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# Part V

# Department of Labor

## Employment and Training Administration

**20 CFR Part 618**

**Alternative Trade Adjustment Assistance Benefits; Amendment of Regulations; Proposed Rule**

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Part 618**

**RIN 1205–AB40**

## Alternative Trade Adjustment Assistance Benefits; Amendment of Regulations

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice of Proposed Rule Making (NPRM); Request for comments.

**SUMMARY:** On August 6, 2002, President Bush signed into law the Trade Adjustment Assistance Reform Act of 2002 (the Reform Act), which amended the Trade Act of 1974, as amended (Act or Trade Act). The Reform Act reauthorized the Trade Adjustment Assistance (TAA) program through fiscal year 2007 and made significant amendments to the TAA program, including the addition of Alternative Trade Adjustment Assistance for Older Workers (Alternative TAA or ATAA). These amendments generally took effect on November 4, 2002, and required that the Department establish the ATAA program ''[n]ot later than one year after the date of the enactment of the [Reform Act]''.

The Department is implementing the TAA amendments, including the introduction of ATAA, through three separate rulemakings. This proposed rule implements the ATAA program, a demonstration project for older workers. On August 25, 2006, the Department published a proposed rule governing the payment of TAA and the provision of related employment services. The Department will publish a third proposed rule governing TAA and ATAA certifications of worker groups adversely affected by trade.

**DATES:** The Department invites written comments on this proposed rule. Comments must be submitted on or before December 18, 2006.

**ADDRESSES:** You may submit written comments on this proposed rule, identified by Regulatory Identification Number (RIN) 1205–AB40, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: AlternativeTAA.comments@dol.gov.* Include RIN 1205–AB40 in the subject line of the message. Your comment must be in the body of the e-mail message; do not send attached files.
- *Fax:* (202) 693–3584 (this is not a toll-free number). Only comments of 10 or fewer pages (including a Fax cover sheet and attachments, if any) will be accepted by Fax.
- *Mail:* Submit comments to Erica Cantor, Administrator, Office of National Response, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5422, Washington, DC 20210. Please note that due to security concerns, mail delivery in Washington, DC, may be delayed. Therefore, the Department encourages the public to submit comments via e-mail or Internet as indicated above.
- *Hand Delivery/Courier:* 200 Constitution Avenue, NW., Room N–5422, Washington, DC 20210.

*Instructions:* All comment submissions should include the RIN (1205–AB40) for this rulemaking and must be received on or before the last day of the comment period. The Department will not open, read, or consider any comments received after that date. Also, the Department will not acknowledge receipt of any comments received. Commenters who submit comments to the Department by Fax or through the Internet as well as by mail should indicate that the mailed comments are duplicate copies.

*Docket:* All comments will be available for public inspection and copying during normal business hours at 200 Constitution Avenue, NW., Division of Trade Adjustment Assistance, Room N–5422, Washington, DC 20210. Copies of the proposed rule are available in alternative formats of large print and electronic file on computer disk, which may be obtained at the above-stated address. The proposed rule is available on the Internet at the Web address *http://www.doleta.gov.*

**FOR FURTHER INFORMATION CONTACT:** Erica Cantor, Administrator, Office of National Response, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5422, Washington, DC 20210. Telephone: (202) 693–3560 (voice) (this is not a toll-free number); 1–800–326–2577 (TDD).

**SUPPLEMENTARY INFORMATION:** This preamble is divided into three sections. Section I provides general background information on the Reform Act and the Department's approach for developing implementing regulations for the Reform Act. Section II is a section-by-section analysis of this NPRM which proposes rules to implement ATAA for older workers. Section III covers the administrative requirements for this proposed rulemaking mandated by statute and executive order.

### I. Background

The Reform Act expanded the scope of the TAA program and increased certain benefit amounts available under that program, repealed the North American Free Trade Agreement Transitional Adjustment Assistance (NAFTA–TAA) program, provided the Health Coverage Tax Credit (HCTC) administered by the Internal Revenue Service (IRS) to provide a tax credit for qualified health insurance costs for eligible workers, and enacted the Alternative TAA demonstration program for older workers. These amendments augmented the benefits and services to workers certified as adversely affected by foreign trade under the TAA program.

One of the purposes of the TAA program, 19 U.S.C. 2271 *et seq.*, as described in section 2 of the Act, 19 U.S.C. 2102, is ''to assist * * * workers * * * to adjust to changes in international trade flows.'' The TAA program assists workers adversely affected by international trade by providing eligible workers with certain benefits and services, including income support in the form of trade readjustment allowances (TRA), training, job search allowances, relocation allowances, wage subsidies under ATAA, and the Health Coverage Tax Credit (HCTC). In order for a worker to apply to a cooperating State agency (CSA) for these benefits and services, the worker must be part of a group of workers covered under a TAA certification.

To implement the substantial changes to the TAA program, including the introduction of ATAA, the Department proposes creating a new 20 CFR Part 618. Proposed Part 618 would consist of nine subparts: subpart A—General; subpart B—Petitions and Determinations of Eligibility to Apply for Trade Adjustment Assistance; subpart C—Delivery of Services through the One-Stop Delivery System; subpart D—Job Search Allowances; subpart E—Relocation Allowances; subpart F—Training Services; subpart G—Trade Readjustment Allowances (TRA); subpart H—Administration by Applicable State Agencies; and subpart I—Alternative Trade Adjustment Assistance for Older Workers.

The rulemaking for Part 618 is divided into three parts: This NPRM proposes rules for Subpart I, ATAA for Older Workers. The Reform Act introduced this demonstration program to provide alternate benefits to older workers who obtain group certifications of their eligibility to apply for both TAA and ATAA. These older workers, when

they are part of a group certified as eligible to apply for ATAA, have the option of applying for a wage supplement as an alternative to TAA when they take work for less compensation than they received in their adversely affected employment.

