Federal Register

Wednesday,
December 20, 2000

Part III

Department of Labor

Employment and Training Administration

20 CFR Parts 655 and 656

Temporary Employment in the United States of Nonimmigrants under H–1B Visas; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

RIN 1215–AB09

Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States

AGENCY: Employment and Training Administration, Labor, in concurrence with the Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: This document contains interim final regulations implementing recent legislation and clarifying existing Departmental rules relating to the temporary employment in the United States of nonimmigrants under H–1B visas. On January 5, 1999, the Department published a notice of proposed rulemaking (64 FR 628) seeking public comment on issues to be addressed in regulations to implement changes made to the Immigration and Nationality Act (INA) by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). In particular, the ACWIA requires H–1B-dependent employers and willful violators to comply with certain additional attestations regarding anti-displacement and recruitment obligations. The Department also sought further comment on certain proposals which were previously published for comment as a Proposed Rule on October 31, 1995 (60 FR 55339), and on certain interpretations of the statutes and its existing regulations which the Department proposed to incorporate in the regulations.

DATES: *Effective Dates:* These regulations are effective January 19, 2001, with the exception of §§ 655.731(a)(2) and 656.40, (c) and (d) which are effective December 20, 2000.

Applicabililty Date: Sections 655.731(a)(2) and 656.40 apply retroactively to any prevailing wage determinations thereunder which were not final as of October 21, 1998. Sections 655.720 and 655.721 are applicable to Labor Condition Applications filed on or after February 5, 2001.

Comment Date: Written comments on these regulations and issues raised in the preamble may be submitted by February 20, 2001, with the exception of any comments on Form WH–4, which must be submitted by January 19, 2001.

ADDRESSES: Submit written comments concerning Part 655 to Deputy Administrator, Wage and Hour Division, ATTN: Immigration Team, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card. Comments may also be transmitted by facsimile (''FAX'') machine to (202) 693–1432. This is not a toll-free number.

Submit written comments concerning Part 656 to the Assistant Secretary for Employment and Training, ATTN: Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room C–4318, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card. Comments may also be transmitted by facsimile (''FAX'') machine to (202) 693–2769. This is not a toll-free number.

FOR FURTHER INFORMATION CONTACT: Michael Ginley, Director, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration, Department of Labor, Room S–3510, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693–0745 (this is not a toll-free number).

James Norris, Chief, Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room C–4318, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693–3010 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

The H–1B nonimmigrant program is a voluntary program that allows employers to temporarily import and employ nonimmigrants admitted under H-1B visas to fill specialized jobs not filled by U.S. workers. (Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(H)(I)(b), 1182(n), 1184(c)). The statute, among other things, requires that an employer pay an H–1B worker the higher of the actual wage or the prevailing wage, to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.

Under the Immigration and Nationality Act (INA), as amended by the Immigration Act of 1990 (Act), and as amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, an employer seeking to employ an alien in a specialty occupation or as a fashion model of distinguished merit and ability on an H–1B visa is required to file a labor condition application with and receive certification from DOL before the Immigration and Naturalization Service (INS) may approve an H–1B petition. The labor condition application process is administered by ETA; complaints and investigations regarding labor condition applications are the responsibility of ESA.

On January 5, 1999, the Department of Labor (DOL) published a proposed rule which would implement statutory changes in the H–1B program made to the INA by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) (Title IV, Pub. L. 105–277). The ACWIA, as amended by the American Competitiveness in the Twenty-First Century Act of 2000 (Pub. L. 106–313), among other things, temporarily (until October 2003) increases the maximum number of H–1B visas permitted each year; temporarily requires new non-displacement (layoff) and recruitment attestations by ''H–1B dependent'' employers (as defined by the ACWIA) and willfully violating employers; and requires employers to offer the same fringe benefits to H–1B workers on the same basis as it offers fringe benefits to U.S. workers. The public was invited to comment on the proposed rule, including the information collection requirements noted below. In addition, pursuant to the Paperwork Reduction Act of 1990, DOL submitted a paperwork package to the Office of Management and Budget (OMB), requesting review and approval of the information collection requirements included in the proposed rule.

Since publication of the NPRM, additional amendments to the H–1B provisions were enacted by the American Competitiveness in the Twenty-first Century Act of 2000 (Pub. L. 106–313, 114 Stat. 1251, October 17, 2000), the Immigration and Nationality Act—Amendments (Pub. L. 106–311, 114 Stat. 1247, October 17, 2000), and section 401 of the Visa Waiver Permanent Program Act (Pub. L. 106–396, 114 Stat. 1637, October 30, 2000) (collectively, the October 2000 Amendments). Most pertinent to these regulations were provisions that raised the ceiling on the number of H–1B visas that may be issued and extended the

period of effectiveness of the additional attestations applicable only to H–1B-dependent employers and willful violators.

Comments were received from members of Congress, OMB, law firms, information technology industry associations, other industry associations, information technology firms, research firms, other employers of H–1B workers, Federal agencies and individuals. Commenters questioned DOL authority under the ACWIA and/or the Immigration and Nationality Act to impose the paperwork requirements contained in the proposed rule. Further, commenters questioned the DOL burden estimates for these information collections, indicating that the estimates were much too low. Many commenters contended DOL should only require the production of records in an investigation context. One commenter suggested for clarity that DOL provide a check list for H–1B employers indicating which records must be kept, which records are required by other statutes or regulations and where these records must be kept.

Many commenters have fundamental misunderstandings of the nature of the reporting and disclosure requirements proposed in the NPRM. The Department has made every effort in the NPRM and in the Interim Final Rule to limit recordkeeping requirements to documents which are necessary for the Department to ensure compliance, and to documents which are already required by other statutes and regulations or would ordinarily be kept by a prudent businessperson. As a general matter, when reviewing the recordkeeping and disclosure obligations set forth in the regulations, employers should be aware that the regulations distinguish between a requirement to ''preserve'' or ''retain'' records if they otherwise exist, and a requirement to ''maintain'' records whether or not they already exist. A requirement that employers retain, for example, ''any'' documentation on a particular subject requires only that any such documents be retained if they otherwise exist, but does not require creation of any documents. In addition, the Department points out that where the regulations do not explicitly require public access, the records may be kept in the employer's files in any manner desired; they do not need to be segregated by labor condition application (LCA) or establishment and do not need to be segregated from the records of non-H–1B workers, provided they are promptly made available to the Department upon request in the conduct of an investigation. The Department considers it important to require that such records be maintained, as in other enforcement programs, so that in the event of an investigation, the Department is able to determine compliance or, in the event of violations, to determine the nature and extent of the violations. This can only be accomplished with adequate, accurate records since it is only the employer who is in a position to know and produce the most probative underlying facts. *See Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 687 (1946).

In addition, in the regulations, the Department has limited the documents that must be disclosed to the public to those which the Department has concluded are necessary for a member of the public to be able to determine the employer's obligations and the general contours of how it will comply with its attestation obligations. The regulations on public access files do not require that there be a separate public access file for each LCA or for each worker. Thus, for example, an employer might choose to keep a single public access file with one copy of each of the required documents which are applicable to all LCAs (such as the description of the employer's pay system), and separately clip together those documents which are specific to each LCA.

Nothing in the ACWIA suggests that it intends to deny the Department the usual authority to require recordkeeping as a means of ensuring compliance with an employer's statutory obligations. To the contrary, Section 212(n)(1) specifically requires employers to make the LCA ''and such accompanying documents as are necessary'' available for public examination. The Department believes that this provision clearly permits the Department to determine what documents must be created or retained by employers to support the LCA. In the absence of such records, the Department is unable to ascertain whether an employer in fact is in compliance or the extent of violations.

