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Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models, and Labor Attestation Requirements for Employers Using Nonimmigrants on H–1B1 Visas in Specialty Occupations; Filing Procedures; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205–AB39

Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models, and Labor Attestation Requirements for Employers Using Nonimmigrants on H–1B1 Visas in Specialty Occupations; Filing Procedures

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (the Department or DOL) is amending its regulations related to the H–1B and H–1B1 programs to generally require employers to use Web-based electronic filing of labor condition applications (LCAs). This final rule also implements technical and clarifying amendments to ETA's H–1B and H–1B1 regulations to correct terminology and addresses, update internal agency procedures, and clarify text. Among these amendments are provisions to reflect Congressional reinstatement of certain attestations and obligations applicable to employers that are H–1B dependent or have committed willful violations of H–1B requirements.

DATES: *Effective Date:* This final rule is effective on January 4, 2006.

FOR FURTHER INFORMATION CONTACT: Rachel Wittman, Senior Policy Advisor, Division of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; Telephone: (202) 693–3010 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION

I. Introduction

On April 1, 2005, the Department published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) to amend its regulations related to the H–1B and H–1B1 programs to generally require employers to use Web-based electronic filing of labor condition applications (LCAs). The NPRM also proposed technical and clarifying amendments to ETA's H–1B and H–1B1 regulations to correct terminology and addresses, update internal agency procedures, and clarify text. Among those proposed amendments were provisions to reflect Congressional reinstatement of certain attestation obligations applicable to employers that are H–1B dependent or have committed willful violations of H–1B requirements. 70 FR 16774 (April 1, 2005). Public comments were invited through May 2, 2005.

II. Statutory Authority and Background

The Immigration and Nationality Act, as amended, (INA or Act) assigns responsibilities to the Department relating to the entry and employment in the United States of certain categories of employment-based immigrants and nonimmigrants, including under the H–1B and H–1B1 visas. *See* INA § 101 *et seq.* [8 U.S.C. 1101 *et seq.*].

The H–1B visa program permits admission to the United States, on a nonimmigrant basis, of foreign workers who will temporarily perform services in a specialty occupation or as a fashion model of distinguished merit and ability. *See* 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184(c), (g), and (i). Specialty occupations under the H–1B program are those requiring the theoretical and practical application of a body of highly specialized knowledge and the 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. 8 U.S.C. 1184(i)(1).

The H–1B1 visa was created on January 1, 2004, as part of Congress' approval of the United States-Chile Free Trade Agreement and the United States-Singapore Free Trade Agreement. The visa permits the temporary entry and employment in the United States of professionals in specialty occupations from countries with which the United States has entered into agreements identified in section 1184(g)(8)(A) of the Immigration and Nationality Act. *See* INA, 8 U.S.C. 1101(a)(15)(H)(i)(b1), 1182(t), 1184(g)(8)(A), and 1184(i). The statute now covers nationals of Chile and Singapore. 8 U.S.C. 1184(g)(8)(A). Under the INA amendments creating the H–1B1 visa, the Department of Labor's responsibilities regarding H–1B1 visas are required to be implemented in a manner similar to the H–1B program. To implement the H–1B1 program in accordance with statutory requirements, on November 23, 2004, DOL issued an interim final rule extending the H–1B regulations found at 20 CFR part 655, subparts H and I, to the H–1B1 program, with limited exceptions consistent with statutory requirements. *See* 69 FR 68222 (November 23, 2004). (Prior to publication of the H–1B1 Interim Final Rule, DOL conducted its H–1B1 responsibilities in accordance with the statute and procedures posted on the DOL Web site prior to the H–1B1 visa effective date of January 1, 2004.)

Before H–1B or H–1B1 status for a foreign worker will be approved by the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (formerly the Immigration and Naturalization Service or INS),[1] the Secretary of Labor must certify a ''labor condition application'' or LCA filed by the foreign worker's prospective employer. *See* 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b1), 1182(n) and (t); 20 CFR part 655, subpart H. In completing the ''labor condition application'' or LCA in paper form (Form ETA 9035) or electronic form (Form ETA 9035E), an employer must specifically indicate, among other things, the H–1B or H–1B1 nonimmigrant's prospective job title, the number of H–1B or H–1B1 nonimmigrants sought, the nonimmigrant's anticipated period of employment and rate of pay, and the location where the H–1B or H–1B1 nonimmigrant(s) will work. Additionally, the employer attests to four statements:

1. H–1B or H–1B1 nonimmigrants will be paid at least the local prevailing wage or the actual wage level paid by the employer to others with similar experience and qualifications, whichever is higher;

2. The employment of H–1B or H–1B1 nonimmigrants will not adversely affect the working conditions of U.S. workers similarly employed;

3. There is not a strike or lockout in the course of a labor dispute in the occupation in which H–1B or H–1B1 nonimmigrants will be employed at the place of employment; and

4. Notice of the application has been provided to workers employed in the occupations in which H–1B or H–1B1 nonimmigrants will be employed. *See* 8 U.S.C. 1182(n)(1) and (t)(1); 20 CFR 655.705(c)(1), 655.730(d), 655.731 through 655.734; Forms ETA 9035E, 9035, and 9035CP (Cover Pages). While DOL administers and enforces the labor condition application portion of the H–1B and H–1B1 program, USCIS identifies and defines the occupations covered by the H–1B and H–1B1 category (except as already defined in the Chile and Singapore Free Trade

[1] *See* 6 U.S.C. 236(b), 552(d), and 557.