A separate NPRM, published at 71 FR 50760–50832 (August 25, 2006) (RIN 1205–AB32), covers six subparts governing the payment of TAA and the provision of related employment services (subpart C through subpart H) and related definitions in subpart A. The Department will publish a third NPRM for subpart B, which will govern TAA and ATAA certifications of worker groups adversely affected by trade. (A worker must be covered under a TAA or ATAA certification to apply for TAA or ATAA, respectively.) It will also provide definitions relating to TAA and ATAA certifications that were reserved in subpart A.

The reader should note that since the Department initially expected to publish subparts B and I as one NPRM, both subparts B and I were initially covered under the same RIN, 1205–AB40. In order to expedite the publication of subpart I, the Department has decided to publish the NPRM for subpart B separately. Therefore, subpart I will remain under RIN 1205–AB40, and the Department will request a new RIN for subpart B and remaining definitions in subpart A.

**II. Summary and Discussion of Regulatory Provisions: Subpart I—Alternative Trade Adjustment Assistance for Older Workers**

This proposed subpart governs ATAA, a demonstration project established by the Reform Act under new section 246 of the Act. ATAA is a new approach to providing employment assistance to workers 50 years of age or older through wage subsidies. The goal of ATAA is to encourage reemployment of older workers who may find it difficult to find a new job at the same wage level when they change careers after long-term employment in a single job or industry. Training to improve opportunities for a future career, such as training individuals may receive through TAA, may not be the best option for these workers.

The program allows a worker covered by an ATAA certification a choice. An eligible worker may receive either an ATAA wage supplement to supplement income from a new job at lower pay than the worker's adversely affected employment, or TAA benefits including training and income support (although some workers may, under this proposed subpart, receive TRA, the income support component of TAA, before being determined eligible for ATAA). A worker under either program may receive employment and other related services focused on obtaining new employment offering compensation at or near the wages earned in adversely affected employment, and a worker under either program may receive the Health Coverage Tax Credit (HCTC) if otherwise eligible.

Some provisions in proposed subpart I reference provisions in subpart H of Part 618, Administration by Applicable State Agencies. All subpart H provisions apply to the ATAA program except where subpart H or subpart I specifically provides to the contrary. The absence in subpart I of a reference to an applicable subpart H provision may not be construed to mean subpart H does not apply.

Proposed § 618.900 describes the scope and purpose of ATAA. It explains that the Division of Trade Adjustment Assistance (DTAA) will determine ATAA and TAA certification at the same time. ATAA group certification will be covered in subpart B of this Part. Paragraph (a) of § 618.900 also explains that a worker for whom a nonrefundable expense is incurred for training approved under § 618.605(c) loses the option to receive ATAA, whether or not TAA funds pay the expense. The basis for this requirement appears in the preamble explanation of proposed § 618.915. Finally, this provision explains that proposed § 618.915 provides that workers individually found eligible for TAA and ATAA may not receive any TAA (except for the HCTC) after receiving an ATAA wage supplement, to highlight the choice of benefits that receipt of ATAA imposes on an individual worker.

Proposed paragraph (b) states the purpose of the ATAA program: ''to provide workers 50 years of age or older with the option to receive a temporary wage supplement upon prompt reemployment at lower pay than their previous adversely affected employment.''

Proposed § 618.905 discusses the six criteria that section 246 of the Act requires the Cooperating State Agencies (CSAs) to apply in determining whether an individual worker is eligible for ATAA.

Proposed paragraph (a)(1) of § 618.905 (criterion 1) implements both section 246(a)(3)(B)(i) of the Act, requiring that, to be eligible for the ATAA wage supplement, the worker ''is covered by a certification under subpart A of this Part [providing for group certifications for TAA],'' as well as the section 246(a)(3)(B) requirement that the worker is covered by an ATAA certification. Accordingly, proposed paragraph (a)(1) requires that the worker be certified as eligible to apply for ATAA under an ATAA certification (which is issued concurrently with a TAA certification). Further, the Department interprets the statutory phrase ''covered by a certification'' to mean that the worker is an ''adversely affected worker,'' as defined in § 618.110(b)(3). To be an adversely affected worker, the worker must be separated from adversely affected employment during the period of coverage of the certification. Thus, an adversely affected worker is one who is ''covered by a certification,'' as required by the statutory language. Moreover, the definition of adversely affected worker requires that the worker be separated ''because of lack of work in adversely affected employment * * *.'' This requirement assures that a worker fired for cause or laid off for other reasons than lack of work is not eligible for ATAA benefits. Accordingly, proposed paragraph (a)(1) requires that the worker be an adversely affected worker in a group of workers certified as eligible to apply for TAA and ATAA.

Proposed paragraph (a)(2) of § 618.905 (criterion 2) implements section 246(a)(3)(B)(ii) of the Act, which requires that the worker obtain reemployment not more than 26 weeks after the date of separation from adversely affected employment. Proposed paragraph (a)(2) implements this provision by requiring the worker to obtain reemployment by the last day of the 26th week after the date of the worker's most recent ''total separation,'' as defined in § 618.110(b)(76), that occurred within the certification period of the ATAA certification. The use of the term ''most recent total separation'' recognizes that workers may undergo more than one separation from employment and, like the regular TAA program, permits workers to obtain benefits when the employment relationship appears to be finally severed.

By making the wage supplement available only if reemployment occurred within 26 weeks of the worker's total separation, the statute encourages workers to begin looking for employment as soon as possible. However, as provided in proposed §§ 618.905(d)(4) and 618.910(a)(3), a CSA may approve a wage supplement and pay it retroactively to a worker who is covered by an ATAA certification but is reemployed before the certification is issued, if the worker otherwise meets eligibility requirements. The Department believes that denying the supplement to a worker who becomes

reemployed before the certification is issued is inconsistent with the intent of the statute to encourage rapid reemployment. In addition, denying retroactive approval of ATAA could encourage a worker to delay reemployment if a petition is pending, since the worker would have an incentive to wait until a determination is made. Further, the statute does not preclude retroactive approval of ATAA since it requires reemployment within 26 weeks of separation and does not provide an alternate deadline for reemployment if the separation occurs prior to the certification.

