If the place of employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of employment; however, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling

with regard to the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA or PMSA (or CMSA).

*Attorney General* means the chief official of the U.S. Department of Justice or the Attorney General's designee.

*Authorized agent* and *authorized representative* mean an official of the employer who has the legal authority to commit the employer to the statements in the labor condition application.

*Certification* means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

*Certify* means the act of making a certification.

*Certifying Officer* and *Regional Certifying Officer* mean a Department of Labor official, or such official's designee, who makes determinations about whether or not to certify labor condition applications.

*Chief Administrative Law Judge (Chief ALJ)* means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

*Department* and *DOL* mean the United States Department of Labor.

*Division* means the Wage and Hour Division of the Employment Standards Administration, DOL.

*Employed, employed by the employer, or employment relationship* means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase \* \* \* can be applied to find the answer \* \* \*. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

*Employer* means a person, firm, corporation, contractor, or other association or organization in the United

States which has an employment relationship with H-1B nonimmigrants and/or U.S. worker(s). The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H-1B nonimmigrant is deemed to be the employer of that H-1B nonimmigrant.

*Employment and Training Administration (ETA)* means the agency within the Department which includes the Office of Workforce Security (OWS).

*Employment Standards Administration (ESA)* means the agency within the Department which includes the Wage and Hour Division.

*Immigration and Naturalization Service (INS)* means the component of the Department of Justice which makes the determination under the INA on whether to grant visa petitions of employers seeking the admission of nonimmigrants under H-1B visas for the purpose of employment.

*INA* means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

*Independent authoritative source* means a professional, business, trade, educational or governmental association, organization, or other similar entity, not owned or controlled by the employer, which has recognized expertise in an occupational field.

*Independent authoritative source survey* means a survey of wages conducted by an independent authoritative source and published in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's application. Such survey shall:

(1) Reflect the average wage paid to workers similarly employed in the area of intended employment;

(2) Be based upon recently collected data—*e.g.*, within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.

*Interested party* means a person or entity who or which may be affected by the actions of an H-1B employer or by the outcome of a particular investigation and includes any person, organiza-

tion, or entity who or which has notified the Department of his/her/its interest or concern in the Administrator's determination.

*Lockout* means a labor dispute involving a work stoppage, wherein an employer withholds work from its employees in order to gain a concession from them.

*Occupation* means the occupational or job classification in which the H-1B nonimmigrant is to be employed.

*Office of Workforce Security (OWS)* means the agency of the Department which is charged with administering the national system of public employment offices.

*Period of intended employment* means the time period between the starting and ending dates inclusive of the H-1B nonimmigrant's intended period of employment in the occupational classification at the place of employment as set forth in the labor condition application.

*Place of employment* means the worksite or physical location where the work actually is performed.

(1) The term does not include any location where either of the following criteria—paragraph (1)(i) or (ii)—is satisfied:

(i) *Employee developmental activity.* An H-1B worker who is stationed and regularly works at one location may temporarily be at another location for a particular individual or employer-required developmental activity such as a management conference, a staff seminar, or a formal training course (other than "on-the-job-training" at a location where the employee is stationed and regularly works). For the H-1B worker participating in such activities, the location of the activity would not be considered a "place of employment" or "worksite," and that worker's presence at such location—whether owned or controlled by the employer or by a third party—would not invoke H-1B program requirements with regard to that employee at that location. However, if the employer uses H-1B nonimmigrants as instructors or resource or support staff who continuously or regularly perform their duties at such locations, the locations would be "places of employment" or "worksites" for any such employees and,

thus, would be subject to H-1B program requirements with regard to those employees.

(ii) *Particular worker's job functions.* The nature and duration of an H-1B nonimmigrant's job functions may necessitate frequent changes of location with little time spent at any one location. For such a worker, a location would not be considered a "place of employment" or "worksite" if the following three requirements (*i.e.*, paragraphs (1)(ii)(A) through (C)) are all met—

(A) The nature and duration of the H-1B worker's job functions mandates his/her short-time presence at the location. For this purpose, either:

(1) The H-1B nonimmigrant's job must be peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location; or

(2) The H-1B worker's duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations; and

(B) The H-1B worker's presence at the locations to which he/she travels from the "home" worksite is on a casual, short-term basis, which can be recurring but not excessive (*i.e.*, not exceeding five consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations); and

(C) The H-1B nonimmigrant is not at the location as a "strikebreaker" (*i.e.*, the H-1B nonimmigrant is not performing work in an occupation in which workers are on strike or lock-out).

(2) Examples of "non-worksite" locations based on worker's job functions: A computer engineer sent out to customer locations to "troubleshoot" complaints regarding software malfunctions; a sales representative making calls on prospective customers or established customers within a "home office" sales territory; a manager monitoring the performance of out-stationed employees; an auditor providing advice or conducting reviews at cus-

tomers facilities; a physical therapist providing services to patients in their homes within an area of employment; an individual making a court appearance; an individual lunching with a customer representative at a restaurant; or an individual conducting research at a library.

(3) Examples of "worksite" locations based on worker's job functions: A computer engineer who works on projects or accounts at different locations for weeks or months at a time; a sales representative assigned on a continuing basis in an area away from his/her "home office;" an auditor who works for extended periods at the customer's offices; a physical therapist who "fills in" for full-time employees of health care facilities for extended periods; or a physical therapist who works for a contractor whose business is to provide staffing on an "as needed" basis at hospitals, nursing homes, or clinics.

(4) Whenever an H-1B worker performs work at a location which is not a "worksite" (under the criterion in paragraph (1)(i) or (1)(ii) of this definition), that worker's "place of employment" or "worksite" for purposes of H-1B obligations is the worker's home station or regular work location. The employer's obligations regarding notice, prevailing wage and working conditions are focused on the home station "place of employment" rather than on the above-described location(s) which do not constitute worksite(s) for these purposes. However, whether or not a location is considered to be a "worksite"/"place of employment" for an H-1B nonimmigrant, the employer is required to provide reimbursement to the H-1B nonimmigrant for expenses incurred in traveling to that location on the employer's business, since such expenses are considered to be ordinary business expenses of employers (§§ 655.731(c)(7)(iii)(C); 655.731(c)(9)). In determining the worker's "place of employment" or "worksite," the Department will look carefully at situations which appear to be contrived or abusive; the Department would seriously question any situation where the H-1B nonimmigrant's purported "place of employment" is a location other than where the worker spends most of his/

her work time, or where the purported "area of employment" does not include the location(s) where the worker spends most of his/her work time.

*Required wage rate* means the rate of pay which is the higher of:

(1) The actual wage for the specific employment in question; or

(2) The prevailing wage rate (determined as of the time of filing the application) for the occupation in which the H-1B nonimmigrant is to be employed in the geographic area of intended employment. The prevailing wage rate must be no less than the minimum wage required by Federal, State, or local law.

*Secretary* means the Secretary of Labor or the Secretary's designee.

*Specialty occupation* means an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the United States. The nonimmigrant in a specialty occupation shall possess the following qualifications: (1) Full state licensure to practice in the occupation, if licensure is required for the occupation; (2) completion of the required degree; or (3) experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty. 8 U.S.C. 1184(i). Determinations of specialty occupation and of nonimmigrant qualifications are made by INS.

*Specific employment in question* means the set of duties and responsibilities performed or to be performed by the H-1B nonimmigrant at the place of employment.

*State* means one of the 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

*State Employment Security Agency (SESA)* means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with OWS in the operation of the national system of public employment offices.

*Strike* means a labor dispute wherein employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-

bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operation.

*United States worker ('U.S. worker')* means an employee who is either

(1) A citizen or national of the United States, or

(2) An alien who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under section 207 of the INA, is granted asylum under section 208 of the INA, or is an immigrant otherwise authorized (by the INA or by the Attorney General) to be employed in the United States.

*Wage rate* means the remuneration (exclusive of fringe benefits) to be paid, stated in terms of amount per hour, day, month or year (see definition of "Required Wage Rate").

[59 FR 65659, 65676, Dec. 20, 1994, as amended at 65 FR 80211, Dec. 20, 2000]

**§ 655.720 Where are labor condition applications to be filed and processed?**

(a) *Facsimile transmission (FAX)*. If the employer submits the LCA (Form ETA 9035) by FAX, the transmission shall be made to 1-800-397-0478 (regardless of the intended place of employment for the H-1B nonimmigrant(s)). (Note: the employer submitting an LCA via FAX shall not use the FAX number assigned to an ETA regional office, but shall use only the 1-800-397-0478 number designated for this purpose.) The cover pages to Form ETA 9035 (i.e., Form ETA 9035CP) should not be FAXed with the Form ETA 9035.

(b) *U.S. Mail*. If the employer submits the LCA (Form ETA 9035) by U.S. Mail, the LCA shall be sent to the ETA service center at the following address: ETA Application Processing Center, P.O. Box 13640, Philadelphia PA 19101 (regardless of the intended place of employment for the H-1B nonimmigrant(s)).

(c) *Electronic submission*. If the employer submits the LCA (Form ETA 9035E) by electronic transmission, the submission shall be made on the Department of Labor WEB page at [www.lca.doleta.gov](http://www.lca.doleta.gov) (regardless of the intended place of employment for the H-1B nonimmigrant(s)). The employer shall follow the instructions in the electronic submission process, which



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include the requirement that the employer shall print out and sign the LCA immediately after ETA's certification, shall maintain the "signed original" in its files, shall place a copy of the "signed original" in the public access file, and shall submit a copy of the "signed original" to the Immigration and Naturalization Service in support of the Form I-129 petition for the H-1B nonimmigrant. In the event that ETA implements the Government Paperwork Elimination Act (44 U.S.C.A. 3504 n.) and/or the Electronic Records and Signatures in Global and National Commerce Act (E-SIGN) (15 U.S.C. 7001-7006) for the submission and certification of the ETA 9035E, instructions will be provided (by public notice(s) and by instructions on the Department's WEB page) to employers as to how the requirements of these statutes will be met in the ETA-9035E procedures.

(d) All matters other than the processing of LCAs (e.g., prevailing wage challenges by employers) that are the responsibility of ETA are within the jurisdiction of the Regional Certifying Officers in the ETA regional offices identified in § 655.721.

[66 FR 63301, Dec. 5, 2001]

### **§ 655.721 What are the addresses of the ETA regional offices which handle matters other than processing LCAs?**

(a) The Regional Certifying Officers in the ETA regional offices are responsible for administrative matters under this subpart other than the processing of LCAs (e.g., prevailing wage challenges by employers). (Note to paragraph (a): LCAs are filed by employers and processed by ETA only in accordance with § 655.720.)

(b) The ETA regional offices with responsibility for labor certification programs are—

(1) Region I Boston (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): J.F.K. Federal Building, Room E-350, Boston, Massachusetts 02203. Telephone: 617-565-4446.

(2) Region I New York (New York, New Jersey, Puerto Rico, and the Virgin Islands): 201 Varick Street, Room

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755, New York, New York 10014. Telephone: 212-337-2186.

(3) Region II ( Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia): Suite 825 East, The Curtis Center, 170 S. Independence Mall West, Philadelphia, Pennsylvania 19106-3315. Telephone: 215-861-5250.

(4) Region III (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee): Atlanta Federal Ctr., 100 Alabama St., NW, Suite 6M-12, Atlanta, Georgia 30303. Telephone: 404-562-2115.

(5) Region IV (Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming): 525 Griffin Street, Room 317, Dallas, Texas 75202. Telephone: 214-767-4989.

(6) Region V (Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin): 230 South Dearborn Street, Room 605, Chicago, Illinois 60604. Telephone: 312-353-1550.

(7) Region VI (Alaska, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, and Washington): P.O. Box 193767, San Francisco, California 94119-3767. Telephone: 415-975-4601.

(c) The ETA website at <http://ows.doleta.gov> will be updated to reflect any changes in the information contained in this section concerning the ETA regional offices.

[65 FR 80212, Dec. 20, 2000]

### **§ 655.730 What is the process for filing a labor condition application?**

(a) *Who must submit labor condition applications?* An employer, or the employer's authorized agent or representative, which meets the definition of "employer" set forth in § 655.715 and intends to employ an H-1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability shall submit an LCA to the Department.

(b) *Where and when is an LCA to be submitted?* An LCA shall be submitted by the employer to ETA in accordance with the procedure prescribed in § 655.720 no earlier than six months before the beginning date of the period of intended employment shown on the LCA. It is the employer's responsibility

to ensure that a complete and accurate LCA is received by ETA. Incomplete or obviously inaccurate LCAs will not be certified by ETA. ETA will process all LCAs sequentially upon receipt regardless of the method used by the employer to submit the LCA (i.e., FAX, or U.S. Mail, or electronic submission, as prescribed in § 655.720) and will make a determination to certify or not certify the LCA within seven working days of the date the LCA is received by ETA.

(c) *What is to be submitted?* Form ETA 9035.

(1) *General.* One completed and dated Form ETA 9035 or ETA 9035E shall be submitted to ETA by the employer (or by the employer's authorized agent or representative) in accordance with the procedure prescribed in § 655.720. In submitting the Form ETA 9035 or the ETA 9035E, the employer, or its authorized agent or representative on behalf of the employer, attests that the statements in the Form are true and promises to comply with the attestation requirements set forth in full in the ETA 9035-CP. The Form ETA 9035 must be used if the employer uses FAX or U.S. Mail for submission; this Form must bear the original signature of the employer (or that of the employer's authorized agent or representative) when it is submitted to ETA. The Form ETA 9035E must be used for electronic submission; this Form must be printed out and signed by the employer immediately upon certification by ETA. The signed original of the Form ETA 9035 or the Form ETA 9035E must be maintained by the employer in its files, as set forth at § 655.720(c) and § 655.760(a)(1), if it is submitted by FAX or by electronic submission to ETA. A copy of the signed, certified Form ETA 9035 or ETA 9035E must be made available in the public access file, as set forth at § 655.760(a)(1). The signature of the employer or its authorized agent or representative on Form ETA 9035 or Form ETA 9035E constitutes the employer's representation of the truth of the statements on the Form and acknowledges the employer's agreement to the labor condition statements (attestations), which are specifically identified in Forms ETA 9035 and ETA 9035E, as well as set forth in the cover pages (Form ETA 9035CP) and incorporated by reference

in Forms ETA 9035 and ETA 9035E. Another copy of the signed, certified Form ETA 9035 or ETA 9035E must be submitted to the Immigration and Naturalization Service in support of the Form I-129 petition, thereby reaffirming the employer's acceptance of all of the attestation obligations in accordance with 8 CFR 214.2(h)(4)(iii)(B)(2). The labor condition statements (attestations) are described in detail in §§ 655.731 through 655.735, and 655.736 through 655.739 (if applicable). Copies of Form ETA 9035 and cover pages Form ETA 9035CP are available from ETA regional offices and on the ETA website at <http://ows.doleta.gov>. Form ETA 9035E is found on the DOL WEB page at [www.lca.doleta.gov](http://www.lca.doleta.gov), where the electronic submission is made. Each Form ETA 9035 and ETA 9035E shall identify the occupational classification for which the LCA is being submitted and shall state:

(i) The occupation, by Dictionary of Occupational Titles (DOT) Three-Digit Occupational Groups code and by the employer's own title for the job;

(ii) The number of H-1B nonimmigrants sought;

(iii) The gross wage rate to be paid to each H-1B nonimmigrant, expressed on an hourly, weekly, biweekly, monthly or annual basis;

(iv) The starting and ending dates of the H-1B nonimmigrants' employment;

(v) The place(s) of intended employment;

(vi) The prevailing wage for the occupation in the area of intended employment and the specific source (e.g., name of published survey) relied upon by the employer to determine the wage. If the wage is obtained from a SESA, the appropriate box must be checked and the wage must be stated; the source for a wage obtained from a source other than a SESA must be identified along with the wage; and

(vii) The employer's status as to whether or not the employer is H-1B-dependent and/or a willful violator, and, if the employer is H-1B-dependent and/or a willful violator, whether the employer will use the application only in support of petitions for exempt H-1B nonimmigrants.

(2) *Multiple positions and/or places of employment.* The employer shall file a

separate LCA for each occupation in which the employer intends to employ one or more H-1B nonimmigrants, but the LCA may cover more than one intended position (employment opportunity) within that occupation. All intended places of employment shall be identified on the LCA; the employer may file one or more additional LCAs to identify additional places of employment.

(3) *Full-time and part-time jobs.* The position(s) covered by the LCA may be either full-time or part-time; full-time and part-time positions cannot be combined on a single LCA.

(d) *What attestations does the LCA contain?* An employer's LCA shall contain the labor condition statements referenced in §§ 655.731 through 655.734, and § 655.736 through 655.739 (if applicable), which provide that no individual may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary an application stating that:

(1) The employer is offering and will offer during the period of authorized employment to H-1B nonimmigrants no less than the greater of the following wages (such offer to include benefits and eligibility for benefits provided as compensation for services, which are to be offered to the nonimmigrants on the same basis and in accordance with the same criteria as the employer offers such benefits to U.S. workers):

(i) The actual wage paid to the employer's other employees at the worksite with similar experience and qualifications for the specific employment in question; or

(ii) The prevailing wage level for the occupational classification in the area of intended employment;

(2) The employer will provide working conditions for such nonimmigrants that will not adversely affect the working conditions of workers similarly employed (including benefits in the nature of working conditions, which are to be offered to the nonimmigrants on the same basis and in accordance with the same criteria as the employer offers such benefits to U.S. workers);

(3) There is not a strike or lockout in the course of a labor dispute in the oc-

cupational classification at the place of employment;

(4) The employer has provided and will provide notice of the filing of the labor condition application to:

(i)(A) The bargaining representative of the employer's employees in the occupational classification in the area of intended employment for which the H-1B nonimmigrants are sought, in the manner described in § 655.734(a)(1)(i); or

(B) If there is no such bargaining representative, affected workers by providing electronic notice of the filing of the LCA or by posting notice in conspicuous locations at the place(s) of employment, in the manner described in § 655.734(a)(1)(ii); and

(ii) H-1B nonimmigrants by providing a copy of the LCA to each H-1B nonimmigrant at the time that such nonimmigrant actually reports to work, in the manner described in § 655.734(a)(2).

(5) The employer has determined its status concerning H-1B-dependency and/or willful violator (as described in § 655.736), has indicated such status, and if either such status is applicable to the employer, has indicated whether the LCA will be used only for exempt H-1B nonimmigrant(s), as described in § 655.737.

(6) The employer has provided the information about the occupation required in paragraph (c) of this section.

(e) *Change in employer's corporate structure or identity.* (1) Where an employer corporation changes its corporate structure as the result of an acquisition, merger, "spin-off," or other such action, the new employing entity is not required to file new LCAs and H-1B petitions with respect to the H-1B nonimmigrants transferred to the employ of the new employing entity (regardless of whether there is a change in the Employer Identification Number (EIN)), *provided that* the new employing entity maintains in its records a list of the H-1B nonimmigrants transferred to the employ of the new employing entity, and maintains in the public access file(s) (see § 655.760) a document containing all of the following:

(i) Each affected LCA number and its date of certification;

(ii) A description of the new employing entity's actual wage system applicable to H-1B nonimmigrant(s) who become employees of the new employing entity;

(iii) The employer identification number (EIN) of the new employing entity (whether or not different from that of the predecessor entity); and

(iv) A sworn statement by an authorized representative of the new employing entity expressly acknowledging such entity's assumption of all obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective LCA filed by the predecessor entity. Unless such statement is executed and made available in accordance with this paragraph, the new employing entity shall not employ any of the predecessor entity's H-1B nonimmigrants without filing new LCAs and petitions for such nonimmigrants. The new employing entity's statement shall include such entity's explicit agreement to:

(A) Abide by the DOL's H-1B regulations applicable to the LCAs;

(B) Maintain a copy of the statement in the public access file (see § 655.760); and

(C) Make the document available to any member of the public or the Department upon request.

(2) Notwithstanding the provisions of paragraph (e)(1) of this section, the new employing entity must file new LCA(s) and H-1B petition(s) when it hires any new H-1B nonimmigrant(s) or seeks extension(s) of H-1B status for existing H-1B nonimmigrant(s). In other words, the new employing entity may not utilize the predecessor entity's LCA(s) to support the hiring or extension of any H-1B nonimmigrant after the change in corporate structure.

(3) A change in an employer's H-1B-dependency status which results from the change in the corporate structure has no effect on the employer's obligations with respect to its current H-1B nonimmigrant employees. However, the new employing entity shall comply with § 655.736 concerning H-1B-dependency and/or willful-violator status and § 655.737 concerning exempt H-1B nonimmigrants, in the event that such entity seeks to hire new H-1B nonimmigrant(s) or to extend the H-1B

status of existing H-1B nonimmigrants. (See § 655.736(d)(6).)

[65 FR 80212, Dec. 20, 2000, as amended at 66 FR 63301, Dec. 5, 2001]

**§ 655.731 What is the first LCA requirement, regarding wages?**

An employer seeking to employ H-1B nonimmigrants in a specialty occupation or as a fashion model of distinguished merit and ability shall state on Form ETA 9035 or 9035E that it will pay the H-1B nonimmigrant the required wage rate.

(a) *Establishing the wage requirement.* The first LCA requirement shall be satisfied when the employer signs Form ETA 9035 or 9035E attesting that, for the entire period of authorized employment, the required wage rate will be paid to the H-1B nonimmigrant(s); that is, that the wage shall be the greater of the actual wage rate (as specified in paragraph (a)(1) of this section) or the prevailing wage (as specified in paragraph (a)(2) of this section). The wage requirement includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for services to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(1) The *actual wage* is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. "Legitimate business factors," for purposes of this section, means those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards. Where there are other employees with substantially similar experience and qualifications in the specific employment in question—*i.e.*, they have substantially the same duties and responsibilities as the H-1B nonimmigrant—the actual wage shall be the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage shall be the

wage paid to the H-1B nonimmigrant by the employer. Where the employer's pay system or scale provides for adjustments during the period of the LCA—*e.g.*, cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation—such adjustments shall be provided to similarly employed H-1B nonimmigrants (unless the prevailing wage is higher than the actual wage).

(2) The *prevailing wage* for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information as of the time of filing the application. Except as provided in paragraph (a)(3) of this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a SESA, an independent authoritative source, or other legitimate sources of data. One of the following sources shall be used to establish the prevailing wage:

(i) A wage determination for the occupation and area issued under one of the following statutes (which shall be available through the SESA):

(A) The Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see also 29 CFR part 1), or

(B) The McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (SCA) (see also 29 CFR part 4). The following provisions apply to the use of the SCA wage rate as the prevailing wage:

(1) Where an SCA wage determination for an occupational classification in the computer industry states a rate of \$27.63, that rate will not be issued by the SESA and may not be used by the employer as the prevailing wage; that rate does not represent the actual prevailing wage but, instead, is reported by the Wage and Hour Division in the SCA determination merely as an artificial "cap" in the SCA-required wage that results from an SCA exemption provision (see 41 U.S.C. 357(b); 29 CFR 541.3). In such circumstances, the SESA and the employer must consult another source for wage information (*e.g.*, Bureau of Labor Statistics' Occupational Employment Statistics Survey).

(2) Except as provided in paragraph (a)(2)(i)(B)(1) of this section, for pur-

poses of the determination of the H-1B prevailing wage for an occupational classification through the use of an SCA wage determination, it is irrelevant whether a worker is employed on a contract subject to the SCA or whether the worker would be exempt from the SCA through application of the SCA/FLSA "professional employee" exemption test (*i.e.*, duties and compensation; see 29 CFR 4.156; 541.3). Thus, in issuing the SCA wage rate as the prevailing wage determination for the occupational classification, the SESA will not consider questions of employee exemption, and in an enforcement action, the Department will consider the SCA wage rate to be the prevailing wage without regard to whether any particular H-1B employee(s) could be exempt from that wage as SCA contract workers under the SCA/FLSA exemption. An employer who employs H-1B employee(s) to perform services under an SCA-covered contract may find that the H-1B employees are required to be paid the SCA rate as the H-1B prevailing wage even though non-H-1B employees performing the same services may be exempt from the SCA.

(ii) A union contract which was negotiated at arms-length between a union and the employer, which contains a wage rate applicable to the occupation; or

(iii) If the job opportunity is in an occupation which is not covered by paragraph (a)(2)(i) or (ii) of this section, the prevailing wage shall be the weighted average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wages paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within five percent of the average rate of wages. See paragraph (c) of this section, regarding payment of required wages. See also paragraph (d)(4) of this section, regarding enforcement. The prevailing wage rate under this paragraph (a)(2)(iii) shall be based on the best information

available. The Department believes that the following prevailing wage sources are, in order of priority, the most accurate and reliable:

(A) *A SESA Determination.* Upon receipt of a written request for a prevailing wage determination, the SESA will determine whether the occupation is covered by a Davis-Bacon or Service Contract Act wage determination, and, if not, whether it has on file current prevailing wage information for the occupation. This information will be provided by the SESA to the employer in writing in a timely manner. Where the prevailing wage is not immediately available, the SESA will determine the prevailing wage using the methods outlined at 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The SESA shall specify the validity period of the prevailing wage, which shall in no event be for less than 90 days or more than one year from the date of the SESA's issuance of the determination.

(I) An employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application within the validity period of the prevailing wage as specified on the determination. Once an employer obtains a prevailing wage determination from the SESA and files an LCA supported by that prevailing wage determination, the employer is deemed to have accepted the prevailing wage determination (as to the amount of the wage) and thereafter may not contest the legitimacy of the prevailing wage determination through the Employment Service complaint system or in an investigation or enforcement action. Prior to filing the LCA, the employer may challenge a SESA prevailing wage determination through the Employment Service complaint system, by filing a complaint with the SESA. See subpart E of 20 CFR part 658. Employers which challenge a SESA prevailing wage determination must obtain a final ruling from the Employment Service complaint system prior to filing an LCA based on such determination. In any challenge, the SESA shall not divulge any employer wage data which was collected under the promise of confidentiality.

(2) If the employer is unable to wait for the SESA to produce the requested prevailing wage determination for the occupation in question, or for the Employment Service complaint system process to be completed, the employer may rely on other legitimate sources of available wage information in filing the LCA, as set forth in paragraph (a)(2)(iii)(B) and (C) of this section. If the employer later discovers, upon receipt of a prevailing wage determination from the SESA, that the information relied upon produced a wage that was below the prevailing wage for the occupation in the area of intended employment and the employer was paying below the SESA-determined wage, no wage violation will be found if the employer retroactively compensates the H-1B nonimmigrant(s) for the difference between the wage paid and the prevailing wage, within 30 days of the employer's receipt of the SESA determination.

(3) In all situations where the employer obtains the prevailing wage determination from the SESA, the Department will accept that prevailing wage determination as correct (as to the amount of the wage) and will not question its validity where the employer has maintained a copy of the SESA prevailing wage determination. A complaint alleging inaccuracy of a SESA prevailing wage determination, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of a SESA prevailing wage determination. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

(C) *Another legitimate source of wage information.* The employer may rely on other legitimate sources of wage data to obtain the prevailing wage. The other legitimate source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(C) of this section. The employer will be required to demonstrate the legitimacy of the wage in the event of an investigation.

(iv) For purposes of this section, "similarly employed" means "having substantially comparable jobs in the occupational classification in the area

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of intended employment,” except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, “similarly employed” means:

(A) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(B) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(v) A prevailing wage determination for LCA purposes made pursuant to this section shall not permit an employer to pay a wage lower than that required under any other applicable Federal, State or local law.

(vi) Where a range of wages is paid by the employer to individuals in an occupational classification or among individuals with similar experience and qualifications for the specific employment in question, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.

(vii) The employer shall enter the prevailing wage on the LCA in the form in which the employer will pay the wage (*i.e.*, either a salary or an hourly rate), except that in all cases the prevailing wage must be expressed as an hourly wage if the H-1B nonimmigrant will be employed part-time. Where an employer obtains a prevailing wage determination (from any of the sources identified in paragraph (a)(2)(i) through (iii) of this section) that is expressed as an hourly rate, the employer may convert this determination to a salary by multiplying the hourly rate by 2080. Conversely, where an employer obtains a prevailing wage (from any of these sources) that is expressed as a salary, the employer may convert this determination to an hourly rate by dividing the salary by 2080.

(viii) In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment in the case of an employee of an institution of higher education or an affiliated or related nonprofit entity, a nonprofit research organization, or a Governmental research organization as these terms are

defined in 20 CFR 656.40(c), the prevailing wage level shall only take into account employees at such institutions and organizations in the area of intended employment.

(ix) An employer may file more than one LCA for the same occupational classification in the same area of employment and, in such circumstances, the employer could have H-1B employees in the same occupational classification in the same area of employment, brought into the U.S. (or accorded H-1B status) based on petitions approved pursuant to different LCAs (filed at different times) with different prevailing wage determinations. Employers are advised that the prevailing wage rate as to any particular H-1B nonimmigrant is prescribed by the LCA which supports that nonimmigrant's H-1B petition. The employer is required to obtain the prevailing wage at the time that the LCA is filed (see paragraph (a)(2) of this section). The LCA is valid for the period certified by ETA, and the employer must satisfy all the LCA's requirements (including the required wage which encompasses both prevailing and actual wage rates) for as long as any H-1B nonimmigrants are employed pursuant to that LCA (§655.750). Where new nonimmigrants are employed pursuant to a new LCA, that new LCA prescribes the employer's obligations as to those new nonimmigrants. The prevailing wage determination on the later/subsequent LCA does not “relate back” to operate as an “update” of the prevailing wage for the previously-filed LCA for the same occupational classification in the same area of employment. However, employers are cautioned that the actual wage component to the required wage may, as a practical matter, eliminate any wage-payment differentiation among H-1B employees based on different prevailing wage rates stated in applicable LCAs. Every H-1B nonimmigrant is to be paid in accordance with the employer's actual wage system, and thus to receive any pay increases which that system provides.

(3) Once the prevailing wage rate is established, the H-1B employer then

shall compare this wage with the actual wage rate for the specific employment in question at the place of employment and must pay the H-1B nonimmigrant at least the higher of the two wages.

(b) *Documentation of the wage statement.* (1) The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the wage statement required in paragraph (a) of this section and attested to on Form ETA 9035 or 9035E. The documentation shall be made available to DOL upon request. Documentation shall also be made available for public examination to the extent required by § 655.760. The employer shall also document that the wage rate(s) paid to H-1B nonimmigrant(s) is(are) no less than the required wage rate(s). The documentation shall include information about the employer's wage rate(s) for all other employees for the specific employment in question at the place of employment, beginning with the date the labor condition application was submitted and continuing throughout the period of employment. The records shall be retained for the period of time specified in § 655.760. The payroll records for each such employee shall include:

- (i) Employee's full name;
- (ii) Employee's home address;
- (iii) Employee's occupation;
- (iv) Employee's rate of pay;
- (v) Hours worked each day and each week by the employee if:

(A) The employee is paid on other than a salary basis (*e.g.*, hourly, piece-rate; commission); or

(B) With respect only to H-1B nonimmigrants, the worker is a part-time employee (whether paid a salary or an hourly rate).

(vi) Total additions to or deductions from pay each pay period, by employee; and

(vii) Total wages paid each pay period, date of pay and pay period covered by the payment, by employee.

(viii) Documentation of offer of benefits and eligibility for benefits provided as compensation for services on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers (see paragraph (c)(3) of this section):

(A) A copy of any document(s) provided to employees describing the benefits that are offered to employees, the eligibility and participation rules, how costs are shared, etc. (*e.g.*, summary plan descriptions, employee handbooks, any special or employee-specific notices that might be sent);

(B) A copy of all benefit plans or other documentation describing benefit plans and any rules the employer may have for differentiating benefits among groups of workers;

(C) Evidence as to what benefits are actually provided to U.S. workers and H-1B nonimmigrants, including evidence of the benefits selected or declined by employees where employees are given a choice of benefits;

(D) For multinational employers who choose to provide H-1B nonimmigrants with "home country" benefits, evidence of the benefits provided to the nonimmigrant before and after he/she went to the United States. See paragraph (c)(3)(iii)(C) of this section.

(2) *Actual wage.* In addition to payroll data required by paragraph (b)(1) of this section (and also by the Fair Labor Standards Act), the employer shall retain documentation specifying the basis it used to establish the actual wage. The employer shall show how the wage set for the H-1B nonimmigrant relates to the wages paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question at the place of employment. Where adjustments are made in the employer's pay system or scale during the validity period of the LCA, the employer shall retain documentation explaining the change and clearly showing that, after such adjustments, the wages paid to the H-1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation and area of intended employment.

(3) *Prevailing wage.* The employer also shall retain documentation regarding its determination of the prevailing wage. This source documentation shall not be submitted to ETA with the labor condition application, but shall be retained at the employer's place of business for the length of time required in § 655.760(c). Such documentation



shall consist of the documentation described in paragraph (b)(3)(i), (ii), or (iii) of this section and the documentation described in paragraph (b)(1) of this section.

(i) If the employer used a wage determination issued pursuant to the provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (see 29 CFR part 4), the documentation shall include a copy of the determination showing the wage rate for the occupation in the area of intended employment.

(ii) If the employer used an applicable wage rate from a union contract which was negotiated at arms-length between a union and the employer, the documentation shall include an excerpt from the union contract showing the wage rate(s) for the occupation.

(iii) If the employer did not use a wage covered by the provisions of paragraph (b)(3)(i) or (b)(3)(ii) of this section, the employer's documentation shall consist of:

(A) A copy of the prevailing wage finding from the SESA for the occupation within the area of intended employment; or

(B) A copy of the prevailing wage survey for the occupation within the area of intended employment published by an independent authoritative source. For purposes of this paragraph (b)(3)(iii)(B), a prevailing wage survey for the occupation in the area of intended employment published by an independent authoritative source shall mean a survey of wages published in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's application. Such survey shall:

(1) Reflect the weighted average wage paid to workers similarly employed in the area of intended employment;

(2) Be based upon recently collected data—*e.g.*, within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the independent authoritative source for the

occupation in the area of intended employment; or

(C) A copy of the prevailing wage survey or other source data acquired from another legitimate source of wage information that was used to make the prevailing wage determination. For purposes of this paragraph (b)(3)(iii)(C), a prevailing wage provided by another legitimate source of such wage information shall be one which:

(1) Reflects the weighted average wage paid to workers similarly employed in the area of intended employment;

(2) Is based on the most recent and accurate information available; and

(3) Is reasonable and consistent with recognized standards and principles in producing a prevailing wage.