In an effort to fully educate the public regarding the H–1B program and its requirements (including paperwork), DOL intends to prepare and make available pamphlets, fact sheets and a small business compliance guide. Further compliance assistance material will be made available on the DOL website. See Section IV.B, below, for an extensive discussion of this public outreach effort. The following is a brief discussion of the paperwork requirements contained in the proposed rule, the public comments on those requirements, the DOL response and the paperwork requirements imposed by this interim final rule. A much more extensive discussion of the issues, including the paperwork requirements, is contained in Section IV of the preamble.

A. Labor Condition Application (§ 655.700)

The process of protecting U.S. workers begins with a requirement that employers file a labor condition application (LCA) (Form ETA 9035) with the Department. In this application the employer is required to attest: (1) That it will pay H–1B aliens prevailing wages or actual wages, whichever are greater—including, pursuant to the ACWIA, the requirement to pay for certain nonproductive time and to provide benefits on the same basis as they are provided to U.S. workers; (2) that it will provide working conditions that will not adversely affect the working conditions of U.S. workers similarly employed; (3) that there is no strike or lockout at the place of employment; and (4) that it has publicly notified the bargaining representative or, if there is no bargaining representative, the employees, by posting at the place of employment or by electronic notification—and will provide copies of the LCA to each H–1B nonimmigrant employed under the LCA. In addition, the employer must provide the information required in the application about the number of aliens sought, occupational classification, wage rate, the prevailing wage rate and the source of the wage rate, and period of employment. Pursuant to the ACWIA, additional attestation requirements become applicable to H–1B-dependent employers and willful violators after promulgation of these regulations. This form, currently approved by OMB under OMB No. 1205–0310, was revised in the NPRM to identify H–1B dependent employers and provide for their attestation to the new requirements. The ACWIA increased the number of H–1B nonimmigrants from 65,000 to 115,000 in fiscal years 1999 and 2000 and to 107,500 in fiscal year 2002. Besides the increase in LCAs filed for these additional workers, by regulation H–1B-dependent employers are required to file new LCAs if they wish to file petitions for new H–1B nonimmigrants or to seek extensions of status for existing workers. The Department estimated in the proposal that 249,500 LCAs are filed annually by 50,000 H–1B employers (dependent and nondependent). The only added LCA burden proposed in the NPRM was for H–1B-dependent employers and willful violators to indicate on the LCA their status and their agreement to the

additional attestation requirements. (The time required for an estimated 50 H–1B employers to make the mathematical calculation to determine if they must make the additional attestations required of an H–1B employer is separately set out in C. of this section, below.) Since it was estimated that only 50 H–1B employers will find it necessary to make this calculation, out of a total of 50,000 H–1B employers, the estimate of time necessary to complete the form remained at 1 hour. Total annual burden was estimated at 249,500 hours.

Since promulgation of the NPRM, the 2000 Amendments to the INA further increase the ceiling on the number of H–1B visas that may be issued annually for 2001, 2002 and 2003, to 195,000 annually, with an additional unspecified number who may be admitted if they will be employed by a school, a related non-profit entity, a State or local government research organization, or a nonprofit research organization.

Commenters generally objected to the one hour estimate for completing the LCA, pointing out that the revised LCA is four pages long, whereas the current LCA is only one page for an estimated burden of one and one-quarter hour per LCA.

OMB suggested asked whether the conditions in a, b and c in section 8 capture the requirements for H–1B dependent employers. They also suggested amending the end of the sentence following the second box to read ''* * * unless the exemption requirement in the NOTE below is met.''

A commenter stated that DOL had failed to consider that many employers will now be forced to file two LCAs where previously they only filed one. Several of its member employers who previously filed an LCA for multiple openings indicated that they may file separate LCAs for each opening rather than take the risk that of INS making a determination that one H–1B nonimmigrant is not exempt, thus invalidating the entire LCA.

As discussed in Section IV.B.4 below, the ETA Form 9035 has been amended to provide that every employer is required to indicate whether it is or is not H–1B-dependent or a willful violator. Since all employers are required to determine whether or not they are H–1B dependent—although for most employers, as discussed below, their status will be readily apparent and no actual computation will be necessary—the additional box for non-dependent employers should require no additional time. There is no other information required which is not contained on the current form other than to check a box indicating the agreement of H–1B-dependent employers and willful violators to the additional attestation requirements. The longer form is not due to the requirement to furnish additional information, but to the new format required for the FAXback, which is designed to decrease significantly the processing time. See Section IV.5, below. The Department also notes that the 1¼ hour estimate on the current ETA Form 9035 includes the 15 minutes estimated to file a complaint with the Wage and Hour Division

Upon review, the Department sees no reason to change its estimate of an average of one hour per form, including both reading the instructions and filling out the form (estimated to take no more than one-half hour per form), as well as taking the actions that are subsumed in filling out the form (obtain the prevailing wage and providing notice). Based upon current data, and considering the regulatory change deleting the necessity for filing a new LCA when an employer's corporate identity changes (*see* B. of this section, below) as well as the requirement that H–1B-dependent employers with current LCAs file new LCAs if they wish to file new H–1B petitions or requests for extension of status, DOL estimates that 637,000 LCAs will be submitted annually by 63,500 H–1B employers (dependent and nondependent). Total annual burden for the LCA is estimated to be 637,000 hours (637,000 LCAs × 1 hour).

B. Documentation of Corporate Identity (§ 655.760)

Currently, the regulatory requirement is that a new LCA must be filed when an employer's corporate identity changes and a new Employer Identification Number (EIN) is obtained. Under the proposed rule, an employer who merely changes corporate identity through acquisition or spin-off could merely document the change in the public file (including an express acknowledgment of all LCA obligations on the part of the successor entity), provided it satisfied the Internal Revenue Code definition of a single employer. The proposed regulation was designed to eliminate a burden on businesses to file a new LCA, while at the same time ensuring that the public is aware of the changes and that the employer will continue to follow its LCA obligations. It was estimated in the proposal that 500 H–1B employers would be required to file the subject documentation annually. It was estimated that the recording and filing of each such document would take 15 minutes for a total annual burden of 125 hours.

One commenter asked how DOL's rulemaking affected the INS interpretation that any ''material change in employment'' necessitates the filing of an amended petition. Another commenter asked what opinion an employer is to follow when current DOL opinion is that any change to an approved LCA requires an amendment to the H–1B petition and the view of INS is that a change in company name or EIN does not require a new LCA, just that the change be documented at the time of amendment or extension. Another commenter stated that the burden for this requirement is significantly higher than DOL estimated.

Upon reconsideration, DOL's Interim Final Rule provides that a new LCA will not be required merely because a corporate reorganization results in a change of corporate identity, regardless of whether there is a change in the EIN and regardless of whether the IRS definition of single employer is satisfied, provided that the successor entity, prior to the continued employment of the H–1B nonimmigrant, agrees to assume the predecessor entity's obligations and liabilities under the LCA. The agreement to comply with the LCA for the future and to any liability of the predecessor under the LCA must be documented with a memorandum in the public access file.

With these changes, and based on the Department's experience, it is now estimated that 1000 H–1B employers (an increase from the 500 employers estimated in the NPRM) will be required to file the documentation annually and that the recording and filing of each such document will take approximately 30 minutes for a total annual burden of 500 hours. The Department also estimates that employers who file this memorandum will file 10,000 fewer LCAs, for a net saving of 9,500 hours.

INS requirements for the filing of an amended petition are separate from DOL requirements for the filing of LCAs.