Proposed paragraph (a)(3) of § 618.905 (criterion 3) implements section 246(a)(3)(B)(iii) of the Act, which requires that the worker is at least 50 years of age. Proposed paragraph (a)(3) implements this provision by requiring that the worker must be at least 50 years of age at the time of reemployment. The Department proposes using the age of the worker at the time of the worker's reemployment because that is the time when all 6 criteria must be met. The worker's age may be verified with a driver's license or other appropriate documentation.

Proposed paragraph (a)(4) of § 618.905 (criterion 4) implements section 246(a)(3)(B)(iv) of the Act, which conditions the wage supplement on the worker not earning more than $50,000 a year in wages from reemployment. Accordingly, proposed paragraph (a)(4) requires that the worker may not earn more than $50,000 in annualized wages from reemployment as calculated under proposed § 618.910(a)(2)(ii). Computations of annualized wages from reemployment include wages from all jobs in which the worker is employed. When a worker applies for ATAA, a paycheck or supporting statement from the employer, or from each employer if there is more than one, must indicate that the annualized wages from reemployment with that employer will not exceed $50,000. Because the $50,000 figure is a prospective calculation, a formula to annualize reemployment wages, set forth in proposed § 618.910(a)(2)(ii), must be used to calculate whether the worker's wages project to exceed this amount or the annualized wages at separation as computed under proposed § 618.910(a)(2)(i). Finally, the proposed paragraph provides that annualized wages from reemployment must be less than the worker's annualized wages at separation from adversely affected employment, computed under § 618.910(a)(2)(i).

Proposed paragraph (a)(5) of § 618.905 (criterion 5) implements section 246(a)(3)(B)(v) of the Act, which requires that the worker is employed on a full-time basis as defined by State law in the State in which the worker is employed by repeating the statutory language. It also adds the requirement that the worker must continue to be employed on a full-time basis, although not necessarily at the same job or for the same employer. This is a requirement for continuing eligibility which the Department believes should be clearly stated.

Proposed paragraph (a)(5)(i) explains that either a single full-time job or any combination of part-time work that meets or exceeds full-time employment under that State law may be used. ''State law'' is defined in § 618.110(b)(70) as the State Unemployment Insurance (UI) law. Following longstanding practice, State UI law means not only State statutory provisions, but also: State court decisions, regulations, program letters, manuals, and any other documents interpreting State UI law. Thus, even if full-time employment were not defined in the State code, a definition contained in another State-issued document would apply. If the worker is employed in more than one State, then the law of the State in which the worker has the higher weekly earnings applies. If the worker's weekly earnings in that State are reduced, the law of that State continues to apply. The determination of which State law applies is made at the same time as the initial determination of eligibility and the amount of the supplement or, if the worker requalifies for ATAA on the basis of subsequent employment in two States, at the initial determination for that employment. Once the CSA makes the determination of the applicable State law, that determination continues to apply even if the worker's weekly earnings change. If the worker's wages in that State are reduced, it is easier to simply continue to apply the law of that State.

State UI law does not need to cover the employment, but the employment must not present any unusual risk to the health, safety, or morals of the worker and the employment must not be in an unlawful activity under any applicable Federal, State, or local law. The Department includes this provision because it believes that ATAA should not serve as an incentive for a worker either to accept employment that otherwise would jeopardize the worker's own welfare or involve illegal activities.

Proposed paragraph (a)(5)(ii) provides an exception to the requirement that State law requirements define full-time employment. It provides that a worker is considered employed full-time for any week in which the worker worked less than full-time as defined in State law, *only* because the worker was on employer-authorized leave. The Department believes that a worker should not be disqualified from receiving ATAA for periods of employer-authorized leave, whether paid or unpaid, simply because the worker actually worked fewer than the minimum number of hours required under the applicable State law definition of full-time employment.

Proposed paragraph (a)(5)(iii) provides that the employment may not be TAA- or WIA-sponsored on-the-job training (OJT). Under both TAA and WIA, OJT is a form of training in which a Federal program pays a subsidy to an employer to offset the employer's cost of providing training. Since ATAA is provided as an alternative to other TAA benefits, the choice to enroll in training means that a worker becomes ineligible for ATAA. ATAA allowances may be paid if a WIA-funded OJT, that has not been approved as TAA training, ends and leads to permanent unsubsidized employment within the 26-week window for applying for ATAA.

Proposed paragraph (a)(6) of § 618.905 (criterion 6) implements section 246(a)(3)(B)(vi) of the Act, which requires that the worker ''does not return to the employment from which the worker was separated.'' The Department interprets this as meaning more than merely a return to the same job, with the same facility, of the same firm, producing the same article. Rather, the provision's evident intent is to prevent the subsidization of wages when the worker effectively is returning to the adversely affected employment, a broader standard.

Proposed paragraph (a)(6)(i) contains the first part of this interpretation, that the worker returns to the same facility owned by the same firm from which the adversely affected worker was separated, regardless of whether the worker returns to the same job or produces the same article as in adversely affected employment. Proposed paragraph (a)(6)(ii) contains the second part of the interpretation, that the worker returns to the same facility but under ownership by a different firm from that which the worker was separated, if the worker is producing the same article as identified in the TAA determination but without regard to whether the worker is in the same job. Proposed paragraph (a)(6)(iii) contains the third part of the interpretation, that the worker is reemployed at a different facility of the same firm from which the worker was

separated, and in the same job producing the same article identified in the TAA determination.

Proposed paragraph (b) of § 618.905 contains the basic filing requirement for a worker to file an application for ATAA. For an ATAA application to be timely, it must be filed with the CSA within two years from the first day of the worker's reemployment, unless the Department extends this two-year deadline for workers covered by an ATAA certification whose issuance was unduly delayed as determined by the Department. Although the Act is silent, the Department proposes a deadline in order to avoid an open-ended commitment. ATAA is payable for no more than two years and it is reasonable that a claimant file the claim within this period.