Agreements) and determines an alien's qualifications for such occupations.

Congress enacted the ''H–1B Visa Reform Act of 2004'' as part of the Consolidated Appropriations Act of 2005. *See* P.L. 108–447, 118 Stat. 2809, Division J, Title IV, Subtitle B (December 8, 2004). Among other provisions, the H–1B Visa Reform Act reinstated, effective March 8, 2005, special attestation requirements for employers who are H–1B dependent or who have been found to have committed willful violations of H–1B requirements or misrepresentations of a material fact during the five-year period prior to filing an H–1B LCA. *See* P.L. 108–447 at Division J, § 422(a). Reinstatement was achieved by deleting from INA Section 212(n)(1)(E)(ii) the sunset date of October 1, 2003, previously applicable to the H–1B dependent employer and willful violator provisions. Pursuant to this INA amendment, H–1B dependent employers and willful violator employers who file H–1B applications after March 7, 2005, generally must attest: The employer did not displace and will not displace a U.S. worker within the period of 90 days before and after filing a petition for an H–1B nonimmigrant; the employer will not place H–1B nonimmigrants with a secondary employer unless the employer has inquired if the secondary employer has displaced or intends to displace a U.S. worker within the period of 90 days before and after the placement of the H–1B nonimmigrant; the employer took good faith steps prior to filing the H–1B application to recruit U.S. workers; and, finally, the employer has offered the job to any U.S. applicant who is equally or better qualified than the H–1B nonimmigrant for the job.

III. Overview of Regulatory Changes

The regulatory changes are summarized below. See the NPRM at 70 FR 16776 for a more detailed discussion of the regulatory changes, including the Department's rationale for proposing the changes.

This final rule requires electronic filing and processing of H–1B and H–1B1 labor condition applications (LCAs) except in limited circumstances where a physical disability or lack of Internet access prevents the employer from filing electronically. This transition to primarily electronic filing will reduce paper-based LCA filings now submitted by U.S. Mail and facsimile. No changes are made through this final rule to the existing LCA forms (Forms ETA 9035, 9035E, and 9035CP) or to the current electronic filing procedures. This final rule amends the H–1B and H–1B1 regulations at §§ 655.700, 655.705, 655.720, 655.730 and 655.760 to state the requirements of electronic filing, except in limited circumstances, and to remove references to filing by facsimile and/or U.S. Mail.

In addition to the proposed regulatory changes to institute a general requirement for electronic filing of LCAs, this final rule also contains a number of technical amendments to ETA's H–1B and H–1B1 regulations to correct terminology and addresses, update internal agency procedures, and clarify text. Specifically, this final rule amends the definition of the Immigration and Naturalization Service (INS) at § 655.715 to reflect that INS'' functions in relation to H–1B visas now are performed by the U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security. The § 655.715 definition of State Employment Security Agency or SESA is also amended to reflect these state agencies now are known as ''State Workforce Agencies'' or SWAs.

This final rule also amends the H–1B and H–1B1 regulations at §§ 655.715, 655.720, 655.721, and 655.740 to remove references to the previous role of ''Regional Certifying Officers'' and ETA's Regional Offices in processing labor condition applications and taking other actions regarding LCAs. These regulatory references are unnecessary and are deleted, because ETA Regional Offices no longer process LCAs. This final rule also amends § 655.720(e) (previously § 655.720(d)) to reflect the ETA National Office, not ETA Regional Offices, handles matters regarding the H–1B and H–1B1 programs, and to provide a clearer reference to the regulatory section that identifies how employers may challenge state prevailing wage determinations. Consistent with the deletion of references to a role regarding LCAs for ETA Regional Offices, this final rule removes § 655.721, which currently provides the addresses of ETA Regional Offices.

A number of amendments are included in this final rule to reflect Congress' reinstatement, effective March 8, 2005, of special attestation requirements for employers who are H–1B dependent or willful violators. As discussed in Section I above, these special attestation requirements expired on September 30, 2003. Provisions reflecting the responsibility of employers who file applications regarding H–1B nonimmigrants (but not regarding H–1B1 nonimmigrants) to provide information regarding H–1B dependent status and these special attestations are found at §§ 655.705(c)(1), 655.730(c)(2), (c)(4)(vii), and (d)(5), and 655.736(c), (g)(1), (g)(2) and (g)(3). As reflected in these sections, the special attestation requirements for H–1B dependent employers and willful violators apply to H–1B labor condition applications filed with the Department on or after March 8, 2005. These special attestation requirements do not apply to H–1B labor condition applications filed from October 1, 2003 through March 7, 2005, or before January 19, 2001. An LCA filed during a period when the special attestation obligations for H–1B dependent employers and willful violators were not in effect (that is prior to January 19, 2001, and from October 1, 2003 through March 7, 2005) may not be used by an H–1B dependent employer or willful violator to support either petitions for new H–1B nonimmigrants or requests for extensions of status for existing H–1B nonimmigrants.

