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20 CFR Part 655

Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Attestations Regarding H–1B1 Visas; Interim Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205–AB38

Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Attestations Regarding H–1B1 Visas

AGENCIES: Employment and Training Administration and Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Department of Labor (Department or DOL) is amending its regulations related to the temporary employment of foreign professionals to implement procedural requirements applicable to a new visa category—the H–1B1 visa. The H–1B1 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 214(g)(8)(A) of the Immigration and Nationality Act (INA). Congress created the new visa category as part of its approval of the United States-Chile Free Trade Agreement and the United States-Singapore Free Trade Agreement. By statute, the new H–1B1 visa is available only to nationals of Chile and Singapore. Under the implementing legislation, DOL's responsibilities regarding H–1B1 visas are to be implemented in a manner similar to the existing H–1B program for temporary employment of nonimmigrant aliens in specialty occupations and as fashion models. Thus, employers in the United States seeking to temporarily employ foreign professionals in specialty occupations through H–1B1 visas must file a labor attestation with the Department of Labor making the same attestations regarding payment of prevailing wages, working conditions, absence of strikes or lockouts, and notice to other employees that employers currently make when seeking entry of a foreign worker under the H–1B program.

DATES: This interim final rule is effective on November 23, 2004. Interested persons are invited to submit written comments on this interim final rule. To ensure consideration, comments must be received on or before January 24, 2005.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205–AB38, by any of the following methods:

- Federal e-Rulemaking Portal: *http://www.regulations.gov*. Follow the website instructions for submitting comments.
- E-mail: Comments may be submitted by e-mail to *Chil.sing@dol.gov*. Include RIN 1205–AB38 in the subject line of the message.
- Mail: Submit written comments to the Assistant Secretary for Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210, Attention: William Carlson, Chief, Division of Foreign Labor Certification. Because of security measures, mail directed to Washington, DC is sometimes delayed. We will only consider comments postmarked by the U.S. Postal Service or other delivery service on or before the deadline for comments.

Instructions: All submissions received must include the RIN 1205–AB38 for this rulemaking. Receipt of submissions, whether by mail, Internet, or e-mail will not be acknowledged. Because DOL continues to experience delays in receiving postal mail in the Washington, DC area, commenters are encouraged to submit any comments by mail early.

Comments will be available for public inspection during normal business hours at the address listed above for mailed comments. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this interim final rule may be obtained in alternative formats (*e.g.*, large print, Braille, audiotape, or disk) upon request. To schedule an appointment to review the comments and/or to obtain the proposed rule in an alternative format, contact the Division of Foreign Labor Certification at 202–693–3010 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: On 20 CFR part 655, subpart H, regarding the H–1B1 labor attestation procedures, contact Denis Gruskin, Senior Specialist, Division of Foreign Labor Certification, Employment and Training Administration (ETA), Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; Telephone: (202) 693–2953 (this is not a toll-free number).

On 20 CFR part 655, subpart I, regarding the H–1B1 enforcement process, contact Michael Ginley, Director, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration (ESA), Department of Labor, 200 Constitution Avenue, NW., Room S–3510, Washington, DC 20210; Telephone: (202) 693–0745 (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 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Statutory Authority and Background

The United States-Chile Free Trade Agreement (Chile FTA) and United States-Singapore Free Trade Agreement (Singapore FTA) have been implemented by the U.S. Congress through legislation. *See* United States-Chile Free Trade Agreement Implementation Act, Pub. L. 108–77, 117 Stat. 909 (September 3, 2003) (Chile FTA Implementation Act); United States-Singapore Free Trade Agreement Implementation Act, Pub. L. 108–78, 117 Stat. 948 (September 3, 2003) (Singapore FTA Implementation Act). The Chile FTA and Singapore FTA are available on the Web site for the Office of the United States Trade Representative at *http://www.ustr.gov*.

The Chile FTA Implementation Act amends the Immigration and Nationality Act (INA) to create a new visa category—the H–1B1 visa—for the temporary entry and employment in the United States of professionals from countries with which the United States has entered into agreements identified in section 214(g)(8)(A) of the INA. *See* INA section 101(a)(15)(H)(i)(b1) [8 U.S.C. 1101(a)(15)(H)(i)(b1)]. The H–1B1 visa is available for individuals in specialty occupations who seek to come to the United States temporarily to engage in professional activities for an employer. *Id.* The INA amendments creating the H–1B1 visa took effect on January 1, 2004. The INA as amended identifies two agreements with countries that qualify for the H–1B1 program—the Chile FTA and Singapore FTA. *See* INA section 214(g)(8)(A) [8 U.S.C. 1184(g)(8)(A)].