(c) *Satisfaction of required wage obligation.* (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.

(2) "Cash wages paid," for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:

(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;

(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, *et seq.*);

(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, *et seq.* (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid *except that* when the H-1B non-immigrant is a citizen of a foreign

country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (*i.e.*, an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.

(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

(v) Future bonuses and similar compensation (*i.e.*, unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (*i.e.*, they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (*i.e.*, recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

(3) *Benefits and eligibility for benefits* provided as compensation for services (*e.g.*, cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(i) For purposes of this section, the offer of benefits "on the same basis, and in accordance with the same criteria" means that the employer shall offer H-1B nonimmigrants the same benefit package as it offers to U.S. workers, and may not provide more strict eligibility or participation requirements for the H-1B nonimmigrant(s) than for similarly employed U.S. workers(s) (*e.g.*, full-time workers compared to full-time workers; professional staff compared to professional staff). H-1B nonimmigrants are not to be denied benefits on the

basis that they are "temporary employees" by virtue of their nonimmigrant status. An employer may offer greater or additional benefits to the H-1B nonimmigrant(s) than are offered to similarly employed U.S. worker(s), *provided* that such differing treatment is consistent with the requirements of all applicable nondiscrimination laws (*e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e-2000e17). Offers of benefits by employers shall be made in good faith and shall result in the H-1B nonimmigrant(s)'s actual receipt of the benefits that are offered by the employer and elected by the H-1B nonimmigrant(s).

(ii) The benefits received by the H-1B nonimmigrant(s) need not be identical to the benefits received by similarly employed U.S. workers(s), *provided that* the H-1B nonimmigrant is offered the same benefits package as those workers but voluntarily chooses to receive different benefits (*e.g.*, elects to receive cash payment rather than stock option, elects not to receive health insurance because of required employee contributions, or elects to receive different benefits among an array of benefits) or, in those instances where the employer is part of a multinational corporate operation, the benefits received by the H-1B nonimmigrant are provided in accordance with an employer's practice that satisfies the requirements of paragraph (c)(3)(iii)(B) or (C) of this section. In all cases, however, an employer's practice must comply with the requirements of any applicable nondiscrimination laws (*e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e-2000e17).

(iii) If the employer is part of a multinational corporate operation (*i.e.*, operates in affiliation with business entities in other countries, whether as subsidiaries or in some other arrangement), the following three options (*i.e.*, (A), (B) or (C)) are available to the employer with respect to H-1B nonimmigrants who remain on the "home country" payroll.

(A) The employer may offer the H-1B nonimmigrant(s) benefits in accordance with paragraphs (c)(3)(i) and (ii) of this section.

(B) Where an H-1B nonimmigrant is in the U.S. for no more than 90 consecutive calendar days, the employer during that period may maintain the H-1B nonimmigrant on the benefits provided to the nonimmigrant in his/her permanent work station (ordinarily the home country), and not offer the nonimmigrant the benefits that are offered to similarly employed U.S. workers, *provided that* the employer affords reciprocal benefits treatment for any U.S. workers (*i.e.*, allows its U.S. employees, while working out of the country on a temporary basis away from their permanent work stations in the United States, or while working in the United States on a temporary basis away from their permanent work stations in another country, to continue to receive the benefits provided them at their permanent work stations). Employers are cautioned that this provision is available only if the employer's practices do not constitute an evasion of the benefit requirements, such as where the H-1B nonimmigrant remains in the United States for most of the year, but briefly returns to the "home country" before any 90-day period would expire.

(C) Where an H-1B nonimmigrant is in the U.S. for more than 90 consecutive calendar days (or from the point where the worker is transferred to the U.S. or it is anticipated that the worker will likely remain in the U.S. more than 90 consecutive days), the employer may maintain the H-1B nonimmigrant on the benefits provided in his/her home country (*i.e.*, "home country benefits") (and not offer the nonimmigrant the benefits that are offered to similarly employed U.S. workers) *provided that* all of the following criteria are satisfied:

(1) The H-1B nonimmigrant continues to be employed in his/her home country (either with the H-1B employer or with a corporate affiliate of the employer);

(2) The H-1B nonimmigrant is enrolled in benefits in his/her home country (in accordance with any applicable eligibility standards for such benefits);

(3) The benefits provided in his/her home country are equivalent to, or equitably comparable to, the benefits offered to similarly employed U.S. work-

ers (*i.e.*, are no less advantageous to the nonimmigrant);

(4) The employer affords reciprocal benefits treatment for any U.S. workers while they are working out of the country, away from their permanent work stations (whether in the United States or abroad), on a temporary basis (*i.e.*, maintains such U.S. workers on the benefits they received at their permanent work stations);

(5) If the employer offers health benefits to its U.S. workers, the employer offers the same plan on the same basis to its H-1B nonimmigrants in the United States where the employer does not provide the H-1B nonimmigrant with health benefits in the home country, or the employer's home-country health plan does not provide full coverage (*i.e.*, coverage comparable to what he/she would receive at the home work station) for medical treatment in the United States; and

(6) *the* employer offers H-1B nonimmigrants who are in the United States more than 90 continuous days those U.S. benefits which are paid directly to the worker (*e.g.*, paid vacation, paid holidays, and bonuses).

(iv) Benefits provided as compensation for services may be credited toward the satisfaction of the employer's required wage obligation only if the requirements of paragraph (c)(2) of this section are met (*e.g.*, recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

(4) For *salaried employees*, wages will be due in prorated installments (*e.g.*, annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly *except that*, in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (*e.g.*, a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay

periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period. An employer that is a school or other educational institution may apply an established salary practice under which the employer pays to H-1B nonimmigrants and U.S. workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, *provided that* the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment and the application of the salary practice to the nonimmigrant does not otherwise cause him/her to violate any condition of his/her authorization under the INA to remain in the U.S.

(5) For *hourly-wage employees*, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (*e.g.*, weekly) but in no event less frequently than monthly.

(6) Subject to the standards specified in paragraph (c)(7) of this section (regarding nonproductive status), an H-1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant "enters into employment" with the employer.

(i) For purposes of this paragraph (c)(6), the H-1B nonimmigrant is considered to "enter into employment" when he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.

(ii) Even if the H-1B nonimmigrant has not yet "entered into employment" with the employer (as described in paragraph (c)(6)(i) of this section), the employer that has had an LCA certified and an H-1B petition approved for the H-1B nonimmigrant shall pay the nonimmigrant the required wage beginning 30 days after the date the nonimmigrant first is admitted into the U.S. pursuant to the petition, or, if the nonimmigrant is present in the

United States on the date of the approval of the petition, beginning 60 days after the date the nonimmigrant becomes eligible to work for the employer. For purposes of this latter requirement, the H-1B nonimmigrant is considered to be eligible to work for the employer upon the date of need set forth on the approved H-1B petition filed by the employer, or the date of adjustment of the nonimmigrant's status by INS, whichever is later. Matters such as the worker's obtaining a State license would not be relevant to this determination.

(7) *Wage obligation(s) for H-1B nonimmigrant in nonproductive status.*

(i) *Circumstances where wages must be paid.* If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (*e.g.*, because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA. If the employer's LCA carries a designation of "part-time employment," the employer is required to pay the nonproductive employee for at least the number of hours indicated on the I-129 petition filed by the employer with the INS and incorporated by reference on the LCA. If the I-129 indicates a range of hours for part-time employment, the employer is required to pay the nonproductive employee for at least the average number of hours normally worked by the H-1B nonimmigrant, provided that such average is within the range indicated; in no event shall the employee be paid for fewer than the minimum number of hours indicated for the range of part-time employment. In all cases the H-1B nonimmigrant must be paid the required wage for all hours performing work within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

(ii) *Circumstances where wages need not be paid.* If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (*e.g.*, touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (*e.g.*, maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period, *provided that* such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*). Payment need not be made if there has been a *bona fide* termination of the employment relationship. INS regulations require the employer to notify the INS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

(8) If the employee works in an occupation other than that identified on the employer's LCA, the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working.

(9) "Authorized deductions," for purposes of the employer's satisfaction of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (*i.e.*, paragraph (c)(9)(i), (ii), or (iii))—

(i) Deduction which is required by law (*e.g.*, income tax; FICA); or

(ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (*e.g.*, union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C.

1001, *et seq.*), *except that* the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, *e.g.*, preparation and filing of LCA and H-1B petition); the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H-1B nonimmigrants (where there are U.S. workers); or

(iii) Deduction which meets the following requirements:

(A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);

(B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this "benefit of employee" standard, unless the employee is in travel status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (*e.g.*, employee living at work-site in "on call" status));

(C) Is not a recoupment of the employer's business expense (*e.g.*, tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (*e.g.*, preparation and filing of LCA and H-1B petition)). (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker's home country shall not be considered a business expense.);

(D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value); and

(E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25 percent of an employee's disposable earnings for a workweek.

(10) A deduction from or reduction in the payment of the required wage is not authorized (and is therefore prohibited) for the following purposes (*i.e.*, paragraphs (c)(10) (i) and (ii)):

(i) A penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.

(A) The employer is not permitted to require (directly or indirectly) that the nonimmigrant pay a penalty for ceasing employment with the employer prior to an agreed date. Therefore, the employer shall not make any deduction from or reduction in the payment of the required wage to collect such a penalty.

(B) The employer is permitted to receive *bona fide* liquidated damages from the H-1B nonimmigrant who ceases employment with the employer prior to an agreed date. However, the requirements of paragraph (c)(9)(iii) of this section must be fully satisfied, if such damages are to be received by the employer via deduction from or reduction in the payment of the required wage.

(C) The distinction between liquidated damages (which are permissible) and a penalty (which is prohibited) is to be made on the basis of the applicable State law. In general, the laws of the various States recognize that *liquidated damages* are amounts which are fixed or stipulated by the parties at the inception of the contract, and which are reasonable approximations or estimates of the anticipated or actual damage caused to one party by the other party's breach of the contract. On the other hand, the

laws of the various States, in general, consider that penalties are amounts which (although fixed or stipulated in the contract by the parties) are not reasonable approximations or estimates of such damage. The laws of the various States, in general, require that the relation or circumstances of the parties, and the purpose(s) of the agreement, are to be taken into account, so that, for example, an agreement to a payment would be considered to be a prohibited penalty where it is the result of fraud or where it cloaks oppression. Furthermore, as a general matter, the sum stipulated must take into account whether the contract breach is total or partial (*i.e.*, the percentage of the employment contract completed). (*See, e.g., Vanderbilt University v. DiNardo*, 174 F.3d 751 (6th Cir. 1999) (applying Tennessee law); *Overholt Crop Insurance Service Co. v. Travis*, 941 F.2d 1361 (8th Cir. 1991) (applying Minnesota and South Dakota law); *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220 (N.Y. 1999); *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88 (Tenn. 1999); *Wojtowicz v. Greeley Anesthesia Services, P.C.*, 961 P.2d 520 (Colo.Ct.App. 1998); *see generally*, Restatement (Second) Contracts §356 (comment b); 22 Am.Jur.2d Damages §§683, 686, 690, 693, 703). In an enforcement proceeding under subpart I of this part, the Administrator shall determine, applying relevant State law (including consideration where appropriate to actions by the employer, if any, contributing to the early cessation, such as the employer's constructive discharge of the nonimmigrant or non-compliance with its obligations under the INA and its regulations) whether the payment in question constitutes liquidated damages or a penalty. (Note to paragraph (c)(10)(i)(C): The \$500/\$1,000 filing fee under section 214(c)(1) of the INA can never be included in any liquidated damages received by the employer. *See* paragraph (c)(10)(ii), which follows.)

(ii) A rebate of the \$500/\$1,000 filing fee paid by the employer under Section 214(c)(1) of the INA. The employer may not receive, and the H-1B nonimmigrant may not pay, any part of the \$500 additional filing fee (for a petition filed prior to December 18, 2000) or

\$1,000 additional filing fee (for a petition filed on or subsequent to December 18, 2000), whether directly or indirectly, voluntarily or involuntarily. Thus, no deduction from or reduction in wages for purposes of a rebate of any part of this fee is permitted. Further, if liquidated damages are received by the employer from the H-1B nonimmigrant upon the nonimmigrant's ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer, such liquidated damages shall not include any part of the \$500/\$1,000 filing fee (see paragraph (c)(10)(i) of this section). If the filing fee is paid by a third party and the H-1B nonimmigrant reimburses all or part of the fee to such third party, the employer shall be considered to be in violation of this prohibition since the employer would in such circumstances have been spared the expense of the fee which the H-1B nonimmigrant paid.

(11) Any unauthorized deduction taken from wages is considered by the Department to be non-payment of that amount of wages, and in the event of an investigation, will result in back wage assessment (plus civil money penalties and/or disqualification from H-1B and other immigration programs, if willful).

(12) Where the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expenses(s), the Department will consider the amount to be an unauthorized deduction from wages even if the matter is not shown in the employer's payroll records as a deduction.

(13) Where the employer makes deduction(s) for repayment of loan(s) or wage advance(s) made to the employee, the Department, in the event of an investigation, will require the employer to establish the legitimacy and purpose(s) of the loan(s) or wage advance(s), with reference to the standards set out in paragraph (c)(9)(iii) of this section.

(d) *Enforcement actions.* (1) In the event of an investigation pursuant to subpart I of this part, concerning a failure to meet the "prevailing wage" condition or a material misrepresentation by the employer regarding the payment of the required wage, the Ad-

ministrator shall determine whether the employer has the documentation required in paragraph (b)(3) of this section, and whether the documentation supports the employer's wage attestation. Where the documentation is either nonexistent or insufficient to determine the prevailing wage (e.g., does not meet the criteria specified in this section, in which case the Administrator may find a violation of paragraph (b)(1), (2), or (3), of this section); or where, based on significant evidence regarding wages paid for the occupation in the area of intended employment, the Administrator has reason to believe that the prevailing wage finding obtained from an independent authoritative source or another legitimate source varies substantially from the wage prevailing for the occupation in the area of intended employment; or where the employer has been unable to demonstrate that the prevailing wage determined by another legitimate source is in accordance with the regulatory criteria, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed. The 30-day investigatory period shall be suspended while ETA makes the prevailing wage determination and, in the event that the employer timely challenges the determination through the Employment Service complaint system (see paragraph (d)(2), which follows), shall be suspended until the Employment Service complaint system process is completed and the Administrator's investigation can be resumed.

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, the employer may challenge the ETA prevailing wage only through the Employment Service complaint system. (See 20 CFR part 658, subpart E.) Notwithstanding the provisions of 20 CFR 658.421 and 658.426, the appeal shall be initiated at the ETA regional office which services the State in which the place of employment is located (see § 655.721 for the ETA regional offices and their jurisdictions). Such challenge

shall be initiated within 10 days after the employer receives ETA's prevailing wage determination from the Administrator. In any challenge to the wage determination, neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where the employer timely challenges an ETA prevailing wage determination obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling from the Employment Service complaint system. Upon such final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's prevailing wage determination serving as the conclusive determination for all purposes.

(ii) Where the employer does not challenge ETA's prevailing wage determination obtained by the Administrator, such determination shall be deemed to have been accepted by the employer as accurate and appropriate (as to the amount of the wage) and thereafter shall not be subject to challenge in a hearing pursuant to §655.835.

(3) For purposes of this paragraph (d), ETA may consult with the appropriate SESA to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

(4) No prevailing wage violation will be found if the employer paid a wage that is equal to, or more than 95 percent of, the prevailing wage as required by paragraph (a)(2)(iii) of this section. If the employer paid a wage that is less than 95 percent of the prevailing wage, the employer will be required to pay 100 percent of the prevailing wage.

[65 FR 80214, Dec. 20, 2000, as amended at 66 FR 63302, Dec. 5, 2001]

**§ 655.732 What is the second LCA requirement, regarding working conditions?**

An employer seeking to employ H-1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability shall state on Form ETA 9035 or 9035E that the employment of H-1B nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment.

(a) *Establishing the working conditions requirement.* The second LCA requirement shall be satisfied when the employer affords working conditions to its H-1B nonimmigrant employees on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees. Working conditions include matters such as hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules. The employer's obligation regarding working conditions shall extend for the longer of two periods: the validity period of the certified LCA, or the period during which the H-1B nonimmigrant(s) is(are) employed by the employer.

(b) *Documentation of the working condition statement.* In the event of an enforcement action pursuant to subpart I of this part, the employer shall produce documentation to show that it has afforded its H-1B nonimmigrant employees working conditions on the same basis and in accordance with the same criteria as it affords its U.S. worker employees who are similarly employed.

[65 FR 80221, Dec. 20, 2000, as amended at 66 FR 63302, Dec. 5, 2001]

**§ 655.733 What is the third LCA requirement, regarding strikes and lockouts?**

An employer seeking to employ H-1B nonimmigrants shall state on Form ETA 9035 or 9035E that there is not at that time a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment. A strike or lockout which occurs after the labor condition application is filed by the employer with DOL is covered by INS regulations at 8 CFR 214.2(h)(17).

(a) *Establishing the no strike or lockout requirement.* The third labor condition application requirement shall be satisfied when the employer signs the labor condition application attesting that, as of the date the application is filed, the employer is not involved in a strike, lockout, or work stoppage in the



course of a labor dispute in the occupational classification in the area of intended employment. Labor disputes for the purpose of this section relate only to those disputes involving employees of the employer working at the place of employment in the occupational classification named in the labor condition application. See also INS regulations at 8 CFR 214.2(h)(17) for effects of strikes or lockouts in general on the H-1B nonimmigrant's employment.

(1) *Strike or lockout subsequent to certification of labor condition application.* In order to remain in compliance with the no strike or lockout labor condition statement, if a strike or lockout of workers in the same occupational classification as the H-1B nonimmigrant occurs at the place of employment during the validity of the labor condition application, the employer, within three days of the occurrence of the strike or lockout, shall submit to ETA, by U.S. mail, facsimile (FAX), or private carrier, written notice of the strike or lockout. Further, the employer shall not place, assign, lease, or otherwise contract out an H-1B nonimmigrant, during the entire period of the labor condition application's validity, to any place of employment where there is a strike or lockout in the course of a labor dispute in the same occupational classification as the H-1B nonimmigrant. Finally, the employer shall not use the labor condition application in support of any petition filings for H-1B nonimmigrants to work in such occupational classification at such place of employment until ETA determines that the strike or lockout has ended.

(2) *ETA notice to INS.* Upon receiving from an employer a notice described in paragraph (a)(1) of this section, ETA shall examine the documentation, and may consult with the union at the employer's place of business or other appropriate entities. If ETA determines that the strike or lockout is covered under INS's "Effect of strike" regulation for "H" visa holders, ETA shall certify to INS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of workers in the same occupational classification as the H-1B nonimmigrant is

in progress at the place of employment. See 8 CFR 214.2(h)(17).

(b) *Documentation of the third labor condition statement.* The employer need not develop nor maintain documentation to substantiate the statement referenced in paragraph (a) of this section. In the case of an investigation, however, the employer has the burden of proof to show that there was no strike or lockout in the course of a labor dispute for the occupational classification in which an H-1B nonimmigrant is employed, either at the time the application was filed or during the validity period of the LCA.

[59 FR 65659, 65676, Dec. 20, 1994 as amended at 66 FR 63302, Dec. 5, 2001]

**§ 655.734 What is the fourth LCA requirement, regarding notice?**

An employer seeking to employ H-1B nonimmigrants shall state on Form ETA 9035 or 9035E that the employer has provided notice of the filing of the labor condition application to the bargaining representative of the employer's employees in the occupational classification in which the H-1B nonimmigrants will be employed or are intended to be employed in the area of intended employment, or, if there is no such bargaining representative, has posted notice of filing in conspicuous locations in the employer's establishment(s) in the area of intended employment, in the manner described in this section.

(a) *Establishing the notice requirement.* The fourth labor condition application requirement shall be established when the conditions of paragraphs (a)(1) and (a)(2) of this section are met.

(1)(i) Where there is a collective bargaining representative for the occupational classification in which the H-1B nonimmigrants will be employed, on or within 30 days before the date the labor condition application is filed with ETA, the employer shall provide notice to the bargaining representative that a labor condition application is being, or will be, filed with ETA. The notice shall identify the number of H-1B nonimmigrants the employer is seeking to employ; the occupational classification in which the H-1B nonimmigrants will

be employed; the wages offered; the period of employment; and the location(s) at which the H-1B nonimmigrants will be employed. Notice under this paragraph (a)(1)(i) shall include the following statement: "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor."

(ii) Where there is no collective bargaining representative, the employer shall, on or within 30 days before the date the LCA is filed with ETA, provide a notice of the filing of the LCA. The notice shall indicate that H-1B nonimmigrants are sought; the number of such nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the location(s) at which the H-1B nonimmigrants will be employed; and that the LCA is available for public inspection at the H-1B employer's principal place of business in the U.S. or at the worksite. The notice shall also include the statement: "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor." If the employer is an H-1B-dependent employer or a willful violator, and the LCA is not being used only for exempt H-1B nonimmigrants, the notice shall also set forth the non-displacement and recruitment obligations to which the employer has attested, and shall include the following additional statement: "Complaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street & Constitution Avenue, NW., Washington, DC 20530." The notice shall be provided in one of the two following manners:

(A) *Hard copy notice*, by posting a notice in at least two conspicuous locations at each place of employment

where any H-1B nonimmigrant will be employed (whether such place of employment is owned or operated by the employer or by some other person or entity).

(1) The notice shall be of sufficient size and visibility, and shall be posted in two or more conspicuous places so that workers in the occupational classification at the place(s) of employment can easily see and read the posted notice(s).

(2) Appropriate locations for posting the notices include, but are not limited to, locations in the immediate proximity of wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a).

(3) The notices shall be posted on or within 30 days before the date the labor condition application is filed and shall remain posted for a total of 10 days.

(B) *Electronic notice*, by providing electronic notification to employees in the occupational classification (including both employees of the H-1B employer and employees of another person or entity which owns or operates the place of employment) for which H-1B nonimmigrants are sought, at each place of employment where any H-1B nonimmigrant will be employed. Such notification shall be given on or within 30 days before the date the labor condition application is filed, and shall be available to the affected employees for a total of 10 days, except that if employees are provided individual, direct notice (as by e-mail), notification only need be given once during the required time period. Notification shall be readily available to the affected employees. An employer may accomplish this by any means it ordinarily uses to communicate with its workers about job vacancies or promotion opportunities, including through its "home page" or "electronic bulletin board" to employees who have, as a practical matter, direct access to these resources; or through e-mail or an actively circulated electronic message such as the employer's newsletter. Where affected employees at the place of employment are not on the "intranet" which provides direct access to the home page or

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other electronic site but do have computer access readily available, the employer may provide notice to such workers by direct electronic communication such as e-mail (*i.e.*, a single, personal e-mail message to each such employee) or by arranging to have the notice appear for 10 days on an intranet which includes the affected employees (*e.g.*, contractor arranges to have notice on customer's intranet accessible to affected employees). Where employees lack practical computer access, a hard copy must be posted in accordance with paragraph (a)(1)(ii)(A) of this section, or the employer may provide employees individual copies of the notice.

(2) Where the employer places any H-1B nonimmigrant(s) at one or more worksites not contemplated at the time of filing the application, but which are within the area of intended employment listed on the LCA, the employer is required to post electronic or hard-copy notice(s) at such worksite(s), in the manner described in paragraph (a)(1) of this section, on or before the date any H-1B nonimmigrant begins work.

(3) The employer shall, no later than the date the H-1B nonimmigrant reports to work at the place of employment, provide the H-1B nonimmigrant with a copy of the LCA (Form ETA 9035, or Form ETA 9035E) certified by ETA and signed by the employer (or by the employer's authorized agent or representative). Upon request, the employer shall provide the H-1B nonimmigrant with a copy of the cover pages, Form ETA 9035CP.

(b) *Documentation of the fourth labor condition statement.* The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the statement referenced in paragraph (a) of this section and attested to on Form ETA 9035 or 9035E. Such documentation shall include a copy of the dated notice and the name and address of the collective bargaining representative to whom the notice was provided. Where there is no collective bargaining representative, the employer shall note and retain the dates when, and locations where, the

notice was posted and shall retain a copy of the posted notice.

(c) *Records retention; records availability.* The employer's documentation shall not be submitted to ETA with the labor condition application, but shall be retained for the period of time specified in §655.760(c) of this part. The documentation shall be made available for public examination as required in §655.760(a) of this part, and shall be made available to DOL upon request.

[65 FR 65659, 65676, Dec. 20, 1994, as amended at 65 FR 80221, Dec. 20, 2000; 66 FR 63302, Dec. 5, 2001]

**§ 655.735 What are the special provisions for short-term placement of H-1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on the LCA?**

(a) Subject to the conditions specified in this section, an employer may make short-term placements or assignments of H-1B nonimmigrant(s) at worksite(s) (place(s) of employment) in areas not listed on the employer's approved LCA(s) without filing new labor condition application(s) for such area(s).

(b) The following conditions must be fully satisfied by an employer during all short-term placement(s) or assignment(s) of H-1B nonimmigrant(s) at worksite(s) (place(s) of employment) in areas not listed on the employer's approved LCA(s):

(1) The employer has fully satisfied the requirements of §§655.730 through 655.734 with regard to worksite(s) located within the area(s) of intended employment listed on the employer's LCA(s).

(2) The employer shall not place, assign, lease, or otherwise contract out any H-1B nonimmigrant(s) to any worksite where there is a strike or lockout in the course of a labor dispute in the same occupational classification(s) as that of the H-1B nonimmigrant(s).

(3) For every day the H-1B nonimmigrant(s) is placed or assigned outside the area(s) of employment listed on the approved LCA(s) for such worker(s), the employer shall:

(i) Continue to pay such worker(s) the required wage (based on the prevailing wage at such worker's(s) permanent worksite, or the employer's actual wage, whichever is higher);

(ii) Pay such worker(s) the actual cost of lodging (for both workdays and non-workdays); and

(iii) Pay such worker(s) the actual cost of travel, meals and incidental or miscellaneous expenses (for both workdays and non-workdays).

(c) An employer's short-term placement(s) or assignment(s) of H-1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's approved LCA(s) shall not exceed a total of 30 workdays in a one-year period for any H-1B nonimmigrant at any worksite or combination of worksites in the area, *except that* such placement or assignment of an H-1B nonimmigrant may be for longer than 30 workdays but for no more than a total of 60 workdays in a one-year period where the employer is able to show the following:

(1) The H-1B nonimmigrant continues to maintain an office or work station at his/her permanent worksite (*e.g.*, the worker has a dedicated workstation and telephone line(s) at the permanent worksite);

(2) The H-1B nonimmigrant spends a substantial amount of time at the permanent worksite in a one-year period; and

(3) The H-1B nonimmigrant's U.S. residence or place of abode is located in the area of the permanent worksite and not in the area of the short-term worksite(s) (*e.g.*, the worker's personal mailing address; the worker's lease for an apartment or other home; the worker's bank accounts; the worker's automobile driver's license; the residence of the worker's dependents).

(d) For purposes of this section, the term *workday* shall mean any day on which an H-1B nonimmigrant performs any work at any worksite(s) within the area of short-term placement or assignment. For example, three workdays would be counted where a nonimmigrant works three non-consecutive days at three different worksites (whether or not the employer owns or controls such worksite(s)), within the same area of employment. Further, for

purposes of this section, the term *one-year period* shall mean the calendar year (*i.e.*, January 1 through December 31) or the employer's fiscal year, whichever the employer chooses.

(e) The employer may not make short-term placement(s) or assignment(s) of H-1B nonimmigrant(s) under this section at worksite(s) in any area of employment for which the employer has a certified LCA for the occupational classification. Further, an H-1B nonimmigrant entering the U.S. is required to be placed at a worksite in accordance with the approved petition and supporting LCA; thus, the nonimmigrant's initial placement or assignment cannot be a short-term placement under this section. In addition, the employer may not continuously rotate H-1B nonimmigrants on short-term placement or assignment to an area of employment in a manner that would defeat the purpose of the short-term placement option, which is to provide the employer with flexibility in assignments to afford enough time to obtain an approved LCA for an area where it intends to have a continuing presence (*e.g.*, an employer may not rotate H-1B nonimmigrants to an area of employment for 20-day periods, with the result that nonimmigrants are continuously or virtually continuously employed in the area of employment, in order to avoid filing an LCA; such an employer would violate the short-term placement provisions).

(f) Once any H-1B nonimmigrant's short-term placement or assignment has reached the workday limit specified in paragraph (c) of this section in an area of employment, the employer shall take one of the following actions:

(1) File an LCA and obtain ETA certification, and thereafter place any H-1B nonimmigrant(s) in that occupational classification at worksite(s) in that area pursuant to the LCA (*i.e.*, the employer shall perform all actions required in connection with such LCA, including determination of the prevailing wage and notice to workers); or

(2) Immediately terminate the placement of any H-1B nonimmigrant(s) who reaches the workday limit in an area of employment. No worker may exceed the workday limit within the one-year period specified in paragraph

(d) of this section, unless the employer first files an LCA for the occupational classification for the area of employment. Employers are cautioned that if any worker exceeds the workday limit within the one-year period, then the employer has violated the terms of its LCA(s) and the regulations in the subpart, and thereafter the short-term placement option cannot be used by the employer for H-1B nonimmigrants in that occupational classification in that area of employment.

(g) An employer is not required to use the short-term placement option provided by this section, but may choose to make each placement or assignment of an H-1B nonimmigrant at worksite(s) in a new area of employment pursuant to a new LCA for such area. Further, an employer which uses the short-term placement option is not required to continue to use the option. Such an employer may, at any time during the period identified in paragraphs (c) and (d) of this section, file an LCA for the new area of employment (performing all actions required in connection with such LCA); upon certification of such LCA, the employer's obligation to comply with this section concerning short-term placement shall terminate. (However, see § 655.731(c)(9)(iii)(C) regarding payment of business expenses for employee's travel on employer's business.)

[65 FR 80222, Dec. 20, 2000]

**§ 655.736 What are H-1B-dependent employers and willful violators?**

Two attestation obligations apply only to two types of employers: H-1B-dependent employers (as described in paragraphs (a) through (e) of this section) and employers found to have willfully violated their H-1B obligations within a certain five-year period (as described in paragraph (f) of this section). These obligations apply only to certain labor condition applications filed by such employers (as described in paragraph (g) of this section), and do not apply to LCAs filed by such employers solely for the employment of "exempt" H-1B nonimmigrants (as described in paragraph (g) of this section and § 655.737). These obligations require that such employers not displace U.S. workers from jobs (as described in

§ 655.738) and that such employers recruit U.S. workers before hiring H-1B nonimmigrants (as described in § 655.739).

(a) *What constitutes an "H-1B-dependent" employer?*

(1) "H-1B-dependent employer," for purposes of THIS subpart H and subpart I of this part, means an employer that meets one of the three following standards, which are based on the ratio between the employer's total work force employed in the U.S. (including both U.S. workers and H-1B nonimmigrants, and measured according to full-time equivalent employees) and the employer's H-1B nonimmigrant employees (a "head count" including both full-time and part-time H-1B employees) —

(i)(A) The employer has 25 or fewer full-time equivalent employees who are employed in the U.S.; and

(B) Employs more than seven H-1B nonimmigrants;

(ii)(A) The employer has at least 26 but not more than 50 full-time equivalent employees who are employed in the U.S.; and

(B) Employs more than 12 H-1B nonimmigrant; or

(iii)(A) The employer has at least 51 full-time equivalent employees who are employed in the U.S.; and

(B) Employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

(2) *"Full-time equivalent employees" (FTEs)*, for purposes of paragraph (a) of this section are to be determined according to the following standards:

(i) The determination of FTEs is to include only persons employed by the employer (as defined in § 655.715), and does not include *bona fide* consultants and independent contractors. For purposes of this section, the Department will accept the employer's designation of persons as "employees," provided that such persons are consistently treated as "employees" for all purposes including FICA, FLSA, etc.

(ii) The determination of FTEs is to be based on the following records:

(A) To determine the number of employees, the employer's quarterly tax statement (or similar document) is to be used (assuming there is no issue as

to whether all employees are listed on the tax statement); and

(B) To determine the number of hours of work by part-time employees, for purposes of aggregating such employees to FTEs, the last payroll (or the payrolls over the previous quarter, if the last payroll is not representative) is to be used, or where hours of work records are not maintained, other available information is to be used to make a reasonable approximation of hours of work (such as a standard work schedule). (But see paragraph (a)(2)(iii)(B)(1) of this section regarding the determination of FTEs for part-time employees without a computation of the hours worked by such employees.)

(iii) *The FTEs employed by the employer* means the total of the two numbers yielded by paragraphs (a)(2)(iii)(A) and (B), which follow:

(A) The number of full-time employees. A full-time employee is one who works 40 or more hours per week, unless the employer can show that less than 40 hours per week is full-time employment in its regular course of business (however, in no event would less than 35 hours per week be considered to be full-time employment). Each full-time employee equals one FTE (e.g., 50 full-time employees would yield 50 FTEs). (Note to paragraph (a)(2)(iii)(A): An employee who commonly works more than the number of hours constituting full-time employment cannot be counted as more than one FTE.); plus

(B) The part-time employees aggregated to a number of full-time equivalents, if the employer has part-time employees. For purposes of this determination, a part-time employee is one who regularly works fewer than the number of hours per week which constitutes full-time employment (e.g., employee regularly works 20 hours, where full-time employment is 35 hours per week). The aggregation of part-time employees to FTEs may be performed by either of the following methods (i.e., paragraphs (a)(2)(iii)(B)(1) or (2)):

(1) Each employee working fewer than full-time hours counted as one-half of an FTE, with the total rounded to the next higher whole number (e.g., three employees working fewer than 35

hours per week, where full-time employment is 35 hours, would yield two FTEs (i.e., 1.5 rounded to 2)); or

(2) The total number of hours worked by all part-time employees in the representative pay period, divided by the number of hours per week that constitute full-time employment, with the quotient rounded to the nearest whole number (e.g., 72 total hours of work by three part-time employees, divided by 40 (hours per week constituting full-time employment), would yield two FTEs (i.e., 1.8 rounded to 2)).