C. Determination of H–1B Dependency (§ 655.736)

An H–1B employer must calculate the ratio between its H–1B workers and the number of full-time equivalent employees (FTEs) to determine whether it meets the statutory definition of an H–1B-dependent employer (8 U.S.C. 1182 (n)(3)(A)). The NPRM provided that when it is a close question, the determination would ordinarily be made by examination of an employer's quarterly tax statement and last payroll (or last quarter of payrolls if more

representative) or other evidence as to average hours worked by part-time employees to aggregate their hours into FTEs, together with a count of the number of workers under H–1B petitions. Documentation of this determination would be required where non-dependent status is not readily apparent and a mathematical determination must be made. A copy of this determination would be placed in the public disclosure file. In addition, if an employer changed from dependent to non-dependent status, or vice-versa, a simple statement of the change in status would be placed in the public disclosure file. The NPRM explained that documentation of a determination of H–1B dependency where it is a close question is necessary to determine employer compliance with H–1B requirements, and to advise the public of an employer's status. It was estimated in the proposal that approximately 50 H–1B employers would need to make the determination with 25 employers who are found not to be dependent employers would be required to document this determination annually. The making and documentation of each such determination was estimated to take approximately 15 minutes, and occur at least twice annually for a total annual burden of 12.5 hours.

Several commenters expressed the view that the DOL burden estimate for this requirement was severely underestimated. They remarked that large employers who hire H–1B employees will have to create systems of verification of H–1B dependency and that the determination will be difficult where employees are located in multiple locations and departments and the data needed to make the determination are maintained in different databases. Some commenters questioned the connection DOL made between the use of blanket LCAs and the likelihood of H–1B dependency and how frequently the determination would need to be made. Some also commented that it appeared that whenever the determination is made, a copy of the calculation must be placed in the public access file, making it a requirement for all H–1B employers, not just those who are borderline H–1B dependent. OMB commented that the 15-minute burden for the dependency determination seemed low and asked if the estimate just includes the assurance (how it is written) or does it also include documentation of the assurance.

Having taken into consideration all of the comments pertaining to the determination of dependency status, DOL has decided modification these requirements is appropriate to achieve the purposes of the ACWIA and avoid unnecessary burden on employers. First, the Interim Final Rule provides that all employers must retain copies of the I–129 petitions or requests for extensions of status filed with INS. These documents are critical to several provisions in the regulations, including in particular the determination of dependency and the number of hours that must be compensated if employees are ''benched.'' The Department believes that prudent businessmen would retain copies of these documents in any event. (See also the discussion in D. of this section, below.)

The Interim Final Rule also significantly reduces the burden to employers in making the computations of dependency. The Rule will permit employers to use a ''snap shot'' test to determine if dependency status is readily apparent and requires a full computation only if the number of H–1B workers exceeds 15 percent of the total number of full-time workers of the employer. Furthermore, the Rule provides employers an option of considering all part-time workers to be one-half FTE, rather than make the full computation. If the full computation (where required because the dependency status is not readily apparent) indicates that the employer is not H–1B dependent, the employer must retain a copy of this computation. Further, the employer must retain a copy of the full computation in specified circumstances which the Department believes will very rarely occur. The full computation must be maintained if the employer changes status from dependent to non-dependent. If the employer uses the Internal Revenue Code single employer test to determine dependency, it must maintain records documenting what entities are included in the single employer, as well as the computation performed, showing the number of workers employed by each entity who is included in the calculation. Finally, if the employer includes workers who do not appear on the payroll, a record of the computation must be kept. The Department has concluded that the computations or summary of the computations need not be kept in the public access file.

Although DOL has made several changes to simplify the determination of dependency status and its documentation, upon reconsideration DOL has increased its estimate of burden from 15 to 30 minutes, thus increasing the annual burden for an estimated 25 employers who must make and document such calculations twice annually from 12.5 to 25 hours. The Department also estimates that no more than 5 percent of employers will be required to retain copies of H–1B petitions and extensions who do not currently retain these documents, for an average of 3 minutes per petition, and a total of 159 hours (3,175 employers × 3 minutes ÷ 60). Total annual burden for this item is estimated to be 184 hours.

D. List of Exempt H–1B Employees in Public Access File (§ 655.737(a)(1))

The ACWIA provisions regarding non-displacement and recruitment of U.S. workers do not apply where the LCA is used only for petitions for exempt H–1B workers. The NPRM provided that where the INS determines a worker is exempt, employers would be required to maintain a copy of such documentation in the public access file. Determinations as to whether or not H–1B workers meet the education requirements to be classified as exempt H–1B nonimmigrants would be made initially by the INS in the course of adjudicating the petitions filed on behalf of H–1B nonimmigrants by dependent employers. In the event of an investigation, it was anticipated that considerable weight would be given to the INS determination that H–1B nonimmigrants were exempt, based on the educational attainments of the workers, since INS has considerable experience in evaluating the educational qualifications of aliens. Retention of copies of such determinations would aid DOL in determining compliance with the H–1B requirements and provide the public with notice as well. It was estimated in the proposal that 28,125 such documents would need to be filed annually. Each such filing would take approximately one minute for an annual burden of approximately 468.8 hours.

One commenter indicated that the one minute to physically complete the form may be correct but that the estimate ignores the analysis and review required to determine if they are exempt. Another commenter asked what documentation must be copied and maintained in the file, *i.e.,* would INS issue a separate determination or would Form I–797, Notice of Approval of H–1B Petition suffice? They also believed it was unclear how DOL estimated only 28,125 documents would be filed annually when the number of H–1B petition approvals for the current fiscal year is 115,000.

On further consideration, because of privacy considerations, DOL has concluded that the H–1B petitions with the INS determinations of workers' exempt status need not be included in the public access file. However, DOL

believes the public should know which workers are not covered by the new attestation elements so they can challenge a determination of exempt status where they believe the basis for the exemption is invalid. Therefore, under the interim final rule employers will be required to include in their public access file a list of the H–1B nonimmigrants supported by any LCA attesting that it will be used only for exempt workers, or in the alternative, a statement that the employer employs only exempt H–1B workers. DOL estimates that each list or statement will take approximately 15 minutes and that 200 H–1B employers will prepare one such list or statement annually for a total burden of 50 hours.

E. Record of Assurance of Non-displacement of U.S. Workers at Second Employer's Worksite (§ 655.738(e))

Section 212(n)(F)(ii) of the INA, 8 U.S.C. 1182(n)(F)(ii), prohibits an H–1B-dependent employer from placing H–1B nonimmigrant with another employer unless the dependent employer makes a bona fide inquiry as to the secondary employer's intent regarding displacement of U.S. workers by H–1B workers. The proposed regulation would require an employer seeking to place an H–1B nonimmigrant with another employer to secure and retain either a written assurance from the second employer, a contemporaneous written record of the second employer's oral statements regarding non-displacement, or a prohibition in the contract between the H–1B employer and the second employer. Pursuant to the ACWIA, an H–1B employer may be debarred for a secondary displacement ''only if the Secretary of Labor found that such placing employer * * * knew or had reason to know of such displacement at the time of the placement of the nonimmigrant with the other employer.'' Congress clearly intended that the employer make a reasonable inquiry and give due regard to available information. In order to assure that the purposes of the statute are achieved, the Department developed a regulatory provision to require that the H–1B employer make a reasonable effort to inquire about potential secondary displacement and to document those inquiries. It was estimated that approximately 150 employers would place H–1B nonimmigrants with secondary employers where assurances are required. It was estimated that each such assurance will take approximately 5 minutes and each such employer would obtain such assurances 5 times annually for an annual burden of 62.5 hours.

Commenters stated that DOL grossly underestimated the amount of time necessary to persuade and obtain from the secondary employer the necessary assurances, create a verification form or revise a contract and the annual frequency of the assurances. Further, some commenters felt that DOL had failed to consider the additional burden on the secondary employer to document their compliance with the assurance.

The paperwork burden estimate, properly, does not include the time necessary to persuade a secondary employer to provide such an assurance but does include the development of the verification form or contract clause and its execution. DOL believes that once the form or contract clause is created, this form or contract clause will be used uniformly for subsequent assurances making the average burden per occurrence minimal. There is no burden on the secondary employer to document its compliance with the assurance, since it is solely the responsibility of the primary H–1B employer to comply with the attestation that no U.S. worker will be displaced by an H–1B worker. DOL estimates an average burden of 10 minutes per attestation or statement, and that 150 H–1B employers will document such assurance 5 times annually, for a total annual burden of 125 hours.