Additionally, the following sections are revised to reflect address changes: (1) in § 655.710(b) and § 655.734(a)(1)(ii), the address for filing complaints with the Department of Justice arising under 8 U.S.C. 1182(n)(1)(G)(i)(II) of the INA; (2) in § 655.720(c) (previously § 655.720(b)), the address for filing LCAs by U.S. Mail; and (3) in § 655.750(b)(2), the address for withdrawing previously filed LCAs. In the case of both the address for filing LCAs by U.S. Mail (§ 655.720(c)) and for withdrawing previously filed LCAs (§ 655.750(b)(2)), because ETA anticipates addresses may change over time, the final rule provides that addresses will be published in a notice in the **Federal Register** and posted on DOL's Web site at *http://www.ows.doleta.gov/foreign/*.

Finally, where regulatory sections or subsections are amended to reflect the e-filing requirement, these sections have been edited for clarity and to update terminology, such as replacing INS with USCIS.

IV. Discussion of Comments

The Department invited comments on the proposed elimination of options to file LCAs for the H–1B and H–1B1 programs by U.S. Mail and facsimile and the requirement of employers to file electronically except in limited circumstances. The Department also stated it was particularly interested in receiving comments from small business entities on this proposal.

Four comments were received. One was received from an employer, one from the American Immigration Lawyers Association (AILA) and two from practicing attorneys. No comments

were received from small business entities on the Department's proposal to require employers to file electronically.

Two commenters offered some support for the proposed rule. AILA stated: ''In general AILA applauds the Department for its efforts to streamline the filing of Labor Condition Applications online, which is at the heart of the proposed regulation. Such a modification to the LCA program recognizes the need to replace inefficient procedures—mailed or faxed applications—with new procedures that take into account modern business practices.'' However, as discussed below, AILA was also concerned there were some employers lacking Internet access and some ''older employer representatives'' who would find online submission of LCAs troublesome.

The Microsoft Corporation stated it ''applauds the DOL in its proposal to dispense with paper submission of LCAs'' and the ''proposed rule is a welcome step in automating the filing and adjudication of immigration-related government forms.'' However, as discussed below, Microsoft was concerned the rule does not adequately detail privacy and security provisions.

One attorney commenter objected to the provision in § 655.730(b) that precludes the submission of on-line LCAs more than 6 months in advance of the beginning date of the period of intended employment shown on the LCA. The commenter maintained in many instances not all information is available to prepare an on-line LCA and employer representatives file a facsimile LCA to enable them to secure the missing information from the employer and the employer's required signature at the same time. The thrust of the comment appeared to be that by filing an incomplete LCA more than 6 months in advance of the date of need, the employer would maintain its place in line for obtaining a certified LCA and filing a petition with USCIS. Such a practice would be contrary to the Department's regulations and current administrative practice. The current regulation at § 655.30(b) contains substantively the same provision as the proposed rule regarding the earliest point in time at which an LCA may be filed (*i.e.*, no more than 6 months in advance of the beginning date for employment), and this restriction applies to applications submitted by facsimile, U.S. Mail, and electronically. The existing regulations also state it is the employer's responsibility to ensure that a complete and accurate LCA is received by ETA. *See* § 655.730(b). The Department will not certify applications, whether complete or incomplete, submitted more than 6 months in advance of the first date of need. The Department returns such prematurely filed applications to the employer in accordance with 20 CFR 656.740(a)(2)(ii). It should also be noted the current USCIS regulation at 8 CFR 214.2(h)(9)(B) provides: ''(t)he petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services or training.'' Accordingly, the Department has not made any changes in the final rule to the provision at § 655.730(b) which provides, in relevant part, that ''(a)n 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 intended employment shown on the LCA.''

AILA was concerned there were some employers and attorneys seeking H–1B or H–1B1 visas that lack computer and Internet access. AILA hypothesized that a ''small'' group of recent immigrants who are themselves entrepreneurs seeking to augment their businesses with the help of key H–1B or H–1B1 professionals have neither the technical need for Internet access in their business nor the ability to go to their local libraries during business hours to file LCAs, maintain LCA accounts, and withdraw LCAs when necessary. The end result of the NPRM's proposed requirement of electronic filing, according to AILA, would be to cut such employers out of the H–1B and H–1B1 process entirely.