(iv) *Examples of determinations of FTEs:* Employer A has 100 employees, 70 of whom are full-time (with full-time employment shown to be 44 hours of work per week) and 30 of whom are part-time (with a total of 1004 hours of work by all 30 part-time employees during the representative pay period). Utilizing the method in paragraph (a)(2)(iii)(B)(1) of this section, this employer would have 85 FTEs: 70 FTEs for full-time employees, plus 15 FTEs for part-time employees (i.e., each of the 30 part-time employees counted as one-half of a full-time employee, as described in paragraph (a)(2)(iii)(B)(1) of this section). (This employer would have 23 FTEs for part-time employees, if these FTEs were computed as described in paragraph (a)(2)(iii)(B)(2) of this section: 1004 total hours of work by part-time employees, divided by 44 (full-time employment), yielding 22.8, rounded to 23). Employer B has 100 employees, 80 of whom are full-time (with full-time employment shown to be 40 hours of work per week) and 20 of whom are part-time (with a total of 630 hours of work by all 30 part-time employees during the representative pay period). This employer would have 90 FTEs: 80 FTEs for full-time employees, plus 10 FTEs for part-time employees (i.e., each of the 20 part-time employees counted as one-half of a full-time employee, as described in paragraph (a)(2)(iii)(B)(1) of this section) (This employer would have 16 FTEs for part-time employees, if these FTEs were computed as described in paragraph (a)(2)(iii)(B)(2) of this section: 630 total hours of work by part-time employees, divided by 40 (full-time employment), yielding 15.7, rounded to 16)).

(b) *What constitutes an “employer” for purposes of determining H-1B-dependency status?* Any group treated as a single employer under the Internal Revenue Code (IRC) at 26 U.S.C. 414(b), (c), (m) or (o) shall be treated as a single employer for purposes of the determination of H-1B-dependency. Therefore, if an employer satisfies the requirements of the IRC and relevant regulations with respect to the following groups of employees, those employees will be treated as employees of a single employer for purposes of determining whether that employer is an H-1B-dependent employer.

(1) Pursuant to section 414(b) of the IRC and related regulations, all employees “within a controlled group of corporations” (within the meaning of section 1563(a) of the IRC, determined without regard to section 1563(a)(4) and (e)(3)(C)), will be treated as employees of a single employer. A *controlled group of corporations* is a parent-subsidiary-controlled group, a brother-sister-controlled group, or a combined group. 26 U.S.C. 1563(a), 26 CFR 1.414(b)-1(a).

(i) A *parent-subsidiary-controlled group* is one or more chains of corporations connected through stock ownership with a common parent corporation where at least 80 percent of the stock (by voting rights or value) of each subsidiary corporation is owned by one or more of the other corporations (either another subsidiary or the parent corporation), and the common parent corporation owns at least 80 percent of the stock of at least one subsidiary.

(ii) A *brother-sister-controlled group* is a group of corporations in which five or fewer persons (individuals, estates, or trusts) own 80 percent or more of the stock of the corporations and certain other ownership criteria are satisfied.

(iii) A *combined group* is a group of three or more corporations, each of which is a member of a parent-subsidiary controlled group or a brother-sister-controlled group and one of which is a common parent corporation of a parent-subsidiary-controlled group and is also included in a brother-sister-controlled group.

(2) Pursuant to section 414(c) of the IRC and related regulations, all employees of trades or businesses (whether or not incorporated) that are under

common control are treated as employees of a single employer. 26 U.S.C. 414(c), 26 CFR 1.414(c)-2.

(i) Trades or businesses are under common control if they are included in:

(A) A parent-subsidiary group of trades or businesses;

(B) A brother-sister group of trades or businesses; or

(C) A combined group of trades or businesses.

(ii) Trades or businesses include sole proprietorships, partnerships, estates, trusts or corporations.

(iii) The standards for determining whether trades or businesses are under common control are similar to standards that apply to controlled groups of corporations. However, pursuant to 26 CFR 1.414(c)-2(b)(2), ownership of at least an 80 percent interest in the profits or capital interest of a partnership or the actuarial value of a trust or estate constitutes a controlling interest in a trade or business.

(3) Pursuant to section 414(m) of the IRC and related regulations, all employees of the members of an affiliated service group are treated as employees of a single employer. 26 U.S.C. 414(m).

(i) An *affiliated service group* is, generally, a group consisting of a service organization (the “first organization”), such as a health care organization, a law firm or an accounting firm, and one or more of the following:

(A) A second service organization that is a shareholder or partner in the first organization and that regularly performs services for the first organization (or is regularly associated with the first organization in performing services for third persons); or

(B) Any other organization if :

(1) A significant portion of the second organization’s business is the performance of services for the first organization (or an organization described in paragraph (b)(3)(i) of this section or for both) of a type historically performed in such service field by employees, and

(2) Ten percent or more of the interest in the second organization is held by persons who are highly compensated employees of the first organization (or an organization described in paragraph (b)(3)(i) of this section).

(ii) [Reserved]

(4) Section 414(o) of the IRC provides that the Department of the Treasury may issue regulations addressing other business arrangements, including employee leasing, in which a group of employees are treated as employed by the same employer. However, the Department of the Treasury has not issued any regulations under this provision. Therefore, that section of the IRC will not be taken into account in determining what groups of employees are considered employees of a single employer for purposes of H-1B dependency determinations, unless regulations are issued by the Treasury Department during the period the dependency provisions of the ACWIA are effective.

(5) The definitions of "single employer" set forth in paragraphs (b)(1) through (b)(3) of this section are established by the Internal Revenue Service (IRS) in regulations located at 26 CFR 1.414(b)-1(a), (c)-2 and (m)-5. Guidance on these definitions should be sought from those regulations or from the IRS.

(c) *Which employers are required to make determinations of H-1B-dependency status?* Every employer that intends to file an LCA or to file H-1B petition(s) or request(s) for extension(s) of H-1B status between January 19, 2001 and October 1, 2003 is required to determine whether it is an H-1B-dependent employer or a willful violator which, except as provided in § 655.737, will be subject to the additional obligations for H-1B-dependent employers (see paragraph (g) of this section). During this time period, no H-1B-dependent employer or willful violator may use an LCA filed before January 19, 2001 to support a new H-1B petition or request for an extension of status. Furthermore, on all LCAs filed during this period an employer will be required to attest as to whether it is an H-1B-dependent employer or willful violator. An employer that attests that it is non-H-1B-dependent but does not meet the "snap shot" test set forth in paragraph (c)(2) of this section shall make and document a full calculation of its status. However, as explained in paragraphs (c)(1) and (2), which follow, most employers would not be required to make any calculations or to create any

documentation as to the determination of H-1B status.

(1) *Employers with readily apparent status concerning H-1B-dependency need not calculate that status.* For most employers, regardless of their size, H-1B-dependency status (*i.e.*, H-1B-dependent or non-H-1B-dependent) is readily apparent and would require no calculations, in that the ratio of H-1B employees to the total workforce is obvious and can easily be compared to the definition of "H-1B-dependency" (see definition set out in paragraph (a)(1) of this section).

*For example:* Employer A with 20 employees, only one of whom is an H-1B non-immigrant, would obviously not be H-1B-dependent and would not need to make calculations to confirm that status. Employer B with 45 employees, 30 of whom are H-1B non-immigrants, would obviously be H-1B-dependent and would not need to make calculations. Employer C with 500 employees, only 30 of whom are H-1B nonimmigrants, would obviously not be H-1B-dependent and would not need to make calculations. Employer D with 1,000 employees, 850 of whom are H-1B nonimmigrants, would obviously be H-1B-dependent and would not have to make calculations.

(2) *Employers with borderline H-1B-dependency status may use a "snap-shot" test to determine whether calculation of that status is necessary.* Where an employer's H-1B-dependency status (*i.e.*, H-1B-dependent or non-H-1B-dependent) is not readily apparent, the employer may use one of the following tests to determine whether a full calculation of the status is needed:

(i) *Small employer* (50 or fewer employees). If the employer has 50 or fewer employees (both full-time and part-time, including H-1B nonimmigrants and U.S. workers), then the employer may compare the number of its H-1B nonimmigrant employees (both full-time and part-time) to the numbers specified in the definition set out in paragraph (a)(1) of this section, and shall fully calculate its H-1B-dependency status (*i.e.*, calculate FTEs) where the number of its H-1B nonimmigrant employees is above the number specified in the definition. In other words, if the employer has 25 or fewer employees, and more than seven of them are H-1B nonimmigrants, then the employer shall fully calculate its status; if the employer has at least 26 but no



more than 50 employees, and more than 12 of them are H-1B nonimmigrants, then the employer shall fully calculate its status.

(ii) *Large employer* (51 or more employees). If the number of H-1B nonimmigrant employees (both full-time and part-time), divided by the number of full-time employees (including H-1B nonimmigrants and U.S. workers), is 0.15 or more, then an employer which believes itself to be non-H-1B-dependent shall fully calculate its H-1B-dependency status (including the calculation of FTEs). In other words, if the number of full-time employees (including H-1B nonimmigrants and U.S. workers) multiplied by 0.15 yields a number that is equal to or less than the number of H-1B nonimmigrant employees (both full-time and part-time), then the employer shall attest that it is H-1B-dependent or shall fully calculate its H-1B dependency status (including the calculation of FTEs).

(d) *What documentation is the employer required to make or maintain, concerning its determination of H-1B-dependency status?* All employers are required to retain copies of H-1B petitions and requests for extensions of H-1B status filed with the INS, as well as the payroll records described in § 655.731(b)(1). The nature of any additional documentation would depend upon the general characteristics of the employer's workforce, as described in paragraphs (d)(1) through (4), which follow.

(1) *Employer with readily apparent status concerning H-1B-dependency.* If an employer's H-1B-dependency status (i.e., H-1B-dependent or non-H-1B-dependent) is readily apparent (as described in paragraph (c)(1) of this section), then that status must be reflected on the employer's LCA but the employer is not required to make or maintain any particular documentation. The public access file maintained in accordance with § 655.760 would show the H-1B-dependency status, by means of copy(ies) of the LCA(s). In the event of an enforcement action pursuant to subpart I of this part, the employer's readily apparent status could be verified through records to be made available to the Administrator (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(2) *Employer with borderline H-1B-dependency status.* An employer which uses a "snap-shot" test to determine whether it should undertake a calculation of its H-1B-dependency status (as described in paragraph (c)(2) of this section) is not required to make or maintain any documentation of that "snap-shot" test. The employer's status must be reflected on the LCA(s), which would be available in the public access file. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the "snap-shot" test (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(3) *Employer with H-1B-dependent status.* An employer which attests that it is H-1B-dependent—whether that status is readily apparent or is determined through calculations—is not required to make or maintain any documentation of the calculation. The employer's status must be reflected on the LCA(s), which would be available in the public access file. In the event of an enforcement action pursuant to subpart I of this part, the employer's designation of H-1B-dependent status on the LCA(s) would be conclusive and sufficient documentation of that status (except where the employer's status had altered to non-H-1B-dependent and had been appropriately documented, as described in paragraph (d)(5)(ii) of this section).

(4) *Employer with non-H-1B-dependent status who is required to perform full calculation.* An employer which attests that it is non-H-1B-dependent and does not meet the "snap shot" test set forth in paragraph (c)(2) of this section shall retain in its records a dated copy of its calculation that it is not H-1B-dependent. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(5) *Employer which changes its H-1B-dependency status due to changes in*

*workforce.* An employer may experience a change in its H-1B-dependency status, due to changes in the ratio of H-1B nonimmigrant to U.S. workers in its workforce. Thus it is important that employers who wish to file a new LCA or a new H-1B petition or request for extension of status remain cognizant of their dependency status and do a recheck of such status if the make-up of their workforce changes sufficiently that their dependency status might possibly change. In the event of such a change of status, the following standards will apply:

(i) Change from non-H-1B-dependent to H-1B-dependent. An employer which experiences this change in its workforce is not required to make or maintain any record of its determination of the change of its H-1B-dependency status. The employer is not required to file new LCA(s) (which would accurately state its H-1B-dependent status), unless it seeks to hire new H-1B nonimmigrants or extend the status of existing H-1B nonimmigrants (see paragraph (g) of this section).

(ii) Change from H-1B-dependent to non-H-1B-dependent. An employer which experiences this change in its workforce is required to perform a full calculation of its status (as described in paragraph (c) of this section) and to retain a copy of such calculation in its records. If the employer seeks to hire new H-1B nonimmigrants or extend the status of existing H-1B nonimmigrants (see paragraph (g) of this section), the employer shall either file new LCAs reflecting its non-H-1B-dependent status or use its existing certified LCAs reflecting an H-1B-dependency status, in which case it shall continue to be bound by the dependent-employer attestations on such LCAs. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(6) *Change in corporate structure or identity of employer.* If an employer which experiences a change in its corporate structure as the result of an acquisition, merger, "spin-off," or other

such action wishes to file a new LCA or a new H-1B petition or request for extension of status, the new employing entity shall redetermine its H-1B-dependency status in accordance with paragraphs (a) and (c) of this section (see paragraph (g) of this section). (See § 655.730(e), regarding change in corporate structure or identity of employer.) In the event of an enforcement action pursuant to subpart I of this part, the employer's calculations where required under paragraph (c) of this section and its records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(7) *"Single employer" under IRC test.* If an employer utilizes the IRC single-employer definition and concludes that it is non-H-1B-dependent, the employer shall perform the "snap-shot" test set forth in paragraph (c)(2) of this section, and if it fails to meet that test, shall attest that it is H-1B-dependent or shall perform the full calculation of dependency status in accordance with paragraph (a) of this section. The employer shall place a list of the entities included as a "single employer" in the public access file maintained in accordance with § 766.760. In addition, the employer shall retain in its records the "snap-shot" or full calculation of its status, as appropriate (showing the number of employees of each entity who are included in the numerator and denominator of the equation, whether the employer utilizes the "snap shot" test or a complete calculation as described in paragraph (c) of this section). In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(e) *How is an employer's H-1B-dependency status to be shown on the LCA?* The employer is required to designate its status by marking the appropriate box

on the Form ETA-9035 or 9035E (*i.e.*, either H-1B-dependent or non-H-1B-dependent). An employer which marks the designation of “H-1B-dependent” may also mark the designation of its intention to seek only “exempt” H-1B nonimmigrants on the LCA (see paragraph (g) of this section, and § 655.737). In the event that an employer has filed an LCA designating its H-1B-dependency status (either H-1B-dependent or non-H-1B-dependent) and thereafter experiences a change of status, the employer cannot use that LCA to support H-1B petitions for new nonimmigrants or requests for extension of H-1B status for existing nonimmigrants. Similarly, an employer that is or becomes H-1B-dependent cannot continue to use an LCA filed before January 19, 2001 to support new H-1B petitions or requests for extension of status. In such circumstances, the employer shall file a new LCA accurately designating its status and shall use that new LCA to support new petitions or requests for extensions of status.

(f) *What constitutes a “willful violator” employer and what are its special obligations?*

(1) “*Willful violator*” or “*willful violator employer*,” for purposes of this subpart H and subpart I of this part means an employer that meets all of the following standards (*i.e.*, paragraphs (f)(1)(i) through (iii))—

(i) A finding of violation by the employer (as described in paragraph (f)(1)(ii)) is entered in either of the following two types of enforcement proceeding:

(A) A Department of Labor proceeding under section 212(n)(2) of the Act (8 U.S.C. 1182(n)(2)(C) and subpart I of this part; or

(B) A Department of Justice proceeding under section 212(n)(5) of the Act (8 U.S.C. 1182(n)(5)).

(ii) The agency finds that the employer has committed either a willful failure or a misrepresentation of a material fact during the five-year period preceding the filing of the LCA; and

(iii) The agency’s finding is entered on or after October 21, 1998.

(2) For purposes of this paragraph, “willful failure” means a violation which is a “willful failure” as defined in § 655.805(c).

(g) What LCAs are subject to the additional attestation obligations?

(1) An employer that is “H-1B-dependent” (under the standards described in paragraphs (a) through (e) of this section) or is a “willful violator” (under the standards described in paragraph (f) of this section) is subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers (under the standards described in §§ 655.738 and 655.739, respectively) for all LCAs that are filed during the time period specified in paragraph (2)(g) of this section, to be used to support any petitions for new H-1B nonimmigrants or any requests for extensions of status for existing H-1B nonimmigrants. An LCA which does not accurately indicate the employer’s H-1B-dependency status or willful violator status shall not be used to support H-1B petitions or requests for extensions. Further, an employer which falsely attests to non-H-1B-dependency status, or which experiences a change of status to H-1B-dependency but continues to use the LCA to support new H-1B petitions or requests for extension of status shall—despite the LCA designation of non-H-1B-dependency—be held to its obligations to comply with the attestation requirements concerning nondisplacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively), as explicitly acknowledged and agreed on the LCA.

(2) During the period between January 19, 2001 and October 1, 2003, any employer that is “H-1B-dependent” (under the standards described in paragraphs (a) through (e) of this section) or is a “willful violator” (under the standards described in paragraph (f) of this section) shall file a new LCA accurately indicating that status in order to be able to file petition(s) for new H-1B nonimmigrant(s) or request(s) for extension(s) of status for existing H-1B nonimmigrant(s). An LCA filed prior to January 19, 2001 may not be used to support petition(s) for new H-1B nonimmigrant(s) or request(s) for extension(s) of status for existing H-1B nonimmigrants.

(3) An employer that files an LCA indicating “H-1B-dependent” and/or

“willful violator” status may also indicate on the LCA that all the H-1B nonimmigrants to be employed pursuant to that LCA will be “exempt H-1B nonimmigrants” as described in § 655.737. Such an LCA is not subject to the additional LCA attestation obligations, *provided that* all H-1B nonimmigrants employed under it are, in fact, exempt. An LCA which indicates that it will be used only for exempt H-1B nonimmigrants shall not be used to support H-1B petitions or requests for extensions of status for H-1B nonimmigrants who are not, in fact, exempt. Further, an employer which attests that the LCA will be used only for exempt H-1B nonimmigrants but uses the LCA to employ non-exempt H-1B nonimmigrants (through petitions and/or extensions of status) shall—despite the LCA designation of exempt H-1B nonimmigrants—be held to its obligations to comply with the attestation requirements concerning nondisplacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively), as explicitly acknowledged and agreed on the LCA.

(4) The special provisions for H-1B-dependent employers and willful violator employers do not apply to LCAs filed after October 1, 2003 (see 8 U.S.C. 1182(n)(1)(E)(ii)). However, all LCAs filed prior to that date, and containing the additional attestation obligations described in this section and §§ 655.737 through 655.739, will remain in effect with regard to those obligations, for so long as any H-1B nonimmigrant(s) employed pursuant to the LCA(s) remain employed by the employer.

[65 FR 80223, Dec. 20, 2000; 66 FR 1375, Jan. 8, 2001, as amended at 66 FR 63302, Dec. 5, 2001]

**§ 655.737 What are “exempt” H-1B nonimmigrants, and how does their employment affect the additional attestation obligations of H-1B-dependent employers and willful violator employers?**

(a) An employer that is H-1B-dependent or a willful violator of the H-1B program requirements (as described in § 655.736) is subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and

655.739, respectively) for all LCAs that are filed during the time period specified in § 655.736(g). However, these additional obligations do not apply to an LCA filed by such an employer if the LCA is used only for the employment of “exempt” H-1B nonimmigrants (through petitions and/or extensions of status) as described in this section.

(b) *What is the test or standard for determining an H-1B nonimmigrant’s “exempt” status?* An H-1B nonimmigrant is “exempt” for purposes of this section if the nonimmigrant meets either of the two following criteria:

(1) Receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least \$60,000; or

(2) Has attained a master’s or higher degree (or its equivalent) in a specialty related to the intended employment.

(c) *How is the \$60,000 annual wage to be determined?* The H-1B nonimmigrant can be considered to be an “exempt” worker, for purposes of this section, if the nonimmigrant actually receives hourly wages or annual salary totaling at least \$60,000 in the calendar year. The standards applicable to the employer’s satisfaction of the required wage obligation are applicable to the determination of whether the \$60,000 wages or salary are received (see § 655.731(c)(2) and (3)). Thus, employer contributions or costs for benefits such as health insurance, life insurance, and pension plans cannot be counted toward this \$60,000. The compensation to be counted or credited for these purposes could include cash bonuses and similar payments, *provided that* such compensation is paid to the worker “cash in hand, free and clear, when due” (§ 655.731(c)(1)), meaning that the compensation has readily determinable market value, is readily convertible to cash tender, and is actually received by the employee when due (which must be within the year for which the employer seeks to count or credit the compensation toward the employee’s \$60,000 earnings to qualify for exempt status). Cash bonuses and similar compensation can be counted or credited toward the \$60,000 for “exempt” status only if payment is assured (*i.e.*, if the payment is contingent or conditional on some event such as the employer’s annual

profits, the employer must guarantee payment even if the contingency is not met). The full \$60,000 annual wages or salary must be received by the employee in order for the employee to have "exempt" status. The wages or salary required for "exempt" status cannot be decreased or *pro rated* based on the employee's part-time work schedule; an H-1B nonimmigrant working part-time, whose actual annual compensation is less than \$60,000, would not qualify as exempt on the basis of wages, even if the worker's earnings, if projected to a full-time work schedule, would theoretically exceed \$60,000 in a year. Where an employee works for less than a full year, the employee must receive at least the appropriate *pro rata* share of the \$60,000 in order to be "exempt" (e.g., an employee who resigns after three months must be paid at least \$15,000). In the event of an investigation pursuant to subpart I of this part, the Administrator will determine whether the employee has received the required \$60,000 per year, using the employee's anniversary date to determine the one-year period; for an employee who had worked for less than a full year (either at the beginning of employment, or after his/her last anniversary date), the determination as to the \$60,000 annual wages will be on a *pro rata* basis (i.e., whether the employee had been paid at a rate of \$60,000 per year (or \$5,000 per month) including any unpaid, guaranteed bonuses or similar compensation).

(d) *How is the "master's or higher degree (or its equivalent) in a specialty related to the intended employment" to be determined?*

(1) "Master's or higher degree (or its equivalent)," for purposes of this section means a foreign academic degree from an institution which is accredited or recognized under the law of the country where the degree was obtained, and which is equivalent to a master's or higher degree issued by a U.S. academic institution. The equivalence to a U.S. academic degree cannot be established through experience or through demonstration of expertise in the academic specialty (i.e., no "time equivalency" or "performance equivalency" will be recognized as substituting for a degree issued by an academic institu-

tion). The INS and the Department will consult appropriate sources of expertise in making the determination of equivalency between foreign and U.S. academic degrees. Upon the request of the INS or the Department, the employer shall provide evidence to establish that the H-1B nonimmigrant has received the degree, that the degree was earned in the asserted field of study, including an academic transcript of courses, and that the institution from which the degree was obtained was accredited or recognized.

(2) "Specialty related to the intended employment," for purposes of this section, means that the academic degree is in a specialty which is generally accepted in the industry or occupation as an appropriate or necessary credential or skill for the person who undertakes the employment in question. A "specialty" which is not generally accepted as appropriate or necessary to the employment would not be considered to be sufficiently "related" to afford the H-1B nonimmigrant status as an "exempt H-1B nonimmigrant."

(e) *When and how is the determination of the H-1B nonimmigrant's "exempt" status to be made?* An employer that is H-1B-dependent or a willful violator (as described in §655.736) may designate on the LCA that the LCA will be used only to support H-1B petition(s) and/or request(s) for extension of status for "exempt" H-1B nonimmigrants.

(1) If the employer makes the designation of "exempt" H-1B nonimmigrant(s) on the LCA, then the INS—as part of the adjudication of the H-1B petition or request for extension of status—will determine the worker's "exempt" status, since an H-1B petition must be supported by an LCA consistent with the petition (i.e., occupation, area of intended employment, exempt status). The employer shall maintain, in the public access file maintained in accordance with §755.760, a list of the H-1B nonimmigrant(s) whose petition(s) and/or request(s) are supported by LCA(s) which the employer has attested will be used only for exempt H-1B nonimmigrants. In the event of an investigation under subpart I of this part, the Administrator will give conclusive effect to an INS determination of "exempt" status based on

the nonimmigrant's educational attainments (*i.e.*, master's or higher degree (or its equivalent) in a specialty related to the intended employment) unless the determination was based on false information. If the INS determination of "exempt" status was based on the assertion that the nonimmigrant would receive wages (including cash bonuses and similar compensation) at an annual rate equal to at least \$60,000, the employer shall provide evidence to show that such wages actually were received by the nonimmigrant (consistent with paragraph (c) of this section and the regulatory standards for satisfaction or payment of the required wages as described in § 655.731(c)(3)).

(2) If the employer makes the designation of "exempt" H-1B nonimmigrants on the LCA, but is found in an enforcement action under subpart I of this part to have used the LCA to employ nonimmigrants who are, in fact, not exempt, then the employer will be subject to a finding that it failed to comply with the nondisplacement and recruitment obligations (as described in §§ 655.738 and 655.739, respectively) and may be assessed appropriate penalties and remedies.

(3) If the employer does not make the designation of "exempt" H-1B nonimmigrants on the LCA, then the employer has waived the option of not being subject to the additional LCA attestation obligations on the basis of employing only exempt H-1B nonimmigrants under the LCA. In the event of an investigation under subpart I of this part, the Administrator will not consider the question of the nonimmigrant(s)'s "exempt" status in determining whether an H-1B-dependent employer or willful violator employer has complied with such additional LCA attestation obligations.

[65 FR 80227, Dec. 20, 2000]

**§ 655.738 What are the "non-displacement of U.S. workers" obligations that apply to H-1B-dependent employers and willful violators, and how do they operate?**

An employer that is subject to these additional attestation obligations (under the standards described in § 655.736) is prohibited from displace-

ment of any U.S. worker(s)—whether directly (in its own workforce) or secondarily (at a worksite of a second employer)—under the standards set out in this section.

(a) "*United States worker*" ("U.S. worker") is defined in § 655.715.

(b) "*Displacement*," for purposes of this section, has two components: "lay off" of U.S. worker(s), and "essentially equivalent jobs" held by U.S. worker(s) and H-1B nonimmigrant(s).

(1) "*Lay off*" of a U.S. worker means that the employer has caused the worker's loss of employment, other than through—

(i) Discharge of a U.S. worker for inadequate performance, violation of workplace rules, or other cause related to the worker's performance or behavior on the job;

(ii) A U.S. worker's voluntary departure or voluntary retirement (to be assessed in light of the totality of the circumstances, under established principles concerning "constructive discharge" of workers who are pressured to leave employment);

(iii) Expiration of a grant or contract under which a U.S. worker is employed, other than a temporary employment contract entered into in order to evade the employer's non-displacement obligation. The question is whether the loss of the contract or grant has caused the worker's loss of employment. It would not be a layoff where the job loss results from the expiration of a grant or contract without which there is no alternative funding or need for the U.S. worker's position on that or any other grant or contract (*e.g.*, the expiration of a research grant that funded a project on which the worker was employed at an academic or research institution; the expiration of a staffing firm's contract with a customer where the U.S. worker was hired expressly to work pursuant to that contract and the employer has no practice of moving workers to other customers or projects upon the expiration of contract(s)). On the other hand, it would be a layoff where the employer's normal practice is to move the U.S. worker from one contract to another when a contract expires, and work on another contract for which the worker is qualified is available (*e.g.*, staffing firm's contract

with one customer ends and another contract with a different customer begins); or

(iv) A U.S. worker who loses employment is offered, as an alternative to such loss, a similar employment opportunity with the same employer (or, in the case of secondary displacement at a worksite of a second employer, as described in paragraph (d) of this section, a similar employment opportunity with either employer) at equivalent or higher compensation and benefits than the position from which the U.S. worker was discharged, regardless of whether or not the U.S. worker accepts the offer. The validity of the offer of a similar employment opportunity will be assessed in light of the following factors:

(A) The offer is a *bona fide* offer, rather than an offer designed to induce the U.S. worker to refuse or an offer made with the expectation that the worker will refuse;

(B) The offered job provides the U.S. worker an opportunity similar to that provided in the job from which he/she is discharged, in terms such as a similar level of authority, discretion, and responsibility, a similar opportunity for advancement within the organization, and similar tenure and work scheduling;

(C) The offered job provides the U.S. worker equivalent or higher compensation and benefits to those provided in the job from which he/she is discharged. The comparison of compensation and benefits includes all forms of remuneration for employment, whether or not called wages and irrespective of the time of payment (*e.g.*, salary or hourly wage rate; profit sharing; retirement plan; expense account; use of company car). The comparison also includes such matters as cost of living differentials and relocation expenses (*e.g.*, a New York City "opportunity" at equivalent or higher compensation and benefits offered to a worker discharged from a job in Kansas City would provide a wage adjustment from the Kansas City pay scale and would include relocation costs).

(2) *Essentially equivalent jobs.* For purposes of the displacement prohibition, the job from which the U.S. worker is laid off must be essentially equivalent

to the job for which an H-1B nonimmigrant is sought. To determine whether the jobs of the laid off U.S. worker(s) and the H-1B nonimmigrant(s) are essentially equivalent, the comparison(s) shall be on a one-to-one basis where appropriate (*i.e.*, one U.S. worker left employment and one H-1B nonimmigrant joined the workforce) but shall be broader in focus where appropriate (*e.g.*, an employer, through reorganization, eliminates an entire department with several U.S. workers and then staffs this department's function(s) with H-1B nonimmigrants). The following comparisons are to be made:

(i) Job responsibilities. The job of the H-1B nonimmigrant must involve essentially the same duties and responsibilities as the job from which the U.S. worker was laid off. The comparison focuses on the core elements of and competencies for the job, such as supervisory duties, or design and engineering functions, or budget and financial accountability. Peripheral, non-essential duties that could be tailored to the particular abilities of the individual workers would not be determinative in this comparison. The job responsibilities must be similar and both workers capable of performing those duties.

(ii) Qualifications and experience of the workers. The qualifications of the laid off U.S. worker must be substantially equivalent to the qualifications of the H-1B nonimmigrant. The comparison is to be confined to the experience and qualifications (*e.g.*, training, education, ability) of the workers which are directly relevant to the actual performance requirements of the job, including the experience and qualifications that would materially affect a worker's relative ability to perform the job better or more efficiently. While it would be appropriate to compare whether the workers in question have "substantially equivalent" qualifications and experience, the workers need not have identical qualifications and experience (*e.g.*, a bachelor's degree from one accredited university would be considered to be substantially equivalent to a bachelor's degree from another accredited university; 15 years experience in an occupation would be

substantially equivalent to 10 years experience in that occupation). It would not be appropriate to compare the workers' relative ages, their sexes, or their ethnic or religious identities.

(iii) Area of employment. The job of the H-1B nonimmigrant must be located in the same area of employment as the job from which the U.S. worker was laid off. The comparison of the locations of the jobs is confined to the area within normal commuting distance of the worksite or physical location where the work of the H-1B nonimmigrant is or will be performed. For purposes of this comparison, if both such worksites or locations are within a Metropolitan Statistical Area or a Primary Metropolitan Statistical Area, they will be deemed to be within the same area of employment.

(3) The worker's rights under a collective bargaining agreement or other employment contract are not affected by the employer's LCA obligations as to non-displacement of such worker.

(c) *Direct displacement.* An H-1B-dependent or willful-violator employer (as described in §655.736) is prohibited from displacing a U.S. worker in its own workforce (*i.e.*, a U.S. worker "employed by the employer") within the period beginning 90 days before and ending 90 days after the filing date of an H-1B petition supported by an LCA described in §655.736(g). The following standards and guidance apply under the direct displacement prohibition:

(1) *Which U.S. workers are protected against "direct displacement"?* This prohibition covers the H-1B employer's own workforce—U.S. workers "employed by the employer"—who are employed in jobs that are essentially equivalent to the jobs for which the H-1B nonimmigrant(s) are sought (as described in paragraph (b)(2) of this section). The term "employed by the employer" is defined in §655.715.

(2) *When does the "direct displacement" prohibition apply?* The H-1B employer is prohibited from displacing a U.S. worker during a specific period of time before and after the date on which the employer files any H-1B petition supported by the LCA which is subject to the non-displacement obligation (as described in §655.736(g)). This protected

period is from 90 days before until 90 days after the petition filing date.

(3) *What constitutes displacement of a U.S. worker?* The H-1B employer is prohibited from laying off a U.S. worker from a job that is essentially the equivalent of the job for which an H-1B nonimmigrant is sought (as described in paragraph (b)(1) of this section).

(d) *Secondary displacement.* An H-1B-dependent or willful-violator employer (as described in §655.736) is prohibited from placing certain H-1B nonimmigrant(s) with another employer where there are indicia of an employment relationship between the nonimmigrant and that other employer (thus possibly affecting the jobs of U.S. workers employed by that other employer), unless and until the H-1B employer makes certain inquiries and/or has certain information concerning that other employer's displacement of similarly employed U.S. workers in its workforce. Employers are cautioned that even if the required inquiry of the secondary employer is made, the H-1B-dependent or willful violator employer shall be subject to a finding of a violation of the secondary displacement prohibition if the secondary employer, in fact, displaces any U.S. worker(s) during the applicable time period (see §655.810(d)). The following standards and guidance apply under the secondary displacement prohibition:

(1) *Which U.S. workers are protected against "secondary displacement"?* This provision applies to U.S. workers employed by the other or "secondary" employer (not those employed by the H-1B employer) in jobs that are essentially equivalent to the jobs for which certain H-1B nonimmigrants are placed with the other/secondary employer (as described in paragraph (b)(2) of this section). The term "employed by the employer" is defined in §655.715.