The Department also proposes to permit CSAs to require in-person filing because it might, in some cases, help prevent fraud by better enabling the CSA to verify an applicant's identity, or assist in ensuring an accurate calculation of benefits for eligible workers. The ATAA payment, unlike State UI, is not based upon wage records in a database, but pay stubs. The CSA may need the claimant present to obtain the needed information quickly and to speed up the process for deciding on eligibility for and the amount of the ATAA payment. The Department therefore believes that CSA's should have the flexibility of requiring in-person claim filing.

Proposed paragraph (c) addresses situations where, because of the delays associated with litigation over the denials of certifications of petitions, certifications are issued so late that the two-year deadline for receiving ATAA benefits has expired for workers covered. Proposed paragraph (c) remedies this by providing that, as long as the petitioner or the adversely affected worker did not contribute to the delay in issuing the certification, for example, failing to meet filing deadlines or repeatedly requesting extensions of filing deadlines, the filing deadline will be extended for a reasonable period, decided on a case-by-case basis, necessary to permit eligible workers to file for ATAA. The Department believes that, in these cases, the adversely affected workers should not be unfairly penalized by not receiving ATAA. The Department proposes paragraph (c) to restore such workers to the position they would have occupied had the certification covering them been issued without the delay. The 26-week deadline for obtaining reemployment, in § 618.925(a)(2), is not extended. The 26-week deadline is statutory. Under the statute, the deadline runs from the layoff date, not the certification date. Since every certification reaches back one year, in every certification there are potentially workers for whom the 26-week deadline passed long before the petition was certified, or even filed. Everyone must meet this deadline, regardless of whether the worker was laid off before a timely certification, or the worker was laid off before the certification because it was delayed by the appeals process.

Proposed paragraph (d) of § 618.905 provides that specified provisions in subpart H concerning determinations, redeterminations, notice, and appeals and hearings apply to ATAA. The Department proposes to apply the same procedural requirements to ATAA as apply to TAA because doing so promotes efficient ATAA administration. Proposed paragraphs (d)(1), (d)(2), and (d)(3) provide further procedural requirements specific to ATAA.

Proposed paragraph (d)(1) provides that in reviewing the application, the CSA must verify and document the worker's age, reemployment, and wages in determining whether the individual meets the individual eligibility criteria in proposed § 618.905(a).

Proposed paragraph (d)(2) provides that a determination of eligibility issued to a worker must include a notice that the benefit amount will be regularly recalculated and may change if the eligible worker's annualized wages in reemployment vary. Workers' ATAA payments frequently change; therefore, this requirement would prevent confusion as workers see their benefit amounts change.

Proposed paragraph (d)(3) allows a worker to file a new application and obtain ATAA if the worker meets the criteria of proposed § 618.905(a) at the time of filing of the new application, even if the CSA has denied a prior application.

Proposed paragraph (d)(4) provides that a CSA may approve a wage supplement and pay it retroactively to a worker who is covered by an ATAA certification but is reemployed before the certification is issued, and otherwise meets eligibility requirements. This was explained above in the discussion of proposed § 618.905(a)(2).

Proposed paragraph (e) of § 618.905 provides that the recordkeeping and disclosure of information requirements of proposed § 618.865 apply to CSA's ATAA program administration. The language of proposed § 618.865 already states that it applies to the administration of ''the Act,'' which includes ATAA; however, proposed § 618.905(e) ensures there is no confusion concerning the applicability of proposed § 618.865 to ATAA.

Proposed § 618.910 addresses the wage supplement payments available, and the HCTC potentially available, to those receiving ATAA. Proposed paragraphs (a)(1) and (a)(2) of this section govern the computation of the total ATAA wage supplement for an eligible worker.

Proposed paragraph (a)(1) of § 618.910 provides that the total supplement amount, payable for up to a two-year period, is the lesser of $10,000 or an amount equal to 50 percent of the difference between the wages earned from the adversely affected employer and the new employment obtained after separation from adversely affected employment. As discussed above regarding proposed § 618.905(a)(4), a worker is ineligible to receive any wage supplement if the worker's annualized wages at separation do not exceed the worker's annualized wages from reemployment.

Proposed paragraphs (a)(2)(i) and (ii) of § 618.910 provide the computations for, respectively, annualized wages at separation, and annualized wages from reemployment. Proposed paragraph (a)(2)(i) computes the annualized wages at separation based upon the amount of wages received by the worker during the last full week of adversely affected employment. Proposed § 618.110(b)(81) defines ''wages'' as ''all compensation for employment for an employer, including commissions, bonuses, and the cash value of all compensation in a medium other than cash.'' Thus, the computation of annualized wages at separation for ATAA recognizes that some eligible workers are paid by means other than an hourly wage. However, the computation of wages for ATAA purposes varies from the definition of ''wages'' by excluding overtime wages because such wages are too speculative. It also varies from the definition of ''wages'' by excluding employer-paid health insurance premiums and employer pension contributions, so as not to disqualify workers for ATAA because their employer provides health insurance or pensions. Lastly, it varies from the definition of ''wages'' by excluding bonuses, severance payments, buyouts and similar payments, which are not reflective of the worker's weekly pay and which therefore should not be annualized. The computation of annualized wages at separation would use wages earned only in the last full week of the worker's regular schedule in adversely affected employment, rather than, for example, the worker's wages during the preceding 12-month period.

This is because the Act describes the formula as using the wages received by the worker ''at the time of separation.''

Proposed paragraph (a)(2)(ii) of § 618.910 provides that the initial computation of annualized wages from reemployment relies on the amount of wages received by the worker during the first full week of reemployment. This computation also requires combining wages from all jobs, which is consistent with the requirement in proposed § 618.905(a)(5) that ''full-time employment'' may include any combination of part-time jobs. However, the computation of wages from reemployment, like the computation of wages at separation, excludes overtime, employer-paid health insurance premiums, employer pension contributions, as well as bonuses, severance payments, buyouts and similar payments not reflective of weekly pay. Tips are not included in the proposed definition of wages, and the Department specifically invites comments on whether they should be, and if so, how they should be calculated. The computation of annualized wages from reemployment uses wages earned in the first full week of reemployment because that amount is the only actual figure available at the outset of a worker's reemployment.