We think it is highly unlikely that employers using the H–1B or H–1B1 program for professionals in ''specialty occupations'' (and under H–1B, models ''of distinguished merit and ability'') lack computer and Internet access. AILA did not identify any specific immigrant entrepreneur using the H–1B or H–1B1 program without Internet access, and no such entrepreneur, employer, or employer's representative provided comments regarding Internet access, although the preamble to the proposed rule noted that the Department was particularly interested in receiving comments from small business entities. Nor have we encountered in our program experience such employers or agents using the H–1B or H–1B1 program and yet lacking Internet access. Further, as pointed out in the preamble to the proposed rule, a high percentage, if not most, of the positions sought by H–1B employers are in information, computer, and other high technology fields (see 70 FR at 16776), and the Department believes it highly unlikely that employers seeking H–1B workers in information, computers, and other high technology fields would not have access to computers or the Internet.

However, in the spirit of caution, the Department is making a special mail filing procedure available to employers without Internet access as well as to employers with physical disabilities. Under the new procedures set forth in § 655.720(c) employers may petition the Department for approval to submit their LCAs by U.S. Mail instead of the electronic filing system by submitting a written request to the Chief, Division of Foreign Labor Certification. The employer cannot submit an LCA by U.S. Mail until its request is approved. Approval of an employer request to submit LCAs by U.S. Mail shall be good for one year from the date it is granted.

AILA also asserted in its comments that ''the spirit of the Government Paperwork Elimination Act ('GPEA') seeks not to restrict access to government programs but to enhance access.'' AILA also contended that Section 1704 of GPEA ''requires federal agencies to allow entities that deal with an agency the 'option' * * * to submit information or perform transactions with an agency electronically, 'when practicable,' '' but also ''directs'' (emphasis added) agencies not to limit communications ''only to electronic submissions or transactions.'' The Department agrees that GPEA is intended to enhance access to government programs, but disagrees with AILA's interpretation that GPEA forbids Federal agency use of electronic only information submission mechanisms. Rather, Congress enacted GPEA in 1998 to promote government use of electronic systems for submitting and disclosing information, at a time when Internet use was just becoming widespread. GPEA does not address whether electronic-only mechanisms are permissible. In any case, the Department believes this final rule enhances access to the H–1B and H–1B1 programs. As described in the preamble to the NPRM, by moving to an all-electronic system for receiving and adjudicating H–1B and H–1B1 labor condition applications, the Department will create a more responsive and efficient process. The Department believes all-electronic filing will limit incomplete applications, permit more efficient processing of LCAs and allow ETA to better capture statistics and analyze data related to the H–1B and H–1B1 programs. In any case, as noted above, the Department has decided to make a special mail-filing procedure available to employers without Internet access as well as to employers with physical disabilities.

AILA also hypothesized there are some ''older employer representatives''

who have ''fallen behind in technical prowess'' and who would find electronic submission of H–1B or H–1B1 applications to be a daunting task. In the Department's opinion, the electronic system with its detailed instructions, prompts and checks to assist employers or their representatives in completing the ETA 9035E is less daunting than a hard copy submission of the paper Form 9035. The provision in the electronic system of detailed instructions, prompts and checks makes it less likely mistakes will be made that could result in denial of an LCA. Moreover, as discussed above, this final rule provides a procedure at § 655.20(c) through which an employer with a physical disability that prevents use of the electronic filing system, or an employer lacking access to the Internet, may petition the Department for approval to submit LCAs by U.S. Mail.

Four comments were submitted that are outside the scope of the proposed rule. These comments did not address the proposed elimination of U.S. Mail and facsimile filings, but rather focused on provisions of the regulations to which we did not propose any substantive changes. Two commenters objected to the provision in § 655.750(a) that ''in the event employment pursuant to Section 214(n) of the INA (formerly Section 214(m), addressing increased portability of H–1B status) commences prior to certification of the labor certification application, the attestation requirements of the subsequently certified application shall apply back to the first date of employment.'' The NPRM included no substantive changes to the current regulation regarding Section 214(n), and instead merely updated the statutory citation, and, for clarity, identified the subject matter. Although these comments are outside the NPRM's scope, the Department notes that, based on preliminary discussion with USCIS staff, we have concluded this provision in the regulations should be retained. Accordingly, this final rule continues the language from the current regulations providing that, in the case of employment pursuant to INA Section 214(n), attestations shall apply back to the first date of employment.

In another comment outside the scope of the NPRM, the Microsoft Corporation urged the Department to disclose its precautions to protect data privacy and how DOL imposes sanctions under existing law in cases of disclosure or dissemination in violation of law of electronic data submitted in an online LCA. Microsoft further opposed the publication of H–1B data taken from submitted LCAs that is posted on the Internet at *http://www.flcdatacenter.com/CaseH1B.aspx.* Although the Department considers this comment to be outside the scope of the proposed rule, the Department notes it considers the online system for submitting LCAs to be in conformity with all standards for data security and data privacy that are issued by the National Institute of Standards and Technology and the Department of Labor. Further, the Department has determined that none of the information it posts at the Web address listed above is protected under the Freedom of Information Act or the Privacy Act.

Finally, AILA noted in its comments that it had previously submitted comments on the special attestation requirements regarding H–1B dependent employers and willful violators when they were first promulgated in the current H–1B interim final rule. See 65 FR 80110 (December 20, 2000) (interim final rule). We do not consider this final AILA comment to be within the scope of the NPRM published in the **Federal Register** on April 1, 2005. The NPRM and this final rule identify the period during which the special attestations apply, consistent with the latest Congressional reinstatement of these provisions, but do not address the substance of these special attestation requirements.