To qualify as a professional for purposes of the H–1B1 program, a person must be engaged in a specialty occupation requiring theoretical and practical application of a body of specialized knowledge, and attainment of a bachelor's degree or higher as a minimum for entry into the occupation in the United States. *See* INA section 214(i)(3) [8 U.S.C. 1184(i)(3)]. Both the Chile FTA and Singapore FTA state that they cover ''a business person seeking to engage in a business activity as a professional, or to perform training functions related to a particular

profession, including conducting seminars, if the business person otherwise complies with immigration measures applicable to temporary entry.'' Chile FTA Annex 14.3(D)(1); Singapore FTA Annex 11A(IV)(1). Both agreements also identify certain professions that qualify for temporary entry, along with required credentials for each. *See* Chile FTA at Annex 14.3(D)(2) and Appendix 14.3(D)(2) (Disaster Relief Claims Adjuster, Management Consultant, Agricultural Manager, and Physical Therapist); Singapore FTA at Annex 11A(IV)(3) and Appendix 11A.2 (Disaster Relief Claims Adjuster and Management Consultant). The Statement of Administrative Action regarding the Chile FTA, which was approved by Congress, notes that the definition of ''specialty occupation'' will be interpreted in a manner similar to the term's use in the H–1B visa program. *See* Public Law 108–77, § 101(a) (approving United States-Chile Free Trade Agreement Implementation Act—Statement of Administrative Action, July 15, 2003, available at *http://waysandmeans.house.gov/media/pdf/chile/hr2738ChileSAA7–15–03.pdf*). Determinations of specialty occupation and of nonimmigrant qualifications are not made by the Department of Labor, but by the Department of State and/or the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (formerly the Immigration and Naturalization Service or INS) in accordance with the procedures of those agencies for processing H–1B or H–1B1 visa requests.

An employer in the United States wishing to employ a professional from one of the countries for which H–1B1 visas are available (now Chile or Singapore) must submit a labor attestation to the Department of Labor that includes the same elements required for employers' attestations under the existing H–1B visa program. *Compare* INA section 212(t)(1) *with* 212(n)(1) [8 U.S.C. 1182(t)(1) and (n)(1)]. As with the H–1B program, the potential H–1B1 employer must attest that:

- It is offering the nonimmigrant, and will pay during the period of authorized employment, wages that are at least the actual wage level paid to other employees with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of intended employment, whichever is greater;
- It will provide working conditions for the nonimmigrant that will not adversely affect working conditions for similarly employed workers;
- There is no strike or lockout in the course of a labor dispute in the occupational classification at the worksite; and
- It has provided notice of its filing of a labor attestation to its employees' bargaining representative for the occupational classification affected or, if there is no bargaining representative, has provided notice to its employees in the affected occupational classification by physical posting or other means.

Under the INA amendments creating the H–1B1 visas, as under the H–1B labor condition application requirements, the Department must review labor attestations only for completeness and obvious inaccuracies. Unless a filing is incomplete or obviously inaccurate, the Secretary of Labor must certify the H–1B1 filing within 7 days of the filing. *See* INA section 212(t)(2)(C) [8 U.S.C. 1182(t)(2)(C)]. As with the H–1B program, the Department will certify the H–1B1 labor attestation for the period of employment requested by the employer on the ETA Form 9035, up to a maximum 3-year period. By statute, however, H–1B1 visas will be valid and renewable for 1-year periods, with visa renewals beyond 3 years requiring the filing of a new labor attestation with the Department of Labor. *See* INA section 214(g)(8)(C) [8 U.S.C. 1184(g)(8)(C)].

Steps for receiving an H–1B1 visa subsequent to the Department of Labor attestation process are the responsibility of and will be identified by USCIS and the Department of State.

As with labor condition applications for H–1B nonimmigrants, the Secretary of Labor is required to compile a list, by employer and occupational classification, of all labor attestations filed regarding H–1B1 nonimmigrants. The list is to identify for each attestation: the wage rate, number of alien professionals sought, period of intended employment, and date of need. INA section 212(t)(2)(B) [8 U.S.C. 1182(t)(2)(B)]. The Department must make the list publicly available in Washington, DC.

Enforcement provisions for the attestation are also based on requirements under the H–1B visa program. *See* INA section 212(t)(3) [8 U.S.C. 1182(t)(3)]. The Department will receive, investigate, and make determinations on complaints filed by any aggrieved person or organization regarding the failure of an employer to meet the terms of its attestation. Penalties for failure to meet conditions of the labor attestation are the same as those under the H–1B program.

The statute establishing the H–1B1 visa category also provides that an H–1B1 nonimmigrant may be denied entry into the U.S. if a labor dispute is in progress in the occupational classification at the intended place of employment, unless the nonimmigrant establishes, pursuant to regulations to be issued by the Department of Homeland Security, after consultation with the Department of Labor, that the nonimmigrant's entry will not adversely affect settlement of the labor dispute or employment of the workers involved. *See* INA section 214(j)(2) [8 U.S.C. 1184(j)(2)]. This interim final rule does not address this situation, but the Department will consult with USCIS on development of the USCIS labor dispute regulation.