(2) *Which H-1B nonimmigrants activate the secondary displacement prohibition?* Not every placement of an H-1B nonimmigrant with another employer will activate the prohibition and—depending upon the particular facts—an H-1B employer (such as a service provider) may be able to place H-1B nonimmigrant(s) at a client or customer's worksite without being subject to the prohibition. The prohibition applies to



the placement of an H-1B nonimmigrant whose H-1B petition is supported by an LCA described in § 655.736(g) and whose placement with the other/secondary employer meets both of the following criteria:

(i) The nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by the other/secondary employer; and

(ii) There are indicia of an employment relationship between the nonimmigrant and the other/secondary employer. The relationship between the H-1B-nonimmigrant and the other/secondary need not constitute an "employment" relationship (as defined in § 655.715), and the applicability of the secondary displacement provision does not establish such a relationship. Relevant indicia of an employment relationship include:

(A) The other/secondary employer has the right to control when, where, and how the nonimmigrant performs the job (the presence of this indicia would suggest that the relationship between the nonimmigrant and the other/secondary employer approaches the relationship which triggers the secondary displacement provision);

(B) The other/secondary employer furnishes the tools, materials, and equipment;

(C) The work is performed on the premises of the other/secondary employer (this indicia alone would not trigger the secondary displacement provision);

(D) There is a continuing relationship between the nonimmigrant and the other/secondary employer;

(E) The other/secondary employer has the right to assign additional projects to the nonimmigrant;

(F) The other/secondary employer sets the hours of work and the duration of the job;

(G) The work performed by the nonimmigrant is part of the regular business (including governmental, educational, and non-profit operations) of the other/secondary employer;

(H) The other/secondary employer is itself in business; and

(I) The other/secondary employer can discharge the nonimmigrant from providing services.

(3) *What other/secondary employers are included in the prohibition on secondary displacement of U.S. workers by the H-1B employer?* The other/secondary employer who accepts the placement and/or services of the H-1B employer's nonimmigrant employee(s) need not be an H-1B employer. The other/secondary employer would often be (but is not limited to) the client or customer of an H-1B employer that is a staffing firm or a service provider which offers the services of H-1B nonimmigrants under a contract (e.g., a medical staffing firm under contract with a nursing home provides H-1B nonimmigrant physical therapists; an information technology staffing firm under contract with a bank provides H-1B nonimmigrant computer engineers). Only the H-1B employer placing the nonimmigrant with the secondary employer is subject to the non-displacement obligation on the LCA, and only that employer is liable in an enforcement action pursuant to subpart I of this part if the other/secondary employer, in fact, displaces any of its U.S. worker(s) during the applicable time period. The other/secondary employer will not be subject to sanctions in an enforcement action pursuant to subpart I of this part (except in circumstances where such other/secondary employer is, in fact, an H-1B employer and is found to have failed to comply with its own obligations). (Note to paragraph (d)(3): Where the other/secondary employer's relationship to the H-1B nonimmigrant constitutes "employment" for purposes of a statute other than the H-1B provision of the INA, such as the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*), the other/secondary employer would be subject to all obligations of an employer of the nonimmigrant under such other statute.)

(4) *When does the "secondary displacement" prohibition apply?* The H-1B employer's obligation of inquiry concerns the actions of the other/secondary employer during the specific period beginning 90 days before and ending 90 days after the date of the placement of the H-1B nonimmigrant(s) with such other/secondary employer.

(5) *What are the H-1B employer's obligations concerning inquiry and/or information as to the other/secondary employer's displacement of U.S. workers?* The H-1B employer is prohibited from placing the H-1B nonimmigrant with another employer, unless the H-1B employer has inquired of the other/secondary employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of such placement, the other/secondary employer has displaced or intends to displace a similarly-employed U.S. worker employed by such other/secondary employer. The following standards and guidance apply to the H-1B employer's obligation:

(i) The H-1B employer is required to exercise due diligence and to make a reasonable effort to enquire about potential secondary displacement, through methods which may include (but are not limited to)—

(A) Securing and retaining a written assurance from the other/secondary employer that it has not and does not intend to displace a similarly-employed U.S. worker within the prescribed period;

(B) Preparing and retaining a memorandum to the file, prepared at the same time or promptly after receiving the other/secondary employer's oral statement that it has not and does not intend to displace a similarly-employed U.S. worker within the prescribed period (such memorandum shall include the substance of the conversation, the date of the communication, and the names of the individuals who participated in the conversation, including the person(s) who made the inquiry on behalf of the H-1B employer and made the statement on behalf of the other/secondary employer); or

(C) including a secondary displacement clause in the contract between the H-1B employer and the other/secondary employer, whereby the other/secondary employer would agree that it has not and will not displace similarly-employed U.S. workers within the prescribed period.

(ii) The employer's exercise of due diligence may require further, more particularized inquiry of the other/secondary employer in circumstances where there is information which indi-

cates that U.S. worker(s) have been or will be displaced (e.g., where the H-1B nonimmigrants will be performing functions that the other/secondary employer performed with its own workforce in the past). The employer is not permitted to disregard information which would provide knowledge about potential secondary displacement (e.g., newspaper reports of relevant lay-offs by the other/secondary employer) if such information becomes available before the H-1B employer's placement of H-1B nonimmigrants with such employer. Under such circumstances, the H-1B employer would be expected to recontact the other/secondary employer and receive credible assurances that no lay-offs of similarly-employed U.S. workers are planned or have occurred within the prescribed period.

(e) *What documentation is required of H-1B employers concerning the non-displacement obligation?* The H-1B employer is responsible for demonstrating its compliance with the non-displacement obligation (whether direct or indirect), if applicable.

(1) Concerning *direct displacement* (as described in paragraph (c) of this section), the employer is required to retain all records the employer creates or receives concerning the circumstances under which each U.S. worker, in the same locality and same occupation as any H-1B nonimmigrant(s) hired, left its employ in the period from 90 days before to 90 days after the filing date of the employer's petition for the H-1B nonimmigrant(s), and for any such U.S. worker(s) for whom the employer has taken any action during the period from 90 days before to 90 days after the filing date of the H-1B petition to cause the U.S. worker's termination (e.g., a notice of future termination of the employee's job). For all such employees, the H-1B employer shall retain at least the following documents: the employee's name, last-known mailing address, occupational title and job description; any documentation concerning the employee's experience and qualifications, and principal assignments; all documents concerning the departure of such employees, such as notification by the employer of termination of employment prepared by the

employer or the employee and any responses thereto, and evaluations of the employee's job performance. Finally, the employer is required to maintain a record of the terms of any offers of similar employment to such U.S. workers and the employee's response thereto.

(2) Concerning *secondary displacement* (as described in paragraph (d) of this section), the H-1B employer is required to maintain documentation to show the manner in which it satisfied its obligation to make inquiries as to the displacement of U.S. workers by the other/secondary employer with which the H-1B employer places any H-1B nonimmigrants (as described in paragraph (d)(5) of this section).

[65 FR 80228, Dec. 20, 2000]

**§ 655.739 What is the "recruitment of U.S. workers" obligation that applies to H-1B-dependent employers and willful violators, and how does it operate?**

An employer that is subject to this additional attestation obligation (under the standards described in § 655.736) is required—prior to filing the LCA or any petition or request for extension of status supported by the LCA—to take good faith steps to recruit U. S. workers in the United States for the job(s) in the United States for which the H-1B nonimmigrant(s) is/are sought. The recruitment shall use procedures that meet industry-wide standards and offer compensation that is at least as great as the required wage to be paid to H-1B nonimmigrants pursuant to § 655.731(a) (*i.e.*, the higher of the local prevailing wage or the employer's actual wage). The employer may use legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner. This section provides guidance for the employer's compliance with the recruitment obligation.

(a) "*United States worker*" ("U.S. worker") is defined in § 655.715.

(b) "*Industry*," for purposes of this section, means the set of employers which primarily compete for the same types of workers as those who are the subjects of the H-1B petitions to be

filed pursuant to the LCA. Thus, a hospital, university, or computer software development firm is to use the recruitment standards utilized by the health care, academic, or information technology industries, respectively, in hiring workers in the occupations in question. Similarly, a staffing firm, which places its workers at job sites of other employers, is to use the recruitment standards of the industry which primarily employs such workers (*e.g.*, the health care industry, if the staffing firm is placing physical therapists (whether in hospitals, nursing homes, or private homes); the information technology industry, if the staffing firm is placing computer programmers, software engineers, or other such workers).

(c) "*Recruitment*," for purposes of this section, means the process by which an employer seeks to contact or to attract the attention of person(s) who may apply for employment, solicits applications from person(s) for employment, receives applications, and reviews and considers applications so as to present the appropriate candidates to the official(s) who make(s) the hiring decision(s) (*i.e.*, pre-selection treatment of applications and applicants).

(d) "*Solicitation methods*," for purposes of this section, means the techniques by which an employer seeks to contact or to attract the attention of potential applicants for employment, and to solicit applications from person(s) for employment.

(1) Solicitation methods may be either external or internal to the employer's workforce (with internal solicitation to include current and former employees).

(2) Solicitation methods may be either active (where an employer takes positive, proactive steps to identify potential applicants and to get information about its job openings into the hands of such person(s)) or passive (where potential applicants find their way to an employer's job announcements).

(i) Active solicitation methods include direct communication to incumbent workers in the employer's operation and to workers previously employed in the employer's operation and elsewhere in the industry; providing

training to incumbent workers in the employer's organization; contact and outreach through collective bargaining organizations, trade associations and professional associations; participation in job fairs (including at minority-serving institutions, community/junior colleges, and vocational/technical colleges); use of placement services of colleges, universities, community/junior colleges, and business/trade schools; use of public and/or private employment agencies, referral agencies, or recruitment agencies ("headhunters").

(ii) Passive solicitation methods include advertising in general distribution publications, trade or professional journals, or special interest publications (e.g., student-oriented; targeted to underrepresented groups, including minorities, persons with disabilities, and residents of rural areas); America's Job Bank or other Internet sites advertising job vacancies; notices at the employer's worksite(s) and/or on the employer's Internet "home page."

(e) *How are "industry-wide standards for recruitment" to be identified?* An employer is not required to utilize any particular number or type of recruitment methods, and may make a determination of the standards for the industry through methods such as trade organization surveys, studies by consultative groups, or reports/statements from trade organizations. An employer which makes such a determination should be prepared to demonstrate the industry-wide standards in the event of an enforcement action pursuant to subpart I of this part. An employer's recruitment shall be at a level and through methods and media which are normal, common or prevailing in the industry, including those strategies that have been shown to be successfully used by employers in the industry to recruit U.S. workers. An employer may not utilize only the lowest common denominator of recruitment methods used in the industry, or only methods which could reasonably be expected to be likely to yield few or no U.S. worker applicants, even if such unsuccessful recruitment methods are commonly used by employers in the industry. An employer's recruitment methods shall include, at a minimum, the following:

(1) Both internal and external recruitment (i.e., both within the employer's workforce (former as well as current workers) and among U.S. workers elsewhere in the economy); and

(2) At least some active recruitment, whether internal (e.g., training the employer's U.S. worker(s) for the position(s)) or external (e.g., use of recruitment agencies or college placement services).

(f) *How are "legitimate selection criteria relevant to the job that are normal or customary to the type of job involved" to be identified?* In conducting recruitment of U.S. workers (i.e., in soliciting applications and in pre-selection screening or considering of applicants), an employer shall apply selection criteria which satisfy all of the following three standards (i.e., paragraph (b) (1) through (3)). Under these standards, an employer would not apply spurious criteria that discriminate against U.S. worker applicants in favor of H-1B nonimmigrants. An employer that uses criteria which fail to meet these standards would be considered to have failed to conduct its recruitment of U.S. workers in good faith.

(1) *Legitimate criteria*, meaning criteria which are legally cognizable and not violative of any applicable laws (e.g., employer may not use age, sex, race or national origin as selection criteria);.

(2) *Relevant to the job*, meaning criteria which have a nexus to the job's duties and responsibilities; and

(3) *Normal and customary to the type of job involved*, meaning criteria which would be necessary or appropriate based on the practices and expectations of the industry, rather than on the preferences of the particular employer.

(g) *What actions would constitute a prohibited "discriminatory manner" of recruitment?* The employer shall not apply otherwise-legitimate screening criteria in a manner which would skew the recruitment process in favor of H-1B nonimmigrants. In other words, the employer's application of its screening criteria shall provide full and fair solicitation and consideration of U.S. applicants. The recruitment would be considered to be conducted in a discriminatory manner if the employer

applied its screening criteria in a disparate manner (whether between H-1B and U.S. workers, or between jobs where H-1B nonimmigrants are involved and jobs where such workers are not involved). The employer would also be considered to be recruiting in a discriminatory manner if it used screening criteria that are prohibited by any applicable discrimination law (e.g., sex, race, age, national origin). The employer that conducts recruitment in a discriminatory manner would be considered to have failed to conduct its recruitment of U.S. workers in good faith.

(h) *What constitute "good faith steps" in recruitment of U.S. workers?* The employer shall perform its recruitment, as described in paragraphs (d) through (g) of this section, so as to offer fair opportunities for employment to U.S. workers, without skewing the recruitment process against U.S. workers or in favor of H-1B nonimmigrants. No specific regimen is required for solicitation methods seeking applicants or for pre-selection treatment screening applicants. The employer's recruitment process, including pre-selection treatment, must assure that U.S. workers are given a fair chance for consideration for a job, rather than being ignored or rejected through a process that serves the employer's preferences with respect to the make up of its workforce (e.g., the Department would look with disfavor on a practice of interviewing H-1B applicants but not U.S. applicants, or a practice of screening the applications of H-1B nonimmigrants differently from the applications of U.S. workers). The employer shall not exercise a preference for its incumbent nonimmigrant workers who do not yet have H-1B status (e.g., workers on student visas). The employer shall recruit in the United States, seeking U.S. worker(s), for the job(s) in the United States for which H-1B nonimmigrant(s) are or will be sought.

(i) *What documentation is the employer required to make or maintain, concerning its recruitment of U.S. workers?*

(1) The employer shall maintain documentation of the recruiting methods used, including the places and dates of the advertisements and postings or

other recruitment methods used, the content of the advertisements and postings, and the compensation terms (if such are not included in the content of the advertisements and postings). The documentation may be in any form, including copies of advertisements or proofs from the publisher, the order or confirmation from the publisher, an electronic or printed copy of the Internet posting, or a memorandum to the file.

(2) The employer shall retain any documentation it has received or prepared concerning the treatment of applicants, such as copies of applications and/or related documents, test papers, rating forms, records regarding interviews, and records of job offers and applicants' responses. To comply with this requirement, the employer is not required to create any documentation it would not otherwise create.

(3) The documentation maintained by the employer shall be made available to the Administrator in the event of an enforcement action pursuant to subpart I of this part. The documentation shall be maintained for the period of time specified in § 655.760.

(4) The employer's public access file maintained in accordance with § 655.760 shall contain information summarizing the principal recruitment methods used and the time frame(s) in which such recruitment methods were used. This may be accomplished either through a memorandum or through copies of pertinent documents.

(j) In addition to conducting good faith recruitment of U.S. workers (as described in paragraphs (a) through (h) of this section), the employer is required to have offered the job to any U.S. worker who applies and is equally or better qualified for the job than the H-1B nonimmigrant (see 8 U.S.C. 1182(n)(1)(G)(i)(II)); this requirement is enforced by the Department of Justice (see 8 U.S.C. 1182(n)(5); 20 CFR 655.705(c)).

[65 FR 80231, Dec. 20, 2000]

**§ 655.740 What actions are taken on labor condition applications?**

(a) *Actions on labor condition applications submitted for filing.* Once a labor condition application has been received from an employer, a determination

shall be made by the ETA regional Certifying Officer whether to certify the labor condition application or return it to the employer not certified.

(1) *Certification of labor condition application.* Where all items on Form ETA 9035 or Form ETA 9035E have been completed, the form is not obviously inaccurate, and in the case of Form ETA 9035, it contains the signature of the employer or its authorized agent or representative, the regional Certifying Officer shall certify the labor condition application unless it falls within one of the categories set forth in paragraph (a)(2) of this section. The Certifying Officer shall make a determination to certify or not certify the labor condition application within 7 working days of the date the application is received and date-stamped by the Department. If the labor condition application is certified, the regional Certifying Officer shall return a certified copy of the labor condition application to the employer or the employer's authorized agent or representative. The employer shall file the certified labor condition application with the appropriate INS office in the manner prescribed by INS. The INS shall determine whether each occupational classification named in the certified labor condition application is a specialty occupation or is a fashion model of distinguished merit and ability.

(2) *Determinations not to certify labor condition applications.* ETA shall not certify a labor condition application and shall return such application to the employer or the employer's authorized agent or representative, when either or both of the following two conditions exists:

(i) *When the Form ETA 9035 or 9035E is not properly completed.* Examples of a Form ETA 9035 or 9035E which is not properly completed include instances where the employer has failed to check all the necessary boxes; or where the employer has failed to state the occupational classification, number of non-immigrants sought, wage rate, period of intended employment, place of intended employment, or prevailing wage and its source; or, in the case of Form ETA 9035, where the application does not contain the signature of the em-

ployer or the employer's authorized representative.

(ii) *When the Form ETA 9035 or ETA 9035E contains obvious inaccuracies.* An obvious inaccuracy will be found if the employer files an application in error—e.g., where the Administrator, Wage and Hour Division, after notice and opportunity for a hearing pursuant to subpart I of this part, has notified ETA in writing that the employer has been disqualified from employing H-1B non-immigrants under section 212(n)(2) of the INA. Examples of other obvious inaccuracies include stating a wage rate below the FLSA minimum wage, submitting an LCA earlier than six months before the beginning date of the period of intended employment, identifying multiple occupations on a single LCA, identifying a wage which is below the prevailing wage listed on the LCA, or identifying a wage range where the bottom of such wage range is lower than the prevailing wage listed on the LCA.

(3) *Correction and resubmission of labor condition application.* If the labor condition application is not certified pursuant to paragraph (a)(2) (i) or (ii) of this section, ETA shall return it to the employer, or the employer's authorized agent or representative, explaining the reasons for such return without certification. The employer may immediately submit a corrected application to ETA. A "resubmitted" or "corrected" labor condition application shall be treated as a new application by the regional office (*i.e.*, on a "first come, first served" basis) *except that* if the labor condition application is not certified pursuant to paragraph (a)(2)(ii) of this section because of notification by the Administrator of the employer's disqualification, such action shall be the final decision of the Secretary and no application shall be resubmitted by the employer.

(b) *Challenges to labor condition applications.* ETA shall not consider information contesting a labor condition application received by ETA prior to the determination on the application. Such information shall not be made part of ETA's administrative record on the application, but shall be referred to ESA to be processed as a complaint pursuant to subpart I of this part, and,

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if such application is certified by ETA, the complaint will be handled by ESA under subpart I of this part.

(c) *Truthfulness and adequacy of information.* DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. The burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application.

[59 FR 65659, 65676, Dec. 20, 1994, as amended at 65 FR 80232, Dec. 20, 2000; 66 FR 63302, Dec. 5, 2001]

### § 655.750 What is the validity period of the labor condition application?

(a) *Validity of certified labor condition applications.* A labor condition application which has been certified pursuant to the provisions of § 655.740 shall be valid for the period of employment indicated on Form ETA 9035 or ETA 9035E by the authorized DOL official. The validity period of a labor condition application shall not begin before the application is certified (whether through the FAX submission or U.S. Mail submission of the Form ETA 9035, or the electronic submission of the Form ETA 9035E) or exceed three years. However, in the event employment pursuant to section 214(m) of the INA commences prior to certification of the labor condition application, the attestation requirements of the subsequently certified application shall apply back to the first date of employment. Where the labor condition application contains multiple periods of intended employment, the validity period shall extend to the latest date indicated or three years, whichever comes first.

(b) *Withdrawal of certified labor condition applications.* (1) An employer who has filed a labor condition application which has been certified pursuant to § 655.740 of this part may withdraw such labor condition application at any time before the expiration of the validity period of the application, provided that:

(i) H-1B nonimmigrants are not employed at the place of employment pursuant to the labor condition application; and

(ii) The Administrator has not commenced an investigation of the particular application. Any such request

for withdrawal shall be null and void; and the employer shall remain bound by the labor condition application until the enforcement proceeding is completed, at which time the application may be withdrawn.

(2) Requests for withdrawals shall be in writing and shall be directed to the ETA service center at the following address: ETA Application Processing Center, P.O. Box 13640, Philadelphia PA 19101.

(3) An employer shall comply with the “required wage rate” and “prevailing working conditions” statements of its labor condition application required under §§ 655.731 and 655.732 of this part, respectively, even if such application is withdrawn, at any time H-1B nonimmigrants are employed pursuant to the application, unless the application is superseded by a subsequent application which is certified by ETA.

(4) An employer’s obligation to comply with the “no strike or lockout” and “notice” statements of its labor condition application (required under §§ 655.733 and 655.734 of this part, respectively), shall remain in effect and the employer shall remain subject to investigation and sanctions for misrepresentation on these statements even if such application is withdrawn, regardless of whether H-1B nonimmigrants are actually employed, unless the application is superseded by a subsequent application which is certified by ETA.

(5) Only for the purpose of assuring the labor standards protections afforded under the H-1B program, where an employer files a petition with INS under the H-1B classification pursuant to a certified LCA that had been withdrawn by the employer, such petition filing binds the employer to all obligations under the withdrawn LCA immediately upon receipt of such petition by INS.

(c) *Invalidation or suspension of a labor condition application.* (1) Invalidation of a labor condition application shall result from enforcement action(s) by the Administrator, Wage and Hour Division, under subpart I of this part—e.g., a final determination finding the employer’s failure to meet the application’s condition regarding strike or

lockout; or the employer's willful failure to meet the wage and working conditions provisions of the application; or the employer's substantial failure to meet the notice of specification requirements of the application; see §§ 655.734 and 655.760 of this part; or the misrepresentation of a material fact in an application. Upon notice by the Administrator of the employer's disqualification, ETA shall invalidate the application and notify the employer, or the employer's authorized agent or representative. ETA shall notify the employer in writing of the reason(s) that the application is invalidated. When a labor condition application is invalidated, such action shall be the final decision of the Secretary.

(2) Suspension of a labor condition application may result from a discovery by ETA that it made an error in certifying the application because such application is incomplete, contains one or more obvious inaccuracies, or has not been signed. In such event, ETA shall immediately notify INS and the employer. When an application is suspended, the employer may immediately submit to the certifying officer a corrected or completed application. If ETA does not receive a corrected application within 30 days of the suspension, or if the employer was disqualified by the Administrator, the application shall be immediately invalidated as described in paragraph (c) of this section.

(3) An employer shall comply with the "required wages rate" and "prevailing working conditions" statements of its labor condition application required under §§ 655.731 and 655.732 of this part, respectively, even if such application is suspended or invalidated, at any time H-1B nonimmigrants are employed pursuant to the application, unless the application is superseded by a subsequent application which is certified by ETA.

(4) An employer's obligation to comply with the "no strike or lockout" and "notice" statements of its labor condition application (required under §§ 655.733 and 655.734 of this part, respectively), shall remain in effect and the employer shall remain subject to investigation and sanctions for misrepresentation on these statements even if such application is suspended or invalidated,

regardless of whether H-1B nonimmigrants are actually employed, unless the application is superseded by a subsequent application which is certified by ETA.

(d) *Employers subject to disqualification.* No labor condition application shall be certified for an employer which has been found to be disqualified from participation, in the H-1B program as determined in a final agency action following an investigation by the Wage and Hour Division pursuant to subpart I of this part.

[59 FR 65659, 65676, Dec. 20, 1994, as amended at 65 FR 80232, Dec. 20, 2000; 66 FR 63302, Dec. 5, 2001]

**§ 655.760 What records are to be made available to the public, and what records are to be retained?**

(a) *Public examination.* The employer shall make a filed labor condition application and necessary supporting documentation available for public examination at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the labor condition application is filed with DOL. The following documentation shall be necessary:

(1) A copy of the certified labor condition application (Form ETA 9035 or Form ETA 9035E) and cover pages (Form ETA 9035CP). If the Form ETA 9035 is submitted by facsimile transmission, the application containing the original signature shall be maintained by the employer in its files. If the Form ETA 9035E is submitted electronically, a printout of the certified application shall be signed by the employer and maintained in its files.

(2) Documentation which provides the wage rate to be paid the H-1B nonimmigrant;

(3) A full, clear explanation of the system that the employer used to set the "actual wage" the employer has paid or will pay workers in the occupation for which the H-1B nonimmigrant is sought, including any periodic increases which the system may provide—e.g., memorandum summarizing the system or a copy of the employer's pay system or scale (payroll records are not required, although they shall



be made available to the Department in an enforcement action).

(4) A copy of the documentation the employer used to establish the “prevailing wage” for the occupation for which the H-1B nonimmigrant is sought (a general description of the source and methodology is all that is required to be made available for public examination; the underlying individual wage data relied upon to determine the prevailing wage is not a public record, although it shall be made available to the Department in an enforcement action); and

(5) A copy of the document(s) with which the employer has satisfied the union/employee notification requirements of § 655.734 of this part.

(6) A summary of the benefits offered to U.S. workers in the same occupational classifications as H-1B nonimmigrants, a statement as to how any differentiation in benefits is made where not all employees are offered or receive the same benefits (such summary need not include proprietary information such as the costs of the benefits to the employer, or the details of stock options or incentive distributions), and/or, where applicable, a statement that some/all H-1B nonimmigrants are receiving “home country” benefits (see § 655.731(c)(3));

(7) Where the employer undergoes a change in corporate structure, a sworn statement by a responsible official of the new employing entity that it accepts all obligations, liabilities and undertakings under the LCAs filed by the predecessor employing entity, together with a list of each affected LCA and its date of certification, and a description of the actual wage system and EIN of the new employing entity (see § 655.730(e)(1)).

(8) Where the employer utilizes the definition of “single employer” in the IRC, a list of any entities included as part of the single employer in making the determination as to its H-1B-dependency status (see § 655.736(d)(7));

(9) Where the employer is H-1B-dependent and/or a willful violator, and indicates on the LCA(s) that only “exempt” H-1B nonimmigrants will be employed, a list of such “exempt” H-1B nonimmigrants (see § 655.737(e)(1));

(10) Where the employer is H-1B-dependent or a willful violator, a summary of the recruitment methods used and the time frames of recruitment of U.S. workers (or copies of pertinent documents showing this information) (see § 655.739(i)(4)).

(b) *National list of applications.* ETA shall compile and maintain on a current basis a list of the labor condition applications. Such list shall be by employer, showing the occupational classification, wage rate(s), number of nonimmigrants sought, period(s) of intended employment, and date(s) of need for each employer’s application. The list shall be available for public examination at the Department of Labor, 200 Constitution Avenue, NW., Room N-4456, Washington, DC 20210.

(c) *Retention of records.* Either at the employer’s principal place of business in the U.S. or at the place of employment, the employer shall retain copies of the records required by this subpart for a period of one year beyond the last date on which any H-1B nonimmigrant is employed under the labor condition application or, if no nonimmigrants were employed under the labor condition application, one year from the date the labor condition application expired or was withdrawn. Required payroll records for the H-1B employees and other employees in the occupational classification shall be retained at the employer’s principal place of business in the U.S. or at the place of employment for a period of three years from the date(s) of the creation of the record(s), except that if an enforcement action is commenced, all payroll records shall be retained until the enforcement proceeding is completed through the procedures set forth in subpart I of this part.

(Approved by the Office of Management and Budget under control number 1205-0310)

[59 FR 65659, 65676, Dec. 20, 1994, as amended at 60 FR 4029, Jan. 19, 1995; 65 FR 80232, Dec. 20, 2000; 66 FR 63302, Dec. 5, 2001]

### Subpart I—Enforcement of H-1B Labor Condition Applications

SOURCE: 59 FR 65672, 65676, Dec. 20, 1994, unless otherwise noted.

**§ 655.800 Who will enforce the LCAs and how will they be enforced?**

(a) *Authority of Administrator.* Except as provided in § 655.807, the Administrator shall perform all the Secretary's investigative and enforcement functions under section 212(n) of the INA (8 U.S.C. 1182(n)) and this subpart I and subpart H of this part.

(b) *Conduct of investigations.* The Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters which are the subject of the investigation.

(c) *Employer cooperation/availability of records.* An employer shall at all times cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of section 212(n) of the INA and/or this subpart I or subpart H of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1182(n) or this subpart I or subpart H of this part. Any such interference shall be a violation of the labor condition application and this subpart I and subpart H of this part, and the Administrator may take such further actions as the Administrator considers appropriate. (Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) *Confidentiality.* The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise

under this subpart I or subpart H of this part.

[65 FR 80233, Dec. 20, 2000]

**§ 655.801 What protection do employees have from retaliation?**

(a) No employer subject to this subpart I or subpart H of this part shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee has—

(1) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of section 212(n) of the INA or any regulation relating to section 212(n), including this subpart I and subpart H of this part and any pertinent regulations of INS or the Department of Justice; or

(2) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of section 212(n) of the INA or any regulation relating to section 212(n).

(b) It shall be a violation of this section for any employer to engage in the conduct described in paragraph (a) of this section. Such conduct shall be subject to the penalties prescribed by section 212(n)(2)(C)(ii) of the INA and § 655.810(b)(2), *i.e.*, a fine of up to \$5,000, disqualification from filing petitions under section 204 or section 214(c) of the INA for at least two years, and such further administrative remedies as the Administrator considers appropriate.

(c) Pursuant to section 212(n)(2)(v) of the INA, an H-1B nonimmigrant who has filed a complaint alleging that an employer has discriminated against the employee in violation of paragraph (d)(1) of this section (or § 655.501(a)) may be allowed to seek other appropriate employment in the United States, provided the employee is otherwise eligible to remain and work in the United States. Such employment may not exceed the maximum period of stay authorized for a nonimmigrant classified under section 212(n) of the INA. Further information concerning this provision should be sought from the

## § 655.805

Immigration and Naturalization Service.

[65 FR 80233, Dec. 20, 2000]

### § 655.805 What violations may the Administrator investigate?

(a) The Administrator, through investigation, shall determine whether an H-1B employer has—

(1) Filed a labor condition application with ETA which misrepresents a material fact (Note to paragraph (a)(1): Federal criminal statutes provide penalties of up to \$10,000 and/or imprisonment of up to five years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546);

(2) Failed to pay wages (including benefits provided as compensation for services), as required under § 655.731 (including payment of wages for certain nonproductive time);

(3) Failed to provide working conditions as required under § 655.732;

(4) Filed a labor condition application for H-1B nonimmigrants during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment, as prohibited by § 655.733;

(5) Failed to provide notice of the filing of the labor condition application, as required in § 655.734;

(6) Failed to specify accurately on the labor condition application the number of workers sought, the occupational classification in which the H-1B nonimmigrant(s) will be employed, or the wage rate and conditions under which the H-1B nonimmigrant(s) will be employed;

(7) Displaced a U.S. worker (including displacement of a U.S. worker employed by a secondary employer at the worksite where an H-1B worker is placed), as prohibited by § 655.738 (if applicable);

(8) Failed to make the required displacement inquiry of another employer at a worksite where H-1B nonimmigrant(s) were placed, as set forth in § 655.738 (if applicable);

(9) Failed to recruit in good faith, as required by § 655.739 (if applicable);

(10) Displaced a U.S. worker in the course of committing a willful violation of any of the conditions in paragraphs (a)(2) through (9) of this section,

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or willful misrepresentation of a material fact on a labor condition application;

(11) Required or accepted from an H-1B nonimmigrant payment or remittance of the additional \$500/\$1,000 fee incurred in filing an H-1B petition with the INS, as prohibited by § 655.731(c)(10)(ii);

(12) Required or attempted to require an H-1B nonimmigrant to pay a penalty for ceasing employment prior to an agreed upon date, as prohibited by § 655.731(c)(10)(i);

(13) Discriminated against an employee for protected conduct, as prohibited by § 655.801;

(14) Failed to make available for public examination the application and necessary document(s) at the employer's principal place of business or worksite, as required by § 655.760(a);

(15) Failed to maintain documentation, as required by this part; and

(16) Failed otherwise to comply in any other manner with the provisions of this subpart I or subpart H of this part.

(b) The determination letter setting forth the investigation findings (see § 655.815) shall specify if the violations were found to be substantial or willful. Penalties may be assessed and disqualification ordered for violation of the provisions in paragraphs (a)(5), (6), or (9) of this section only if the violation was found to be substantial or willful. The penalties may be assessed and disqualification ordered for violation of the provisions in paragraphs (a)(2) or (3) of this section only if the violation was found to be willful, but the Secretary may order payment of back wages (including benefits) due for such violation whether or not the violation was willful.

(c) For purposes of this part, “*willful failure*” means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to section 212(n)(1)(A)(i) or (ii) of the INA, or §§ 655.731 or 655.732. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).

(d) The provisions of this part become applicable upon the date that the employer's LCA is certified pursuant to §§ 655.740 and 655.750, or upon the date

employment commences pursuant to section 214(m) of the INA, whichever is earlier. The employer's submission and signature on the LCA (whether Form ETA 9035 or Form ETA 9035E) each constitutes the employer's representation that the statements on the LCA are accurate and its acknowledgment and acceptance of the obligations of the program. The employer's acceptance of these obligations is re-affirmed by the employer's submission of the petition (Form I-129) to the INS, supported by the LCA. See 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies that the employer will comply with the terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay. If the period of employment specified in the LCA expires or the employer withdraws the application in accordance with § 655.750(b), the provisions of this part will no longer apply with respect to such application, except as provided in § 655.750(b)(3) and (4).

[65 FR 80233, Dec. 20, 2000, as amended at 66 FR 63302, Dec. 5, 2001]

**§ 655.806 Who may file a complaint and how is it processed?**

(a) Any aggrieved party, as defined in § 655.715, may file a complaint alleging a violation described in § 655.805(a). The procedures for filing a complaint by an aggrieved party and its processing by the Administrator are set forth in this section. The procedures for filing and processing information alleging violations from persons or organizations that are not aggrieved parties are set forth in § 655.807. With regard to complaints filed by any aggrieved person or organization—

(1) No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint.

(2) The complaint shall set forth sufficient facts for the Administrator to determine whether there is reasonable cause to believe that a violation as described in § 655.805 has been committed, and therefore that an investigation is warranted. This determination shall be made within 10 days of the date that the complaint is received by a Wage

and Hour Division official. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary. No hearing or appeal pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted.