V. Administrative Information

Executive Order 12866—Regulatory Planning and Review: This final rule is significant, although not ''economically significant'' within the meaning of Executive Order 12866. The final rule therefore has been reviewed by the Office of Management and Budget (OMB). The requirement for all-electronic filing (except in limited circumstances) of H–1B and H–1B1 labor condition applications, and corresponding elimination of U.S. Mail or facsimile filing options, will not have an economic impact of $100 million or more because this will not alter the required forms or attestations for labor condition applications, but rather merely alters the method of filing for a small portion of participating employers. The final rule will alter the filing mechanism for less than 10 percent of the LCAs filed in FY 2004, namely those filed by means other than electronic filing. While employers previously filing by facsimile or U.S. Mail will have to change to electronic filing, they will be moving to a more efficient and rapid processing procedure.

Regulatory Flexibility Act: 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 final rule will not have a significant economic impact on a substantial number of small entities.

The factual basis for that certification is as follows: Based on past filing data, ETA estimates in the upcoming year employers will file approximately 341,000 attestations under the H–1B and H–1B1 program as a whole. (Since the H–1B program's inception, the number of H–1B attestations has exceeded the initial H–1B visas available each year; for example, for Fiscal Year 2004, about 341,000 attestations covering 652,000 job openings were certified even though only 65,000 initial H–1B visas were available that year.) This includes approximately 385 H–1B1 LCAs filed with ETA during FY 2004. Some employers will file multiple attestations in a year. We do not inquire about the size of employers filing labor attestations; however, the number of small entities that file attestations in the upcoming year will be less than the expected total of 341,000 applications and significantly below the potential universe of small businesses to which the program is available. Because applications come from employers in all industry segments, we consider all small businesses as the appropriate universe for comparison purposes. According to information provided on the Small Business Administration, Office of Advocacy Web site at *http://sba.gov/advo/,* small firms with less than 500 employees represent 99.7 percent, or 23,628,000, of the approximately 23,700,000 businesses in the United States. Thus in comparison to the universe of all small businesses, the expected 341,000 applications represent approximately 1.44% of all small businesses. The Department of Labor asserts a small business pool of less than 1.44% does not represent a substantial proportion of small entities.

In any case, the Department of Labor does not believe this final rule will have a significant economic impact on employers, large or small, using the H–1B and H–1B1 programs. This final rule does not alter the required forms or attestations for labor condition applications, but rather requires all-electronic filing of LCAs (except in limited circumstances). The final rule will alter the filing mechanism for less than 10 percent of the LCAs filed in FY 2004, namely those filed by means other than electronic filing. While employers previously filing by facsimile or U.S. Mail will have to change to electronic filing, they will be moving to a more

efficient and rapid processing procedure.

Unfunded Mandates Reform Act of 1995: This final rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996: This final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996 (SBREFA). The standards for determining whether a rule is a major rule as defined by section 804 of SBREFA are similar to those used to determine whether a rule is an ''economically significant regulatory action'' within the meaning of Executive Order 12866. Because we certified this final rule is not an economically significant rule under Executive Order 12866, we certify it also is not a major rule under SBREFA. It will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132: This final rule will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 Civil Justice Reform: This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act: The collection of information under 20 CFR part 655, subpart H, is currently approved under OMB control number 1205–0310. This final rule does not include a substantive or material modification of that collection of information. Forms ETA 9035 and 9035E are not being changed by this final rule and both will remain in use. Accordingly, the Department believes the Paperwork Reduction Act is inapplicable to this final rule.

Catalog of Federal Domestic Assistance Number: This program is listed in the *Catalogue of Federal Domestic Assistance* at Number 17.252, ''Attestations by Employers Using Non-Immigrant Aliens in Specialty Occupations.''

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Chile, Employment, Forest and forest products, Health professions, Immigration, Labor, Longshore work, Migrant labor, Penalties, Reporting requirements, Singapore, Students, Wages.

■ Accordingly, for the reasons stated in the Preamble, 20 CFR part 655, subpart H, is amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models, and Labor Attestation Requirements for Employers Using Nonimmigrants on H–1B1 Visas in Specialty Occupations

■ 1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m), (n), and (t), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 323, Pub. L. 103–206, 107 Stat. 2149; Title IV, Pub. L. 105–277, 112 Stat. 2681; Pub. L. 106–95, 113 Stat. 1312 (8 U.S.C. 1182 note); and 8 CFR 213.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

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).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b1), 1182(n), 1182(t), and 1184; 29 U.S.C. 49 *et seq.*; sec 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and Title IV, Pub. L. 105–277, 112 Stat. 2681.

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

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.*

■ 2. Section 655.700 is amended by revising paragraph (b)(1) and, in paragraph (d)(1), by revising the first sentence, to read as follows:

§ 655.700 What statutory provisions govern the employment of H–1B and H–1B1 nonimmigrants and how do employers apply for an H–1B or H–1B1 visa?