During the period that the temporary entry of professionals provisions of the Chile FTA are in effect, prospective employers of Chilean nationals seeking H–1B1 visas will be subject to the attestation requirements of section 212(t) of the INA, in accordance with Chapter 14 and Section D of Annex 14.3 of the Chile FTA and section 402 of the Chile FTA Implementation Act. The number of Chilean professionals that may enter the United States on H–1B1 visas under Annex 14.3, Section D is limited to 1,400 annually. *See* Appendix 14.3(D)(6) of the Chile FTA and INA section 214(g)(8)(B).

For their part, prospective employers of Singaporean nationals seeking H–1B1 visas will be subject to the attestation requirements of section 212(t) of the INA during the period that the temporary entry of professionals provisions of the Singapore FTA are in effect, in accordance with Chapter 11 and Section IV of Annex 11A of the Singapore FTA and section 402 of the Singapore FTA Implementation Act. The number of Singaporean professionals entering the United States under Annex 11A, Section IV is limited to 5,400 annually. *See* Appendix 11A.3 of the Singapore FTA and INA section 214(g)(8)(B).

The Chile and Singapore Free Trade Agreements specify that their provisions for the temporary entry of professionals (that is, the H–1B1 visa program) do not limit the ability of such professionals to seek entry under other immigration measures. Likewise, entry into the United States of Chilean or Singaporean nationals under the H–1B1 provisions neither forecloses nor establishes their eligibility for entry under other similar provisions of the INA.

II. Overview of Regulatory Changes

This interim final rule implements responsibilities of the Department of

Labor with respect to the admission and related enforcement provisions under the new H–1B1 program of nonimmigrant professionals in specialty occupations from countries with which the United States has reached agreements identified in section 214(g)(8)(A) of the INA. This rule amends the subpart headings, applicability section, and other sections of the Department of Labor regulations pertaining to employers seeking the temporary entry on H–1B visas of nonimmigrant aliens in specialty occupations and as fashion models (20 CFR part 655, subparts H and I) to extend the same procedures, with limited exceptions based upon statutory requirements, to temporary entry and employment on H–1B1 visas.

In accordance with the provisions of the legislation implementing the Chile and Singapore FTAs, this rule specifically applies subparts H and I, subject to the limited exceptions, to H–1B1 labor attestations regarding nationals of those countries by amending 20 CFR 655.0(d), adding a new introductory paragraph to § 655.700, adding new paragraphs (c)(3) and (d) to § 655.700, and adding a new introductory paragraph to § 655.730. The specific applicability of subparts H and I of part 655 to nonimmigrants from Chile and Singapore is identified in new § 655.700(d)(5) (applicability to Chile) and § 655.700(d)(6) (applicability to Singapore). Other conforming changes are made as described below.

As provided in this rule, employers seeking to temporarily employ professionals under H–1B1 visas must file labor attestations with the Department in accordance with the regulations at 20 CFR part 655, subpart H, and comply with the requirements of subpart I, with certain exclusions identified in the regulation. Because the Department is making the existing H–1B regulations generally applicable to H–1B1 nonimmigrants, rather than writing a new rule for the H–1B1 program, this interim final rule identifies in § 655.700(c) and (d) the portions of subparts H and I that will apply and others that will not apply to the H–1B1 program. Employer's responsibilities under the H–1B1 program are identified in new § 655.700(d)(4). New section 20 CFR 655.700(d)(1) lists the provisions of the H–1B regulations that do not apply to H–1B1 nonimmigrants, but rather apply only to H–1B nonimmigrants. Among these exclusions are several provisions related to ''H–1B-dependent employers'' and ''willful violators'' of the H–1B rules that Congress did not include in the legislation establishing the H–1B1 visa, specifically 20 CFR 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); part of 655.705(c); and 655.805(a)(7), (8), and (9). These provisions also no longer apply to H–1B filings, because the statutory provisions regarding H–1B-dependent employers and willful violators have lapsed for H–1B labor condition applications filed after September 30, 2003.

This interim final rule also directs in § 655.700(d)(2) that certain terms in subparts H and I of part 655 will be interpreted to include terminology applicable to the H–1B1 program in accordance with the INA amendments, except as excluded. Thus, wherever 20 CFR part 655, subparts H or I, reference ''H–1B'' (for example, ''H–1B nonimmigrant'' or ''H–1B visas''), it includes ''H–1B1'' (*e.g.*, ''H–1B1 nonimmigrants'' or ''H–1B1 visas''), except as excluded. Likewise, references to a ''labor condition application'' or ''LCA'' shall be understood to include reference to a labor attestation under the H–1B1 provisions, except as excluded. To provide clear statutory citations within the regulation, this interim final rule amends several sections of part 655, subparts H and I, that refer to the INA statutory provisions regarding H–1B visas (that is, INA section 212(n) and its subordinate clauses) to add references to the corresponding INA statutory provisions regarding H–1B1 visas (that is, INA section 212(t) and its corresponding subordinate clauses). In some instances, no additional reference to the H–1B1 statutory provisions is necessary because the particular H–1B statutory provision ''for example, regarding ''H–1B-dependent employers'' and ''willful violators'' ''has no parallel provision in the H–1B1 statutory section (*see, e.g.*, reference to H–1B statutory provision in § 655.705(a)). Amendments addressing statutory citations are made to §§ 655.731, 655.740, 655.800, 655.801, 655.805, and 655.810. Corrections are also made to statutory citations in §§ 655.731(c)(10)(i)(C) and (c)(10)(ii), and in § 655.801(c).