(3) If the Administrator determines that an investigation on a complaint is warranted, the complaint shall be accepted for filing; an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing. The time for the investigation may be increased with the consent of the employer and the complainant, or if, for reasons outside of the control of the Administrator, the Administrator needs additional time to obtain information needed from the employer or other sources to determine whether a violation has occurred. No hearing or appeal pursuant to this subpart shall be available regarding the Administrator's determination that an investigation on a complaint is warranted.

(4) In the event that the Administrator seeks a prevailing wage determination from ETA pursuant to § 655.731(d), or advice as to prevailing working conditions from ETA pursuant to § 655.732(c)(2), the 30-day investigation period shall be suspended from the date of the Administrator's request to the date of the Administrator's receipt of the wage determination (or, in the event that the employer challenges the wage determination through the Employment Service complaint system, to the date of the completion of such complaint process).

(5) A complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA. This jurisdictional bar does not affect the scope of

the remedies which may be assessed by the Administrator. Where, for example, a complaint is timely filed, back wages may be assessed for a period prior to one year before the filing of a complaint.

(6) A complaint may be submitted to any local Wage and Hour Division office. The addresses of such offices are found in local telephone directories, and on the Department's informational site on the Internet at <http://www.dol.gov/dol/esa/public/contacts/whd/america2.htm>. The office or person receiving such a complaint shall refer it to the office of the Wage and Hour Division administering the area in which the reported violation is alleged to have occurred.

(b) When an investigation has been conducted, the Administrator shall, pursuant to § 655.815, issue a written determination as described in § 655.805(a).

[65 FR 80234, Dec. 20, 2000]

**§ 655.807 How may someone who is not an "aggrieved party" allege violations, and how will those allegations be processed?**

(a) Persons who are not aggrieved parties may submit information concerning possible violations of the provisions described in § 655.805(a)(1) through (4) and (a)(7) through (9). No particular form is required to submit the information, except that the information shall be submitted in writing or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the information. An optional form shall be available to be used in setting forth the information. The information provided shall include:

(1) The identity of the person submitting the information and the person's relationship, if any, to the employer or other information concerning the person's basis for having knowledge of the employer's employment practices or its compliance with the requirements of this subpart I and subpart H of this part; and

(2) A description of the possible violation, including a description of the facts known to the person submitting the information, in sufficient detail for the Secretary to determine if there is reasonable cause to believe that the

employer has committed a willful violation of the provisions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9).

(b) The Administrator may interview the person submitting the information as appropriate to obtain further information to determine whether the requirements of this section are met. In addition, the person submitting information under this section shall be informed that his or her identity will not be disclosed to the employer without his or her permission.

(c) Information concerning possible violations must be submitted not later than 12 months after the latest date on which the alleged violation(s) were committed. The 12-month period shall be applied in the manner described in § 655.806(a)(5).

(d) Upon receipt of the information, the Administrator shall promptly review the information submitted and determine:

(1) Does the source likely possess knowledge of the employer's practices or employment conditions or the employer's compliance with the requirements of subpart H of this part?

(2) Has the source provided specific credible information alleging a violation of the requirements of the conditions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9)?

(3) Does the information in support of the allegations appear to provide reasonable cause to believe that the employer has committed a violation of the provisions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9), and that

(i) The alleged violation is willful?

(ii) The employer has engaged in a pattern or practice of violations? or

(iii) The employer has committed substantial violations, affecting multiple employees?

(e) "Information" within the meaning of this section does not include information from an officer or employee of the Department of Labor unless it was obtained in the course of a lawful investigation, and does not include information submitted by the employer to the Attorney General or the Secretary in securing the employment of an H-1B nonimmigrant.

(f)(1) Except as provided in paragraph (f)(2) of this section, where the Administrator has received information from a source other than an aggrieved party which satisfies all of the requirements of paragraphs (a) through (d) of this section, or where the Administrator or another agency of the Department obtains such information in a lawful investigation under this or any other section of the INA or any other Act, the Administrator (by mail or facsimile transmission) shall promptly notify the employer that the information has been received, describe the nature of the allegation in sufficient detail to permit the employer to respond, and request that the employer respond to the allegation within 10 days of its receipt of the notification. The Administrator shall not identify the source or information which would reveal the identity of the source without his or her permission.

(2) The Administrator may dispense with notification to the employer of the alleged violations if the Administrator determines that such notification might interfere with an effort to secure the employer's compliance. This determination shall not be subject to review in any administrative proceeding and shall not be subject to judicial review.

(g) After receipt of any response to the allegations provided by the employer, the Administrator will promptly review all of the information received and determine whether the allegations should be referred to the Secretary for a determination whether an investigation should be commenced by the Administrator.

(h) If the Administrator refers the allegations to the Secretary, the Secretary shall make a determination as to whether to authorize an investigation under this section.

(1) No investigation shall be commenced unless the Secretary (or the Deputy Secretary or other Acting Secretary in the absence or disability) personally authorizes the investigation and certifies—

(i) That the information provided under paragraph (a) of this section or obtained pursuant to a lawful investigation by the Department of Labor provides reasonable cause to believe

that the employer has committed a violation of the provisions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9);

(ii) That there is reasonable cause to believe the alleged violations are willful, that the employer has engaged in a pattern or practice of such violations, or that the employer has committed substantial violations, affecting multiple employees; and

(iii) That the other requirements of paragraphs (a) through (d) of this section have been met.

(2) No hearing shall be available from a decision by the Administrator declining to refer allegations addressed by this section to the Secretary, and none shall be available from a decision by the Secretary certifying or declining to certify that an investigation is warranted.

(i) If the Secretary issues a certification, an investigation shall be conducted and a determination issued within 30 days after the certification is received by the local Wage and Hour office undertaking the investigation. The time for the investigation may be increased upon the agreement of the employer and the Administrator or, if for reasons outside of the control of the Administrator, additional time is necessary to obtain information needed from the employer or other sources to determine whether a violation has occurred.

(j) In the event that the Administrator seeks a prevailing wage determination from ETA pursuant to § 655.731(d), or advice as to prevailing working conditions from ETA pursuant to § 655.732(c)(2), the 30-day investigation period shall be suspended from the date of the Administrator's request to the date of the Administrator's receipt of the wage determination (or, in the event that the employer challenges the wage determination through the Employment Service complaint system, to the date of the completion of such complaint process).

(k) Following the investigation, the Administrator shall issue a determination in accordance with to § 655.815.

(l) This section shall expire on September 30, 2003 unless section 212(n)(2)(G) of the INA is extended by future legislative action. Absent such extension, no investigation shall be

certified by the Secretary under this section after that date; however, any investigation certified on or before September 30, 2003 may be completed.

[65 FR 80234, Dec. 20, 2000]

**§ 655.808 Under what circumstances may random investigations be conducted?**

(a) The Administrator may conduct random investigations of an employer during a five-year period beginning with the date of any of the following findings, provided such date is on or after October 21, 1998:

(1) A finding by the Secretary that the employer willfully violated

any of the provisions described in § 655.805(a)(1) through (9);

(2) A finding by the Secretary that the employer willfully misrepresented material fact(s) in a labor condition application filed pursuant to § 655.730; or

(3) A finding by the Attorney General that the employer willfully failed to meet the condition of section 212(n)(1)(G)(i)(II) of the INA (pertaining to an offer of employment to an equally or better qualified U.S. worker).

(b) A finding within the meaning of this section is a final, unappealed decision of the agency. See §§ 655.520(a), 655.845(c), and 655.855(b).

(c) An investigation pursuant to this section may be made at any time the Administrator, in the exercise of discretion, considers appropriate, without regard to whether the Administrator has reason to believe a violation of the provisions of this subpart I and subpart H of this part has been committed. Following an investigation, the Administrator shall issue a determination in accordance with § 655.815.

[65 FR 80236, Dec. 20, 2000]

**§ 655.810 What remedies may be ordered if violations are found?**

(a) Upon determining that an employer has failed to pay wages or provide fringe benefits as required by § 655.731 and § 655.732, the Administrator shall assess and oversee the payment of back wages or fringe benefits to any H-1B nonimmigrant who has not been paid or provided fringe benefits as required. The back wages or fringe bene-

fits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to (or with respect to) such nonimmigrant(s).

(b) *Civil money penalties.* The Administrator may assess civil money penalties for violations as follows:

(1) An amount not to exceed \$1,000 per violation for:

(i) A violation pertaining to strike/lockout (§ 655.733) or displacement of U.S. workers (§ 655.738);

(ii) A substantial violation pertaining to notification (§ 655.734), labor condition application specificity (§ 655.730), or recruitment of U.S. workers (§ 655.739);

(iii) A misrepresentation of material fact on the labor condition application;

(iv) An early-termination penalty paid by the employee (§ 655.731(c)(10)(i));

(v) Payment by the employee of the additional \$500/\$1,000 filing fee (§ 655.731(c)(10)(ii)); or

(vi) Violation of the requirements of the regulations in this subpart I and subpart H of this part or the provisions regarding public access (§ 655.760) where the violation impedes the ability of the Administrator to determine whether a violation of section 212(n) of the INA has occurred or the ability of members of the public to have information needed to file a complaint or information regarding alleged violations of section 212(n) of the INA;

(2) An amount not to exceed \$5,000 per violation for:

(i) A willful failure pertaining to wages/working conditions (§§ 655.731, 655.732), strike/lockout, notification, labor condition application specificity, displacement (including placement of an H-1B nonimmigrant at a worksite where the other/secondary employer displaces a U.S. worker), or recruitment;

(ii) A willful misrepresentation of a material fact on the labor condition application; or

(iii) Discrimination against an employee (§ 655.801(a)); or

(3) An amount not to exceed \$35,000 per violation where an employer (whether or not the employer is an H-1B-dependent employer or willful violator) displaced a U.S. worker employed

by the employer in the period beginning 90 days before and ending 90 days after the filing of an H-1B petition in conjunction with any of the following violations:

(i) A willful violation of any of the provisions described in §655.805(a)(2) through (9) pertaining to wages/working condition, strike/lockout, notification, labor condition application specificity, displacement, or recruitment; or

(ii) A willful misrepresentation of a material fact on the labor condition application (§655.805(a)(1)).

(c) In determining the amount of the civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors. The factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the INA and this subpart I or subpart H of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the employer in good faith to comply with the provisions of 8 U.S.C. 1182(n) and this subparts H and I of this part;

(5) The employer's explanation of the violation or violations;

(6) The employer's commitment to future compliance; and

(7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

(d) *Disqualification from approval of petitions.* The Administrator shall notify the Attorney General pursuant to §655.855 that the employer shall be disqualified from approval of any petitions filed by, or on behalf of, the employer pursuant to section 204 or section 214(c) of the INA for the following periods:

(1) At least one year for violation(s) of any of the provisions specified in paragraph (b)(1)(i) through (iii) of this section;

(2) At least two years for violation(s) of any of the provisions specified in paragraph (b)(2) of this section; or

(3) At least three years, for violation(s) specified in paragraph (b)(3) of this section.

(e) *Other administrative remedies.* (1) If the Administrator finds a violation of the provisions specified in paragraph (b)(1)(iv) or (v) of this section, the Administrator may issue an order requiring the employer to return to the employee (or pay to the U.S. Treasury if the employee cannot be located) any money paid by the employee in violation of those provisions.

(2) If the Administrator finds a violation of the provisions specified in paragraph (b)(1)(i) through (iii), (b)(2), or (b)(3) of this section, the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including but not limited to reinstatement of workers who were discriminated against in violation of §655.805(a), reinstatement of displaced U.S. workers, back wages to workers who have been displaced or whose employment has been terminated in violation of these provisions, or other appropriate legal or equitable remedies.

(f) The civil money penalties, back wages, and/or any other remedy(ies) determined by the Administrator to be appropriate are immediately due for payment or performance upon the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or upon the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The payment or performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. Distribution of back wages shall be administered in accordance with existing procedures established by the Administrator.

(g) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), requires that inflationary adjustments to civil



**§ 655.815**

money penalties in accordance with a specified cost-of-living formula be made, by regulation, at least every four years. The adjustments are to be based on changes in the Consumer Price Index for all Urban Consumers (CPI-U) for the U.S. City Average for All Items. The adjusted amounts will be published in the FEDERAL REGISTER. The amount of the penalty in a particular case will be based on the amount of the penalty in effect at the time the violation occurs.

[65 FR 80236, Dec. 20, 2000]

**§ 655.815 What are the requirements for the Administrator's determination?**

(a) The Administrator's determination, issued pursuant to § 655.806, 655.807, or 655.808, shall be served on the complainant, the employer, and other known interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and the Administrator's determination.

(c) The Administrator's written determination required by § 655.805 of this part shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor, and in the case of a finding of violation(s) by an employer, prescribe any remedies, including the amount of any back wages assessed, the amount of any civil money penalties assessed and the reason therefor, and/or any other remedies assessed.

(2) Inform the interested parties that they may request a hearing pursuant to § 655.820 of this part.

(3) Inform the interested parties that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, give the addresses

of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of labor (upon whom copies of the request must be served).

(5) Where appropriate, inform the parties that, pursuant to § 655.855, the Administrator shall notify ETA and the Attorney General of the occurrence of a violation by the employer.

[59 FR 65672, 65676, Dec. 20, 1994, as amended at 65 FR 80237, Dec. 20, 2000]

**§ 655.820 How is a hearing requested?**

(a) Any interested party desiring review of a determination issued under §§ 655.805 and 655.815, including judicial review, shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. If such a request for an administrative hearing is timely filed, the Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

(b) Interested parties may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s). In such a proceeding, the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent; the Administrator may intervene as a party or appear as *amicus curiae* at any time in the proceeding, at the Administrator's discretion.

(2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party and the employer shall be the respondent.

(c) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the party requesting the hearing believes such determination is in error;

(5) Be signed by the party making the request or by an authorized representative of such party; and

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing shall be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An interested party which fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party pursuant to 29 CFR 18.10 (b) through (d) or through participation as an *amicus curiae* pursuant to 29 CFR 18.12.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the requestor or authorized representative, shall be filed within ten days.

(f) Copies of the request for a hearing shall be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

[59 FR 65672, 65676, Dec. 20, 1994, as amended at 65 FR 80237, Dec. 20, 2000]

**§ 655.825 What rules of practice apply to the hearing?**

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Sec-

retary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

**§ 655.830 What rules apply to service of pleadings?**

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Room N-2716, Washington, DC 20210, and one copy shall be served on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

**§ 655.835 How will the administrative law judge conduct the proceeding?**

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.820 of this part, the Chief Administrative Law Judge

shall promptly appoint an administrative law judge to hear the case.

(b) Within 7 calendar days following the assignment of the case, the administrative law judge shall notify all interested parties of the date, time and place of the hearing. All parties shall be given at least fourteen calendar days notice of such hearing.

(c) The date of the hearing shall be not more than 60 calendar days from the date of the Administrator's determination. Because of the time constraints imposed by the INA, no request for postponement shall be granted except for compelling reasons. Even where such reasons are shown, no request for postponement of the hearing beyond the 60-day deadline shall be granted except by consent of all the parties to the proceeding.

(d) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § 655.830 of this part. Posthearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party in accordance with § 655.830 of this part.

**§ 655.840 What are the requirements for a decision and order of the administrative law judge?**

(a) Within 60 calendar days after the date of the hearing, the administrative law judge shall issue a decision. If any party desires review of the decision, including judicial review, a petition for Secretary's review thereof shall be filed as provided in § 655.845 of this subpart. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Secretary issues an order affirming the decision, or, unless and until 30 calendar days have passed after the Secretary's receipt of the petition for review and the Secretary has not issued notice to the parties that the

Secretary will review the administrative law judge's decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision.

(c) In the event that the Administrator's determination of wage violation(s) and computation of back wages are based upon a wage determination obtained by the Administrator from ETA during the investigation (pursuant to § 655.731(d)) and the administrative law judge determines that the Administrator's request was not warranted (under the standards in § 655.731(d)), the administrative law judge shall remand the matter to the Administrator for further proceedings on the existence of wage violations and/or the amount(s) of back wages owed. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept as final and accurate the wage determination obtained from ETA or, in the event either the employer or another interested party filed a timely complaint through the Employment Service complaint system, the final wage determination resulting from that process. See § 655.731; see also 20 CFR 658.420 through 658.426. Under no circumstances shall the administrative law judge determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the prevailing wage determination.

(d) The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(e) The decision shall be served on all parties in person or by certified or regular mail.

[59 FR 65672, 65676, Dec. 20, 1994, as amended at 65 FR 80237, Dec. 20, 2000]

**§ 655.845 What rules apply to appeal of the decision of the administrative law judge?**

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for the Board's review permitted by this subpart. However, any such petition shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

(c) Whenever the Board determines to review the decision and order of an administrative law judge, a notice of the Board's determination shall be served upon the administrative law judge, upon the Office of Administrative Law Judges, and upon all parties to the proceeding within 30 calendar days after the Board's receipt of the petition for review. If the Board determines that it will review the decision and order, the order shall be inoperative unless and until the Board issues an order affirming the decision and order.

(d) Upon receipt of the Board's notice, the Office of Administrative Law

Judges shall within 15 calendar days forward the complete hearing record to the Board.

(e) The Board's notice shall specify:

- (1) The issue or issues to be reviewed;
- (2) The form in which submissions shall be made by the parties (*e.g.*, briefs);
- (3) The time within which such submissions shall be made.

(f) All documents submitted to the Board shall be filed with the Administrative Review Board, Room S-4309, U.S. Department of Labor, Washington, DC 20210. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Board until actually received by the Board. All documents, including documents filed by mail, shall be received by the Board either on or before the due date.

(g) Copies of all documents filed with the Board shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § 655.830(b).

(h) The Board's final decision shall be issued within 180 calendar days from the date of the notice of intent to review. The Board's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Board's decision, the Board shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.850.

[65 FR 80237, Dec. 20, 2000]

**§ 655.850 Who has custody of the administrative record?**

The official record of every completed administrative hearing procedure provided by subparts H and I of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

**§ 655.855 What notice shall be given to the Employment and Training Administration and the Attorney General of the decision regarding violations?**

(a) The Administrator shall notify the Attorney General and ETA of the final determination of any violation requiring that the Attorney General not approve petitions filed by an employer. The Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions. Violations requiring notification to the Attorney General are identified in § 655.810(f).

(b) The Administrator shall notify the Attorney General and ETA upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made pursuant to § 655.820; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review is filed with the Department's Administrative Review Board (Board) pursuant to § 655.845; or

(3) Where a timely petition for review is filed from an administrative law judge's decision finding a violation and the Board either declines within 30 days to entertain the appeal, pursuant to § 655.845(c), or the Board reviews and affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an employer, and the Board, upon review, issues a decision pursuant to § 655.845, holding that a violation was committed by an employer.

(c) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (a) of this section, shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for non-immigrants to be employed by the employer, for the period of time provided by the Act and described in § 655.810(f).

(d) ETA, upon receipt of the Administrator's notice pursuant to paragraph

(a) of this section, shall invalidate the employer's labor condition application(s) under this subpart I and subpart H of this part, and shall not accept for filing any application or attestation submitted by the employer under 20 CFR part 656 or subparts A, B, C, D, E, H, or I of this part, for the same calendar period as specified by the Attorney General.

[65 FR 80238, Dec. 20, 2000]

**Subpart J—Attestations by Employers Using F-1 Students in Off-Campus Work**

SOURCE: 56 FR 56865, 56876, Nov. 6, 1991, unless otherwise noted.

**§ 655.900 Purpose, procedure and applicability of subparts J and K of this part.**

(a) *Purpose.* The Immigration Act of 1990 (Act) at section 221 creates a three-year work authorization program beginning October 1, 1991, for aliens admitted as F-1 students described in subparagraph (F) of section 101 (a)(15) of the Immigration and Nationality Act. 8 U.S.C. 1101(a)(15)(F). The Act specifies that the Attorney General shall grant an alien authorization to be employed in a position unrelated to the alien's field of study (*i.e.*, a position not involving curricular or post-graduate practical training) and off-campus if:

(1) The alien has completed one year of school as an F-1 student and is maintaining good academic standing at the educational institution;

(2) The employer provides the educational institution and the Secretary of Labor with an attestation regarding recruitment and rate of pay specified in paragraph (b) of this section; and

(3) The alien will not be employed more than 20 hours each week during the academic term (but may be employed on a full-time basis during vacation periods and between academic terms).

Subpart J of this part sets forth the procedure for filing attestations with the Department of Labor (the Department or DOL) for employers who seek to use F-1 students for off-campus work. Subpart K of this part sets forth

complaint, investigation, and disqualification provisions with respect to such attestations.

(b) *Procedure.* (1) An employer must comply with the following procedure in order to hire F-1 students for off-campus employment:

(i) Recruit for 60 days before filing an attestation;

(ii) File the attestation with the DOL and the Designated School Official (DSO) of the educational institution before hiring any F-1 student(s);

(iii) Hire F-1 student(s) during the 90-day period following the last day of the recruitment period; and

(iv) Initiate a new 60-day recruitment effort in order to hire any F-1 student(s), under the valid attestation, after the 90-day hiring period. (A job order placed with the SESA as part of the employer's initial recruitment which remains "open" with the SESA shall satisfy the requirement regarding a new 60-day recruitment effort.)

(2) The employer's attestation shall state that the employer:

(i) Has recruited unsuccessfully for at least 60 days for the position and will recruit for 60 days for each position in which an F-1 student is hired under that attestation until September 30, 1996; and

(ii) Will provide for payment to the alien and to other similarly situated workers at a rate not less than the actual wage for the occupation at the place of employment, or if greater, the prevailing wage for the occupation in the area of intended employment.

(3) The employer shall file the attestation with the Designated School Official (DSO) of each educational institution from which it seeks to hire F-1 students. In fulfilling this requirement, the employer may file the attestation initially:

(i) With the appropriate Regional Office of ETA only; or

(ii) Simultaneously with the DSO and the appropriate Regional Office of ETA.

In either instance, under paragraph (b)(3) of this section, ETA will return to the employer a copy of the attestation with ETA's acceptance indicated thereon. The employer must then send a copy of each accepted attestation to the DSO. Where the employer has cho-

sen to file the attestation simultaneously with DOL and the DSO, as described in paragraph (b)(3)(ii) of this section, the employer shall provide a copy of the accepted attestation to the DSO within 15 days after receiving the accepted attestation from DOL. The employer shall also retain the accepted attestation and produce it in the event the Department conducts an investigation to determine if the employer has made an attestation that is materially false or has failed to pay wages in accordance with the attestation. In no case may an employer hire an F-1 student for off-campus employment without first filing an attestation with DOL and the DSO. The employer may not file the attestation with the DSO before it is filed with DOL or in the absence of filing the attestation with DOL. The DSO may treat an attestation as accepted for filing by DOL for the purpose of authorizing F-1 student employment upon its receipt by the school.

(4) The employer may file an attestation for one or more openings in the same occupation, or one or more positions in more than one occupation, provided that all occupations are listed on the attestation and all positions are located within the same geographic area of intended employment.

(5) The attestation shall be deemed "accepted for filing" on the date it is received by DOL. Where the attestation is not completed as set forth at § 655.940(f)(1) of this part, it shall be returned to the employer which will have 15 days to correct the deficiency or it will be rejected. If the attestation is rejected, DOL will notify INS. Attestations deemed unacceptable under § 655.940(f)(2) of this part may not be re-submitted.

(c) *Applicability.* Subparts J and K of this part apply to all employers who seek to employ F-1 students in off-campus work in positions unrelated to their field(s) of study.

(d) *Final date.* ETA will not accept attestations under this program after September 30, 1996.

(e) *Revalidation of employer attestations in effect on November 30, 1995.* Any employer's attestation which was valid on November 30, 1995, is revalidated effective on November 30, 1995, and shall

remain valid through September 30, 1996, unless withdrawn or invalidated.

[56 FR 56865, 56876, Nov. 6, 1991, as amended at 59 FR 64776, 64777, Dec. 15, 1994; 60 FR 61210, 61211, Nov. 29, 1995]

**§ 655.910 Overview of process.**

This section provides a context for the attestation process to facilitate understanding by employers that seek to employ F-1 students in off-campus work.

(a) *Department of Labor's responsibilities.* The Department of Labor (DOL) administers the attestation process. Within DOL, the Employment and Training Administration (ETA) shall have responsibility for accepting and filing employer attestations on behalf of F-1 students; the Employment Standards Administration (ESA) shall be responsible for conducting any investigations concerning such attestations.

(b) *Employer attestation responsibilities.* Prior to hiring any F-1 student(s) for off-campus employment, an employer must submit an attestation on Form ETA-9034, as described in § 655.940 of this part, to the Employment and Training Administration (ETA) of DOL at the address set forth at § 655.930 of this part.

(1) The attesting employer shall file the attestation with the Designated School Official (DSO) of each educational institution from which it seeks to hire F-1 students. If the employer is filing the attestation with the DSO simultaneously to filing it with DOL, or prior to DOL's accepting it, the employer must provide the DSO with a copy of the accepted attestation within 15 days after receiving the attestation from DOL.

(2)(i) Each attestation shall be valid through September 30, 1996. Throughout the validity period of the attestation, the employer may hire F-1 students as needed, during the 90-day period immediately following each 60-day recruitment period, for the positions specified on Form ETA-9034, at the required wage rate, from any educational institution in the geographic area of intended employment. In order to employ F-1 students in any occupation(s) different from the occupation(s) speci-

fied in the attestation, the employer shall file a new attestation with ETA.

(ii) The employer shall have the burden of proving the truthfulness and accuracy of each attestation element in the event that such attestation element is challenged in an investigation.

(iii) Substantiating documentation in support of each attestation element must be maintained by the employer and shall be made available to DOL for inspection and copying upon request. If the employer maintains the specific documentation recommended in appendix A of this subpart, and the documentation is found to be truthful, accurate, and substantiates compliance, it shall meet the burden of proof. If the employer chooses to support its attestation in a manner other than in accordance with appendix A of this subpart, the employer's documentation must be of equal probative value to that shown in appendix A of this subpart in the event of an investigation.

(c) *Designated School Official (DSO) responsibilities.* The Department notes that the basic responsibilities of the DSO are outlined in INS regulations at 8 CFR 214.2(f).

(1) DOL understands INS regulations to mean that the DSO at the educational institution is expected to assure that, prior to authorizing the off-campus employment of any F-1 student(s):

(i) It has received an attestation from the prospective employer;

(ii) The prospective employer has not been disqualified from participation in the F-1 student work authorization program (Employers disqualified from participation in the program are listed in the FEDERAL REGISTER. See § 655.950(b) of this part); and

(iii) The F-1 student(s) has completed one year of study and is maintaining good academic standing at the institution.

(2) It is also understood that the DSO will not authorize F-1 student(s) to work in excess of 20 hours per week during the academic term, and that the DSO shall notify ETA when the employer of F-1 student(s) has not provided the educational institution with an accepted copy of the attestation within 90 days of its receipt of the attestation from the employer.

(d) *Complaints.* (1) Complaints alleging that an attestation is materially false or that wages were not paid in accordance with the attestation may be filed by any aggrieved party with the Wage and Hour Division (Administrator), of the Employment Standards Administration, DOL, according to the procedures set forth in subpart K of this part.

(i) Examples of violations that may be alleged in a complaint include:

(A) The employer failed to pay an F-1 student the prevailing wage for the occupation in the area of intended employment;

(B) The employer failed to pay the actual wage for the position(s) at the employer's place of business; or

(C) The employer's recruitment efforts demonstrated that qualified U.S. workers were available for the position(s) filled by F-1 students.

(ii) The Administrator shall review the allegations contained in the complaint to determine if there are reasonable grounds to conduct an investigation. If, after investigation, the Administrator finds a violation, the Administrator shall disqualify the employer (after notice and opportunity for a hearing) from employing F-1 students and shall so notify INS.

(2) Complaints alleging that an F-1 student is not maintaining the required academic standing or is working in excess of the authorized number of hours of employment per week shall be filed with the INS.

(e) *Termination of program.* The pilot F-1 student visa program of section 221 of the Immigration Act of 1990 expires after September 30, 1996, and the Department of Labor will not accept any further employer attestations after that date. 8 U.S.C. 1184 note. However, complaints and appeals arising out of actions occurring prior to September 30, 1996, will continue to be received, investigated, and processed under the standards and procedures of subparts J and K of this part. Therefore, subparts J and K of this part remain in effect through the completion of such enforcement.

[56 FR 56865, 56876, Nov. 6, 1991, as amended at 59 FR 64777, Dec. 15, 1994; 60 FR 61210, 61211, Nov. 29, 1995]

**§ 655.920 Definitions.**

For the purposes of subparts J and K of this part:

*Accepted for filing* means that an attestation submitted by the employer or his designated agent or representative has been received and filed by the Employment and Training Administration of the Department of Labor.

*Act* means the Immigration Act of 1990, as amended.

*Actual wage* means the wage rate paid by the attesting employer to all similarly situated employees in the occupation at the worksite at the time of employment.

*Administrative Law Judge* means an official appointed pursuant to 5 U.S.C. 3105.

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, or such authorized representatives as may be designated to perform any of the functions of the Administrator under subparts J and K of this part.

*Area of intended employment* means the geographic area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of intended employment.

*Attestation* means a properly completed Form ETA-9034.

*Attesting employer* means any employer who has filed an attestation required by section 221 of the Act.

*Attorney General* means the chief official of the U.S. Department of Justice or the Attorney General's designee.

*Chief Administrative Law Judge* means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

*Date of filing* means the date an attestation is received by ETA as indicated by the date stamped on the attestation.

*Department* and *DOL* mean the United States Department of Labor.

*Designated School Official (DSO)* means the official of the educational institution who has authority to authorize off-campus employment of F-1



students pursuant to Immigration and Naturalization Service regulations at 8 CFR parts 214 and 274a.

*Educational institution* means the educational institution at which an alien admitted to the United States as an F-1 student is enrolled in a full course of study.

*Employer* means a person, firm, corporation, or other association or organization, which suffers or permits a person to work; and

(1) Which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States; and

(2) Which has an employer-employee relationship with respect to employees under subparts J and K of this part, as indicated by the fact that it may hire, fire, supervise or otherwise control the work of any such employee.

*Employment and Training Administration (ETA)* means the agency within the Department which includes the United States Employment Service (USES).

*Employment Standards Administration (ESA)* means the agency within the Department which includes the Wage and Hour Division.

*F-1 nonimmigrant student (F-1 student)* means an alien who has an F-1 visa. See 8 U.S.C. 1101(A)(15)(F)(i). INS grants such a visa to an alien who has a residence in a foreign country which he/she has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who entered the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him/her and approved by the Attorney General after consultation with the Department of Education of the United States. For purposes of subparts J and K, the term "F-1 student" shall refer to F-1 student(s) who will be employed in off-campus employment unrelated to their field(s) of study.

*Immigration and Naturalization Service (INS)* means the component of the Department of Justice which administers the Department of Justice's principal functions under the Act.

*INA* means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

*Independent authoritative source* means a professional, business, trade, educational or governmental association, organization, or other similar entity, not owned or controlled by the employer, which has a recognized expertise in the occupational field.

*Independent authoritative source survey* means a survey of wages conducted by an independent authoritative source and published in a book, newspaper, periodical, looseleaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's attestation and each succeeding annual prevailing wage update. Such survey shall:

(1) Reflect the average wage paid to workers similarly employed in the area of intended employment;

(2) Be based upon recently collected data—e.g., within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.

*Position* means a single job opening in an occupation for which the attesting employer has recruited and either proposes to fill or has filled with an F-1 student.

*Regional Certifying Officer* means the official in the Employment and Training Administration in a Department of Labor regional office (or his/her designee) who is authorized to act on labor certifications and employment attestations on behalf of the Secretary of Labor.

*Required wage rate* means the rate of pay which is the higher of:

(1) The actual establishment wage rate for the occupation in which the F-1 student is to be (or is) employed; or

(2) The prevailing wage rate (adjusted on an annual basis) for the occupation in which the F-1 student is to be (or is) employed in the geographic area of intended employment.

*Secretary* means the Secretary of Labor or the Secretary's designee.

*United States* is defined at 8 U.S.C. 1101(a)(38).

*United States (U.S.) worker* means any U.S. citizen or alien who is legally permitted to work indefinitely within the United States.

**§ 655.930 Addresses of Department of Labor regional offices.**

Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): One Congress Street 10th Floor, Boston, MA 02114-2021. Telephone: 617-565-4446.

Region II (New York, New Jersey, Puerto Rico, and the Virgin Islands): 201 Varick Street, room 755, New York, NY 10014. Telephone: 212-660-2185.

Region III (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia): Post Office Box 8796, Philadelphia, PA 19101. Telephone: 215-596-6363.

Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee): 1371 Peachtree Street, NE., Atlanta, GA 30309. Telephone: 404-347-3938.

Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin): 230 South Dearborn Street, room 605, Chicago, IL 60604. Telephone: 312-353-1550.

Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, and Texas): 525 Griffin Street, room 314, Dallas, TX 75202. Telephone: 214-767-4989.

Region VII (Iowa, Kansas, Missouri, and Nebraska) 911 Walnut Street, Kansas City, MO 64106. Telephone: 816-426-3796.

Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming) 1961 Stout Street, 16th Floor, Denver, CO 80294. Telephone: 303-844-4613.

Region IX (Arizona, California, Guam, Hawaii, and Nevada) 71 Stevenson Street, room 830, San Francisco, CA 94119. Telephone: 415-744-6647.

Region X (Alaska, Idaho, Oregon, and Washington) 1111 Third Avenue, room 900, Seattle, WA 98101. Telephone: 206-553-5297.

The telephone numbers set forth in this section are not toll-free.

**§ 655.940 Employer attestations.**

(a) *Who may submit attestations?* An employer (or the employer's designated agent or representative) seeking to employ F-1 student(s) for off-campus work shall submit an attestation on Form ETA-9034. The attestation shall be signed by the employer (or the employer's designated agent or representative). For this purpose, the employer's authorized agent or representative shall mean an official of the employer who has the legal authority to commit

the employer to the terms and conditions of F-1 student attestations.