F. Offers of Employment to Displaced U.S. Workers (§ 655.738(e))

The ACWIA prohibits H–1B dependent employers and willful violators from hiring H–1B nonimmigrants if their doing so would displace similar U.S. workers from an essentially equivalent job in the same area of employment. The proposed regulations would require H–1B-dependent employers to keep certain documentation with respect to each former worker in the same locality and same occupation as any H–1B worker who left its employ in the period from 90 days before to 90 days after an employer's petition for an H–1B worker. For all such employees, the Department proposed that covered H–1B employers maintain the last-known mailing address, occupational title and job description, any documentation concerning the employee's experience and qualifications, and principal assignments. Further, the employer would be required to keep all documents concerning the departure of such employees and the terms of any offers of similar employment to such U.S. workers and responses to those offers. These records are necessary for the Department to determine whether the H–1B employer has displaced similar U.S. workers with H–1B nonimmigrants. The Department stated that no records need be created to comply with these requirements, since the Equal Employment Opportunity Commission (EEOC) already requires under its regulations that the records described above be maintained.

Commenters stated that they were unaware of the EEOC regulation that required this documentation and requested that DOL recite rather than just refer to the EEOC regulations.

As discussed in Section IV.F.8 below, commenters are generally correct that the EEOC regulation cited in the NPRM, 29 CFR 1620.14, does not establish a general requirement that employers create the records encompassed by the Department's displacement proposal. Rather, it requires an employer to preserve all personnel or employment records which the employer ''made or kept''. Furthermore, EEOC requires the preservation of the same or similar records under other statutes it administers, such as the Age Discrimination in Employment Act (ADEA). Under this Interim Final Regulation, DOL is not requiring employers to create any documents other than basic payroll information, with one noted exception. If the employer offers the U.S. worker another employment opportunity, and does not otherwise do so in writing, by the provisions of section 655.738(e)(1) of these regulations, the employer must document and retain the offer and the response to such offer.

It is estimated that 10 H–1B employers will make such offers of employment 5 times annually (50) and that 5 of those offers and responses would not otherwise be committed to writing without this paperwork requirement. Each such documentation is estimated to take 30 minutes for a total annual burden of 2.5 hours.

G. Documentation of U.S. Worker Recruitment (§ 655.739(i)

Pursuant to the ACWIA, H–1B-dependent employers are required to make good faith efforts to recruit U.S. workers before hiring H–1B workers. Under the proposed regulations, H–1B-dependent employers would be required to retain documentation of the recruiting methods used, including the places and dates of the advertisements and postings or other recruitment method used, the content of the advertisements or postings, and the compensation terms. Further, the employer would be required to retain any documentation concerning consideration of applications of U.S. workers, such as copies of applications

and related documents, rating forms, job offers, etc. The proposed rule also would require the employer to place either documentation or a simple list of the places and dates of the advertisements and postings of other recruitment methods used. Comments were requested regarding how employers should determine industry-wide standards and make this determination available for public disclosure. The documentation noted above is necessary for the Department of Labor to determine whether the employer has made a good faith effort to recruit U.S. workers and for the public to be aware of the recruiting methods used. It was estimated that annually 200 H–1B dependent employers would need to document their good faith efforts to recruit U.S. workers. The filing of such records was estimated to take approximately twenty minutes per employer for an annual burden of approximately 66.7 hours.

Commenters felt the burden for this item was underestimated, *i.e.,* that DOL should recognize that employers file more than one LCA each year and that DOL should recite rather than just refer to the EEOC regulation requiring this documentation.

As noted in F. above and as discussed at some length in Section IV.G.5 of the preamble, DOL believes that employers are required to preserve the records required under current EEOC requirements. With the exception of the list to be included in the public access file (and here too employers have the option of putting the actual records in the file), DOL is not requiring employers to create any documents, but rather to preserve those documents which are created or received. Further, DOL, upon further review, has determined that employers will not be required to maintain evidence of industry practice for recruitment. The only additional recordkeeping burden required by these regulation is that the public disclosure file contain a summary of the principal recruitment methods used and the time frames in which they were used. This recordkeeping requirement may be satisfied by creating a memorandum to the file or the filing of pertinent documents. It is estimated that 200 H–1B employers will file such documents or memorandum 5 times annually and that each recordkeeping will take 20 minutes, for an annual burden of approximately 333 hours.

H. Documentation of Fringe Benefits (§ 655.731(b))

Pursuant to the ACWIA, all employers of H–1B workers are required to offer benefits to H–1B workers on the same basis and under the same criteria as offered to similarly employed U.S. workers. The proposed regulations would require employers to retain copies of all fringe benefit plans and summary plan descriptions, including all rules regarding eligibility and benefits, evidence of what benefits are actually provided to individual workers and how costs are shared between employers and employees. These records are necessary for the Department to determine whether the H–1B nonimmigrants are offered the same fringe benefits as similarly employed U.S. workers. Copies of most fringe benefit programs are required to be maintained by Internal Revenue Service and Pension and Welfare Benefits Administration regulations; thus there would not ordinarily be an additional recordkeeping burden from these requirements. The Department estimated that 2,500 employers would spend approximately 15 minutes each documenting unwritten plans, for an annual burden of 625 hours.

The Department in the proposed rule also inquired as to whether it would be possible to require multinational employers to keep H–1B workers on ''home country'' benefit plans in lieu of those provided to U.S. workers and what records would need to be kept to demonstrate the value of the ''home-country'' benefits and those provided to U. S. workers.

A commenter said that DOL should recite, rather than just refer to the PWBA and IRS regulations. Another commenter stated it was unclear whether in fact these regulations governing retention of benefits information meet the DOL requirements for the H–1B program, since the DOL regulations require specific documentation of the comparative benefits offered and received by H–1B employees and their U.S. counterparts, including the need to determine the appropriate comparison group and then require the maintenance of all the information in the public inspection file for each H–1B worker. Another comment stated that DOL has failed to consider the additional burden of comparing fringe benefits offered by similar employers in the area which DOL is proposing to require. Commenters questioned the need for the documentation of fringe benefits to be placed in each public access file, with others suggesting more flexibility in how the documentation should be provided. One commenter suggested that employers be allowed to select equivalent but different valued benefits as long as employers can show that all similarly situated workers were offered the same array of benefits.

It is believed that almost all employers of H–1B workers would, absent the regulation, have already created an employee handbook or have a summary description plan required by ERISA regulations which would satisfy the H–1B regulatory requirement. The provision being considered to require a comparison of fringe benefits offered by similar employers in the area is not included in this interim final rule. DOL is not requiring that detailed records of fringe benefits be maintained in each public access file. These records may be kept in a master file or in any other manner the employer desires. The public access file need only contain a summary of the benefits offered to U.S. workers in the same occupation as H–1B workers, including a statement of how employees are differentiated, if at all. Ordinarily this would be satisfied with the employee handbook or summary description discussed above. Where an employer is providing home country benefits, the employer need only place a notation to that effect in the public access file.

There are an estimated 10 percent of H–1B employers, or 6,350 who provide fringe benefits, such as bonuses, vacations and holidays, not required by ERISA regulations to be documented. It is estimated to document these plans would take 15 minutes per employer, for an annual burden of 1,588 hours (6,350 × 15 minutes). It is further estimated that 25 percent of H–1B employers (15,875) are multinational employers and that a note to the file that these workers receive ''home country'' benefits would take 5 minutes per employer for an annual burden of 1,323 hours. The total estimated burden for this item is 2,911 hours.