Filing procedures for H–1B1 labor attestations are identified in § 655.700(d)(3). As provided by that section, employers seeking to hire an H–1B1 nonimmigrant must make the required labor attestations by submitting a completed ETA Form 9035 or ETA Form 9035E (electronic) to the Department in accordance with the procedures identified in §§ 655.720 and 655.730. The Department has obtained approval for revised ETA Forms 9035 and 9035E covering both the H–1B and H–1B1 programs (OMB control number 1205–0310, expiration date August 31, 2007). The new forms allow the Department to distinguish between Form 9035s filed under the H–1B statutory terms and those filed under the H–1B1 statutory terms, and between labor attestations regarding H–1B1 nonimmigrants from Chile and H–1B1 nonimmigrants from Singapore. ETA will announce changes in filing procedures and instructions by publication of notice in the **Federal Register** and posting on the ETA Web site at *http://atlas.doleta.gov/foreign/*.

As required by the new INA amendments related to the H–1B1 program, this interim rule provides in 20 CFR 655.760(b) that ETA will compile and maintain a list of H–1B1 labor attestations filed under INA section 212(t). For each attestation, this list will show, by employer, the occupational classification, wage rate(s), number of nonimmigrants sought, period(s) of intended employment, and date(s) of need for each employer's application. The list will be available for public examination at the Washington, DC offices of ETA's Division of Foreign Labor Certification.

As stated in 20 CFR 655.700(c)(3), this interim rule, which implements the Department of Labor's statutory responsibilities regarding the H–1B1 program, will take effect immediately on publication in the **Federal Register** and will apply to H–1B1 attestations regarding Chilean or Singaporean nationals filed on or after that date. H–1B1 attestations filed on or after January 1, 2004, but prior to this interim final rule's effective date, will be handled in accordance with the statutory terms and the processing procedures that the Department posted on its Web Site in advance of the January 1, 2004, commencement of the H–1B1 program.

III. Administrative Information

Executive Order 12866—Regulatory Planning and Review

We have determined that this interim final rule is not an ''economically significant regulatory action'' within the meaning of Executive Order 12866. The procedures for filing a labor attestation under the new H–1B1 visa category, and specifically on behalf of nonimmigrant professionals from Chile and Singapore, will not have an economic impact of $100 million or more because employers seeking to employ H–1B1 nonimmigrant professionals will use the same procedures and forms presently required for the H–1B nonimmigrant professionals program, and H–1B1 visas will be subject to annual numerical limits. While it is not economically significant, the Office of Management

and Budget (OMB) reviewed this interim final rule because this is a new program and needs to be closely coordinated with other Federal agencies, in particular the Departments of State and of Homeland Security, which are also charged with responsibilities in implementing the H–1B1 program.

Regulatory Flexibility Analysis

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 interim 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: This rule, which is procedural in nature, is required to implement statutory provisions enacted by Congress pursuant to the Chile FTA and Singapore FTA that narrowly extend the scope of the Department of Labor's existing H–1B program to include similar labor attestation filing requirements for the temporary entry of Chilean and Singaporean professionals under the H–1B1 program. The regulatory change will affect only those employers seeking nonimmigrant H–1B1 professionals in specialty occupations from Chile or Singapore for temporary employment in the United States. Employers seeking to employ these H–1B1 nonimmigrant professionals will use the same procedures and forms presently required for H–1B nonimmigrant professionals, and H–1B1 visas will be subject to annual numerical limits. Based on past filing data, the DOL estimates that in the upcoming year employers will file approximately 260,000 attestations under the H–1B and H–1B1 programs. (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 2003, about 261,000 attestations covering 517,000 job openings were certified even though only 195,000 initial H–1B visas were available that year.) Some employers will file multiple attestations in a year. Because entry of professionals from Chile and Singapore under the H–1B1 program will be subject to annual numerical limits (1,400 from Chile and 5,400 from Singapore), the Department does not anticipate a significant expansion in filings. 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 260,000 applications and significantly below the potential universe of small businesses to which the program is open. Further, it should be noted that a sizeable number of employers file multiple applications. Because applications come from employers in all industry segments, we consider all small businesses as the appropriate universe for comparison purposes. According to the Small Business Administration's publication *The Regulatory Flexibility Act—An Implementation Guide for Federal Agencies,* there were 22,900,000 small businesses in the United States in 2002. Thus in comparison to the universe of all small businesses, we estimate the number of different (or non-duplicated) employers that will be involved in filing the expected 260,000 applications represents approximately 1% of all small businesses. The Department of Labor asserts a small business pool of 1% does not represent a substantial proportion of small entities.