The Department notes that the proposed computation of the wage supplement does not address one possible problem, that is, where a worker's wages decrease because an employer lowers the worker's wage rate immediately prior to separation or because piece rate or commission earnings are reduced. The Department invites comment on this possible problem as well as whether there is a better way to calculate wages at separation.

Proposed paragraph (a)(3) of § 618.910 governs the timing of wage supplement payments and explains that the CSA has the option to distribute the wage supplement payments to the worker on either a weekly, biweekly, or monthly basis for no more than a two-year period to a worker under any single ATAA certification. Proposed paragraph (a)(3) also provides that a worker may receive a lump-sum retroactive wage supplement payment for a previous period for which the worker was eligible for such payments, but did not have the opportunity to apply. This most commonly would occur where a worker was separated and found a new job before the ATAA certification was issued. Retroactive payment was explained above in the discussion of § 618.905(a)(2).

Proposed paragraph (a)(4) of § 618.910 provides that each wage supplement payment will be equal to the Annualized Wage Differential divided by the number of payments made during the year, *e.g.*, divided by 12 in a State that pays on a monthly basis and divided by 52 in a State that pays on a weekly basis. As noted in proposed § 618.905(d)(2), this calculation, and thus the payments, may change when the Annualized Wage Differential is recalculated as a result of changes in wages.

Proposed paragraph (a)(5) of § 618.910 provides that the CSA will, no less than monthly, review whether a worker remains eligible for, and the amount of, the wage supplement payments. This requirement would reduce the risk of fraud and error and would reduce the number of overpayments that would have to be established in the case of workers who receive payments to which they are not entitled. This requirement also is necessary for determinations of eligibility and recalculations of wage supplement payment amounts if the worker's annualized wages from reemployment change, as provided in proposed paragraph (a)(6) of § 618.910. If the review determines that the worker's annualized wages from reemployment have changed, then proposed paragraph (a)(6) requires a CSA to determine eligibility or recalculate wage supplement payment amounts based on the new annualized wages from the change.

Proposed paragraph (a)(7) of § 618.910 provides that if a CSA has verified continued eligibility monthly, as required by proposed paragraph (a)(5), then payments made after a worker's annualized wages from reemployment have changed but before the regular monthly review, are considered valid payments to which the individual was entitled and are not overpayments subject to § 618.840. The Department believes that in these circumstances, basic fairness and justice requires that it allow a worker to keep wage supplement payments received as the result of determinations that were correct and accurate at the time they were made based on all the information available at that time.

Proposed paragraph (a)(8) of § 618.910 explains how a change in employment affects ATAA eligibility. Proposed paragraph (a)(8)(i) provides that an eligible worker who changes jobs is not disqualified from continuing to receive wage supplement payments so long as the new employment meets the applicable requirements in proposed § 618.905(a), that is, proposed paragraphs (a)(4), (a)(5) and (a)(6).

The Department proposes this policy because it does not want to preclude workers from receiving ATAA benefits if they secure different employment after their initial reemployment. Also, the employment is not required to be consecutive. However, ATAA benefits are not payable during periods of unemployment. If a worker receiving ATAA becomes unemployed, the worker must complete a new individual application for ATAA upon reemployment. The worker then will be eligible to receive the wage supplement, up to the $10,000 maximum, for the remainder of the two-year eligibility period (the two-calendar year period beginning with the first day of initial reemployment) if the worker meets criteria 4, 5, and 6 of § 618.905.

If the worker's initial reemployment meets all the criteria for individual eligibility found in § 618.905, then the worker continues to be eligible for ATAA even though the worker obtains different employment, as long as it is within the worker's two-year eligibility period for benefits and the new job meets criteria 4, 5 and 6. Criteria 1, 2 and 3 do not need to be reevaluated. Criterion 1, the worker is covered by a certification and criterion 3, the worker is at least 50 years of age, will not change. The Department also interprets criterion 2, that the worker obtained the job not more than 26 weeks after the date of separation from adversely affected employment, as only applying to the first reemployment job. Thus, it is not necessary that the worker obtain subsequent reemployment by the statutory deadline described in § 618.905(a)(2), because that deadline was met by the initial reemployment.

Proposed paragraph (a)(8)(ii) specifies that a worker already receiving wage supplement payments will become ineligible for the duration of any period of unemployment. However, the worker may regain eligibility upon again becoming reemployed if the new employment meets the same three requirements in § 618.905(a).

Proposed paragraph (a)(8)(iii) provides that a worker whose recalculated annualized wages from reemployment exceed $50,000, may not receive any further wage supplement payments or any TAA benefit. However, if another change reduces the worker's annualized wages from reemployment below $50,000 and the job still meets criteria 4, 5 and 6, the worker may reapply and receive ATAA for the remaining portion of the two-year eligibility period. The Department believes a worker should not be permanently barred from further wage supplement payments due to a

temporary spike in earnings that subsides before the worker's two-year eligibility period expires.

Proposed paragraph (b) of § 618.910 provides that ATAA recipients are ''eligible ATAA recipients'' for purposes of the HCTC. Although neither the Department nor CSAs make HCTC eligibility determinations, proposed § 618.770(b) describes the duties of a CSA in administering the HCTC. The Internal Revenue Service makes the final determination of HCTC eligibility.

Proposed § 618.915 explains the Department's interpretation of section 246(a)(5) of the Act, limiting the TAA benefits available to workers receiving ATAA. That provision prohibits a worker who is receiving ATAA benefits from receiving benefits under the TAA program other than the HCTC, but it does not indicate whether a worker may receive ATAA after having received TAA benefits. Proposed § 618.915 interprets section 246(a)(5) of the Act as permitting a worker to receive TRA, a job search allowance, and a relocation allowance under a TAA certification before receiving a wage supplement payment under the accompanying ATAA certification. Once such a worker receives a wage supplement payment, however, that worker may not receive any further TAA benefits under that TAA certification, except the HCTC, if eligible.