* * * * *

(b) * * *

(1) First, an employer shall submit to the Department of Labor (DOL), and obtain DOL certification of, a labor condition application (LCA). The requirements for obtaining a certified LCA are provided in this subpart. The electronic LCA (Form ETA 9035E) is available at *http://www.lca.doleta.gov.* The paper-version LCA (Form ETA 9035) and the LCA cover pages (Form ETA 9035CP), which contain the full attestation statements incorporated by reference into Form ETA 9035 and Form ETA 9035E, may be obtained from *http://ows.doleta.gov* and from the Employment and Training Administration (ETA) National Office. Employers must file LCAs in the manner prescribed in § 655.720.

* * * * *

(d) *Nonimmigrants on H–1B1 visas—*

(1) *Exclusions.* The following sections and portions of sections in this subpart and in subpart I of this part do not apply to H–1B1 nonimmigrants but apply only to H–1B nonimmigrants: Sections 655.700(a), (b), (c)(1) and (c)(2); 655.705(b) and (c); 655.710(b); 655.730(d)(5) and (e)(3); 655.736; 655.737; 655.738; 655.739; 655.760(a)(8), (9) and (10); and 655.805(a)(7), (8) and (9). * * *

* * * * *

■ 3. Section 655.705 is amended by revising the section heading, paragraphs (c) introductory text and (c)(1) to read as follows:

§ 655.705 What Federal agencies are involved in the H–1B and H–1B1 programs, and what are the responsibilities of those agencies and of employers?

* * * * *

(c) *Employer's Responsibilities.* This paragraph applies only to the H–1B program; employer responsibilities under the H–1B1 program are found at § 655.700(d)(4). 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 9035E or Form ETA 9035 in the manner prescribed in § 655.720. By completing and submitting the LCA, and by signing the LCA, the employer makes certain representations and agrees to several attestations regarding its 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 the job to U.S. applicants who are equally or better qualified than the H–1B nonimmigrant(s) sought for the job, 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 a 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 ETA certifies the LCA, notice of the certification will be sent to the employer by the same means the employer used to submit the LCA (that is, electronically where the Form ETA 9035E was submitted electronically, and by U.S. Mail where the Form ETA 9035 was submitted by U.S. Mail). The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the U.S. Citizenship and Immigration Services (formerly the Immigration and Naturalization Service or INS) in support of the Petition for Nonimmigrant Worker, Form I–129, for an H–1B nonimmigrant. See 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies the employer will comply with the terms of the LCA for the duration of the H–1B nonimmigrant's authorized period of stay.

* * * * *

■ 4. Section 655.710 is amended by revising paragraph (b) to read as follows:

§ 655.710 What is the procedure for filing a complaint?

* * * * *

(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. applicant, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices, 950 Pennsylvania Avenue, NW., Washington, DC 20530, Telephone: 1–800–255–8155 (employers), 1–800–255–7688 (employees); Web address: *http://www.usdoj.gov/crt/osc.* The Department of Justice shall investigate where appropriate, and take action as appropriate under that Department's regulations and procedures.

■ 5. Section 655.715 is amended by revising the definitions of *Certifying Officer and Regional Certifying Officer, Immigration and Naturalization Service,* and *State Employment Security Agency* to read as follows:

§ 655.715 Definitions.

* * * * *

Certifying Officer means a Department of Labor official, or such official's designee, who makes determinations about whether or not to certify labor condition applications.

* * * * *

Immigration and Naturalization Service (INS), now known as United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security, means the Federal entity that 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.

* * * * *

State Employment Security Agency (SESA), now known as a State Workforce Agency (SWA), means the state agency designated under section 4 of the Wagner-Peyser Act to cooperate with the Employment and Training Administration of the Department of Labor in the operation of the national public workforce system.

* * * * *

■ 6. Section 655.720 is revised to read as follows:

§ 655.720 Where are labor condition applications (LCAs) to be filed and processed?

(a) Employers must file all LCAs regarding H–1B and H–1B1 nonimmigrants through the electronic submission procedure identified in paragraph (b) of this section except as provided in the next sentence. If a physical disability or lack of access to the Internet prevents an employer from using the electronic filing system, an LCA may be filed by U.S. Mail in accordance with paragraphs (c) and (d) of this section. Requirements for signing, providing public access to, and use of certified LCAs are identified in § 655.730(c). If the LCA is certified by DOL, notice of the certification will be sent to the employer by the same means that the employer used to submit the LCA, that is, electronically where the Form ETA 9035E was submitted electronically, and by U.S. Mail where the Form ETA 9035 was submitted by U.S. Mail.

(b) *Electronic submission.* Employers must file the electronic LCA, Form ETA 9035E, through the Department of Labor's Web site at *http://www.lca.doleta.gov.* The employer must follow instructions for electronic submission posted on the Web site. In the event 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 Form ETA 9035E, instructions will be provided (by public notice(s) and by instructions on the Department's Web site) to employers as to how the requirements of these statutes will be met in the Form ETA 9035E procedures.