Moreover, the Department of Labor does not believe that this rule will have a significant economic impact. Under the interim final rule, an employer will spend the same amount of time preparing and submitting the Form ETA 9035 for the H–1B1 program as the employer would for application under the H–1B program. Since the attestation and filing activities are no different from those required under the existing H–1B program, the interim rule establishes no additional economic burden on small entities.

The Department of Labor welcomes comments on this RFA certification.

Unfunded Mandates Reform Act of 1995

This interim 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 interim 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 that this interim final rule is not an economically significant rule under Executive Order 12866, we certify that 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—Federalism

This interim final rule will not have a substantial direct effect 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 Executive Order 13132, we have determined that this interim final rule does not have sufficient federalism implications to warrant the preparation of a summary impact statement.

Assessment of Federal Regulations and Policies on Families

This interim final rule does not affect family well-being.

Paperwork Reduction Act

Forms and information collection requirements related to the Department's H–1B and H–1B1 programs under 20 CFR part 655, subpart H, are currently approved under OMB control number 1205–0310 (expiration date August 31, 2007). This interim final rule does not include a substantive or material modification of that collection of information. Under this interim final rule, employers filing labor attestations regarding H–1B1 nonimmigrants will use the same forms and follow the same procedures as employers seeking entry for H–1B nonimmigrants. This interim final rule simply extends existing H–1B paperwork forms and filing procedures to potential employers of an additional category of potential foreign temporary workers—nationals of countries with which the United States has entered into certain agreements (Chile and Singapore) seeking to enter the United States under H–1B1 visas to perform professional work. Because H–1B1 visas will be subject to annual numerical limits, the Department does not anticipate a substantial increase in filings under 20 CFR part 655, subpart H.

Publication as an Interim Final Rule

The Department has determined that the public interest requires the

immediate issuance of this interim final rule, and that it is unnecessary to publish this technical amendment to the H–1B regulations as a Notice of Proposed Rulemaking. Pursuant to the September 2003 legislation implementing the Chile Free Trade Agreement, the statutory changes extending the H–1B labor attestation procedures, with limited changes, to the newly created H–1B1 visa category for nonimmigrant professionals from certain countries became effective January 1, 2004. In accordance with the Chile FTA and the Singapore FTA and their respective implementing legislation, application of the new H–1B1 nonimmigrant procedures, including the labor attestation requirements, to employers seeking to temporarily employ nonimmigrant professionals of those countries also took effect on January 1, 2004. (While this interim rule, which implements the Department of Labor's statutory responsibilities regarding the H–1B1 program, will take effect immediately on publication in the **Federal Register**, any H–1B1 applications filed on or after January 1, 2004, but prior to this interim rule's effective date, have been handled in accordance with the statutory terms and the processing procedures that the Department posted on its website in advance of the January 1, 2004, commencement of the H–1B1 program.) Insufficient time existed following enactment of the statutory implementing provisions for the Department to issue a proposal for comments, review the comments, and promulgate a final rule to be effective by January 1, 2004. Moreover, the changes being made by this interim final rule merely extend the H–1B regulations to H–1B1 nonimmigrants, subject to limited exceptions, in accordance with statutory provisions that extend the H–1B procedural filing requirements to the temporary entry of Chilean and Singaporean professionals during the effective periods of the Chile FTA and Singapore FTA. Therefore, the Department finds, pursuant to 5 U.S.C. 553(b)(3)(B), that good cause exists for publishing this regulatory amendment as an interim final rule. While notice of proposed rulemaking is being waived, the Department is interested in comments and advice regarding this interim final rule.

In addition, for these same reasons, it has been determined that good cause exists for waiving the requirements to delay the effective date of these technical amendments under 5 U.S.C. 553(d). It is impracticable and unnecessary to provide for a delayed effective date because the statutory amendments creating the H–1B1 nonimmigrant category, extending the procedural filing requirements under the H–1B program to H–1B1 nonimmigrants, and applying these provisions to nationals of Chile and Singapore became effective January 1, 2004.

Catalog of Federal Domestic Assistance Number

This program is listed in the *Catalog 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 and recordkeeping requirements, Singapore, Students, Wages.

■ For the reasons stated in the Preamble, 20 CFR part 655 is amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

■ 1. The authority citation for part 655 is revised 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 655.0 is amended by revising paragraph (d) to read as follows:

§ 655.0 Scope and purpose of part.