I. Wage Recordkeeping Requirements Applicable to Employers of H–1B Nonimmigrants

The Department republished and asked for comment on several provisions of the December 20, 1994 Final Rule (59 FR 65646) which were published for notice and comment on October 31, 1995 (60 FR 55339). Existing regulations require all H–1B employers to document their actual wage system to be applied to the H–1B nonimmigrants and U.S. workers. They are also required to keep payroll records for non-FLSA exempt H–1B workers and other employees for the specific employment in question. The proposed rule would decrease the burden on employers of keeping hourly pay records for U.S. workers, requiring such records only if either the worker is not

paid on a salary basis, or the actual wage is stated as an hourly wage. For H–1B workers, such records must also be kept if the prevailing wage is expressed as an hourly rate. The statute requires that the employer pay H–1B nonimmigrants the higher of the actual or prevailing wage. The Department explained that in order to determine if the employer is paying the required wage, it must be able to ascertain the system an employer uses to determine the wages of non-H–1B workers. The Department also stated that it is essential to require the employer to maintain payroll records for the employer's employees in the specific employment in question at the place of employment to ensure that H–1B nonimmigrants are being paid at least the actual wage being paid to non-H–1B workers or the prevailing wage, whichever is higher. The Department estimated that approximately 50,000 employers employ H–1B nonimmigrants. The documentation would have to be done only one time for each employer. Hourly pay records would have to be prepared with respect to all affected employees each pay period. The Department estimated that the public burden wold be approximately 1 hour per employer per year to document the actual wage system for a total burden to the regulated community of 50,000 hours in a year.

The payroll recordkeeping requirements are virtually the same as those required by the Fair Labor Standards Act (FLSA) and any burden required is subsumed in the OMB Approval No. 1215–0017 for those regulations at 29 CFR Parts 516, except with respect to records of hours worked for exempt employees. There would be no burden for U.S. workers since as a practical matter, hours worked records would be required for U.S. workers only if they are not exempt from FLSA, or if they are exempt but paid on an hourly basis (certain computer professionals), and therefore would keep hourly records in any event. The Department estimates that 55,000 H–1B workers will be paid on a salary basis. Hours worked records would be required for these workers only if the prevailing wage is expressed as an hourly rate—estimated to 17 percent of all cases. The Department estimated a burden of 2.5 hours per worker per year, for 9,350 workers and a total of 23,375 hours.

Several commenters stated that DOL had grossly underestimated the burden of documenting the objective wage system. Some indicated that it was ludicrous to estimate that the documentation is done only once, since wage systems continually change, documentation will need be done, at a minimum, each time a new LCA is prepared and employers do not hire H–1B nonimmigrants only for one position in the organization. Thus, DOL must calculate how many different job categories are filled by H–1B nonimmigrants on average for each employer to estimate how many times the burden of documenting the objective wage system occurs annually. Further, the documentation must be sufficiently detailed to allow a third party to determine the actual wage, making the burden higher than estimated. Some commented that the proposed regulation requires the actual wage be determined and documented anew for each H–B hire, along with periodic adjustments to the actual wage system.

The Department has deleted the provisions suggesting that the employer's wage system must be objective, as well as the statement that it must be described in the public disclosure file with detail sufficient for a third party to determine the actual wage rate for an H–1B nonimmigrant. As stated above, the requirement that a description of the actual wage system be included in the public access file is already contained in the regulations at section 655.760(a)(3). Therefore these regulations create no additional burden for this requirement.

Some commenters stated that while DOL estimated that only 17 percent of the prevailing wages provided to employers by State Employment Security Agencies (SESAs) are expressed as hourly rates, their experience was that SESAs regularly provides employers and attorneys with the prevailing wage stated as an hourly rate.

With respect to the concern expressed that SESA more frequently issues hourly rates, the modification to section 655.731(a)(2) in the interim final rule will provide that employer shall convert the prevailing wage determination into the form which accurately reflects the wages which it will pay.

The Department has also concluded that a revision of the regulation is appropriate to remove the requirement that the employer keep hourly wage records for its full-time H–1B employees paid on a salary basis. The regulation continues to require employers to keep hours worked records for employees who are not paid on a salary basis and for part-time H–1B workers, regardless of how paid. The additional burden of keeping records for salaried H–1B workers who are exempt from the FLSA is estimated at 2.5 hours per worker for 10,500 workers (1.5 percent of total H–1B workers), for a total annual burden of 26,250 hours.

J. Information Form Alleging H–1B Violations

The ACWIA requires DOL to develop a procedure so that a person, other than an aggrieved party, can provide, in writing on a form developed by DOL, information alleging H–1B program violations. The Department proposes that a single form be used by any party alleging violations, to the Wage and Hour Division of the U.S. Department of Labor, whether a complainant or another source. The H–1B Nonimmigrant Information Form, WH–4, is included in this Interim Final Rule for public review and comment. It is estimated that 200 such responses will be received annually and that each response will take approximately 20 minutes, for a total burden of 67 hours.

Total Annual Hours Burden for all Information Collections—667,423 Hours

Retention of Records: The current regulations provide at section 655.760 that copies of the LCAs and its documentation are to be kept for a period of one year beyond the end of the period of employment specified on the LCA or one year from the date the LCA was withdrawn, except that if an enforcement action is commenced, these records must be kept until the enforcement procedure is completed as set forth in part 655, subpart I. The payroll records for the H–1B employees and others employees in the same occupational classification must be retained for a period of three years from the date(s) of the creation of the record(s), except that if an enforcement proceeding is commenced, all payroll records shall be retained until the enforcement proceeding is completed. These record retention requirements have been approved by OMB under OMB No. 1205–0310.

After consideration of comments raised in response to the NPRM, the Department has clarified the record retention requirements to provide that where there is no enforcement action, the employer shall retain required records for a period of one year beyond the last date on which any H–1B nonimmigrant is employed under the labor condition application or, if no nonimmigrants were employed under the labor condition application, one year from the date the labor condition application expired or was withdrawn.

H–1B employers may be from a wide variety of industries. Salaries for employers and/or their employees who perform the reporting and

recordkeeping functions required by this regulation may range from several hundred dollars to several hundred thousand dollars where the corporate executive office of a large company performs some or all of these functions themselves. Absent specific wage data regarding such employers and employees, respondent costs were estimated in the proposed rule at $25 an hour. Total annual respondent hour costs for all information collections were estimated to be $8,105,887.50 ($25.00 × 324,235.5 hours).

Some commenters questioned the $25 per hour estimate for respondent costs, indicating that in order to comply with the information requirements, H–1B employers must employ high-level compensation professionals and human resource professionals. The Department recognizes that some employers may employ highly-paid professionals to advise them on how to comply with the H–1B program requirements. However, it is believed that such a need will be short-lived and that once a system is in place, compliance can be maintained without this highly paid professional assistance. The $25 an hour respondent cost is an average cost, which recognizes higher initial cost to effect compliance, as well as the low cost of performing the clerical filing functions. Further, as noted above, in addition to the guidance provided in this regulation and its preamble, the Department intends to provide non-technical guidance printed material and information in electronic format which should greatly assist employers and employees in understanding the H–1B program requirements. Total annual respondent hour costs for all information collections are estimated at $16,685,575 ($25.00 × 667,423).

The paperwork requirements discussed above will not become effective until OMB has reviewed and approved these requirements and assigned an OMB approval number.

II. Background

On November 29, 1990, the Immigration and Nationality Act was amended by the Immigration Act of 1990 (IMMACT 90) (Pub. L. 101–649, 104 Stat. 4978) to create the ''H–1B visa program'' for the temporary employment in the United States (U.S.) of nonimmigrants in ''specialty occupations'' and as ''fashion models of distinguished merit and ability.'' The H–1B provisions of the INA were amended on December 12, 1991, by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA) (Pub. L. 102–232, 105 Stat. 1733). Further amendments were made to the H–1B provisions of the INA on October 21, 1998, by enactment of the American Competitiveness and Workforce Improvement Act (ACWIA) (Title IV of Pub. L. 105–277, 112 Stat. 2681). In addition, the H–1B provisions of the INA were amended in October, 2000 by enactment of the American Competitiveness in the Twenty-first Century Act of 2000 (Pub. L. 106–313, 114 Stat. 1251, October 17, 2000), the Immigration and Nationality Act—Amendments (Pub. L. 106–311, 114 Stat. 1247, October 17, 2000), and section 401 of the Visa Waiver Permanent Program Act (Pub. L. 106–396, 114 Stat. 1637, October 30, 2000) (collectively, the October 2000 Amendments).