Proposed § 618.915 prohibits a worker for whom a nonrefundable expense is incurred—whether or not TAA funds pay the expense—for training approved under § 618.605(c) from receiving a wage supplement payment under the ATAA certification. The Department proposes this prohibition because ATAA is a demonstration program designed to test whether a wage supplement will return older workers to work faster than training under the TAA program. Therefore, it is reasonable to require a worker to choose between a longer-term commitment to training and the receipt of ATAA to supplement the wages earned in employment obtained quickly with existing skills. Mere approval of training under § 618.605(c) does not disqualify a worker from receiving ATAA; rather, the disqualification for receipt of training applies only once an actual and nonrefundable expense for TAA approved training is incurred from TAA or other funds.

Proposed § 618.920 explains the effect of the termination of the ATAA program. This program was enacted as a demonstration project to better serve older workers seeking reemployment. Section 246(b) of the Act provides that a worker may not receive ATAA after the termination date unless the worker is ''receiving payments * * * on the termination date.'' Proposed § 618.920 interprets this provision to mean that an eligible worker whose initial application for ATAA is approved on or before the termination date may receive ATAA payments for as long as the worker remains eligible for the duration of the worker's ATAA eligibility period. The Department believes this interpretation, as opposed to one that would permit continuing wage supplement payments only to workers who had received an actual payment by the termination date, is reasonable and is more sensible because it avoids the inequity of a worker having an initial application approved before the termination date, but then not receiving a payment because of an administrative delay.

## III. Administrative Requirements of the Proposed Rulemaking

*Executive Order 12866*

This proposed rule for ATAA program benefits is not an economically significant rule because it will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; have an annual effect on the economy of $100 million or more; or adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way. However, the proposed rule is a significant regulatory action under Executive Order 12866 at section 3(f), Regulatory Planning and Review, because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. This proposed rule implements a new program under the Reform Act for individuals who are at least 50 years old. Therefore, the Department has submitted this proposed rule to the Office of Management and Budget for review.

*Paperwork Reduction Act*

The ATAA program described in this proposed rule contains a requirement for States to submit to the Department the quarterly ATAA Activities Report (ATAAAR). These requirements were previously reviewed and approved for use by the Office of Management and Budget (OMB) and assigned OMB control number 1205–0459 under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) (PRA).

*Executive Order 13132: Federalism*

The Department has reviewed this proposed rule revising the operation of a Federal benefit program in accordance with Executive Order 13132 and found that it will not have substantial direct effects on the States or the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government, within the meaning of the Executive Order.

*Unfunded Mandates Reform Act of 1995*

This regulatory action has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) and Executive Order 12875. The Department has determined that this rule does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, the Department has not prepared a budgetary impact statement.

*Effect on Family Life*

The Department certifies that this proposed rule has been assessed according to section 654 of Pub. L. 105–277, 112 Stat. 2681, for its effect on family well-being. The Department concludes that the rule will not adversely affect the well-being of the nation's families. Rather, it should have a positive effect on family well-being by providing greater choice in for benefits to eligible individuals.

*Regulatory Flexibility Act/SBREFA*

We have notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act (RFA) at 5 U.S.C. 605(b), that this proposed rule will not have a significant economic impact on a substantial number of small entities. Under the RFA, no regulatory flexibility analysis is required where the rule ''will not * * * have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b). A small entity is defined as a small business, small not-for-profit organization, or small governmental jurisdiction. 5 U.S.C. 601(3)–(5). Therefore, the definition of the term ''small entity'' does not include States or individuals.

This proposed rule provides procedures governing a program for individuals over age 50 and is administered by the States and not by small governmental jurisdictions. In addition, the program applies to individuals who seek benefits under the program only, and not small entities as

defined by the Regulatory Flexibility Act. Therefore, the Department certifies that this proposed rule will not have a significant impact on a substantial number of small entities and, as a result, no regulatory flexibility analysis is required.

In addition, the Department certifies that this proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996 (SBREFA). Under section 804 of SBREFA, a major rule is one that is an ''economically significant regulatory action'' within the meaning of Executive Order 12866. Because this proposed rule is not an economically significant rule under Executive Order 12866, the Department certifies that it also is not a major rule under SBREFA.

*Catalogue of Federal Domestic Assistance Number*

This program is listed in the Catalogue of Federal Domestic Assistance at No. 17.245.

**List of Subjects in 20 CFR Part 618**

Administrative practice and procedure, Employment, Fraud, Grant programs—labor, Manpower training programs, Relocation assistance, Reporting and recordkeeping requirements, Trade adjustment assistance, Vocational education.

Signed at Washington, DC, on October 12, 2006.

**Emily Stover DeRocco,**

*Assistant Secretary, Employment and Training Administration.*

For the reasons stated in the preamble, the Department of Labor proposes to amend 20 CFR part 618 as proposed in a Notice of Proposed Rulemaking entitled Trade Adjustment Assistance for Workers, Workforce Investment Act; Amendment of Regulations, published at 71 FR 50760–50832 (August 25, 2006) which is proposed to be further amended as follows:

## PART 618—TRADE ADJUSTMENT ASSISTANCE UNDER THE TRADE ACT OF 1974 FOR WORKERS CERTIFIED UNDER PETITIONS FILED BEFORE NOVEMBER 4, 2002

1. The authority citation for this part continues to read as follows:

**Authority:** 19 U.S.C. 2320; Secretary's Order No. 3–81, 46 FR 31117.

2. 20 CFR part 618 is amended to add subpart I to read as follows:

### Subpart I—Alternative Trade Adjustment Assistance for Older Workers

Sec.



### Subpart I—Alternative Trade Adjustment Assistance for Older Workers

#### § 618.900 Scope and purpose.

(a) This subpart covers Alternative Trade Adjustment Assistance for older workers (ATAA), including the procedures for applying for individual eligibility determinations. ATAA certification is determined at the same time as TAA certification, both of which are governed by subpart B of this Part. Workers who are covered under an ATAA certification must meet the individual eligibility criteria for ATAA in order to opt to receive a wage supplement. However, a worker for whom a nonrefundable expense is incurred for training approved under § 618.605(c) loses the option to receive ATAA, whether or not TAA funds pay for the expense. Under § 618.915 a worker who receives an ATAA wage supplement may not receive TAA benefits and services, but may still be eligible to receive the HCTC.