* * * * *

(d) *Subparts H and I of this part.* Subparts H and I of this part set forth the process by which employers can file with, and the requirements for obtaining approval from, the Department of Labor of labor condition applications necessary for the purpose of petitioning the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (formerly the Immigration and Naturalization Service or INS) for H–1B visas for aliens to be employed in specialty occupations or as fashion models of distinguished merit and ability, and the enforcement provisions relating thereto. With respect to H–1B1 visas for the temporary employment in specialty occupations of nonimmigrant professionals from countries with which the U.S. has entered into certain agreements identified in section 214(g)(8)(A) of the INA, subparts H and I set forth the process for an employer to file a labor attestation with the Department of Labor, the Department's approval procedures regarding these attestations, and enforcement positions related thereto.

* * * * *

■ 3. Part 655, subpart H, is amended by revising the subpart heading to read as follows:

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

■ 4. Section 655.700 is amended by revising the section title and paragraph (a) introductory text, by adding a new introductory paragraph to be placed prior to paragraph (a), and by adding new paragraphs (c)(3) and (d) 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?

Under the H–1B1 visa, the Immigration and Nationality Act (INA), as amended, permits nonimmigrant professionals in specialty occupations from countries with which the U.S. has entered into certain agreements that are identified in section 214(g)(8)(A) of the

INA to temporarily enter the U.S. for professional employment. Employers seeking to temporarily employ H–1B1 professionals must file a labor attestation with the Department of Labor in accordance with this subpart as set out in § 655.700(c)(3) and (d), which identify the sections of this subpart H and of subpart I of this part that apply to the H–1B1 program, sections and subsections applicable only to the H–1B program, and how terminology is to be applied. Steps for receiving an H–1B1 visa and entering the U.S. on an H–1B1 visa after the attestation process is completed with the Department of Labor, which differ in some respects from the steps for H–1B visas, are the responsibility of the Department of State and the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (formerly the Immigration and Naturalization Service or INS) and are identified in regulations and procedures of those agencies. Consult the Department of State (*http://www.state.gov/*) and USCIS (*http://uscis.gov/*) websites and regulations for specific instructions regarding H–1B1 visas. Procedures described in this subpart H for obtaining a visa and entering the U.S. after the Department of Labor attestation process, including procedures in this section and § 655.705, apply only to H–1B nonimmigrants, not to H–1B1 nonimmigrants.

(a) *Statutory provisions regarding H–1B visas.* With respect to nonimmigrant workers entering the U.S. on H–1B visas, which are available to nonimmigrant aliens in specialty occupations or certain fashion models from any country, the INA, as amended, provides as follows: * * *

* * * * *

(c) * * *

(3) Subject to paragraph (d) of this section, this subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the H–1B1 visa classification in specialty occupations in accordance with INA section 101(a)(15)(H)(i)(b1) (8 U.S.C. 1101(a)(15)(H)(i)(b1)), under an agreement listed in INA section 214(g)(8)(A) (8 U.S.C. 1184(g)(8)(A)), and during the period that the listed agreement is in effect. This paragraph is applicable to H–1B1 attestations filed on or after November 23, 2004; H–1B1 attestations filed prior to that date but on or after January 1, 2004, the commencement of the H–1B1 program, will be handled in accordance with the H–1B1 statutory terms and the H–1B1 processing procedures the Department posted on its website in advance of January 1, 2004.

(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); the last clause of the second sentence of 655.720(c) (regarding a petition to INS); 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). Additionally, the definition of the Immigration and Naturalization Service in § 655.715 is inapplicable to the H–1B1 program. Further, any of the following references in this subpart H or in subpart I of this part, whether in the excluded sections listed above or elsewhere, do not apply to H–1B1 nonimmigrants but apply only to H–1B nonimmigrants: References to fashion models of distinguished merit and ability (H–1B but not H–1B1 visas are available to such fashion models); references to a petition process before the INS (now USCIS) (the petition process applies only to H–1B not H–1B1 visas); references to H–1B-dependent employers and employers found to have willfully violated the H–1B program requirements (these provisions do not apply to the H–1B1 program); and reference in § 655.750(a) or elsewhere in this part to the provision in INA section 214(n) (formerly INA section 214(m)) regarding increased portability of H–1B status (by the statutory terms, the portability provision is inapplicable to H–1B1 nonimmigrants).

(2) *Terminology.* For purposes of this subpart H and subpart I of this part, except in those sections identified in paragraph (d)(1) of this section as inapplicable to H–1B1 nonimmigrants and as otherwise excluded:

(i) The term ''H–1B'' shall include ''H–1B1'' (INA section 101(a)(15)(H)(i)(b1)); and

(ii) The term ''labor condition application'' or ''LCA'' shall include a labor attestation pursuant to the provisions of INA section 212(t)(1) with respect to an H–1B1 nonimmigrant professional under INA section 101(a)(15)(H)(i)(b1).