These cumulative amendments of the INA assigned certain responsibility to the Department of Labor (Department or DOL) for implementing several provisions of the Act relating to the temporary employment of certain nonimmigrants. The H–1B provisions of the INA govern the temporary entry of foreign ''professionals'' to work in ''specialty occupations'' in the United States under H–1B visas. 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184(c). The H–1B category of specialty occupations consists of occupations requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a Bachelor's or higher degree in the specific specialty as a minimum for entry into the occupation in the United States. 8 U.S.C. 1184(i)(1). In addition, an H–1B nonimmigrant in a specialty occupation must possess full State licensure to practice in the occupation (if required), completion of the required degree, or experience equivalent to the degree and recognition of expertise in the specialty. 8 U.S.C. 1184(i)(2). The category of ''fashion model'' requires that the nonimmigrant be of distinguished merit and ability. 8 U.S.C. 1101(a)(15)(H)(i)(b).

A. Changes Made by the ACWIA and the October 2000 Amendments

The ACWIA made numerous significant changes in the H–1B provisions. One was the temporary increase in the maximum number of H–1B visas over the three fiscal years following ACWIA's enactment: For fiscal years 1999 and 2000, the cap would be 115,000; for fiscal year 2001, the cap would be 107,500; and for fiscal year 2002 (and thereafter), the cap would return to the original 65,000. Another significant change was the imposition of additional attestation requirements for certain employers to provide better protections to U.S. workers. The additional attestation requirements apply to ''H–1B-dependent employers'' and to employers who have been found to have committed a willful failure or misrepresentation with respect to the H–1B requirements (hereafter referred to as ''willful violators''). H–1B-dependent employers and willful violators must attest that they: (1) Have not displaced and will not displace a U.S. worker within the period beginning 90 days before and ending 90 days after the filing of an H–1B petition; (2) will not place an H–1B worker with another employer with indicia of an employment relationship without making an inquiry to assure displacement has not and will not take place within the period beginning 90 days before and ending 90 days after the placement; and (3) have taken good faith steps to recruit U.S. workers for the job for which the H–1B workers are sought, and will offer the job to any equally or better qualified U.S. worker. The recruitment provision does not apply to an LCA for an H–1B worker who is ''exceptional,'' an ''outstanding professor or researcher,'' or a ''multinational manager or executive'' within the meaning of section 203(b)(1) of the INA. The ACWIA specified that both the displacement and recruitment/hiring protections become effective upon the date of the Department's final regulation and apply only to LCAs filed before October 1, 2001. An H–1B-dependent employer or willful violator filing an LCA which will be used only for ''exempt'' H–1B workers is not required to comply with the new attestation requirements for that LCA.

The ACWIA also instituted a filing fee of $500, to be collected by INS, for initial petitions and first extensions filed on or after December 1, 1998, and before October 1, 2001. Institutions of higher education and related or affiliated nonprofit entities, nonprofit research organizations, and Governmental research organizations are exempt from the new fee. The fees are to be used for job training, low-income scholarships, and program administration/enforcement.

The ACWIA included other generally applicable worker protections, specifically: whistleblower protection, prohibitions against reimbursement of the $500 filing fee and against penalizing an H–1B worker who terminates employment prior to a date agreed with the employer, and a requirement that the employer pay wages during nonproductive time if such time is not due to reasons occasioned by the worker. The ACWIA

also required employers to offer H–1B workers fringe benefits on the same basis and in accordance with the same criteria as U.S. workers.

The ACWIA specified new civil money penalties ranging from $1,000 to $35,000 per violation, along with debarment. New investigative procedures were created, authorizing the Department to conduct ''random'' investigations of willful violators during the five-year period after the finding of such violation, and establishing an alternative investigation protocol based on information indicating potential violations obtained from sources other than aggrieved parties. Enforcement of the requirement that employers hire U.S. workers if they are equally or better qualified than the H–1B workers is carried out by the Attorney General through arbitration.

The ACWIA mandated a particular method of computation of the local prevailing wage for purposes of the requirements of the H–1B program and the permanent immigrant worker program with respect to employees of institutions of higher education and related or affiliated nonprofit entities, nonprofit research organizations, and Governmental research organizations. Under the ACWIA provision, the prevailing wage level is to take into account only employees at such institutions and organizations.

The ACWIA became law on October 21, 1998. With one exception, its provisions took effect at that time, and apply both to existing LCAs and to LCAs filed in the future. Pursuant to section 412(d) of the ACWIA and section 212(n)(1)(E)(ii) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(E)(ii), the special attestation provisions regarding displacement and recruitment are applicable only to LCAs filed by H–1B-dependent employers and willful violators on or after the date this Interim Final Rule becomes effective and until October 21, 2001.

In addition, section 415(b) of the ACWIA provided that the amendments to section 212(p) of the INA, 8 U.S.C. 1182(p)—relating to computing the prevailing wage level for employees of an institution of higher education or a related or affiliated nonprofit entity, for employees of a nonprofit research organization or Governmental research organization, or for professional athletes—apply to prevailing wage computations for LCAs filed before October 21, 1998, ''but only to the extent that the computation is subject to an administrative or judicial determination that is not final as of such date.'' Therefore, the regulations in parts 655 and 656 to implement section 212(p) apply retroactively to any prevailing wage determinations thereunder which were not final as of October 21, 1998.

Two other ACWIA's provisions contained temporal qualifications, relating to the Department's authority to conduct random investigations and other source investigations (INA, sections 212(n)(2)(F), 212(n)(2)(G), respectively). The Act specified that the Department's authority, pursuant to section 212(n)(2)(F) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(2)(F), to conduct random investigations of employers who have committed a willful failure to meet a condition of their LCAs or who have made a willful misrepresentation of material fact applies only where such a finding has been made by the Secretary on or after October 21, 1998. The Act also specified that the Department's authority, pursuant to section 212(n)(2)(G), 8 U.S.C. 1182(n)(2)(G), to conduct investigations based on credible information from a source other than an aggrieved person would ''sunset,'' *i.e.*, expire, on September 30, 2001.

The October 2000 Amendments made substantial increases in the numbers of H–1B visas available for the employment of nonimmigrants: 195,000 each year for fiscal years 2001, 2002, and 2003 (with the number thereafter to revert to the original 65,000 per fiscal year); an unspecified additional number for fiscal year 1999 to cover nonimmigrants issued visas above the authorized number for that year; an unspecified additional number for fiscal year 2000 to cover petitions filed before September 1, 2000; and an unlimited number for nonimmigrants employed by institutions of higher education, by their related or affiliated nonprofit entities, by nonprofit research organizations, or by governmental research organizations (*i.e.*, visas for employees of such entities are not counted against the annual limits). The Amendments extended the effective periods for two ACWIA provisions: The additional attestation elements for H–1B-dependent employers and willful violator employers were extended until October 1, 2003; the Department's authority to conduct investigations based on sources other than aggrieved parties was extended through September 30, 2003. In addition, the Amendments created a ''portability'' option for H–1B nonimmigrants, by authorizing their change of employers (from one H–1B employer to another) ''upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant'' (*i.e.*, eliminating the need to await the INS adjudication of the petition). Further, the Amendments authorized the extension of H–1B status for nonimmigrants in cases of delayed INS adjudications of petitions for employment-based immigration or applications for adjustment of status for permanent residence; the extensions of H–1B status are to be made by the INS in one-year increments. The Amendments doubled the ACWIA-created petition fee (from $500 to $1,000) and extended the effective period of the fee provision to October 1, 2003. The Amendments broadened the ACWIA's exemption of certain employers from payment of the filing fee (to include nonprofit entities engaging in established curriculum-related clinical training of students registered at such institutions). In addition, the Amendments made some changes in the ACWIA allocations of fee monies for various training programs, increased the ACWIA allocation of fee monies to the INS for processing of LCAs, and reduced the ACWIA allocation of fee monies to the Department for processing and enforcement of LCAs (*i.e.*, reduced from 6 percent to 5 percent, to be divided equally between processing and enforcement). Finally, the Amendments directed that an amended H–1B petition was not required to be filed by an employer that was involved in a corporate restructuring, where the nonimmigrant's terms and conditions of employment remained the same.