(b) The purpose of ATAA is to provide workers 50 years of age or older with the option to receive a temporary wage supplement upon prompt reemployment at lower pay than their previous adversely affected employment, as an alternative to training and other TAA benefits.

#### § 618.905 Individual eligibility criteria, applications, and determinations.

(a) *Criteria for individual eligibility.* An individual worker must satisfy each of the following requirements to qualify for ATAA:

(1) *Criterion 1: The worker is covered by a certification.* The worker must be an adversely affected worker, as defined in § 618.110(b)(3), in the group of workers certified as eligible to apply for TAA and ATAA;

(2) *Criterion 2: The worker obtains reemployment not more than 26 weeks after the date of separation from the adversely affected employment.* The worker's first day of employment must occur before the last day of the 26th week after the date of the worker's most recent total separation, as defined in § 618.110(b)(76), within the ATAA certification period;

(3) *Criterion 3: The worker is at least 50 years of age.* The worker must be at least 50 years of age at the time of reemployment;

(4) *Criterion 4: The worker earns not more than $50,000 a year in annualized wages from reemployment.* The worker may not earn more than $50,000 in annualized wages from reemployment, *as computed under 618.910(a)(2)(ii).* Annualized wages from reemployment will include wages from all jobs in which the worker is employed. When a worker applies for ATAA, a paycheck or supporting statement from the employer, or from each employer if more than one, must be used to establish that annualized wages from reemployment will not exceed $50,000. Annualized wages from reemployment also must be less than the worker's annualized wages at separation from adversely affected employment, as computed under § 618.910(a)(2)(i);

(5) *Criterion 5: The worker is employed on a full-time basis as defined by State law in the State in which the worker is employed.* The worker must be employed, and must continue being employed (although the worker need not continue to be employed in the same job(s) or for the same employer(s)), on a full-time basis as defined by State law (as defined in § 618.110(b)(70)) in the State in which the worker is employed.

(i) Employment on a full-time basis may include a single, full-time job or any combination of part-time work that meets or exceeds full-time employment, as defined under State law in the State in which the worker is employed. If the worker is employed in more than one State, then the law of the State in which the worker has the highest weekly earnings applies. If the worker's weekly earnings in that State are reduced, the law of that State continues to apply. Such employment need not be covered employment under State UI law, but must be employment which does not present any unusual risk to the health, safety, or morals of the individual and must not involve activity that is unlawful under Federal, State, or local law.

(ii) Notwithstanding State law, a worker must be considered employed full-time for any week in which the worker worked less than full-time as defined in State law, *only* because the worker was on employer-authorized leave.

(iii) Such employment may not be TAA- or WIA-sponsored on-the-job training (OJT);

(6) *Criterion 6: The worker does not return to the employment from which the worker was separated.* The worker's reemployment must not be the same employment as the adversely affected employment from which the worker was separated. An adversely affected worker

returns to adversely affected employment if reemployed:

(i) by the same firm at the same facility from which the adversely affected worker was separated, regardless of whether the worker is returning to the same job or producing the same article as identified in the TAA determination; or

(ii) by a different firm but at the same facility from which the adversely affected worker was separated, and producing the same article identified in the TAA determination, regardless of whether the worker is returning to the same job; or

(iii) by the same firm but at a different facility in the same job and producing the same article identified in the TAA determination.

(b) *Filing an individual application for ATAA.* To receive ATAA, an adversely affected worker must file an application for ATAA with the cooperating State agency within two years from the first day of the worker's reemployment. The cooperating State agency, at its discretion, may require the worker to file the application in person.

(c) The limitation in paragraph (b) of this section does not apply where a negative determination on a petition filed under subpart B of this part 618 has been appealed to the United States Court of International Trade; and the certification is later granted; and the delay in the certification is not attributable to the petitioner or the adversely affected worker. In that event, the filing period for ATAA will be extended by the Department of Labor, on a case-by-case basis, for a reasonable period in which workers may file for ATAA. The 26 week deadline for reemployment described in § 618.905(a)(2) remains and is not changed by this provision.

(d) *Determinations, redeterminations, and appeals.* Cooperating State agencies must apply the requirements of § 618.825 (determinations and notice) and § 618.835 (appeals and hearings) of subpart H, respectively, to all determinations, redeterminations, and appeals under this subpart I.

(1) Before issuing a determination or redetermination, the cooperating State agency must verify and document the worker's age, reemployment, and wages in determining whether the requirements of paragraph (a) of this section have been met.

(2) A determination of eligibility issued to a worker must include a notice that the benefit amount will be regularly recalculated (as required by § 618.910(a)(6)) and may change if the eligible worker's annualized wages in reemployment vary.

(3) A worker who is denied individual eligibility based on a first reemployment may file a new application and subsequently obtain ATAA eligibility if the worker meets all of the criteria of paragraph (a) of this section at the time the worker files the new application.

(4) A wage supplement may be approved retroactively in the case of a worker who is covered by an ATAA certification but is reemployed before such certification actually is issued, and otherwise meets the eligibility requirements of this section.

(e) *Recordkeeping requirements.* The recordkeeping and disclosure of information requirements of § 618.865 apply to the cooperating State agencies' administration of the ATAA program.

**§ 618.910 Benefits.**

(a) *Wage supplement.* An eligible worker under an ATAA certification may receive a total wage supplement of up to $10,000 over a period of not more than two years.

(1) *Computation of total worker payment and Annualized Wage Differential.* The ATAA wage supplement supplements an individual's wages for up to two calendar years beginning with the first day of initial reemployment or $10,000, whichever occurs first, by an amount equal to the annualized wage differential. The Annualized Wage Differential is an amount equal to 50 percent of the result of—

(i) The amount of the worker's annualized wages at separation, as computed under paragraph (a)(2)(i) of this section, minus

(ii) The amount of the worker's annualized wages from reemployment, as computed under paragraph (a)(2)(ii) of this section.