(c) *Approval to file LCAs by U.S. Mail.* (1) Employers with physical disabilities or lacking Internet access and wishing to file LCAs by U.S. Mail may submit a written request to the Chief, Division of Foreign Labor Certification in accordance with paragraphs (c)(2) through (c)(4) of this section. The ETA shall identify the address to which such written request shall be mailed in a Notice in the **Federal Register** and on the Department's Web site at *http://www.lca.doleta.gov.*

(2) The written request must establish the employer's need to file by U.S. Mail, including providing an explanation of how physical disability or lack of access to the Internet prevents the employer from using the electronic filing system. No particular form or format is required for this request.

(3) ETA will review the submitted justification, and may require the employer to submit supporting documentation. In the case of employers asserting a lack of Internet access, supporting documentation could, for example, consist of documentation that the Internet cannot be accessed from the employer's worksite or physical location (for example because no Internet service provider serves the site), and there is no publicly available Internet access, at public libraries or elsewhere, within a

reasonable distance of the employer. In the case of employers with physical disabilities supporting documentation could, for example, consist of physicians' statements or invoices for medical devices or aids relevant to the employer's disability.

(4) ETA may approve or deny employers' requests to submit LCAs by U.S. Mail. Approvals shall be valid for 1 year from the date of approval.

(d) *U.S. Mail.* If an employer has a valid approval to file by U.S. Mail in accordance with paragraph (c) of this section, the employer may use Form ETA 9035 and send it by U.S. Mail to ETA. ETA shall publish a Notice in the **Federal Register** identifying the address, and any future address changes, to which paper LCAs must be mailed, and shall also post these addresses on the DOL Internet Web site at *http://www.lca.doleta.gov.* When Form ETA 9035 is submitted by U.S. Mail, the form must bear the original signature of the employer (or that of the employer's authorized agent or representative) at the time it is submitted to ETA.

(e) The ETA National Office is responsible for policy questions and other issues regarding LCAs. Prevailing wage challenges are handled in accordance with the procedures identified in § 655.731(a)(2).

§ 655.721 [Removed and Reserved]

■ 7. Section 655.721 is removed and reserved.

■ 8. Section 655.730 is amended by revising paragraphs (b), (c), and (d)(5) to read as follows:

§ 655.730 What is the process for filing a labor condition application?

* * * * *

(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 ETA receives a complete and accurate LCA. Incomplete or obviously inaccurate LCAs will not be certified by ETA. ETA will process all LCAs sequentially and will usually make a determination to certify or not certify an LCA within seven working days of the date ETA receives the LCA. LCAs filed by U.S. Mail may not be processed as quickly as those filed electronically.

(c) *What is to be submitted and what are its contents?* Form ETA 9035 or ETA 9035E.

(1) *General.* The employer (or the employer's authorized agent or representative) must submit to ETA one completed and dated LCA as prescribed in § 655.720. The electronic LCA, Form ETA 9035E, is found on the DOL Web site where the electronic submission is made, at *http://www.lca.doleta.gov.* Copies of the paper form, Form ETA 9035, and cover pages Form ETA 9035CP are available on the DOL Web site at *http://www.ows.doleta.gov* and from the ETA National Office, and may be used by employers with approval under § 655.720 to file by U.S. Mail during the approval's validity period.

(2) *Undertaking of the Employer.* In submitting the LCA, and by affixing the signature of the employer or its authorized agent or representative on Form ETA 9035E or Form ETA 9035, the employer (or its authorized agent or representative on behalf of the employer) attests the statements in the LCA are true and promises to comply with the labor condition statements (attestations) specifically identified in Forms ETA 9035E and ETA 9035, as well as set forth in full in the Form ETA 9035CP. The labor condition statements (attestations) are described in detail in §§ 655.731 through 655.734, and the additional attestations for LCAs filed by certain H–1B-dependent employers and employers found to have willfully violated the H–1B program requirements are described in §§ 655.736 through 655.739.

(3) *Signed Originals, Public Access, and Use of Certified LCAs.* In accordance with § 655.760(a) and (a)(1), the employer must maintain in its files and make available for public examination the LCA as submitted to ETA and as certified by ETA. When Form ETA 9035E is submitted electronically, a signed original is created by the employer (or by the employer's authorized agent or representative) printing out and signing the form immediately upon certification by ETA. When Form ETA 9035 is submitted by U.S. Mail as permitted by § 655.720(a), the form must bear the original signature of the employer (or of the employer's authorized agent or representative) when submitted to ETA. For H–1B visas only, the employer must submit a copy of the signed, certified Form ETA 9035 or ETA 9035E to the U.S. Citizenship and Immigration Services (USCIS, formerly INS) 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).