(b) *Where and when should attestations be submitted?* (1) Attestations shall be submitted, by U.S. mail, private carrier, or facsimile transmission, to the appropriate ETA Regional office, as defined in § 655.920 of this part, not later than 60 days after the employer's recruitment period (see paragraph (d) of this section) has ended and shall be accepted for filing, returned, or rejected by ETA in accordance with paragraph (f) of this section.

(2) Attestations shall also be submitted to the Designated School Official (DSO) at each educational institution from which the employer seeks to hire any F-1 student(s). Attestations may be filed simultaneously with ETA and the DSO, or the employer may file the approved attestation with the DSO. However, in no case shall the employer file the attestation with the DSO before filing the attestation with ETA or in the absence of filing the attestation with ETA.

(3) If the attestation is submitted simultaneously with ETA and the DSO, and ETA does not receive its copy of the attestation, the Administrator, for purposes of enforcement proceedings under subpart K of this part, shall consider that the attestation was accepted for filing by ETA as of the date the attestation is received by the DSO.

(c) *What should be submitted?* (1) Form ETA-9034. One completed and dated original Form ETA-9034 (or a facsimile), containing the attestation elements referenced in paragraphs (d) and (e) of this section, and the original signature (or a facsimile of the original signature) of the employer (or the employer's authorized agent or representative) and one copy of Form ETA-9034 shall be submitted to ETA. Each attestation form shall identify the position(s) for which the attestation is provided, state the occupational division in which the position is located, by Dictionary of Occupational Titles (DOT) Two-Digit Occupational Divisions code, and shall state the rate(s) of pay for the position(s). The DOT Two-Digit Occupational Division code is required for DOL recordkeeping and reporting purposes only and should not be used by the employer to determine

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the prevailing wage, as it is too general for this purpose. (Copies of Form ETA-9034 are available at the addresses listed in § 655.930 of this part). When an employer has filed an attestation by facsimile transmission, the employer shall retain in its files the original of the attestation which contains the employer's original signature.

(2) The employer may file an attestation for a single position or for multiple positions in the same occupation, or in multiple occupations, provided that all positions are located within the same geographic area of intended employment.

(3) If the employer files the attestation simultaneously with ETA and the DSO, or files the attestation first with ETA and subsequently files with the DSO before an accepted copy is returned from ETA to the employer, the employer shall, within fifteen days of receipt of ETA's notification of acceptance of the attestation for filing, provide an exact copy of the accepted attestation to the DSO at each educational institution from which the employer seeks to employ an F-1 student. The DSO shall notify ETA if the educational institution has not been provided with a copy of the attestation indicating that it was accepted for filing by ETA within 90 days from the date that the attestation was filed with the DSO.

(4) *Attestation Elements.* The attestation elements referenced in § 655.940 (d) and (e) of this section are mandated by section 221(a)(2) of the Act (8 U.S.C. 1184 note). Section 221(a)(2) of the Act provides that one of the conditions for the Attorney General to grant F-1 students work authorization, as described in INA section 101(a)(15)(F), to be employed off-campus in positions unrelated to their field of study, is that the employer provides the educational institution and the Secretary with an attestation that the employer:

(i) Has recruited for at least 60 days for the position; and

(ii) Will pay the F-1 student and all other similarly situated workers at a rate not less than the "required wage rate" (see § 655.920 of this part).

(d) *The first attestation element: 60-day recruitment.* An employer seeking to employ an F-1 student shall attest on

Form ETA-9034 that it has recruited for at least 60 days for the position(s) and that a sufficient number of U.S. workers were not able, qualified, and available for the position(s).

(1) *Establishing the 60-day recruitment requirement.* (i) The first attestation element is demonstrated if the employer attests that:

(A) It has recruited unsuccessfully for U.S. workers for at least 60 days for the position prior to filing the attestation; and

(B) It will conduct at least 60 days of unsuccessful recruitment for U.S. workers for each position in which, and at each time at which (until September 30, 1996), an F-1 student is subsequently employed.

(ii) To satisfy paragraph (d)(1)(i)(A) of this section, the employer shall recruit for the position for 60 consecutive days by posting the job vacancy (or help wanted) notice at the worksite and by placing a job order with the State Employment Service agency (SESA) local office which services the worksite.

(iii) To satisfy paragraph (d)(1)(i)(B) of this section, the employer shall either:

(A) Recruit for each position vacancy in the manner required by paragraph (d)(1)(ii) of this section; or

(B) File an "open job order" with the SESA local office which services the worksite. The employer shall accept referrals from the SESA local office on the "open job order".

(2) *Documenting the first attestation element.* In the event of an investigation, the employer shall have the burden of proving that it has complied with the elements described in paragraph (d)(1) of this section and attested to on ETA Form 9034. Documentation that is truthful, accurate and substantiates compliance as identified in Appendix A to this subpart shall be sufficient to meet the employer's burden of proof. The employer retains the right to meet its burden of proof in proving its attestation through other sufficient means.

(i) Documentation shall not be submitted to ETA or to the DSO with the attestation. An employer must be able to produce sufficient documentary

evidence to substantiate the attestation in the event of an investigation. Such documentation shall be made available to DOL as described in §§ 655.900(b)(3) and 655.1000(c) of this part.

(ii) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the recruitment, the employer should be able to produce such substantiating documentary evidence for a period of no less than 18 months after the close of the recruitment period or, in the event of an investigation, for the period of the enforcement proceeding under subpart K of this part.

(e) *The second attestation element: wages.* An employer seeking to employ F-1 students shall state on Form ETA-9034 that it will pay the F-1 student(s) and other similarly employed worker(s) the "required wage rate" as defined in § 655.920 of this part. For purposes of this paragraph "similarly employed" shall mean employees of the employer working in the same positions under like conditions, such as the same shift on the same days of the week. Neither the actual wage rate nor a prevailing wage determination for attestation purposes made pursuant to this section shall permit an employer to pay a wage lower than that required under any other Federal, State, or local law.

(1) *Establishing the wage requirement.* The second attestation element shall be satisfied when the employer signs Form ETA-9034, attesting that for the validity period of the attestation the "required wage rate" will be paid to the F-1 student(s) and other similarly situated workers; that is, that the wage will be no less than the actual wage rate paid to workers similarly employed at the worksite, or the prevailing wage (adjusted on an annual basis) for the occupation in the area of intended employment, whichever is higher. The employer's obligation to pay the "required wage rate" for the position(s) named in the attestation shall continue throughout the validity period of the attestation; the employer's determination of the prevailing wage shall be updated annually, beginning with the date of the attestation. The prevailing wage rate for a posi-

tion(s) named in the attestation, unless the subject of a Davis-Bacon Act or McNamara-O'Hara Service Contract Act wage determination described in paragraph (b)(4)(i) of appendix A of this subpart or a union contract as described in paragraph (b)(4)(ii) of appendix A of this subpart, shall be: The average rate of wages paid to workers similarly employed in the area of intended employment. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. For purposes of this section, "similarly employed" means having substantially comparable jobs in the occupational category in the area of intended employment, except that if no such workers are employed by employers other than the employer applicant in the area of intended employment "similarly employed" shall mean:

(i) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(ii) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(2) *Documentation of the second attestation element.* In the event of a complaint and investigation, the employer shall have the burden of proving the validity of and compliance with the attestation element referenced in paragraph (e)(1) of this section and attested to on ETA Form 9034. Documentation that the Department finds to be truthful, accurate and substantiates compliance as identified in appendix A of this subpart should be sufficient to meet the employer's burden of proof. The employer retains the right to meet its burden of proof in proving its attestation through other sufficient means.

(i) Documentation shall not be submitted to ETA or to the DSO with the attestation, but the employer must substantiate its attestation with appropriate documentation in the event of an investigation. Such documentation shall be made available to DOL as described in §§ 655.900(b)(3) and 655.1000(c) of this part.

(ii) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the determination the employer should be able to produce documentation substantiating its attestation for a period of no less than 18 months after the determination or update, or in the event of an investigation, for the period of the enforcement proceedings under subpart K of this part.

(f) *Actions on attestations submitted for filing.* Upon receipt of an attestation pursuant to this subpart, the Regional Certifying Officer shall determine whether the attestation is properly completed and whether there is cause to return the attestation to the employer as unacceptable.

(1) *Acceptable Attestations.* (i) Where all items on Form ETA-9034 have been completed and the attestation contains the signature of the employer or its authorized representative, the Regional Certifying Officer, except as provided in paragraph (f)(2)(ii) of this section, shall accept the attestation for filing. The Regional Certifying Officer shall return a copy of the accepted attestation to the employer or the employer's designated agent or representative, with ETA's acceptance indicated thereon. An attestation which is properly filled out in accordance with this section shall be deemed accepted for filing as of the date it is received by ETA as indicated by the date stamped thereon.

(ii) The employer shall file a copy of the accepted attestation with the DSO at the educational institution pursuant to § 655.940(c)(3) of this part.

(2) *Unacceptable Attestations.* ETA shall not accept an attestation for filing and shall return such attestation as unaccepted to the employer or the employer's designated agent or representative, when any one of the following conditions exists:

(i) Form ETA-9034 is not properly completed. Examples of Form ETA-9034 which is not properly completed include: instances where the employer has failed to complete all of the necessary items; or where the employer has failed to identify the position(s) or state the rate(s) of pay; or where the attestation does not contain the original signature (or facsimile of the signature when the attestation is submitted

by facsimile transmission) of the employer or its authorized representative.

(ii) The Administrator, Wage and Hour Division, after notice and opportunity for a hearing pursuant to subpart K of this part, has notified ETA in writing that the employer has been disqualified from employing F-1 students under section 221 of the Immigration Act.

(3) If the attestation is not accepted for filing pursuant to paragraph (f)(2)(i) of this section, ETA shall return it to the employer or the employer's agent or representative with written and dated notification of the reason(s) that the attestation is unacceptable. If the employer does not complete and return the attestation within 15 days of the date of such notification (as stated in paragraph (f)(4) of this section), ETA shall invalidate the attestation and shall notify the Attorney General of such invalidation. The Attorney General may then use such notification in its enforcement responsibilities. Employers shall not employ F-1 students without a valid attestation.

(4) *Resubmission.* When the attestation is determined to be unacceptable and is returned to the employer for completion pursuant to paragraph (f)(2)(i) of this section, the employer may resubmit the attestation. The employer shall resubmit the attestation within 15 days of the date of nonacceptance to avoid the invalidation of its attestation and ETA's notice to the Attorney General. Upon resubmission, if the attestation is determined to be acceptable pursuant to paragraph (f)(1) of this section, the Regional Certifying Officer shall accept the attestation for filing as of the original date of receipt by ETA, and shall return a copy of the attestation to the employer with ETA's acceptance indicated thereon.

(g) *Challenges to Attestations.* (1) ETA will not consider, prior to the acceptance or return of the attestation, information contesting an attestation received by ETA. Such information shall not be made part of ETA's administrative record on the attestation, but shall be referred to the Administrator to be processed as a complaint pursuant to subpart K of this part, and, if such attestation is accepted for filing

by ETA, the complaint shall be handled by ESA under subpart K of this part.

(2) DOL is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing pursuant to this subpart.

(h) *Effective date and validity of filed attestations.* (1) A properly completed attestation accepted pursuant to paragraph (f)(1) of this section shall be deemed accepted for filing as of the date it is received and date stamped by the Regional Certifying Officer and shall be valid for the duration of the F-1 student work authorization program which expires on September 30, 1996, unless withdrawn pursuant to paragraph (i) of this section or invalidated pursuant to paragraph (j) of this section or subpart K of this part.

(2) During the validity period of an attestation which has been accepted for filing as described in paragraph (f)(1) of this section, the attesting employer may hire, during the 90-day period following the last day of its 60-day recruitment period, or at any time if the employer has placed an "open job order" with the SESA as part of their recruitment effort, F-1 students as needed from as many educational institutions as it deems necessary to fill the positions described in the attestation, at the location(s) specified in the attestation, and at the "required wage rate." The employer shall provide a copy of the accepted attestation to the DSO at each educational institution from which it hires any F-1 student(s).

(3) The DSO may grant work authorization for an F-1 student to be employed by a particular attesting employer for the duration of the F-1 student's course of study or until September 30, 1996, whichever period is shorter, provided the F-1 student continues to be employed by the attesting employer and is otherwise eligible for F-1 student work authorization as determined by the Attorney General.

(i) *Withdrawal of accepted attestations.* (1) An employer who has submitted an attestation which has been accepted for filing may withdraw such attestation at any time before the expiration of the validity period of the attestation, unless the Administrator has found reasonable cause to commence an investigation of the attestation

under subpart K of this part. Requests for such withdrawals shall be in writing and shall be directed to the Regional Certifying Officer with whom the attestation was filed.

(2) Upon the Regional Certifying Officer's receipt of an employer's written request to withdraw an attestation, it shall be the employer's responsibility to promptly notify the DSO at each school where F-1 students it employs are enrolled.

(3) Withdrawal of an attestation shall not affect an employer's liability with respect to any failure to meet the conditions attested to which took place before the withdrawal, or for material misrepresentations in an attestation. However, if an employer has not yet employed any F-1 student(s) pursuant to the attestation, the Administrator shall not find reasonable cause to investigate unless it is alleged, and there is reasonable cause to believe, that the employer has made material misrepresentations in the attestation.

(j) *Invalidation of filed attestation.* Invalidation of an attestation may result from enforcement action(s) by the Administrator, Wage and Hour Division, under subpart K of this part (*i.e.*, investigation(s) conducted by the Administrator regarding the employer's material misrepresentation of an attestation element or failure to pay wages in accordance with attestation). Invalidation of an attestation may also result where ETA determines that the attestation is unacceptable and the employer fails to resubmit the attestation to ETA within 15 days.

(1) *Result of Wage and Hour Division action.* Upon a determination of a violation under subpart K of this part, the Administrator shall notify ETA and shall notify the Attorney General of the violation and of the Administrator's notice to ETA.

(2) *Result of ETA action.* If, after accepting an attestation for filing, ETA finds that it is unacceptable because it falls within one of the categories set forth at paragraph (f)(2)(i) of this section, ETA shall return the attestation to the employer for correction and resubmission within 15 days. If the employer fails to resubmit the attestation

within 15 days of the date of the notification, ETA shall invalidate the attestation. ETA shall notify the Attorney General of such invalidation. Where the attestation has been invalidated, ETA shall return a copy of the attestation form to the employer, or the employer's agent or representative, and shall notify the employer in writing of the reason(s) that the attestation is invalidated. When an attestation is invalidated pursuant to paragraph (f)(2)(ii) of this section, ETA shall invalidate all attestations filed by the employer. Such action shall be the final decision of the Secretary of Labor and is not subject to appeal.

(k) *Employers subject to disqualification.* No attestation shall be accepted for filing from an employer which has been found to be disqualified from participation in the F-1 student work authorization program as determined in a final agency action following an investigation by the Administrator pursuant to subpart K of this part.

(Approved by the Office of Management and Budget under control number 1205-0315)

[56 FR 56865, 56876, Nov. 6, 1991, as amended at 59 FR 64777, Dec. 15, 1994; 60 FR 61210, 61211, Nov. 29, 1995]

**§ 655.950 Public access.**

(a) *Public examination at ETA.* ETA shall compile and maintain a list of employers who filed attestations specifying the occupation(s), geographical location, and wage rate(s) attested to. The list shall be available for public inspection at the ETA office at which the attestation was filed and such list shall be updated monthly.

(b) *Notice to Public.* ETA shall publish semiannually a list in the FEDERAL REGISTER of employers which have been disqualified from participating in the F-1 student work authorization program pursuant to § 655.940(k) of this part.

APPENDIX A TO SUBPART J OF PART 655—DOCUMENTATION IN SUPPORT OF ATTESTATIONS MADE BY EMPLOYERS

This appendix sets forth the documentation that the Department of Labor considers to be sufficient to satisfy the employer's burden of proof regarding substantiate attestations made on Form ETA-9034, pursuant to subpart J of this part, provided the docu-

mentation is found to be truthful, accurate, and substantiates compliance. The employer retains the right to meet its burden of proof in proving its attestations through other sufficient means. The employer's failure to substantiate its attestation in the event of an investigation shall be found to be a violation.

(a) *Documenting the first attestation element.* The employer shall have the burden of proving that it has complied with the recruitment requirements described in regulations at § 655.940(d)(1) of this part and attested to on ETA Form-9034. The employer's failure to satisfy the burden of proof through the production of adequate documentation shall be found to be a violation.

(1) Documentation shall not be submitted to ETA or to the DSO with the attestation, but shall be made available to DOL as described in §§ 655.900(b)(3) and 655.1000(c) of this part. To be effective in satisfying the burden of proof, the documentation should be contemporaneous with the recruitment, not created after the fact and particularly not after the commencement of an investigation under subpart K of this part.

(2) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the recruitment, the employer should maintain the documentation for a period of no less than 18 months after the close of the recruitment period or, in the event of an investigation, for the period of the enforcement proceeding under subpart K of this part.

(3) The employer should be able to produce the following documentation:

(i) Evidence that a job order for the position was on file with the SESA local office within the area of intended employment for at least 60 consecutive days. Such evidence of a job order should include the employer's contemporaneous written statement setting forth the name and address of the SESA office with which the job order was placed; the name of the SESA employee with whom the job order was placed; the date on which the order was placed; and the dates on which the job order was on file with the SESA office.

(ii) Evidence that a vacancy notice announcing the position was posted for 60 consecutive days at the worksite. Evidence should include a copy of the notice that was posted at the worksite, the dates when the notice was posted, and a description of the specific location at the worksite at which the notice was posted.

(iii) Evidence that a job order for the position was continuously on file and "open" with the SESA local office within the area of intended employment, throughout the validity period of the attestation. Such evidence should include the employer's contemporaneous written statement setting forth the name and address of the SESA office with which the job order was placed; the name of

the SESA employee with whom the job order was placed; the date on which the order was placed; and the dates on which the job order was on file with the SESA office.

(iv) Evidence that the employer was unsuccessful in recruiting a sufficient number of U.S. workers who are able, qualified, and available for the position(s) through the SESA job order and the worksite posting notice. Such evidence should include a contemporaneous written summary of the results of recruitment for each position for which an attestation was filed by the employer. Such summary should include:

(A) The number of job openings in each occupation included in the occupation;

(B) The number of U.S. workers and F-1 students that applied for each position;

(C) The number of U.S. workers that were hired;

(D) The number of F-1 students that were hired;

(E) The number of U.S. workers that were not hired; and

(F) The lawful job-related reason(s) for which each U.S. worker was not hired. An example of a job-related reason for which a U.S. worker can be rejected for a job opportunity is that the U.S. worker does not have the training and experience required for the position.

(4) *Investigations.* In the event that an investigation is conducted pursuant to regulations at subpart K of this part, concerning whether the employer failed to satisfy its recruitment requirement, in that it failed to conduct recruitment or to hire qualified U.S. worker(s) for a position for which an F-1 student(s) was hired, the Administrator shall determine whether the employer has produced documentation sufficient to prove the employer's compliance with the attestation requirements.

(i) Where the focus of the investigation is upon whether recruitment was conducted, the employer shall have satisfied its burden of proof if the documentation described in paragraphs (a)(3) (i), (ii), and (iii) of this appendix is produced, provided the documentation is found to be truthful, accurate and substantiates compliance.

(ii) Where the focus of the investigation is upon whether the employer's recruitment of U.S. workers was unsuccessful because the employer declined to hire U.S. worker(s) without lawful reason(s) for such action, the employer shall have satisfied the burden of proof if the documentation described in paragraph (a)(3)(iv) of this appendix is produced, provided that the Administrator has no significant evidence which reasonably shows that the employer's recruitment or hiring was deficient. In determining whether the employer has demonstrated that U.S. workers were rejected for lawful job-related reasons, the Administrator may contact ETA which shall provide the Administrator with

advice as to whether U.S. workers were properly rejected.

(b) *Documentation of the second attestation element.* The employer shall have the burden of proving the validity of and compliance with the attestation element referenced in §655.940(e) of this part and attested to on Form ETA-9034.

(1) The employer shall be prepared to produce documentation sufficient to satisfy this requirement. Documentation shall not be submitted to ETA or to the DSO with the attestation, but shall be made available to DOL as described in §§655.900(b)(3) and §655.1000(c) of this part. The documentation specified in paragraphs (b) (4) and (5) of this appendix will be sufficient to satisfy the employer's burden of proof, provided the documentation is found to be truthful, accurate and substantiates compliance upon investigation. The employer's failure to satisfy the burden of proof through the production of adequate documentation shall be found to be a violation.

(2) To be effective in satisfying the employer's burden of proof regarding the determination of the prevailing wage, the employer's documentation should be contemporaneous with the determination or the annual update of the prevailing wage, not created after the fact and particularly not after the commencement of an investigation under subpart K of this part.

(3) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the determination or the annual update, the employer should be prepared to produce documentation for a period of no less than 18 months after the determination or update, or in the event of an investigation, for the period of the enforcement proceedings under subpart K of this part.

(4) Documentation described in paragraphs (b) (1) through (3) of this appendix should consist of the following:

(i) If the position is in an occupation which is the subject of a wage determination in the area under the provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, (see 29 CFR part 1) or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*, (see 29 CFR part 4), an excerpt from the wage determination showing the wage rate for the occupation in the area of intended employment; or

(ii) If the position is covered by a union contract which was negotiated at arm's-length between a union and the employer, an excerpt from the union contract showing the wage rate(s) for the occupation(s) set forth in the union contract.

(iii) If position is not covered by the provisions of paragraph (b)(4) (i) or (ii) of this appendix, the employers's documentation shall consist of:



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(A) A prevailing wage finding from the SESA for the occupation within the area of employment; or

(B) A prevailing wage survey for the occupation in the area of intended employment published by an independent authoritative source as defined in § 655.920 of this part. For purposes of this paragraph (b)(4)(iii)(B) "prevailing wage survey" means a survey of wages published in a book, newspaper, periodical, looseleaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's attestation and each succeeding annual prevailing wage update. Such survey shall:

(1) Reflect the average wage paid to workers similarly employed in the area of intended employment;

(2) Be based upon recently collected data, e.g., within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.

(5) The employer should be prepared to produce documentation to prove the payment of the required wage, including payroll records, commencing on the date on which the employer first employs the F-1 student, showing the wages paid to employees in the occupation(s) named in the attestation at the worksite. Such payroll records maintained in accordance with regulations under the Fair Labor Standards Act (see 29 CFR part 516) would include for each employee in the occupation:

(i) The rate(s) of pay, including shift differentials, if any;

(ii) The employee's earnings per pay period;

(iii) The number of hours worked per week by the employee; and

(iv) The amount of and reasons for any and all deductions made from the employee's wages.

(6) *Investigations.* In the event that an investigation is conducted pursuant to subpart K of this part, concerning whether the employer made a material misrepresentation regarding the required wage or failed to pay the required wage, the Administrator shall determine whether the employer has produced documentation sufficient to satisfy the burden of proof.

(i) The employer's documentation of the prevailing wage determination shall be found to be sufficient where the determination is pursuant to the Davis-Bacon Act or Service Contract Act wage determination or a SESA determination.

(ii) Where the employer's prevailing wage determination is based on a survey by an independent authoritative source, the Administrator shall consider the employer's

documentation to be sufficient, provided that it satisfies the standards for independent authoritative source surveys and is properly applied, and provided further that the Administrator has no significant evidence which reasonably shows that the prevailing wage finding obtained by the employer from an independent authoritative source varies substantially from the wage prevailing for the occupation in the area of intended employment. In the event such significant evidence shows a substantial variance, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for the determination as to violations. ETA may consult with the appropriate SESA to ascertain the prevailing wage applicable to the occupation under investigation.

(Approved by the Office of Management and Budget under control number 1205-0315)

**Subpart K—Enforcement of the Attestation Process for Attestations Filed by Employers Utilizing F-1 Students in Off-Campus Work**

SOURCE: 56 FR 56872, 56876, Nov. 6, 1991, unless otherwise noted.

**§ 655.1000 Enforcement authority of Administrator, Wage and Hour Division.**

(a) The Administrator shall perform all the Secretary's investigative and enforcement functions under section 221 of the Act and subparts J and K of this part.

(b) The Administrator shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary to determine compliance with section 221(a) of the Act and subparts J and K of this part.

(c) An employer being investigated pursuant to this subpart shall have the burden of proof as to compliance with section 221(a) of the Act and the validity of its attestation, and in this regard shall make available to the Administrator such records, information,

persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of section 221 of the Act and subparts J and K of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to section 221 of the Act or subpart J or K of this part. Any such interference shall be a violation of the attestation and subparts J and K of this part, and the Administrator may take such further actions as the Administrator deems appropriate.

NOTE: Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) An employer subject to subparts J and K of this part shall at all times cooperate in administrative and enforcement proceedings. No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person because such person has:

(1) Filed a complaint or appeal under or related to section 221 of the Act or subparts J or K of this part;

(2) Testified or is about to testify in any proceeding under or related to section 221 of the Act or subpart J or K of this part;

(3) Exercised or asserted on behalf of himself or herself or others any right or protection afforded by section 221 of the Act or subpart J or K of this part.

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to section 221 of the Act or to subpart J or K of this part or any other DOL regulation promulgated pursuant to section 221 of the Act. In the event of any intimidation or restraint as described in this section, the conduct shall be a violation of the attestation and these regulations, and the Administrator may take such further actions as the Administrator considers appropriate.

(e) The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person, including any complainant, who provides information to the Department in confidence during the course of an investigation or otherwise under subpart J or K of this part.

#### § 655.1005 Complaints and investigative procedures.

(a) The Administrator, through an investigation, shall determine whether an employer of F-1 students has:

(1) Provided an attestation which is materially false

NOTE: Federal criminal statutes provide penalties of up to \$10,000 and/or imprisonment of up to 5 years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546.

(2) Failed to pay the appropriate wage rate as required under § 655.940(e) of this part; or

(3) Failed to comply with the provisions of subpart J or K of this part.

(b) Any aggrieved person or organization may file a complaint alleging a violation of the provisions of subpart J or K of this part. No particular form is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint. The complaint shall set forth sufficient facts for the Administrator to determine whether there is reasonable cause to believe that a particular part or parts of the attestation or regulations may have been violated. The complaint may be submitted to any local Wage and Hour Division office, the addresses of which can be found in local telephone directories. The office or person receiving such a complaint shall refer it to the office of the Wage and Hour Division administering the area in which the reported violation is alleged to have occurred.

(c) The Administrator shall determine whether there is reasonable cause to believe that a complaint warrants investigation. If it is determined that a complaint fails to present reasonable cause, the Administrator shall so notify the complainant, who may submit a new complaint with such additional information as may be available. If the Administrator determines that reasonable cause exists, an investigation will be conducted.

(d) In the event that the Administrator, after an investigation, determines that the employer has committed any violation(s) described in

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paragraph (a) of this section, the Administrator shall issue a written determination to the employer in accordance with § 655.1015 of this part and an opportunity for a hearing shall be afforded in accordance with the procedures specified in § 655.1020 of this part.

### § 655.1010 Remedies.

Where the Administrator, after notice and opportunity for a hearing, determines that an employer has committed a violation identified in § 655.1005(a) of this part, the employer shall be disqualified from employing F-1 student(s) under section 221 of the Act. The Administrator shall so notify the Attorney General and ETA pursuant to § 655.1055 of this part. Upon receipt of the Administrator's notice, the Attorney General and ETA shall take the action specified in § 655.1055 of this part, *i.e.*, cancel any existing attestation(s) or work authorizations, and shall not accept future attestation(s) or grant new work authorization(s) with respect to that employer.

### § 655.1015 Written notice and service of Administrator's determination.

(a) The Administrator's written determination, issued pursuant to §§ 655.1005 and 655.1010 of this part, shall be served on the employer by personal service or by certified mail at the address of the employer or the employer's agent shown on the attestation. Where service by certified mail is not accepted by the employer, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The Administrator's written determination, issued pursuant to §§ 655.1005 and 655.1010 of this part, shall:

(1) Set forth the Administrator's determination of the violation(s) and the Administrator's reason or reasons therefor.

(2) Inform the employer that it may request a hearing pursuant to § 655.1020 of this part.

(3) Inform the employer that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

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(4) Set forth the procedure for requesting a hearing, and give the addresses of the Chief Administrative Law Judge (with whom the request must be filed) and the representative of the Solicitor of Labor (who must be served with a copy of the request).

(5) Inform the employer that, if no timely request for a hearing is filed pursuant to § 655.1020 of this part, the employer shall be disqualified from employing F-1 students, effective upon the expiration of the period for filing a request for a hearing. In such event, the Administrator shall, pursuant to § 655.1055 of this part, notify ETA and the Attorney General of the occurrence of a violation by the employer, and that the employer has been disqualified from employing F-1 students.

### § 655.1020 Request for hearing.

(a) An employer desiring to request an administrative hearing on a determination issued pursuant to § 655.1015 of this part shall make such request in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. Copies of the request shall be served upon the Wage and Hour Division official who issued the notice of determination and upon the representative of the Solicitor of Labor identified in the notice of determination.

(b) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the employer believes such determination is in error;

(5) Be signed by the employer making the request or by an authorized representative of the employer; and

(6) Include the address at which the employer or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar

days after the date of the determination.

(d) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the employer or authorized representative, shall be filed within ten days thereafter.

(e) A copy of the request for a hearing shall be sent by the requestor to the Administrator at the address shown on the Administrator's notice of determination.

**§ 655.1025 Rules of practice for administrative law judge proceedings.**

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

**§ 655.1030 Service and computation of time.**

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to

serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., room N-2716, Washington, DC 20210, and one copy on the attorney representing the Administrator in the proceeding.

(c) Time under this subpart shall be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

**§ 655.1035 Administrative law judge proceedings.**

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.1020 of this part, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) The date of the hearing shall be not more than 60 calendar days from the date of the Chief Administrative Law Judge's receipt of the request for hearing.

(c) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § 655.1030 of this part. Posthearing briefs shall not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served in accordance with § 655.1030 of this part.

(d) Amicus curiae participation or intervention by interested parties may be permitted by the administrative law judge in his/her discretion pursuant to 29 CFR 18.10. If such participation is granted, the amicus curiae and/or intervenor shall serve all documents and

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be served by the parties in accordance with § 655.1030 of this part. In no event, however, shall such participation be permitted to delay the proceedings beyond the deadline specified in paragraphs (b) and (c) of this section.

**§ 655.1040 Decision and order of administrative law judge.**

(a) Within 90 calendar days after receipt of the transcript of the hearing, the administrative law judge shall issue a decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision.

(c) The administrative law judge, in accordance with § 655.940 (d) and (e) of this part, shall impose upon the employer the burden of proving the validity of and compliance with the attestation.

(d) If the administrative law judge finds that the employer has failed to pay the required wage rate or has provided an attestation which is materially false, the judge shall order that the employer be disqualified from employing F-1 students.

(e) In the event that the Administrator's determination(s) of wage violation(s) is based upon a wage determination obtained by the Administrator from ETA during the investigation (paragraph (b)(6) of appendix A of subpart J of this part), the administrative law judge shall not determine the prevailing wage rate *de novo*, but shall, based on the evidence (including the ETA administrative record), either accept the wage determination or vacate the wage determination. If the wage determination is vacated, the administrative law judge shall remand the case to the Administrator, who may then refer the matter to ETA and, upon the issuance of a new wage determination by ETA, resubmit the case to the administrative law judge. Under no circumstances shall source data obtained in confidence by ETA, or the names of

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establishments contacted by ETA, be submitted into evidence or otherwise disclosed.

(f) The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(g) The decision shall be served on all parties in person or by certified or regular mail.

**§ 655.1045 Secretary's review of administrative law judge's decision.**

(a) Any party desiring review of the decision and order of an administrative law judge shall petition the Secretary to review the decision and order. To be effective, such petition must be received by the Secretary within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and the administrative law judge.

(b) No particular form is prescribed for any petition for the Secretary's review permitted by this subpart. However, any such petition shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(c) Whenever the Secretary determines to review the decision and order of an administrative law judge, a notice of the Secretary's determination shall be served upon the administrative law judge and all parties within 30 calendar days after the Secretary's receipt of the petition for review.

(d) Upon receipt of the Secretary's notice, the Office of Administrative Law Judges shall within 15 calendar days forward the complete hearing record to the Secretary.

(e) The Secretary's notice may specify:

- (1) The issue or issues to be reviewed;
- (2) The form in which submissions shall be made by the parties (*e.g.*, briefs);
- (3) The time within which such submissions shall be made.

(f) All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, room S-4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, must be received by the Secretary either on or before the due date.

(g) Copies of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § 655.1030(b) of this part.

(h) The Secretary's final decision shall be issued within 180 calendar days from the date of the notice of intent to review. The Secretary's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Secretary's decision, the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.1050 of this part.

**§ 655.1050 Administrative record.**

The official record of every completed administrative hearing procedure provided by subpart K of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

**§ 655.1055 Notice to the Employment and Training Administration (ETA) and the Attorney General (AG).**

(a) The Administrator shall notify the Attorney General and ETA of the final determination of a violation by an employer, and of the disqualification of the employer from employing F-1 students, upon the earliest of the following events:

(1) When the Administrator issues a written determination that the employer has committed a violation, and no timely request for hearing is made by the employer pursuant to § 655.1020 of this part; or

(2) When, after a hearing on a timely request pursuant to § 655.1020 of this part, the administrative law judge issues a decision and order finding a violation by the employer; or

(3) When, although the administrative law judge found that there was no violation by the employer, the Secretary, upon subsequent review upon a timely request pursuant to § 655.1045 of this part, issues a decision finding that a violation was committed by the employer.

(b) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (a) of this section, shall take appropriate action to cancel work authorization to F-1 students for employment with that employer, and to prevent issuance of new work authorization with respect to that employer.

(1) The Administrator's notice to the Attorney General shall, to the extent known from the investigation, specify the school(s) which issued work authorization for the F-1 students who were employed by the employer. The Attorney General shall inform the appropriate authority at each of the specified school(s) that any work authorization(s) issued for F-1 student(s) to be employed by that employer shall immediately be revoked, and that no new work authorization shall be issued for employment of F-1 student(s) by that employer. The Attorney General shall, in addition, take any other appropriate action to effectuate the disqualification of that employer through revocation of work authorization(s) at any other school(s) that may authorize

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employment with the disqualified employer.