(3) *Filing procedures for H–1B1 labor attestations.* Employers seeking to employ an H–1B1 nonimmigrant must submit to DOL a completed ETA Form 9035 or ETA Form 9035E (electronic) in the manner prescribed in §§ 655.720 and 655.730. Employers must indicate on the form whether the labor attestation is for an ''H–1B1 Chile'' or ''H–1B1 Singapore'' nonimmigrant. Changes in the procedures and instructions for submission of the H–1B1 labor attestation will be provided in a notice published in the **Federal Register** and posted at the ETA web site at *http://atlas.doleta.gov/foreign/*.

(4) *Employer's responsibilities regarding H–1B1 labor attestation.* Each employer seeking an H–1B1 nonimmigrant in a specialty occupation has several responsibilities, as described more fully in this subpart and subpart I of this part, including:

(i) By completing and submitting the LCA, and in addition by signing the LCA, the employer makes certain representations and agrees to several attestations regarding the employer's responsibilities, including the wages, working conditions, and benefits to be provided to the H–1B1 nonimmigrant (8 U.S.C. 1182(t)(1)). These attestations are specifically identified and incorporated in the LCA, as well as being set forth in full on Form ETA 9035CP.

(ii) The employer reaffirms its acceptance of all of the attestation obligations by transmitting the certified labor attestation to the nonimmigrant, the Department of State, and/or the USCIS in accordance with the further procedures of those agencies necessary for the nonimmigrant to obtain an H–1B1 visa and enter or remain in the U.S.

(iii) The employer shall maintain the original signed and certified LCA in its files, and shall make a copy of the filed LCA, as well as necessary supporting documentation (as identified under this subpart), available for public examination in a public access file at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with ETA.

(iv) The employer shall develop sufficient documentation to meet its burden of proof, in the event that such statement or information is challenged, with respect to the validity of the statements made in its LCA and the accuracy of information provided. The employer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

(5) *Application to Chile.* During the period that the provisions of Chapter 14 and Section D of Annex 14.3 of the United States-Chile Free Trade Agreement (Chile FTA) are in effect, this subpart H and subpart I of this part shall apply (except for the provisions excluded under paragraph (d)(1) of this section) to the temporary entry and employment of a nonimmigrant who is

a national of Chile under the provisions of Article 14.9 and Annex 2.1 of the Chile FTA and who is a professional under the provisions of Annex 14.3(D) of the Chile FTA.

(6) *Application to Singapore.* During the period that the provisions of Section IV of Annex 11A of the United States-Singapore Free Trade Agreement (Singapore FTA) are in effect, this subpart H and subpart I of this part shall apply (except for the provisions excluded under paragraph (d)(1) of this section) to the temporary entry and employment of a nonimmigrant who is a national of Singapore under the provisions of Chapter 11 and Section IV of Annex 11A of the Singapore FTA and who is a professional under the provisions of Annex 11A(IV) of the Singapore FTA.

5. Section 655.715 is amended by revising the definitions of ''employer'' and ''specialty occupation'' to read as follows:

§ 655.715 Definitions.

* * * * *

Employer means a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H–1B or H–1B1 nonimmigrants and/or U.S. worker(s). In the case of an H–1B nonimmigrant (not including an H–1B1 nonimmigrant), the person, firm, contractor, or other association or organization in the United States that files a petition with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (formerly the Immigration and Naturalization Service or INS), on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant. In the case of an H–1B1 nonimmigrant, the person, firm, contractor, or other association or organization in the United States that files an LCA with the Department of Labor on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant.

* * * * *

Specialty occupation:

(1) For purposes of the H–1B (not including H–1B1) program, *specialty occupation* means an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the United States. The nonimmigrant in a specialty occupation shall possess the following qualifications:

(i) Full state licensure to practice in the occupation, if licensure is required for the occupation;

(ii) Completion of the required degree; or

(iii) Experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty. INA, 8 U.S.C. 1184(i)(1) and (2).

(2) For purposes of the H–1B1 program, *specialty occupation* means an occupation that requires theoretical and practical application of a body of specialized knowledge, and attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the United States. INA, 8 U.S.C. 1184(i)(3). For H–1B1 nonimmigrants from Chile, additional occupations that qualify as specialty occupations are Disaster Relief Claims Adjuster, Management Consultant, Agricultural Manager, and Physical Therapist, as defined in Appendix 14.3(D)(2) of the United States-Chile Free Trade Agreement. For H–1B1 nonimmigrants from Singapore, additional occupations that qualify as specialty occupations are Disaster Relief Claims Adjuster and Management Consultant, as defined in Appendix 11A.2 of the United States-Singapore Free Trade Agreement.

(3) Determinations of specialty occupation and of nonimmigrant qualifications for the H–1B and H–1B1 programs are not made by the Department of Labor, but by the Department of State and/or United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (formerly the Immigration and Naturalization Service or INS) in accordance with the procedures of those agencies for processing visas, petitions, extensions of stay, or requests for change of nonimmigrant status for H–1B or H–1B1 nonimmigrants.