(2) *Computation of annualized wages.* (i) *Annualized wages at separation* means the product of 52 multiplied by the amount of wages received by the worker during the last full week of the worker's regular schedule in adversely affected employment. The computation of wages at separation excludes overtime, employer-paid health insurance premiums, and employer pension contributions, as well as bonuses, severance payments, buyouts and similar payments not reflective of the worker's weekly pay.

(ii) Annualized wages from reemployment means the product of 52 multiplied by the amount of wages received by the worker during the first full week of reemployment. If a worker's wages from reemployment change, then annualized wages from reemployment means the product of 52 multiplied by the amount of wages received by the worker during the latest full week of reemployment, and the cooperating State agency must follow § 618.910(a)(6) in recalculating the wage supplement payments. The computation of annualized wages from reemployment excludes overtime, employer-paid health insurance premiums, and employer pension contributions, as well as bonuses, severance payments, buyouts and similar payments not reflective of the worker's weekly pay. If a worker's annualized wages from reemployment exceed $50,000, then the worker is ineligible for any ATAA benefit under this subpart I.

(3) *Timing of wage supplement payments.* The cooperating State agency must make wage supplement payments on a regular basis, either weekly, biweekly, or monthly, for no more than a two-year period for a worker under any one certification, beginning no earlier than the first day of reemployment that satisfies the requirements of § 618.905. A worker may receive retroactive payments, in a lump sum, for which the worker was eligible under § 618.905(a) and approved under § 618.905(d)(4).

(4) *Calculation of wage supplement payments.* Each wage supplement payment will be equal to the Annualized Wage Differential divided by the number of payments made during the year, *e.g.*, divided by 12 in a State that pays on a monthly basis and divided by 52 in a State that pays on a weekly basis.

(5) *Periodic verification of employment and annualized wages.* No less than once a month, the cooperating State agency must review whether a worker receiving wage supplement payments continues to meet the eligibility requirements of § 618.905, and determine whether changes have occurred in the worker's annualized wages from reemployment, as described in paragraph (a)(2)(ii) of this section.

(6) *Change in annualized wages from reemployment.* The cooperating State agency must recalculate the appropriate amount of the wage supplement payments if, during its review under paragraph (a)(5) of this section, it determines that the worker's annualized wages from reemployment have changed.

(i) If the worker's annualized wages from reemployment, as computed under paragraph (a)(2)(ii) of this section, exceed either $50,000 or the worker's annualized wages at separation, as computed under paragraph (a)(2)(i) of this section, then the cooperating State agency must immediately issue a determination that the worker is ineligible for further wage supplement

payments, notify the worker of this determination, and cease such wage supplement payments.

(ii) If the worker's annualized wages from reemployment, as computed under paragraph (a)(2)(ii) of this section, change, but still do not exceed either $50,000 or the worker's annualized wages at separation, as computed under paragraph (a)(2)(i) of this section, then the cooperating State agency must recalculate the amount of each wage supplement payment.

(7) *Overpayments.* If a cooperating State agency has verified continued eligibility monthly, as required by paragraph (a)(5) of this section, payments made before a worker's annualized wages from reemployment are determined, under the computation in paragraph (a)(2)(ii) of this section, to have changed will, in the absence of fraud, be considered valid payments to which the individual was entitled and are not overpayments subject to § 618.840.

(8) *Continuing eligibility for wage supplement.* (i) Changing jobs during reemployment does not disqualify an otherwise eligible worker from receiving subsequent wage supplement payments under this subpart I for the remainder of the two-year eligibility period if the new reemployment meets the requirements of § 618.905(a)(4), (a)(5), and (a)(6).

(ii) A worker already receiving wage supplement payments who has a period of unemployment will not be eligible to receive the wage supplement for that period nor any TAA benefit (see § 618.915 (choice of TAA or ATAA wage supplement)). Upon reemployment, the worker must reapply for ATAA to the cooperating State agency. If the new reemployment meets the requirements of § 618.905(a)(4), (a)(5), and (a)(6), the worker may be eligible to receive the wage supplement in accordance with the requirements of this section for the remaining portion of the two-year eligibility period.

(iii) A worker already receiving wage supplement payments whose recalculated annualized wages from reemployment, under 618.910(a)(2)(ii), exceed $50,000, may not receive any further wage supplement payments or any TAA benefit (see § 618.915 (choice of TAA or ATAA wage supplement)). However, if another change reduces the worker's annualized wages from reemployment to $50,000 or less and the worker meets the requirements of § 618.905(a)(4), (a)(5), and (a)(6), the worker may reapply to the CSA and resume receiving ATAA for the remaining portion of the two-year eligibility period.

(b) *Health Coverage Tax Credit.* A worker who receives an ATAA wage supplement payment is an eligible ATAA recipient as defined in 618.110(b)(33) and may, if determined eligible by the Internal Revenue Service, receive the HCTC for any month in which the worker receives an ATAA payment and for one month following the last month of ATAA payment eligibility. A cooperating State agency must meet the responsibilities explained in § 618.770(b) (Health Coverage Tax Credit).

**§ 618.915 Choice of TAA or ATAA wage supplement.**

A worker for whom a nonrefundable expense is incurred—whether or not TAA funds pay the expense—for training approved under § 618.605(c) loses the option to receive ATAA and may not receive a wage supplement under an accompanying ATAA certification. A worker who has received TRA, a job search allowance, or a relocation allowance may still choose to receive ATAA benefits. However, a worker who receives a wage supplement payment under an ATAA certification makes an irrevocable election to receive ATAA benefits and may not receive any concurrent or subsequent TAA benefits, except for the HCTC, as provided in § 618.910(b), under the TAA certification that accompanies that ATAA certification.

**§ 618.920 Termination of ATAA Program.**

A worker may not receive a wage supplement under § 618.910(a) after the termination date of the ATAA program specified in the Act or other law, unless the worker received a determination approving an initial application for ATAA on or before such termination date. A worker who has received approval of a wage supplement under the ATAA program on or before the termination date specified in the Act will, if otherwise eligible, continue to receive payments throughout the worker's eligibility period, in accordance with § 618.910(a) of this subpart I.

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