(2) A copy of the Administrator's notice to the Attorney General may also be sent by the Administrator to each school identified in the notice as a school from which F-1 students have been employed by the disqualified employer. Such copy of the Administrator's notice, upon receipt by the school, shall constitute sufficient notice for the DSO to revoke work authorization(s) and to refuse to issue new work authorization(s) for employment of F-1 students by that employer. Any school which issued or may issue work authorization(s) for employment of any F-1 student(s) by the employer, but which was not known by the Administrator to have done so, or notified by copy of the Administrator's decision, shall comply with any instructions from the Attorney General regarding revocation and nonissuance of work authorization for employment of any F-1 student(s) by the employer. In addition, any school (whether or not it received a copy of the Administrator's notice to the Attorney General regarding the employer) shall revoke F-1 work authorization(s) and refuse to issue new F-1 work authorization(s) for any employer which is identified as a disqualified employer on the list published periodically in the FEDERAL REGISTER by ETA.

(3) Continued or new employment of any F-1 student by the employer shall constitute a violation of the INA's employer sanctions provisions, irrespective of whether the F-1 student's work authorization has been formally revoked by the DSO or INS.

(c) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall cancel any F-1 attestation filed by the employer under subpart J of this part, shall not accept for filing any attestation submitted by the employer, and shall so notify the employer.

**§655.1060 Non-applicability of the Equal Access to Justice Act.**

A proceeding under subpart K of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no author-

ity to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

**Subpart L—What Requirements Must a Facility Meet to Employ H-1C Nonimmigrant Workers as Registered Nurses?**

SOURCE: 65 FR 51149, Aug. 22, 2000, unless otherwise noted.

**§655.1100 What are the purposes, procedures and applicability of these regulations in subparts L and M of this part?**

(a) *Purpose.* The Immigration and Nationality Act (INA), as amended by the Nursing Relief for Disadvantaged Areas Act of 1999, establishes the H-1C nonimmigrant visa program to provide qualified nursing professionals for narrowly defined health professional shortage areas. Subpart L of this part sets forth the procedure by which facilities seeking to use nonimmigrant registered nurses must submit attestations to the Department of Labor demonstrating their eligibility to participate as facilities, their wages and working conditions for nurses, their efforts to recruit and retain United States workers as registered nurses, the absence of a strike/lockout or lay-off, notification of nurses, and the numbers of and worksites where H-1C nurses will be employed. Subpart M of this part sets forth complaint, investigation, and penalty provisions with respect to such attestations.

(b) *Procedure.* The INA establishes a procedure for facilities to follow in seeking admission to the United States for, or use of, nonimmigrant nurses under H-1C visas. The procedure is designed to reduce reliance on nonimmigrant nurses in the future, and calls for the facility to attest, and be able to demonstrate in the course of an investigation, that it is taking timely and significant steps to develop, recruit, and retain U.S. nurses. Subparts L and M of this part set forth the specific requirements of those procedures.

(c) *Applicability.* (1) Subparts L and M of this part apply to all facilities that seek the temporary admission or use of

H-1C nonimmigrants as registered nurses.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, subparts L and M of this part shall apply to the entry of a nonimmigrant who is a citizen of Mexico under the provisions of section D of Annex 1603 of NAFTA. Therefore, the references in this part to "H-1C nurse" apply to such nonimmigrants who are classified by INS as "TN."

**655.1101 What are the responsibilities of the government agencies and the facilities that participate in the H-1C program?**

(a) *Federal agencies' responsibilities.* The United States Department of Labor (DOL), Department of Justice, and Department of State are involved in the H-1C visa process. Within DOL, the Employment and Training Administration (ETA) and the Wage and Hour Division of the Employment Standards Administration (ESA) have responsibility for different aspects of the process.

(b) *Facility's attestation responsibilities.* Each facility seeking one or more H-1C nurse(s) must, as the first step, submit an Attestation on Form ETA 9081, as described in §655.1110 of this part, to the Employment and Training Administration, Director, Office of Workforce Security, 200 Constitution Ave. NW., Room C-4318, Washington, DC 20210. If the Attestation satisfies the criteria stated in §655.1130 and includes the supporting information required by §655.1110 and by §655.1114, ETA shall accept the Attestation for filing, and return the accepted Attestation to the facility.

(c) *H-1C petitions.* Upon ETA's acceptance of the Attestation, the facility may then file petitions with INS for the admission or for the adjustment or extension of status of H-1C nurses. The facility must attach a copy of the accepted Attestation (Form ETA 9081) to the petition or the request for adjustment or extension of status, filed with INS. At the same time that the facility files an H-1C petition with INS, it must also send a copy of the petition to the Employment and Training Administra-

tion, Administrator, Office of Workforce Security, 200 Constitution Avenue, NW., Room C-4318, Washington, DC 20210. The facility must also send to this same ETA address a copy of the INS petition approval notice within 5 days after it is received from INS.

(d) *Visa issuance.* INS assures that the alien possesses the required qualifications and credentials to be employed as an H-1C nurse. The Department of State is responsible for issuing the visa.

(e) *Board of Alien Labor Certification Appeals (BALCA) review of Attestations accepted and not accepted for filing.* Any interested party may seek review by the BALCA of an Attestation accepted or not accepted for filing by ETA. However, such appeals are limited to ETA actions on the three Attestation matters on which ETA conducts a substantive review (*i.e.*, the employer's eligibility as a "facility;" the facility's attestation to alternative "timely and significant steps;" and the facility's assertion that taking a second "timely and significant step" would not be reasonable).

(f) *Complaints.* Complaints concerning misrepresentation of material fact(s) in the Attestation or failure of the facility to carry out the terms of the Attestation may be filed with the Wage and Hour Division, Employment Standards Administration (ESA) of DOL, according to the procedures set forth in subpart M of this part. The Wage and Hour Administrator shall investigate and, where appropriate, after an opportunity for a hearing, assess remedies and penalties. Subpart M of this part also provides that interested parties may obtain an administrative law judge hearing and may seek review of the administrative law judge's decision at the Department's Administrative Review Board.

**§ 655.1102 What are the definitions of terms that are used in these regulations?**

For the purposes of subparts L and M of this part:

*Accepted for filing* means that the Attestation and any supporting documentation submitted by the facility have been received by the Employment



and Training Administration of the Department of Labor and have been found to be complete and acceptable for purposes of Attestation requirements in §§ 655.1110 through 655.1118.

*Administrative Law Judge* means an official appointed under 5 U.S.C. 3105.

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under subparts L and M of this part.

*Administrator, OWS* means the Administrator of the Office of Workforce Security, Employment Training Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator, OWS under subpart L of this part.

*Aggrieved party* means a person or entity whose operations or interests are adversely affected by the employer's alleged misrepresentation of material fact(s) or non-compliance with the Attestation and includes, but is not limited to:

(1) A worker whose job, wages, or working conditions are adversely affected by the facility's alleged misrepresentation of material fact(s) or non-compliance with the attestation;

(2) A bargaining representative for workers whose jobs, wages, or working conditions are adversely affected by the facility's alleged misrepresentation of material fact(s) or non-compliance with the attestation;

(3) A competitor adversely affected by the facility's alleged misrepresentation of material fact(s) or non-compliance with the attestation; and

(4) A government agency which has a program that is impacted by the facility's alleged misrepresentation of material fact(s) or non-compliance with the attestation.

*Attorney General* means the chief official of the U.S. Department of Justice or the Attorney General's designee.

*Board of Alien Labor Certification Appeals (BALCA)* means a panel of one or more administrative law judges who serve on the permanent Board of Alien Labor Certification Appeals established by 20 CFR part 656. BALCA con-

sists of administrative law judges assigned to the Department of Labor and designated by the Chief Administrative Law Judge to be members of the Board of Alien Labor Certification Appeals.

*Certifying Officer* means a Department of Labor official, or such official's designee, who makes determinations about whether or not H-1C attestations are acceptable for certification.

*Chief Administrative Law Judge* means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

*Date of filing* means the date an Attestation is "accepted for filing" by ETA.

*Department* and *DOL* mean the United States Department of Labor.

*Division* means the Wage and Hour Division of the Employment Standards Administration, DOL.

*Employed* or *employment* means the employment relationship as determined under the common law, except that a facility which files a petition on behalf of an H-1C nonimmigrant is deemed to be the employer of that H-1C nonimmigrant without the necessity of the application of the common law test. Under the common law, the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase \* \* \* can be applied to find the answer \* \* \*. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968). The determination should consider the following factors and any other relevant factors that would indicate the existence of an employment relationship:

(1) The firm has the right to control when, where, and how the worker performs the job;

(2) The work does not require a high level of skill or expertise;

(3) The firm rather than the worker furnishes the tools, materials, and equipment;

(4) The work is performed on the premises of the firm or the client;

(5) There is a continuing relationship between the worker and the firm;

(6) The firm has the right to assign additional projects to the worker;

(7) The firm sets the hours of work and the duration of the job;

(8) The worker is paid by the hour, week, month or an annual salary, rather than for the agreed cost of performing a particular job;

(9) The worker does not hire or pay assistants;

(10) The work performed by the worker is part of the regular business (including governmental, educational and nonprofit operations) of the firm;

(11) The firm is itself in business;

(12) The worker is not engaged in his or her own distinct occupation or business;

(13) The firm provides the worker with benefits such as insurance, leave, or workers' compensation;

(14) The worker is considered an employee of the firm for tax purposes (*i.e.*, the entity withholds federal, state, and Social Security taxes);

(15) The firm can discharge the worker; and

(16) The worker and the firm believe that they are creating an employer-employee relationship.

*Employment and Training Administration (ETA)* means the agency within the Department of Labor (DOL) which includes the Office of Workforce Security (OWS).

*Employment Standards Administration (ESA)* means the agency within the Department of Labor (DOL) which includes the Wage and Hour Division.

*Facility* means a "subsection (d) hospital" (as defined in section 1886(d)(1)(B) of the Social Security Act (42 U.S.C. 1395ww(d)(1)(B)) that meets the following requirements:

(1) As of March 31, 1997, the hospital was located in a health professional shortage area (as defined in section 332 of the Public Health Service Act (42 U.S.C. 245e)); and

(2) Based on its settled cost report filed under title XVIII of the Social Security Act (42 U.S.C. 1395 *et seq.*) for its cost reporting period beginning during fiscal year 1994—

(i) The hospital has not less than 190 licensed acute care beds;

(ii) The number of the hospital's inpatient days for such period which were made up of patients who (for such

days) were entitled to benefits under part A of such title is not less than 35% of the total number of such hospital's acute care inpatient days for such period; and

(iii) The number of the hospital's inpatient days for such period which were made up of patients who (for such days) were eligible for medical assistance under a State plan approved under title XIX of the Social Security Act, is not less than 28% of the total number of such hospital's acute care inpatient days for such period.

*Full-time employment* means work where the nurse is regularly scheduled to work 40 hours or more per week, unless the facility documents that it is common practice for the occupation at the facility or for the occupation in the geographic area for full-time nurses to work fewer hours per week.

*Geographic area* means the area within normal commuting distance of the place (address) of the intended worksite. If the geographic area does not include a sufficient number of facilities to make a prevailing wage determination, the term "geographic area" shall be expanded with respect to the attesting facility to include a sufficient number of facilities to permit a prevailing wage determination to be made. If the place of the intended worksite is within a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA will be deemed to be within normal commuting distance of the place of intended employment.

*H-1C nurse* means any nonimmigrant alien admitted to the United States to perform services as a nurse under section 101(a)(15)(H)(i)(c) of the Act (8 U.S.C. 1101(a)(15)(H)(i)(c)).

*Immigration and Naturalization Service (INS)* means the component of the Department of Justice which makes the determination under the Act on whether to grant H-1C visas to petitioners seeking the admission of nonimmigrant nurses under H-1C visas.

*INA* means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

*Lockout* means a labor dispute involving a work stoppage in which an employer withholds work from its employees in order to gain a concession from them.

*Nurse* means a person who is or will be authorized by a State Board of Nursing to engage in registered nursing practice in a State or U.S. territory or possession at a facility which provides health care services. A staff nurse means a nurse who provides nursing care directly to patients. In order to qualify under this definition of "nurse" the alien must:

(1) Have obtained a full and unrestricted license to practice nursing in the country where the alien obtained nursing education, or have received nursing education in the United States;

(2) Have passed the examination given by the Commission on Graduates for Foreign Nursing Schools (CGFNS), or have obtained a full and unrestricted (permanent) license to practice as a registered nurse in the state of intended employment, or have obtained a full and unrestricted (permanent) license in any state or territory of the United States and received temporary authorization to practice as a registered nurse in the state of intended employment; and,

(3) Be fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to practice as a registered nurse immediately upon admission to the United States, and be authorized under such laws to be employed by the employer. For purposes of this paragraph, the temporary or interim licensing may be obtained immediately after the alien enters the United States and registers to take the first available examination for permanent licensure.

*Office of Workforce Security (OWS)* means the agency of the Department of Labor's Employment and Training Administration which is charged with administering the national system of public employment offices.

*Prevailing wage* means the weighted average wage paid to similarly employed registered nurses within the geographic area.

*Secretary* means the Secretary of Labor or the Secretary's designee.

*Similarly employed* means employed by the same type of facility (acute care or long-term care) and working under like conditions, such as the same shift, on the same days of the week, and in the same specialty area.

*State* means one of the 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam.

*State employment security agency (SESA)* means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with OWS in the operation of the national system of public employment offices.

*Strike* means a labor dispute in which employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operations.

*United States* is defined at 8 U.S.C. 1101(a)(38).

*United States (U.S.) nurse* means any nurse who is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is granted the status of an alien admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

*Worksite* means the location where the nurse is involved in the practice of nursing.

**§§ 655.1110 What requirements does the NRDA impose in the filing of an Attestation?**

*(a) Who may file Attestations?*

(1) Any hospital which meets the definition of "facility" in §§ 655.1102 and 655.1111 may file an Attestation.

(2) ETA shall determine the hospital's eligibility as a "facility" through a review of this attestation element on the first Attestation filed by the hospital. ETA's determination on this point is subject to a hearing before the BALCA upon the request of any interested party. The BALCA proceeding shall be limited to this point.

(3) Upon the hospital's filing of a second or subsequent Attestation, its eligibility as a "facility" shall be controlled by the determination made on

this point in the ETA review (and BALCA proceeding, if any) of the hospital's first Attestation.

(b) *Where and when should Attestations be submitted?* Attestations shall be submitted, by U.S. mail or private carrier, to ETA at the following address: Chief, Division of Foreign Labor Certifications, Office of Workforce Security, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Room C-4318, Washington, DC 20210. Attestations shall be reviewed and accepted for filing or rejected by ETA within thirty calendar days of the date they are received by ETA. Therefore, it is recommended that Attestations be submitted to ETA at least thirty-five calendar days prior to the planned date for filing an H-1C visa petition with the Immigration and Naturalization Service.

(c) What shall be submitted?

(1) Form ETA 9081 and required supporting documentation, as described in paragraphs (c)(1)(i) through (iv) of this section.

(i) A completed and dated original Form ETA 9081, containing the required attestation elements and the original signature of the chief executive officer of the facility, shall be submitted, along with one copy of the completed, signed, and dated Form ETA 9081. Copies of the form and instructions are available at the address listed in paragraph (b) of this section.

(ii) If the Attestation is the first filed by the hospital, it shall be accompanied by copies of pages from the hospital's Form HCFA 2552 filed with the Department of Health and Human Services (pursuant to title XVIII of the Social Security Act) for its 1994 cost reporting period, showing the number of its acute care beds and the percentages of Medicaid and Medicare reimbursed acute care inpatient days ( *i.e.*, Form HCFA-2552-92, Worksheet S-3, Part I; Worksheet S, Parts I and II).

(iii) If the facility attests that it will take one or more "timely and significant steps" other than the steps identified on Form ETA 9081, then the facility must submit (in duplicate) an explanation of the proposed "step(s)" and an explanation of how the proposed "step(s)" is/are of comparable signifi-

cance to those set forth on the Form and in §655.1114. (See §655.1114(b)(2)(v).)

(iv) If the facility attests that taking more than one "timely and significant step" is unreasonable, then the facility must submit (in duplicate) an explanation of this attestation. (See §655.1114(c).)

(2) *Filing fee of \$250 per Attestation.* Payment must be in the form of a check or money order, payable to the "U.S. Department of Labor." Remittances must be drawn on a bank or other financial institution located in the U.S. and be payable in U.S. currency.

(3) *Copies of H-1C petitions and INS approval notices.* After ETA has approved the Attestation used by the facility to support any H-1C petition, the facility must send to ETA (at the address specified in paragraph (b) of this section) copies of each H-1C petition and INS approval notice on such petition.

(d) *Attestation elements.* The attestation elements referenced in paragraph (c)(1) of this section are mandated by section 212(m)(2)(A) of the INA (8 U.S.C. 1182(m)(2)(A)). Section 212(m)(2)(A) requires a prospective employer of H-1C nurses to attest to the following:

(1) That it qualifies as a "facility" (See §655.1111);

(2) That employment of H-1C nurses will not adversely affect the wages or working conditions of similarly employed nurses (See §655.1112);

(3) That the facility will pay the H-1C nurse the facility wage rate (See §655.1113);

(4) That the facility has taken, and is taking, timely and significant steps to recruit and retain U.S. nurses (See §655.1114);

(5) That there is not a strike or lock-out at the facility, that the employment of H-1C nurses is not intended or designed to influence an election for a bargaining representative for RNs at the facility, and that the facility did not lay off and will not lay off a registered nurse employed by the facility 90 days before and after the date of filing a visa petition (See §655.1115);

(6) That the facility will notify its workers and give a copy of the Attestation to every nurse employed at the facility (See §655.1116);

(7) That no more than 33% of nurses employed by the facility will be H-1C nonimmigrants (See §655.1117);

(8) That the facility will not authorize H-1C nonimmigrants to work at a worksite not under its control, and will not transfer an H-1C nonimmigrant from one worksite to another (See §655.1118).

**§ 655.1111 Element I—What hospitals are eligible to participate in the H-1C program?**

(a) The first attestation element requires that the employer be a “facility” for purposes of the H-1C program, as defined in INA Section 212(m)(6), 8 U.S.C. 1182 (2)(m)(6).

(b) A qualifying facility under that section is a “subpart (d) hospital,” as defined in Section 1886(d)(1)(B) of the Social Security Act, 42 U.S.C. 1395ww(d)(1)(B), which:

(1) Was located in a health professional shortage area (HPSA), as determined by the Department of Health and Human Services, on March 31, 1997. A list of HPSAs, as of March 31, 1997, was published in the FEDERAL REGISTER on May 30, 1997 (62 FR 29395);

(2) Had at least 190 acute care beds, as determined by its settled cost report, filed under Title XVIII of the Social Security Act, (42 U.S.C. 1395 *et seq.*), for its fiscal year 1994 cost reporting period (*i.e.*, Form HCFA-2552-92, Worksheet S-3, Part I, column 1, line 8);

(3) Had at least 35% of its acute care inpatient days reimbursed by Medicare, as determined by its settled cost report, filed under Title XVIII of the Social Security Act, for its fiscal year 1994 cost reporting period (*i.e.*, Form HCFA-2552-92, Worksheet S-3, Part I, column 4, line 8 as a percentage of column 6, line 8); and

(4) Had at least 28% of its acute care inpatient days reimbursed by Medicaid, as determined by its settled cost report, filed under Title XVIII of the Social Security Act, for its fiscal year 1994 cost reporting period (*i.e.*, Form HCFA-2552-92, Worksheet S-3, Part I, column 5, line 8 as a percentage of column 6, line 8).

(c) The FEDERAL REGISTER notice containing the controlling list of HPSAs (62 FR 29395), can be found in

federal depository libraries and on the Government Printing Office Internet website at <http://www.access.gpo.gov>.

(d) To make a determination about information in the settled cost report, the employer shall examine its own Worksheet S-3, Part I, Hospital and Hospital Health Care Complex Statistical Data, in the Hospital and Hospital Health Care Complex Cost Report, Form HCFA 2552, filed for the fiscal year 1994 cost reporting period.

(e) The facility must maintain a copy of the portions of Worksheet S-3, Part I and Worksheet S, Parts I and II of HCFA Form 2552 which substantiate the attestation of eligibility as a “facility.” One set of copies of this document must be kept in the facility’s public access file. The full Form 2552 for fiscal year 1994 must be made available to the Department upon request.

**§ 655.1112 Element II—What does “no adverse effect on wages and working conditions” mean?**

(a) The second attestation element requires that the facility attest that “the employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed.”

(b) For purposes of this program, “employment” is full-time employment as defined in §655.1102; part-time employment of H-1C nurses is not authorized.

(c) *Wages.* To meet the requirement of no adverse effect on wages, the facility must attest that it will pay each nurse employed by the facility at least the prevailing wage for the occupation in the geographic area. The facility must pay the higher of the wage required under this paragraph or the wage required under §655.1113 (*i.e.*, the third attestation element: facility wage).

(1) *Collectively bargained wage rates.* Where wage rates for nurses at a facility are the result of arms-length collective bargaining, those rates shall be considered “prevailing” for that facility for the purposes of this subpart.

(2) *State employment security determination.* In the absence of collectively bargained wage rates, the facility may not independently determine the prevailing wage. The State employment

security agency (SESA) shall determine the prevailing wage for similarly employed nurses in the geographic area in accordance with administrative guidelines or regulations issued by ETA. The facility shall request the appropriate prevailing wage from the SESA not more than 90 days prior to the date the Attestation is submitted to ETA. Once a facility obtains a prevailing wage determination from the SESA and files an Attestation supported by that prevailing wage determination, the facility shall be deemed to have accepted the prevailing wage determination as accurate and appropriate (as to both the occupational classification and the wage rate) and thereafter shall not contest the legitimacy of the prevailing wage determination in an investigation or enforcement action pursuant to subpart M. A facility may challenge a SESA prevailing wage determination through the Employment Service complaint system. See 20 CFR part 658, subpart M. A facility which challenges a SESA prevailing wage determination must obtain a final ruling from the Employment Service prior to filing an Attestation. Any such challenge shall not require the SESA to divulge any employer wage data which was collected under the promise of confidentiality.

(3) *Total compensation package.* The prevailing wage under this paragraph relates to wages only. Employers are cautioned that each item in the total compensation package for U.S. nurses, H-1C, and other nurses employed by the facility must be the same within a given facility, including such items as housing assistance and fringe benefits.

(4) *Documentation of pay and total compensation.* The facility must maintain in its public access file a copy of the prevailing wage, which shall be either the collective bargaining agreement or the determination that was obtained from the SESA. The facility must maintain payroll records, as specified in § 655.1113, and make such records available to the Administrator in the event of an enforcement action pursuant to subpart M.

(d) *Working conditions.* To meet the requirement of no adverse effect on working conditions, the facility must attest that it will afford equal treat-

ment to U.S. and H-1C nurses with the same seniority, with respect to such working conditions as the number and scheduling of hours worked (including shifts, straight days, weekends); vacations; wards and clinical rotations; and overall staffing-patient patterns. In the event of an enforcement action pursuant to subpart M, the facility must provide evidence substantiating compliance with this attestation.

**§ 655.1113 Element III—What does “facility wage rate” mean?**

(a) The third attestation element requires that the facility employing or seeking to employ the alien must attest that “the alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.”

(b) The facility must pay the higher of the wage required in this section (*i.e.* facility wage), or the wage required in § 655.1112 (*i.e.*, prevailing wage).

(c) *Wage obligations for H-1C nurses in nonproductive status.*

(1) *Circumstances where wages must be paid.* If the H-1C nurse is not performing work and is in a nonproductive status due to a decision by the facility (*e.g.*, because of lack of assigned work), because the nurse has not yet received a license to work as a registered nurse, or any other reason except as specified in paragraph (c)(2) of this section, the facility is required to pay the salaried H-1C nurse the full amount of the weekly salary, or to pay the hourly-wage H-1C nurse for a full-time week (40 hours or such other number of hours as the facility can demonstrate to be full-time employment) at the applicable wage rate.

(2) *Circumstances where wages need not be paid.* If an H-1C nurse experiences a period of nonproductive status due to conditions unrelated to employment which take the nurse away from his/her duties at his/her voluntary request and convenience (*e.g.*, touring the U.S., caring for ill relative) or render the non-immigrant unable to work (*e.g.*, maternity leave, automobile accident which temporarily incapacitates the non-immigrant), then the facility is not obligated to pay the required wage rate during that period, *provided that* such period is not subject to payment under

the facility's benefit plan. Payment need not be made if there has been a *bona fide* termination of the employment relationship, as demonstrated by notification to INS that the employment relationship has been terminated and the petition should be canceled.

(d) *Documentation.* The facility must maintain documentation substantiating compliance with this attestation element. The public access file shall contain the facility pay schedule for nurses or a description of the factors taken into consideration by the facility in making compensation decisions for nurses, if either of these documents exists. Categories of nursing positions not covered by the public access file documentation shall not be covered by the Attestation, and, therefore, such positions shall not be filled or held by H-1C nurses. The facility must maintain the payroll records, as required under the Fair Labor Standards Act at 29 CFR part 516, and make such records available to the Administrator in the event of an enforcement action pursuant to subpart M of this part.

**§ 655.1114 Element IV—What are the timely and significant steps an H-1C employer must take to recruit and retain U.S. nurses?**

(a) The fourth attestation element requires that the facility attest that it "has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on non-immigrant registered nurses." The facility must take at least two such steps, unless it demonstrates that taking a second step is not reasonable. The steps described in this section shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of this section. Nothing in this subpart or subpart M of this part shall require a facility to take more than one step, if the facility can demonstrate that taking a second step is not reasonable. A facility choosing to take timely and significant steps other than those specifically described in this section must submit with its

Attestation a description of the step(s) it is proposing to take and an explanation of how the proposed step(s) are of comparable timeliness and significance to those described in this section (See § 655.1110(c)(1)(iii)). A facility claiming that a second step is unreasonable must submit an explanation of why such second step would be unreasonable (See § 655.1110(c)(1)(iv)).

(b) *Descriptions of steps.* Each of the actions described in this section shall be considered a significant step reasonably designed to recruit and retain U.S. nurses. A facility choosing any of these steps shall designate such step on Form ETA 9081, thereby attesting that its program(s) meets the regulatory requirements set forth for such step. Section 212(m)(2)(E)(ii) of the INA provides that a violation shall be found if a facility fails to meet a condition attested to. Thus, a facility shall be held responsible for all timely and significant steps to which it attests.

(1) *Statutory steps.*

(i) Operating a training program for registered nurses at the facility or financing (or providing participation in) a training program for registered nurses elsewhere. Training programs may include either courses leading to a higher degree (*i.e.*, beyond an associate or a baccalaureate degree), or continuing education courses. If the program includes courses leading to a higher degree, they must be courses which are part of a program accepted for degree credit by a college or university and accredited by a State Board of Nursing or a State Board of Higher Education (or its equivalent), as appropriate. If the program includes continuing education courses, they must be courses which meet criteria established to qualify the nurses taking the courses to earn continuing education units accepted by a State Board of Nursing (or its equivalent). In either type of program, financing by the facility (either directly or arranged through a third party) shall cover the total costs of such training. The number of U.S. nurses for whom such training actually is provided shall be no less than half of the number of nurses who left the facility during the 12-month

period prior to submission of the Attestation. U.S. nurses to whom such training was offered, but who rejected such training, may be counted towards those provided training.

(ii) Providing career development programs and other methods of facilitating health care workers to become registered nurses. This may include programs leading directly to a degree in nursing, or career ladder/career path programs which could ultimately lead to a degree in nursing. Any such degree program shall be, at a minimum, through an accredited community college (leading to an associate's degree), 4-year college (a bachelor's degree), or diploma school, and the course of study must be one accredited by a State Board of Nursing (or its equivalent). The facility (either directly or arranged through a third party) must cover the total costs of such programs. U.S. workers participating in such programs must be working or have worked in health care occupations or facilities. The number of U.S. workers for whom such training is provided must be equal to no less than half the average number of vacancies for nurses during the 12-month period prior to the submission of the Attestation. U.S. nurses to whom such training was offered, but who rejected such training, may be counted towards those provided training.

(iii) Paying registered nurses wages at a rate higher than currently being paid to registered nurses similarly employed in the geographic area. The facility's entire schedule of wages for nurses shall be at least 5 percent higher than the prevailing wage as determined by the SESA, and such differentials shall be maintained throughout the period of the Attestation's effectiveness.

(iv) Providing reasonable opportunities for meaningful salary advancement by registered nurses. This may include salary advancement based on factors such as merit, education, and specialty, and/or salary advancement based on length of service, with other bases for wage differentials remaining constant.

(A) Merit, education, and specialty. Salary advancement may be based on factors such as merit, education, and

specialty, or the facility may provide opportunities for professional development of its nurses which lead to salary advancement (e.g., participation in continuing education or in-house educational instruction; service on special committees, task forces, or projects considered of a professional development nature; participation in professional organizations; and writing for professional publications). Such opportunities must be available to all the facility's nurses.

(B) Length of service. Salary advancement may be based on length of service using clinical ladders which provide, annually, salary increases of 3 percent or more for a period of no less than 10 years, over and above the costs of living and merit, education, and specialty increases and differentials.

(2) *Other possible steps.* The Act indicates that the four steps described in the statute (and set out in paragraph (b)(1) of this section) are not an exclusive list of timely and significant steps which might qualify. The actions described in paragraphs (b)(2)(i) through (iv) of this section, are also deemed to be qualified; in paragraph (b)(2)(v) of this section, the facility is afforded the opportunity to identify a timely and significant step of its own devising.

(i) Monetary incentives. The facility provides monetary incentives to nurses, through bonuses and merit pay plans not included in the base compensation package, for additional education, and for efforts by the nurses leading to increased recruitment and retention of U.S. nurses. Such monetary incentives may be based on actions by nurses such as: Instituting innovations to achieve better patient care, increased productivity, reduced waste, and/or improved workplace safety; obtaining additional certification in a nursing specialty; accruing unused sick leave; recruiting other U.S. nurses; staying with the facility for a given number of years; taking less desirable assignments (other than shift differential); participating in professional organizations; serving on task forces and on special committees; or contributing to professional publications.

(ii) Special perquisites. The facility provides nurses with special perquisites



for dependent care or housing assistance of a nature and/or extent that constitute a “significant” factor in inducing employment and retention of U.S. nurses.

(iii) Work schedule options. The facility provides nurses with non-mandatory work schedule options for part-time work, job-sharing, compressed work week or non-rotating shifts (provided, however, that H-1C nurses are employed only in full-time work) of a nature and/or extent that constitute a “significant” factor in inducing employment and retention of U.S. nurses.

(iv) Other training options. The facility provides training opportunities to U.S. workers not currently in health care occupations to become registered nurses by means of financial assistance (*e.g.*, scholarship, loan or pay-back programs) to such persons.

(v) Alternative but significant steps. Facilities are encouraged to be innovative in devising timely and significant steps other than those described in paragraphs (b)(1) and (b)(2)(i) through (iv) of this section. To qualify, an alternative step must be of a timeliness and significance comparable to those in this section. A facility may designate on Form ETA 9081 that it has taken and is taking such alternate step(s), thereby attesting that the step(s) meet the statutory test of timeliness and significance comparable to those described in paragraphs (b)(1) and (b)(2)(i) through (iv) in promoting the development, recruitment, and retention of U.S. nurses. If such a designation is made on Form ETA 9081, the submission of the Attestation to ETA must include an explanation and appropriate documentation of the alternate step(s), and of the manner in which they satisfy the statutory test in comparison to the steps described in paragraphs (b)(1) and (b)(2)(i) through (iv). ETA will review the explanation and documentation and determine whether the alternate step(s) qualify under this subsection. The ETA determination is subject to review by the BALCA, upon the request of an interested party; such review shall be limited to this matter.

(c) *Unreasonableness of second step.* Nothing in this subpart or subpart M of this part requires a facility to take more than one step, if the facility can

demonstrate that taking a second step is not reasonable. However, a facility shall make every effort to take at least two steps. The taking of a second step may be considered unreasonable if it would result in the facility’s financial inability to continue providing the same quality and quantity of health care or if the provision of nursing services would otherwise be jeopardized by the taking of such a step.

(1) A facility may designate on Form ETA 9081 that the taking of a second step is not reasonable. If such a designation is made on Form ETA 9081, the submission of the Attestation to ETA shall include an explanation and appropriate documentation with respect to each of the steps described in paragraph (b) of this section (other than the step designated as being taken by the facility), showing why it would be unreasonable for the facility to take each such step and why it would be unreasonable for the facility to take any other step designed to recruit, develop and retain sufficient U.S. nurses to meet its staffing needs.

(2) ETA will review the explanation and documentation, and will determine whether the taking of a second step would not be reasonable. The ETA determination is subject to review by the BALCA, upon the request of an interested party; such review shall be limited to this matter.

(d) *Performance-based alternative to criteria for specific steps.* Instead of complying with the specific criteria for one or more of the steps in the second and/or succeeding years of participation in the H-1C program, a facility may include in its *prior* year’s Attestation, in addition to the actions taken under specifically attested steps, that it will reduce the number of H-1C nurses it utilizes within one year from the date of the Attestation by at least 10 percent, without reducing the quality or quantity of services provided. If this goal is achieved, the facility shall so indicate on its subsequent year’s Attestation. Further, the facility need not attest to any “timely and significant step” on that subsequent attestation, if it again indicates that it shall again reduce the number of H-1C nurses it utilizes within one year from the date

of the Attestation by at least 10 percent. This performance-based alternative is designed to permit a facility to achieve the objectives of the Act, without subjecting the facility to detailed requirements and criteria as to the specific means of achieving that objective.