The Department notes that the ACWIA was the product of extensive negotiations between the Administration and the House and the Senate. See 144 Cong. Rec. H8584 (Sept. 24, 1998); 144. Cong. Rec. S10877 (Sept. 24, 1998). Earlier in the year both the House and the Senate had issued very different bills to address the H–1B program (*see* S. Rep. No. 105–186, 105th Cong., 2d Sess. (1998); H.R. Rep. No. 105–657, 105th Cong., 2d Sess. (1998)). The resulting legislation was a compromise, and there was no conference committee report or joint statement by the negotiators that would provide clear legislative history as to its intent. Although Senator Abraham and Congressman Lamar Smith, as well as other individual Congressman, made remarks in the *Congressional Record*, their views as to the meaning and effect of the legislation are dramatically different.

The Department further notes that the October 2000 Amendments were also the product of extensive negotiations, but that there is very little legislative history concerning the limited

provisions that were actually enacted by Congress.

Keeping in mind the difficulty with construing legislation under these circumstances, the Department has—in the Preamble of this Interim Final Rule—cited to the legislative history of ACWIA in both the House and the Senate, and to the extensive remarks of both Senator Abraham and Congressman Smith.

B. Summary of Comments on the January 5, 1999 NPRM

To obtain public input to assist in the development of interim final regulations, the Department published a Notice of Proposed Rulemaking (NPRM) and invited public comment in the **Federal Register** on January 5, 1999. The NPRM also stated that the Department was re-publishing for notice and further comment certain provisions of the Final Rule promulgated in December 1994. These provisions had been proposed for comment on October 31, 1995, during the pendency of the litigation in *National Association of Manufacturers* v. *Reich,* 1996 WL 420868 (D.D.C. 1996) (NAM), which resulted in an injunction against the Department's enforcement of some of the provisions on Administrative Procedure Act (APA) procedural grounds. In addition, the Department sought comment on a number of interpretive issues arising under the existing regulations, set forth in proposed Appendix B. The thirty-day comment period set forth in the January 5, 1999 NPRM was extended until February 19, 1999.

The Department has, in this Interim Final Rule, carefully considered comments received in response to the October 31, 1995 Proposed Rule in conjunction with the comments received in response to the January 5, 1999 NPRM. The 1995 Proposed Rule elicited comments from 13 commenters, including one from a trade association, one from an association representing immigration attorneys, one from an association representing firms which provide international personnel to American businesses, five from information technology companies, one from an accounting and auditing firm, two from universities and two from law firms. The proposals which then elicited the greatest number of comments concerned the actual wage system (Appendix A), workplace notice, the 90-day short-term placement option for H–1B workers who move to worksite(s) not covered by LCA(s), and the use of the Government *per diem* schedule for travel expenses for those workers. All but two of these commenters objected to the Department's proposal that the actual wage be based on a system utilizing objective criteria. Seven of the commenters objected to the Department's proposals on the posting of notices at worksites not controlled by the employer, while eight of the commenters objected to the Department's proposals with regard to the 90-day option. Five of the commenters objected to the use of the Government *per diem* schedule for reimbursement of travel expenses under this option.

The Department received 92 comments in response to the January 5, 1999 NPRM, including comments which were received late but which were included in the rulemaking record and fully considered. The commenters included individuals, a union, employee associations, lawyers or law firms, businesses, trade and business associations, educational and research facilities and associations, U.S. Government agencies, and Members of Congress (one comment from two Senators and one comment signed by 23 Members of Congress (hereafter referred to as ''Congressional commenters'')).

The proposals eliciting the greatest numbers of comments were those regarding non-productive time (or ''benching''), the information required on the LCA regarding the employer's status as H–1B-dependent, recruitment, displacement, and the posting of notices. Individual commenters were critical of the H–1B program generally, describing it as particularly detrimental to the job security of older Americans, and sought more guidance from the Department with regard to procedures which American workers may follow to prove displacement. These commenters also urged the Department to strictly enforce the ACWIA ''no benching'' provisions; include a requirement that all employers check the H–1B dependency box on Form ETA 9035, with the imposition of heavy fines for noncompliance; and require the physical posting of all notices at the place of employment or worksite.

The union and employee association commenters generally endorsed the Department's proposed regulations. Educational and research facilities primarily addressed and supported the Department's proposals regarding determination of prevailing wages for employees of those institutions. These commenters also urged the Department and the INS to be consistent in their application of the definitions contained in the regulatory provisions.

Two associations, one representing the interests of immigration lawyers and the other representing the interests of firms which provide international personnel to American businesses, commented on virtually every proposal made by the Department in the NPRM. Lawyers and law firms particularly addressed the proposal that all fees and costs connected with the filing of the LCA and H–1B petition, including attorney and INS fees, are to be borne by the employer. The Department's proposal addressing the timing of the H–1B dependency determination also drew a strong response from commenters representing business interests. Senator Abraham, one of the ACWIA's Congressional sponsors, submitted his October 21, 1998 *Congressional Record* remarks to be included in the rulemaking record. Senator Abraham, along with Senator Bob Graham, further commented on a number of NPRM provisions they believed to be inconsistent with Congressional intent. The Department also received a letter signed by 23 Congressmen and Senators, including Senators Abraham and Graham. These commenters expressed concerns on a number of provisions, including proposed paperwork requirements, the requirement that the actual wage be based on an objective system, and the 90-day short-term placement option.

III. General Issues Applicable to the Rule

In the review of the comments and the development of this rule, the Department realized that there are a number of general issues which affect the entire rule. The following discussion addresses these issues.

A. The Administrative Procedure Act

On January 5, 1999, the Department of Labor published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (64 FR 628). The Department published the NPRM to obtain public comment and assistance in the development of regulations to implement changes made to the INA by the ACWIA, and to provide an additional opportunity for comment on certain provisions which were previously published for comment as a Proposed Rule in 1995 (60 FR 55339). In addition, the Department sought comments on various interpretations of the existing regulations, published as proposed Appendix B.

The Department's NPRM set forth specific regulatory language for comment on some, but not all, of the issues arising from the provisions of the ACWIA. For those issues with no specific regulatory language, the Department identified concerns, and set out its proposed approach to addressing

them or described alternative approaches. The Department sought comment on all of these issues and proposals.

The Department was mindful of Congress' intent that the ACWIA implementing regulations be promulgated in a ''timely manner;'' the legislation allowed a public comment period of ''not less than 30 days.'' Accordingly, the Department set a 30-day comment period, to close on February 4, 1999. Upon petition by the American Council on International Personnel (ACIP), the Department extended the comment period another 15 days, until February 19, 1999. After consideration of the comments received, the Department now issues this Interim Final Rule and invites further comment on the regulatory provisions set forth in Part IV.A through N of this preamble and the accompanying regulatory text. After reviewing any comments received, the Department will issue a Final Rule.

The Department received 13 comments on its regulatory process.