* * * * *

■ 6. Section 655.730 is amended by adding a new introductory paragraph to be placed prior to paragraph (a) to read as follows:

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

This section applies to the filing of labor condition applications for both H–1B nonimmigrants and H–1B1 nonimmigrants.

* * * * *

§ 655.731 [Amended]

■ 7. Section 655.731 is amended:

■ (a) In paragraph (c)(10)(i)(C) by removing the phrase ''filing fee under section 214(c)(1) of the INA'' and adding in lieu thereof the phrase ''filing fee, if any, under section 214(c) of the INA'' and

■ (b) In paragraph (c)(10)(ii) by removing the phrase ''filing fee paid by the employer under Section 214(c)(1) of the INA'' and adding in lieu thereof the phrase ''filing fee paid by the employer, if any, under section 214(c) of the INA.''

§ 655.740 [Amended]

■ 8. Section 655.740 is amended in paragraph (a)(2)(ii) by removing the phrase ''disqualified from employing H–1B nonimmigrants under section 212(n)(2) of the INA.'' and adding in lieu thereof the phrase ''disqualified from employing H–1B nonimmigrants under section 212(n)(2) of the INA or from employing H–1B1 nonimmigrants under 212(t)(3) of the INA.''

■ 9. Section 655.760 is amended by revising paragraph (b) to read as follows:

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

* * * * *

(b) *National lists of applications and attestations.* ETA shall compile and maintain on a current basis a list of the labor condition applications filed under INA section 212(n) regarding H–1B nonimmigrants and a list of labor attestations filed under INA section 212(t) regarding H–1B1 nonimmigrants. Each list shall be by employer, showing the occupational classification, wage rate(s), number of nonimmigrants sought, period(s) of intended employment, and date(s) of need for each employer's application. The list shall be available for public examination at the Division of Foreign Labor Certification, Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210.

* * * * *

■ 10. Part 655, subpart I is amended by revising the subpart heading to read as follows:

Subpart I—Enforcement of H–1B Labor Condition Applications and H–1B1 Labor Attestations

§ 655.800 [Amended]

■ 11. Section 655.800 is amended:

(a) In paragraph (a) by removing the phrase ''section 212(n) of the INA (8 U.S.C. 1182(n))'' and adding in lieu thereof the phrase ''sections 212(n) and (t) of the INA (8 U.S.C. 1182(n) and (t))'';

■ (b) In paragraph (c) by removing the phrase ''section 212(n) of the INA'' and

adding in lieu thereof the phrase ''sections 212(n) or (t) of the INA''; and

■ (c) In paragraph (c) by removing the phrase ''pursuant to 8 U.S.C. 1182(n)'' and adding in lieu thereof the phrase ''pursuant to 8 U.S.C. 1182(n) or (t).''

§ 655.801 [Amended]

■ 12. Section 655.801 is amended:

■ (a) In paragraphs (a)(1) and (2) by removing the phrase ''section 212(n)'' wherever it appears and adding in lieu thereof the phrase ''sections 212(n) or (t)'';

■ (b) In paragraph (b) by removing the phrase ''section 212(n)(2)(C)(ii)'' and adding in lieu thereof the phrase ''sections 212(n)(2)(C)(ii) or (t)(3)(C)(ii)'';

■ (c) In the first sentence of paragraph (c) by: removing the phrase ''section 212(n)(2)(v) of the INA'' and adding in lieu thereof the phrase ''sections 212(n)(2)(C)(v) and (t)(3)(C)(v) of the INA''; and removing the phrase ''paragraph (d)(1) of this section (or § 655.501(a)) may be allowed'' and adding in lieu thereof the phrase ''paragraph (a)(1) of this section may be allowed''; and

■ (d) In the second sentence of paragraph (c) by removing the phrase ''section 212(n) of the INA'' and adding in lieu thereof the phrase ''sections 212(n) or (t) of the INA, as applicable.''

§ 655.805 [Amended]

■ 13. Section 655.805 is amended in paragraph (c) by removing the phrase ''section 212(n)(1)(A)(i) or (ii) of the INA'' and adding in lieu thereof the phrase ''sections 212(n)(1)(A)(i) or (ii), or 212(t)(1)(A)(i) or (ii) of the INA.''

§ 655.810 [Amended]

■ 14. Section 655.810 is amended:

■ (a) In paragraph (b)(1)(vi) by removing the phrase ''section 212(n)'' wherever it appears and adding in lieu thereof the phrase ''sections 212(n) or (t)''; and

■ (b) In paragraph (c)(4) by removing the phrase ''8 U.S.C. 1182(n)'' and adding in lieu thereof the phrase ''8 U.S.C. 1182(n) or (t).''

Signed in Washington, DC, this 16th day of November 2004.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration.

Alfred B. Robinson, Jr.,

Acting Administrator, Wage and Hour Division, Employment Standards Administration.

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