(e) *Documentation.* The facility must include in the public access file a description of the activities which constitute its compliance with each timely and significant step which is attested on Form ETA 9081 (e.g., summary of a training program for registered nurses; description of a career ladder showing meaningful opportunities for pay advancements for nurses). If the facility has attested that it will take an alternative step or that taking a second step is unreasonable, then the public access file must include the documentation which was submitted to ETA under paragraph (c) of this section. The facility must maintain in its non-public files, and must make available to the Administrator in the event of an enforcement action pursuant to subpart M of this part, documentation which provides a complete description of the nature and operation of its program(s) sufficient to substantiate its full compliance with the requirements of each timely and significant step which is attested to on Form ETA 9081. This documentation should include information relating to all of the requirements for the step in question.

**§ 655.1115 Element V—What does “no strike/lockout or layoff” mean?**

(a) The fifth attestation element requires that the facility attest that “there is not a strike or lockout in the course of a labor dispute, the facility did not lay off and will not lay off a registered nurse employed by the facility within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition, and the employment of such an alien is not intended or designated to influence an election for a bargaining representative for registered nurses of the facility.” Labor disputes for purposes of this attestation element relate only to those involving nurses providing nursing services; other health service occupations are not included. A facility

which has filed a petition for H-1C nurses is also prohibited from interfering with the right of the non-immigrant to join or organize a union.

(b) *Notice of strike or lockout.* In order to remain in compliance with the no strike or lockout portion of this attestation element, the facility must notify ETA if a strike or lockout of nurses at the facility occurs during the one year validity of the Attestation. Within three days of the occurrence of such strike or lockout, the facility must submit to the Chief, Division of Foreign Labor Certifications, Office of Workforce Security, Employment and Training Administration, Department of Labor, 200 Constitution Avenue N.W., Room C-4318, Washington, D.C. 20210, by U.S. mail or private carrier, written notice of the strike or lockout. Upon receiving a notice described in this section from a facility, ETA will examine the documentation, and may consult with the union at the facility or other appropriate entities. If ETA determines that the strike or lockout is covered under 8 CFR 214.2(h)(17), INS’s *Effect of strike* regulation for “H” visa holders, ETA must certify to INS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of nurses is in progress at the facility.

(c) *Lay off* of a U.S. nurse means that the employer has caused the nurse’s loss of employment in circumstances *other than where—*

(1) A U.S. nurse has been discharged for inadequate performance, violation of workplace rules, or other reasonable work-related cause;

(2) A U.S. nurse’s departure or retirement is voluntary (to be assessed in light of the totality of the circumstances, under established principles concerning “constructive discharge” of workers who are pressured to leave employment);

(3) The grant or contract under which the work performed by the U.S. nurse is required and funded has expired, and without such grant or contract the nurse would not continue to be employed because there is no alternative funding or need for the position; or

(4) A U.S. nurse who loses employment is offered, as an alternative to

of the Attestation by at least 10 percent. This performance-based alternative is designed to permit a facility to achieve the objectives of the Act, without subjecting the facility to detailed requirements and criteria as to the specific means of achieving that objective.

(e) *Documentation.* The facility must include in the public access file a description of the activities which constitute its compliance with each timely and significant step which is attested on Form ETA 9081 (e.g., summary of a training program for registered nurses; description of a career ladder showing meaningful opportunities for pay advancements for nurses). If the facility has attested that it will take an alternative step or that taking a second step is unreasonable, then the public access file must include the documentation which was submitted to ETA under paragraph (c) of this section. The facility must maintain in its non-public files, and must make available to the Administrator in the event of an enforcement action pursuant to subpart M of this part, documentation which provides a complete description of the nature and operation of its program(s) sufficient to substantiate its full compliance with the requirements of each timely and significant step which is attested to on Form ETA 9081. This documentation should include information relating to all of the requirements for the step in question.

**§ 655.1115 Element V—What does “no strike/lockout or layoff” mean?**

(a) The fifth attestation element requires that the facility attest that “there is not a strike or lockout in the course of a labor dispute, the facility did not lay off and will not lay off a registered nurse employed by the facility within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition, and the employment of such an alien is not intended or designated to influence an election for a bargaining representative for registered nurses of the facility.” Labor disputes for purposes of this attestation element relate only to those involving nurses providing nursing services; other health service occupations are not included. A facility

which has filed a petition for H-1C nurses is also prohibited from interfering with the right of the non-immigrant to join or organize a union.

(b) *Notice of strike or lockout.* In order to remain in compliance with the no strike or lockout portion of this attestation element, the facility must notify ETA if a strike or lockout of nurses at the facility occurs during the one year validity of the Attestation. Within three days of the occurrence of such strike or lockout, the facility must submit to the Chief, Division of Foreign Labor Certifications, Office of Workforce Security, Employment and Training Administration, Department of Labor, 200 Constitution Avenue N.W., Room C-4318, Washington, D.C. 20210, by U.S. mail or private carrier, written notice of the strike or lockout. Upon receiving a notice described in this section from a facility, ETA will examine the documentation, and may consult with the union at the facility or other appropriate entities. If ETA determines that the strike or lockout is covered under 8 CFR 214.2(h)(17), INS’s *Effect of strike* regulation for “H” visa holders, ETA must certify to INS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of nurses is in progress at the facility.

(c) *Lay off* of a U.S. nurse means that the employer has caused the nurse’s loss of employment in circumstances *other than where—*

(1) A U.S. nurse has been discharged for inadequate performance, violation of workplace rules, or other reasonable work-related cause;

(2) A U.S. nurse’s departure or retirement is voluntary (to be assessed in light of the totality of the circumstances, under established principles concerning “constructive discharge” of workers who are pressured to leave employment);

(3) The grant or contract under which the work performed by the U.S. nurse is required and funded has expired, and without such grant or contract the nurse would not continue to be employed because there is no alternative funding or need for the position; or

(4) A U.S. nurse who loses employment is offered, as an alternative to

such loss, a similar employment opportunity with the same employer. The validity of the offer of a similar employment opportunity will be assessed in light of the following factors:

(i) The offer is a *bona fide* offer, rather than an offer designed to induce the U.S. nurse to refuse or an offer made with the expectation that the worker will refuse;

(ii) The offered job provides the U.S. nurse an opportunity similar to that provided in the job from which he/she is discharged, in terms such as a similar level of authority, discretion, and responsibility, a similar opportunity for advancement within the organization, and similar tenure and work scheduling;

(iii) The offered job provides the U.S. nurse equivalent or higher compensation and benefits to those provided in the job from which he/she is discharged.

(d) *Documentation.* The facility must include in its public access file, copies of all notices of strikes or other labor disputes involving a work stoppage of nurses at the facility (submitted to ETA under paragraph (b) of this section). The facility must retain in its non-public files, and make available in the event of an enforcement action pursuant to subpart M of this part, any existing documentation with respect to the departure of each U.S. nurse who left his/her employment with the facility in the period from 90 days before until 90 days after the facility's petition for H-1C nurse(s). The facility is also required to have a record of the terms of any offer of alternative employment to such a U.S. nurse and the nurse's response to the offer (which may be a note to the file or other record of the nurse's response), and to make such record available in the event of an enforcement action pursuant to subpart M.

**§ 655.1116 Element VI—What notification must facilities provide to registered nurses?**

(a) The sixth attestation element requires the facility to attest that at the time of filing of the petition for registered nurses under section 101(a)(15)(H)(i)(c) of the INA, notice of filing has been provided by the facility

to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to registered nurses at the facility through posting in conspicuous locations, and individual copies of the Attestation have been provided to registered nurses employed at the facility.

(b) *Notification of bargaining representative.* At a time no later than the date the Attestation is transmitted to ETA, the facility must notify the bargaining representative (if any) for nurses at the facility that the Attestation is being submitted. No later than the date the facility transmits a petition for H-1C nurses to INS, the facility must notify the bargaining representative (if any) for nurses at the facility that the H-1C petition is being submitted. This notice may be either a copy of the Attestation or petition, or a document stating that the Attestation and H-1C petition are available for review by interested parties at the facility (explaining how they can be inspected or obtained) and at the Division of Foreign Labor Certifications, Office of Workforce Security, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW., Room C-4318, Washington, DC 20210. The notice must include the following statement: "Complaints alleging misrepresentation of material facts in the Attestation or failure to comply with the terms of the Attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor."

(c) *Posting notice.* If there is no bargaining representative for nurses at the facility, the facility must post a written notice in two or more conspicuous locations at the facility. Such notices shall be clearly visible and unobstructed while posted, and shall be posted in conspicuous places where nurses can easily read the notices on their way to or from their duties. Appropriate locations for posting hard copy notices include locations in the immediate proximity of mandatory Fair Labor Standards Act wage and hour notices and Occupational Safety and Health Act occupational safety and health notices. In the alternative, the

facility may use electronic means it ordinarily uses to communicate with its nurses about job vacancies or promotion opportunities, including through its “home page” or “electronic bulletin board,” provided that the nurses have, as a practical matter, direct access to those sites; or, where the nurses have individual e-mail accounts, the facility may use e-mail. This must be accomplished no later than the date when the facility transmits an Attestation to ETA and the date when the facility transmits an H-1C petition to the INS. The notice may be either a copy of the Attestation or petition, or a document stating that the Attestation or petition has been filed and is available for review by interested parties at the facility (explaining how these documents can be inspected or obtained) and at the national office of ETA. The notice shall include the following statement: “Complaints alleging misrepresentation of material facts in the Attestation or failure to comply with the terms of the Attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor.” Unless it is sent to an individual e-mail address, the Attestation notice shall remain posted during the validity period of the Attestation; the petition notice shall remain posted for ten days. Copies of all notices shall be available for examination in the facility’s public access file.

(d) *Individual notice to RNs.* In addition to notifying the bargaining representative or posting notice as described in paragraphs (b) and (c) of this section, the facility must provide a copy of the Attestation, within 30 days of the date of filing, to every registered nurse employed at the facility. This requirement may be satisfied by electronic means if an individual e-mail message, with the Attestation as an attachment, is sent to every RN at the facility. This notification includes not only the RNs employed by the facility, but also includes any RN who is providing service at the facility as an employee of another entity, such as a nursing contractor.

(e) Where RNs lack practical computer access, a hard copy must be posted in accordance with paragraph (c) of this section and a hard copy of the At-

testation delivered, within 30 days of the date of filing, to every RN employed at the facility in accordance with paragraph (d) of this section.

(f) The facility must maintain, in its public access file, copies of the notices required by this section. The facility must make such documentation available to the Administrator in the event of an enforcement action pursuant to subpart M of this part.

**§ 655.1117 Element VII—What are the limitations as to the number of H-1C nonimmigrants that a facility may employ?**

(a) The seventh attestation element requires that the facility attest that it will not, at any time, employ a number of H-1C nurses that exceeds 33% of the total number of registered nurses employed by the facility. The calculation of the population of nurses for purposes of this attestation includes only nurses who have an employer-employee relationship with the facility (as defined in § 655.1102).

(b) The facility must maintain documentation (*e.g.*, payroll records, copies of H-1C petitions) that demonstrates its compliance with this attestation. The facility must make such documentation available to the Administrator in the event of an enforcement action pursuant to subpart M of this part.

**§ 655.1118 Element VIII—What are the limitations as to where the H-1C nonimmigrant may be employed?**

The eighth attestation element requires that the facility attest that it will not authorize any H-1C nurse to perform services at any worksite not controlled by the facility or transfer any H-1C nurse from one worksite to another worksite, even if all of the worksites are controlled by the facility.

**§ 655.1130 What criteria does the Department use to determine whether or not to certify an Attestation?**

(a) An Attestation form which is complete and has no obvious inaccuracies will be accepted for filing by ETA without substantive review, *except that* ETA will conduct a substantive review

on particular attestation elements in the following limited circumstances:

(1) Determination of whether the hospital submitting the Attestation is a qualifying “facility” (see § 655.1110(c)(ii), regarding the documentation required, and the process for review);

(2) Where the facility attests that it is taking or will take a “timely and significant step” other than those identified on the Form ETA 9081 (see § 655.1114(b)(2)(v), regarding the documentation required, and the process for review);

(3) Where the facility asserts that taking a second “timely and significant step” is unreasonable (see § 655.1114(c), regarding the documentation required, and the process for review).

(b) The certifying officer will act on the Attestation in a timely manner. If the officer does not contact the facility for information or make any determination within 30 days of receiving the Attestation, the Attestation shall be accepted for filing. If ETA receives information contesting the truth of the statements attested to or compliance with an Attestation prior to the determination to accept or reject the Attestation for filing, such information shall not be made part of ETA’s administrative record on the Attestation but shall be referred to the Administrator to be processed as a complaint pursuant to subpart M of this part if such Attestation is accepted by ETA for filing.

(c) Upon the facility’s submitting the Attestation to ETA and providing the notice required by § 655.1116, the Attestation shall be available for public examination at the facility. When ETA accepts the Attestation for filing, the Attestation will be made available for public examination in the Office of Workforce Security, Employment Training Administration, U.S. Department of Labor, Room C-4318, 200 Constitution Avenue, NW., Washington, DC 20210.

(d) *Standards for acceptance of Attestation.* ETA will accept the Attestation for filing under the following standards:

(1) The Attestation is complete and contains no obvious inaccuracies.

(2) The facility’s explanation and documentation are sufficient to satisfy the requirements for the Attestation elements on which substantive review is conducted (as described in paragraph (a) of this section).

(3) The facility has no outstanding “insufficient funds” check(s) in connection with filing fee(s) for prior Attestation(s).

(4) The facility has no outstanding civil money penalties and/or has not failed to satisfy a remedy assessed by the Wage and Hour Administrator, under subpart M of this part, where that penalty or remedy assessment has become the final agency action.

(5) The facility has not been disqualified from approval of any petitions filed by, or on behalf of, the facility under section 204 or section 212(m) of the INA.

(e) *DOL not the guarantor.* DOL is not the guarantor of the accuracy, truthfulness or adequacy of an Attestation accepted for filing.

(f) *Attestation Effective and Expiration Dates.* An Attestation becomes filed and effective as of the date it is accepted and signed by the ETA certifying officer. Such Attestation is valid until the date that is the later of the end of the 12-month period beginning on the date of acceptance for filing with the Secretary, or the end of the period of admission (under INA section 101(a)(15)(H)(i)(c)) of the last alien with respect to whose admission the Attestation was applied, unless the Attestation is suspended or invalidated earlier than such date pursuant to § 655.1132.

**§ 655.1132 When will the Department suspend or invalidate an approved Attestation?**

(a) Suspension or invalidation of an Attestation may result where: the facility’s check for the filing fee is not honored by a financial institution; a Board of Alien Labor Certification Appeals (BALCA) decision reverses an ETA certification of the Attestation; ETA finds that it made an error in its review and certification of the Attestation; an enforcement proceeding has finally determined that the facility failed to meet a condition attested to, or that there was a misrepresentation of material fact in an Attestation; the

facility has failed to pay civil money penalties and/or failed to satisfy a remedy assessed by the Wage and Hour Administrator, where that penalty or remedy assessment has become the final agency action. If an Attestation is suspended or invalidated, ETA will notify INS.

(b) *BALCA decision or final agency action in an enforcement proceeding.* If an Attestation is suspended or invalidated as a result of a BALCA decision overruling an ETA acceptance of the Attestation for filing, or is suspended or invalidated as a result of an enforcement action by the Administrator under subpart M of this part, such suspension or invalidation may not be separately appealed, but shall be merged with appeals on the underlying matter.

(c) *ETA action.* If, after accepting an Attestation for filing, ETA discovers that it erroneously accepted that Attestation for filing and, as a result, ETA suspends or invalidates that acceptance, the facility may appeal such suspension or invalidation under § 655.1135 as if that suspension or invalidation were a decision to reject the Attestation for filing.

(d) A facility must comply with the terms of its Attestation, even if such Attestation is suspended, invalidated or expired, as long as any H-1C nurse is at the facility, unless the Attestation is superseded by a subsequent Attestation accepted for filing by ETA.

**§ 655.1135 What appeals procedures are available concerning ETA's actions on a facility's Attestation?**

(a) *Appeals of acceptances or rejections.* Any interested party may appeal ETA's acceptance or rejection of an Attestation submitted by a facility for filing. However, such an appeal shall be limited to ETA's determination on one or more of the attestation elements for which ETA conducts a substantive review (as described in § 655.1130(a)). Such appeal must be filed no later than 30 days after the date of the acceptance or rejection, and will be considered under the procedures set forth at paragraphs (d) and (f) of this section.

(b) *Appeal of invalidation or suspension.* An interested party may appeal ETA's invalidation or suspension of a filed Attestation due to a discovery by

ETA that it made an error in its review of the Attestation, as described in § 655.1132.

(c) *Parties to the appeal.* In the case of an appeal of an acceptance, the facility will be a party to the appeal; in the case of the appeal of a rejection, invalidation, or suspension, the collective bargaining representative (if any) representing nurses at the facility shall be a party to the appeal. Appeals shall be in writing; shall set forth the grounds for the appeal; shall state if de novo consideration by BALCA is requested; and shall be mailed by certified mail within 30 calendar days of the date of the action from which the appeal is taken (*i.e.*, the acceptance, rejection, suspension or invalidation of the Attestation).

(d) *Where to file appeals.* Appeals made under this section must be in writing and must be mailed by certified mail to: Director, Office of Workforce Security, Employment Training Administration, U.S. Department of Labor, Room C-4318, 200 Constitution Avenue, NW., Washington, DC 20210.

(e) *Transmittal of the case file to BALCA.* Upon receipt of an appeal under this section, the Certifying Office shall send to BALCA a certified copy of the ETA case file, containing the Attestation and supporting documentation and any other information or data considered by ETA in taking the action being appealed. The administrative law judge chairing BALCA shall assign a panel of one or more administrative law judges who serve on BALCA to review the record for legal sufficiency and to consider and rule on the appeal.

(f) *Consideration on the record; de novo hearings.* BALCA may not remand, dismiss, or stay the case, except as provided in paragraph (h) of this section, but may otherwise consider the appeal on the record or in a *de novo* hearing (on its own motion or on a party's request). Interested parties and *amici curiae* may submit briefs in accordance with a schedule set by BALCA. The ETA official who made the determination which was appealed will be represented by the Associate Solicitor for

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Employment and Training Legal Services, Office of the Solicitor, Department of Labor, or the Associate Solicitor's designee. If BALCA determines to hear the appeal on the record without a *de novo* hearing, BALCA shall render a decision within 30 calendar days after BALCA's receipt of the case file. If BALCA determines to hear the appeal through a *de novo* hearing, the procedures contained in 29 CFR part 18 will apply to such hearings, except that:

(1) The appeal will not be considered to be a complaint to which an answer is required.

(2) BALCA shall ensure that, at the request of the appellant, the hearing is scheduled to take place within a reasonable period after BALCA's receipt of the case file (see also the time period described in paragraph (f)(4) of this section).

(3) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B), will not apply to any hearing conducted pursuant to this subpart, but rules or principles designed to assure production of the most credible evidence available, and to subject testimony to test by cross-examination, shall be applied where reasonably necessary by BALCA in conducting the hearing. BALCA may exclude irrelevant, immaterial, or unduly repetitious evidence. The certified copy of the case file transmitted to BALCA by the Certifying Officer must be made part of the evidentiary record of the case and need not be moved into evidence.

(4) BALCA's decision shall be rendered within 120 calendar days after BALCA's receipt of the case file.

(g) *Dismissals and stays.* If BALCA determines that the appeal is solely a question of misrepresentation by the facility or is solely a complaint of the facility's nonperformance of the Attestation, BALCA shall dismiss the case and refer the matter to the Administrator, Wage and Hour Division, for action under subpart M. If BALCA determines that the appeal is partially a question of misrepresentation by the facility, or is partially a complaint of the facility's nonperformance of the

Attestation, BALCA shall refer the matter to the Administrator, Wage and Hour Division, for action under subpart M of this part and shall stay BALCA consideration of the case pending final agency action on such referral. During such stay, the 120-day period described in paragraph (f)(1)(iv) of this section shall be suspended.

(h) *BALCA's decision.* After consideration on the record or a *de novo* hearing, BALCA shall either affirm or reverse ETA's decision, and shall so notify the appellant; and any other parties.

(i) *Decisions on Attestations.* With respect to an appeal of the acceptance, rejection, suspension or invalidation of an Attestation, the decision of BALCA shall be the final decision of the Secretary, and no further review shall be given to the matter by any DOL official.

**§ 655.1150 What materials must be available to the public?**

(a) *Public examination at ETA.* ETA will make available for public examination at the Office of Workforce Security, Employment Training Administration, U.S. Department of Labor, Room C-4318, 200 Constitution Avenue, NW., Washington, DC 20210, a list of facilities which have filed Attestations; a copy of the facility's Attestation(s) and any supporting documentation; and a copy of each of the facility's H-1C petitions (if any) to INS along with the INS approval notices (if any).

(b) *Public examination at facility.* For the duration of the Attestation's validity and thereafter for so long as the facility employs any H-1C nurse under the Attestation, the facility must maintain a separate file containing a copy of the Attestation, a copy of the prevailing wage determination, a description of the facility pay system or a copy of the facility's pay schedule if either document exists, copies of the notices provided under § 655.1115 and § 655.1116, a description of the "timely and significant steps" as described in § 655.1114, and any other documentation required by this part to be contained in the public access file. The facility must make this file available to any interested parties within 72 hours upon written or oral request. If a party requests



a copy of the file, the facility shall provide it and any charge for such copy shall not exceed the cost of reproduction.

(c) *ETA Notice to public.* ETA will periodically publish a notice in the FEDERAL REGISTER announcing the names and addresses of facilities which have submitted Attestations; facilities which have Attestations on file; facilities which have submitted Attestations which have been rejected for filing; and facilities which have had Attestations suspended.

#### **Subpart M—What are the Department's enforcement obligations with respect to H-1C Attestations?**

SOURCE: 65 FR 51149, Aug. 22, 2000, unless otherwise noted.

##### **§ 655.1200 What enforcement authority does the Department have with respect to a facility's H-1C Attestations?**

(a) The Administrator shall perform all the Secretary's investigative and enforcement functions under 8 U.S.C. 1182(m) and subparts L and M of this part.

(b) The Administrator, either because of a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance with the matters to which a facility has attested under section 212(m) of the INA (8 U.S.C. 1182(m)) and subparts L and M of this part.

(c) A facility being investigated must make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. A facility must fully cooperate with any official of the Department of Labor performing an investigation, inspection, or law enforcement function under 8 U.S.C. 1182(m) or subparts L or M of this part. Such cooperation shall include producing documentation upon request. The Adminis-

trator may deem the failure to cooperate to be a violation, and take such further actions as the Administrator considers appropriate.

(NOTE: Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 1114.)

(d) No facility may intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person because such person has:

(1) Filed a complaint or appeal under or related to section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart L or M of this part;

(2) Testified or is about to testify in any proceeding under or related to section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart L or M of this part.

(3) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart L or M of this part.

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to the Act or to subparts L or M of this part or any other DOL regulation promulgated under 8 U.S.C. 1182(m).

(5) In the event of such intimidation or restraint as are described in this paragraph, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate.

(e) A facility subject to subparts L and M of this part must maintain a separate file containing its Attestation and required documentation, and must make that file or copies thereof available to interested parties, as required by § 655.1150. In the event of a facility's failure to maintain the file, to provide access, or to provide copies, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate.

(f) No facility may seek to have an H-1C nurse, or any other nurse similarly employed by the employer, or any other employee waive rights conferred under the Act or under subpart L or M of this part. In the event of such waiver, the Administrator may deem the conduct to be a violation and take such

further actions as the Administrator considers appropriate. This prohibition of waivers does not prevent agreements to settle litigation among private parties, and a waiver or modification of rights or obligations in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act or subpart L and M of this part.

(g) The Administrator shall, to the extent possible under existing law, protect the confidentiality of any complainant or other person who provides information to the Department.

**§ 655.1205 What is the Administrator's responsibility with respect to complaints and investigations?**

(a) The Administrator, through investigation, shall determine whether a facility has failed to perform any attested conditions, misrepresented any material facts in an Attestation (including misrepresentation as to compliance with regulatory standards), or otherwise violated the Act or subpart L or M of this part. The Administrator's authority applies whether an Attestation is expired or unexpired at the time a complaint is filed. (Note: Federal criminal statutes provide for fines and/or imprisonment for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; *see also* 18 U.S.C. 1546.)

(b) Any aggrieved person or organization may file a complaint of a violation of the provisions of section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart L or M of this part. No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint. The complaint must set forth sufficient facts for the Administrator to determine what part or parts of the Attestation or regulations have allegedly been violated. Upon the request of the complainant, the Administrator shall, to the extent possible under existing law, maintain confidentiality about the complainant's identity; if the complainant wishes to be a party to the administrative hearing proceedings under this subpart, the complainant shall then waive confidentiality. The complaint may be submitted to any local Wage and Hour Di-

vision office; the addresses of such offices are found in local telephone directories. Inquiries concerning the enforcement program and requests for technical assistance regarding compliance may also be submitted to the local Wage and Hour Division office.

(c) The Administrator shall determine whether there is reasonable cause to believe that the complaint warrants investigation and, if so, shall conduct an investigation, within 180 days of the receipt of a complaint. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary.

(d) When an investigation has been conducted, the Administrator shall, within 180 days of the receipt of a complaint, issue a written determination, stating whether a basis exists to make a finding that the facility failed to meet a condition of its Attestation, made a misrepresentation of a material fact therein, or otherwise violated the Act or subpart L or M. The determination shall specify any sanctions imposed due to violations. The Administrator shall provide a notice of such determination to the interested parties and shall inform them of the opportunity for a hearing pursuant to § 655.1220.

**§ 655.1210 What penalties and other remedies may the Administrator impose?**

(a) The Administrator may assess a civil money penalty not to exceed \$1,000 per nurse per violation, with the total penalty not to exceed \$10,000 per violation. The Administrator also may impose appropriate remedies, including the payment of back wages, the performance of attested obligations such as providing training, and reinstatement and/or wages for laid off U.S. nurses.

(b) In determining the amount of civil money penalty to be assessed for any violation, the Administrator will consider the type of violation committed and other relevant factors. The

matters which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the facility under the Act and subpart L or M of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the violator in good faith to comply with the Attestation as provided in the Act and subparts L and M of this part;

(5) The violator's explanation of the violation or violations;

(6) The violator's commitment to future compliance, taking into account the public health, interest, or safety; and

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury or adverse effect upon the workers.

(c) The civil money penalty, back wages, and any other remedy determined by the Administrator to be appropriate, are immediately due for payment or performance upon the assessment by the Administrator, or the decision by an administrative law judge where a hearing is requested, or the decision by the Secretary where review is granted. The facility must remit the amount of the civil money penalty, by certified check or money order made payable to the order of "Wage and Hour Division, Labor." The remittance must be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violation(s) occurred. The payment of back wages, monetary relief, and/or the performance or any other remedy prescribed by the Administrator will follow procedures established by the Administrator. The facility's failure to pay the civil money penalty, back wages, or other monetary relief, or to perform any other assessed remedy, will result in the rejection by ETA of any future Attestation submitted by the facility until such payment or performance is accomplished.

(d) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), requires that inflationary adjustments to civil

money penalties in accordance with a specified cost-of-living formula be made, by regulation, at least every four years. The adjustments are to be based on changes in the Consumer Price Index for all Urban Consumers (CPI-U) for the U.S. City Average for All Items. The adjusted amounts will be published in the FEDERAL REGISTER. The amount of the penalty in a particular case will be based on the amount of the penalty in effect at the time the violation occurs.

**§ 655.1215 How are the Administrator's investigation findings issued?**

(a) The Administrator's determination, issued under § 655.1205(d), shall be served on the complainant, the facility, and other interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail. Where the complainant has requested confidentiality, the Administrator shall serve the determination in a manner which will not breach that confidentiality.

(b) The Administrator's written determination required by § 655.1205(c) shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor; prescribe any remedies or penalties including the amount of any unpaid wages due, the actions required for compliance with the facility Attestation, and the amount of any civil money penalty assessment and the reason or reasons therefor.

(2) Inform the interested parties that they may request a hearing under § 655.1220.

(3) Inform the interested parties that if a request for a hearing is not received by the Chief Administrative Law Judge within 10 days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, and give the address of the Chief Administrative Law Judge.

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(5) Inform the parties that, under § 655.1255, the Administrator shall notify the Attorney General and ETA of the occurrence of a violation by the employer.

**§ 655.1220 Who can appeal the Administrator's findings and what is the process?**

(a) Any interested party desiring review of a determination issued under § 655.1205(d), including judicial review, must make a request for an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. If such a request for an administrative hearing is timely filed, the Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

(b) An interested party may request a hearing in the following circumstances:

(1) Where the Administrator determines that there is no basis for a finding of violation, the complainant or other interested party may request a hearing. In such a proceeding, the party requesting the hearing shall be the prosecuting party and the facility shall be the respondent; the Administrator may intervene as a party or appear as *amicus curiae* at any time in the proceeding, at the Administrator's discretion.

(2) Where the Administrator determines that there is a basis for a finding of violation, the facility or other interested party may request a hearing. In such a proceeding, the Administrator shall be the prosecuting party and the facility shall be the respondent.

(c) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the notice of determination giving rise to such request;
- (4) State the specific reason or reasons why the party requesting the hearing believes such determination is in error;

(5) Be signed by the party making the request or by an authorized representative of such party; and

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing must be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 10 days after the date of the determination. An interested party which fails to meet this 10-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party under 29 CFR 18.10 (b) through (d) or through participation as an *amicus curiae* under 29 CFR 18.12.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is filed by mail, it should be certified mail. If the request is filed by facsimile transmission, the original of the request, signed by the requestor or authorized representative, must be filed within 10 days of the date of the Administrator's notice of determination.

(f) Copies of the request for a hearing must be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

**§ 655.1225 What are the rules of practice before an ALJ?**

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The

Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) do not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

**§ 655.1230 What time limits are imposed in ALJ proceedings?**

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy must be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210, and one copy on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or Federally-observed holiday, in which case the time period includes the next business day.

**§ 655.1235 What are the ALJ proceedings?**

(a) Upon receipt of a timely request for a hearing filed in accordance with § 655.1220, the Chief Administrative Law Judge shall appoint an administrative law judge to hear the case.

(b) Within seven (7) days following the assignment of the case, the administrative law judge shall notify all interested parties of the date, time, and place of the hearing. All parties shall

be given at least five (5) days notice of such hearing.

(c) The date of the hearing shall be not more than 60 days from the date of the Administrator's determination. Because of the time constraints imposed by the Act, no requests for postponement shall be granted except for compelling reasons and by consent of all the parties to the proceeding.

(d) The administrative law judge may prescribe a schedule by which the parties are permitted to file a pre-hearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § 655.1230. Posthearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party in accordance with § 655.1230.

**§ 655.1240 When and how does an ALJ issue a decision?**

(a) Within 90 days after receipt of the transcript of the hearing, the administrative law judge shall issue a decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision. The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision shall be served on all parties in person or by certified or regular mail.

**§ 655.1245 Who can appeal the ALJ's decision and what is the process?**

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge, including judicial review, must

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petition the Department's Administrative Review Board (Board) to review the ALJ's decision and order. To be effective, such petition must be received by the Board within 30 days of the date of the decision and order. Copies of the petition must be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for the Board's review permitted by this subpart. However, any such petition must:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the administrative law judge's decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;
- (5) Be signed by the party filing the petition or by an authorized representative of such party;
- (6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and
- (7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

(c) Whenever the Board determines to review the decision and order of an administrative law judge, a notice of the Board's determination must be served upon the administrative law judge and upon all parties to the proceeding within 30 days after the Board's receipt of the petition for review. If the Board determines that it will review the decision and order, the order shall be inoperative unless and until the Board issues an order affirming the decision and order.

(d) Within 15 days of receipt of the Board's notice, the Office of Administrative Law Judges shall forward the complete hearing record to the Board.

- (e) The Board's notice shall specify:
- (1) The issue or issues to be reviewed;
  - (2) The form in which submissions must be made by the parties (*e.g.*, briefs, oral argument);
  - (3) The time within which such submissions must be made.

(f) All documents submitted to the Board must be filed with the Administrative Review Board, Room S-4309, U.S. Department of Labor, Washington, D.C. 20210. An original and two copies of all documents must be filed. Documents are not deemed filed with the Board until actually received by the Board. All documents, including documents filed by mail, must be received by the Board either on or before the due date.

(g) Copies of all documents filed with the Board must be served upon all other parties involved in the proceeding. Service upon the Administrator must be in accordance with § 655.1230(b).

(h) The Board's final decision shall be issued within 180 days from the date of the notice of intent to review. The Board's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Board's decision, the Board shall transmit the entire record to the Chief Administrative Law Judge for custody in accordance with § 655.1250.

**§ 655.1250 Who is the official record keeper for these administrative appeals?**

The official record of every completed administrative hearing procedure provided by subparts L and M of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

**§ 655.1255 What are the procedures for debarment of a facility based on a finding of violation?**

(a) The Administrator shall notify the Attorney General and ETA of the final determination of a violation by a facility upon the earliest of the following events:

- (1) Where the Administrator determines that there is a basis for a finding of violation by a facility, and no timely request for hearing is made under § 655.1220; or

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(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by a facility, and no timely petition for review to the Board is made under §§655.1245; or

(3) Where a petition for review is taken from an administrative law judge's decision and the Board either declines within 30 days to entertain the appeal, under §655.1245(c), or the Board affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by a facility, and the Board, upon review, issues a decision under §655.1245(h), holding that a violation was committed by a facility.

(b) The Attorney General, upon receipt of the Administrator's notice under paragraph (a) of this section, shall not approve petitions filed with respect to that employer under section 212(m) of the INA (8 U.S.C. 1182(m)) during a period of at least 12 months from the date of receipt of the Administrator's notification.

(c) ETA, upon receipt of the Administrator's notice under paragraph (a) of this section, shall suspend the employer's Attestation(s) under subparts L and M of this part, and shall not accept for filing any Attestation submitted by the employer under subparts L and M of this part, for a period of 12 months from the date of receipt of the Administrator's notification or for a longer period if one is specified by the Attorney General for visa petitions filed by that employer under section 212(m) of the INA.

### **§ 655.1260 Can Equal Access to Justice Act attorney fees be awarded?**

A proceeding under subpart L or M of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses under the provisions of the Equal Access to Justice Act.