(4) *Contents of LCA.* Each LCA 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 nonimmigrants sought;

(iii) The gross wage rate to be paid to each nonimmigrant, expressed on an hourly, weekly, biweekly, monthly, or annual basis;

(iv) The starting and ending dates of the 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, now known as a State Workforce Agency (SWA), the appropriate box must be checked and the wage must be stated; the source for a wage obtained from a source other than a SWA must be identified along with the wage; and

(vii) For applications filed regarding H–1B nonimmigrants only (and not applications regarding H–1B1 nonimmigrants), 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.

(5) *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 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. Separate LCAs must be filed for H–1B and H–1B1 nonimmigrants.

(6) *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 can not be combined on a single LCA.

(d) *What attestations does the LCA contain?* * * *

* * * * *

(5) For applications filed regarding H–1B nonimmigrants only (and not regarding H–1B1 nonimmigrants), 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.

* * * * *

§ 655.734 [Amended]

■ 9. Section 655.734 is amended in paragraph (a)(1)(ii) by removing the phrase ''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 and Constitution Avenue, NW., Washington, DC 20530'' and adding in lieu thereof the phrase ''Complaints alleging failure to offer employment to an equally or better qualified U.S. applicant or an employer's misrepresentation regarding such offers of employment may be filed with the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices, 950 Pennsylvania Avenue, NW., Washington, DC 20530, Telephone: 1 (800) 255–8155 (employers), 1 (800) 255–7688 (employees); Web address: *http://www.usdoj.gov/crt/osc.*''

■ 10. Section 655.736 is amended in paragraph (g)(1) by removing the phrase ''paragraph (2)(g) of this section'' where it appears and adding in lieu thereof the phrase ''paragraph (g)(2) of this section'' and by revising paragraphs (c) introductory text, (g)(2), and (g)(4) to read as follows:

§ 655.736 What are H–1B-dependent employers and willful violators?

* * * * *

(c) *Which employers are required to make determinations of H–1B-dependency status?* Every employer that intends to file an LCA regarding H–1B nonimmigrants or to file H–1B petition(s) or request(s) for extension(s) of H–1B status from January 19, 2001 through September 30, 2003, and after March 7, 2005, 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). No H–1B-dependent employer or willful violator may use an LCA filed before January 19, 2001, and during the period of October 1, 2003 through March 7, 2005, to support a new H–1B petition or request for an extension of status. Furthermore, on all H–1B LCAs filed from January 19, 2001 through September 30, 2003, and on or after March 8, 2005, an employer will be required to attest whether it is an H–1B-dependent employer or willful violator. An employer that attests 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) of this section, which follow, most employers would not be required to make any calculations or to create any documentation as to the determination of their H–1B status.

* * * * *

(g) *What LCAs are subject to the additional attestation obligations?*

* * * * *

(2) During the period between January 19, 2001 through September 30, 2003, and on or after March 8, 2005, 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 during a period when the special attestation obligations for H–1B dependent employers and willful violators were not in effect (that is before January 19, 2001, and from October 1, 2003 through March 7, 2005) may not be used by an H–1B dependent employer or willful violator to support petition(s) for new H–1B nonimmigrant(s) or request(s) for extension(s) of status for existing H–1B nonimmigrants.

* * * * *

(4) The special provisions for H–1B-dependent employers and willful violator employers do not apply to LCAs filed from October 1, 2003 through March 7, 2005, or before January 19, 2001. However, all LCAs filed before October 1, 2003, 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.

§ 655.740 [Amended]

■ 11. Section 655.740 is amended in paragraphs (a) introductory text and (a)(1) by removing the phrase ''regional Certifying Officer'' where it appears and adding in lieu thereof the phrase ''Certifying Officer,'' and in paragraph (a)(3) by removing the phrase ''the regional office'' and adding in lieu thereof ''ETA.''

■ 12. Section 655.750 is amended by revising paragraphs (a) and (b)(2) to read as follows:

§ 655.750 What is the validity period of the labor condition application?

(a) *Validity of certified labor condition applications.* A labor condition application certified pursuant to the provisions of § 655.740 is valid for the period of employment indicated on Form ETA 9035E or ETA 9035 by the authorized DOL official. The validity period of a labor condition application will not begin before the application is certified and the period of authorized employment shall not exceed three years. However, in the event employment pursuant to section 214(n) of the INA (formerly section 214(m), addressing increased portability of H–1B status) 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.*

* * * * *

(2) Requests for withdrawals shall be in writing and shall be sent to ETA, Division of Foreign Labor Certification. ETA shall publish a Notice in the **Federal Register** identifying the address, and any future address changes, to which requests for withdrawals shall be mailed, and shall also post these addresses on the DOL Web site at *http://www.lca.doleta.gov.*

* * * * *

■ 13. Section 655.760 is amended by revising paragraph (a)(1) to read as follows:

§ 655.760 What records are to be made available to the public, and what records are to be retained?

(a) *Public examination.* * * *

(1) A copy of the certified labor condition application (Form ETA 9035E or Form ETA 9035) and cover pages (Form ETA 9035CP). 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 and included in the public examination file.

* * * * *

Signed in Washington, DC this 29th day of November, 2005.

Emily Stover DeRocco,

Assistant Secretary, , Employment and Training Administration.

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