The comments focused primarily on the length of the comment period and the NPRM's lack of regulatory text on various issues. Nine commenters generally objected to the length of the comment period in combination with the lack of regulatory text, variously contending that the requirements of the Administrative Procedure Act (APA) were violated in that the bulk of the proposals together with the lack of regulatory text, definitions, and clear explanations prohibited meaningful comment even within the extended period allowed. The American Immigration Lawyers Association (AILA) recommended that the Department withdraw the NPRM and issue an Advance Notice of Proposed Rulemaking (ANPR). ACIP and Senators Abraham and Graham suggested that the Department publish a proposed rule with request for comment prior to implementing an interim final or final rule. ACIP also expressed concern about the inclusion of the outstanding issues in the 1995 NPRM in the proposed rule. In the alternative, ACIP and the American Council on Education (ACE) requested the Department to defer enforcement of the interim final rule during an employer education period of at least 60 days following its promulgation.

The Department has concluded that the delay inherent in the publication of an ANPRM or a new NPRM with full regulatory text would not be warranted. The new attestation requirements for H–1B-dependent employers and willful violators created by the ACWIA do not take effect until these regulations are promulgated and will terminate on October 1, 2003 (with the extended ''sunset'' date specified by the October 2000 Amendments). Congress specifically allowed a comment period of 30 days. The Department obliged commenters by extending this period an additional 15 days. The analysis of the comments and the preparation of this Interim Final Rule have been a complex and time-consuming process. The Department is of the view that there should be no further delay of key ACWIA provisions. The Department is now providing an additional opportunity for comment on the provisions of the Interim Final Rule. Also, the Department seeks comments on additional proposals presented for the first time; these proposals are not included in the Interim Final Rule but are presented for comment for possible inclusion in the Final Rule.

The Department is of the view that the procedure followed on this Rule is in full compliance with the notice and comment provisions of the APA. The APA requires that an agency include in its notice of proposed rulemaking ''either the terms or substance of the proposed rule or a description of the subjects and issues involved.'' 5 U.S.C. 553(b)(3); *see Kooritzky* v. *Reich,* 17 F.3d 1509, 1513 (D.C. Cir. 1994). Furthermore, the agency must give ''interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments.'' 5 U.S.C. 553(c). Thus, under the plain language of the APA, the absence of complete regulatory text in the NPRM does not compromise the Department's compliance with the notice and comment requirements of the APA.

The lengthy and detailed preamble to the NPRM, setting forth the Department's proposals and concerns on each of the issues, struck a balance between the need to promulgate regulations expeditiously (created by the ACWIA provision that its new attestation requirements would not take effect until regulations are issued and will terminate on October 1, 2001 (now extended until October 1, 2003), as well as the need to give regulatory guidance with regard to those ACWIA provisions which took effect immediately), and the opportunity to provide meaningful public comments. Certainly the public has a right to have a sufficient description of the subjects and issues involved to offer meaningful comment. The Department believes that it has fully accommodated this need with its detailed discussion in the NPRM preamble. Furthermore, in addition to describing the provisions it proposed to promulgate where regulatory text was not included in the NPRM, the Department discussed and sought comments on numerous additional alternatives it was considering, in an attempt to ensure that there would be no surprises to the public if, after a review of the comments, it determined that an alternative was appropriate for the Interim Final Rule. The NPRM preamble is sufficiently detailed to ''inform the reader, who is not an expert in the subject area, of the basis and purpose for the * * * proposal[s].'' Federal Register Act, 44 U.S.C. 1501–1511 and regulations thereunder, 1 CFR 1812(a).

The Department has carefully considered the request for a delay in enforcement for 60 days after the effective date of the regulations. The Department notes that the new law was extensively negotiated with stakeholders for nearly a year before it was enacted, that stakeholders have been aware of the Department's proposed approach to the issues for more than a year, that a number of the provisions will be in effect for only a limited period of time, and that several provisions that are the subject of this rulemaking relate to applications of the law that have been in effect for nearly a decade and have been addressed in prior rulemaking. Furthermore, the Department plans to undertake extensive education efforts, as discussed below. The Department has therefore concluded that it is inappropriate to administratively declare a period in which civil money penalties and debarment would not be imposed. However, we would point out that in all cases the Department's enforcement and the penalties imposed take into consideration the full circumstances of any violations found, within the constraints of the statutory requirements. See INA, section 212(n)(2)(C), 8 U.S.C. 1182(n)(2)(C), and § 655.810 of this Rule. Furthermore, with regard to the recordkeeping requirements in particular, as discussed in IV.M.5 below, the Department will issue CMP assessments for violations only where it finds that the violation impedes the ability of the Administrator to determine whether a violation of the H–1B requirements has occurred, or the ability of members of the public to have information needed to file a complaint or information regarding alleged violations of the Act.

Finally, the Department notes that the changes to the method of making prevailing wage determinations for academic institutions and related nonprofit entities, nonprofit research organizations, and Governmental research organizations, set forth at

§§ 655.731(a)(2) and 656.40, are effective immediately and apply retroactively to all LCAs filed on or after October 21, 1998, as well as to all LCAs filed earlier to the extent that the prevailing wage determination was subject to an administrative or judicial determination that was not final as of October 21, 1998. Pursuant to 5 U.S.C. 553(d), the Department finds good cause to make these provisions effective immediately in light of the statutory provisions at Section 415(b) of the ACWIA, expressly making the changes in the prevailing wage determinations apply retroactively.

B. Dissemination of Information to the Public

A significant concern expressed by a large number of commenters is the need to ensure that both U.S. and H–1B workers, as well as employers, are well-informed about their rights and obligations under the H–1B program in general, and the new provisions of the ACWIA in particular. The Department appreciates the importance of such education and intends to undertake active efforts to educate the public about the H–1B program. Specifically, the Department intends to prepare and make available pamphlets, fact sheets and a small business compliance guide in both written and electronic formats. These resources will explain the obligations of employers, the rights of H–1B and U.S. workers, and the roles of the Department of Labor and the other government agencies involved in the program (the INS, the Departments of Justice and State). The resources will also reference materials available from these agencies that bear on the employment of H–1B nonimmigrants. The Department also plans to work with the INS and the State Department to develop a pamphlet to be provided to visa applicants and posted electronically that will explain rights and responsibilities under the H–1B program.

The electronic compliance material will be available through the Department's web page at *http://www.dol.gov,* which will provide electronic links to other sources of information that bear on the employment of nonimmigrants. From the home page, the material will be accessible either by going to DOL Agencies: Employment Standards Administration, Wage and Hour Division (WHD), then to Laws and Regulations, and then to Compliance Assistance Information: Wage and Hour Division, or by going directly to *http://www2.dol.gov/dol/esa/public/regs/compliance/whd/whdcomp.htm.*

The Department also intends to add an ''H–1B Advisor'' to its Internet ''Employment Laws Assistance for Workers and Small Businesses'' (ELAWS) system (located at the bottom of the home page). The H–1B ELAWS Advisor will be an interactive program that helps employers, employees, and other interested parties determine their H–1B rights and responsibilities, 24 hours-a-day, 7 days-a-week. The Advisor imitates the interaction an individual may have with a DOL expert—it asks questions, provides information, and directs the user to the appropriate resolution based on the responses given.

This information may also be obtained from the Wage and Hour Division's national and local offices. Mail requests should be addressed to the Wage and Hour Division Immigration Team, Room S–3510, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone requests should be made of the Wage and Hour Division Immigration Team at (202) 693–0071.

The addresses and phone numbers for Wage-Hour's district offices may be found on the Department's website at *http://www.dol.gov/dol/esa/public/contacts/whd/america2.htm,* and in the Federal government section of local telephone directories. Additionally, the Interim Final Rule refers to three electronic resources: America's Job Bank, O*NET, and the Occupational Outlook Handbook . The job bank may be accessed at *http://www.ajb.dni.us.* The O*NET may be downloaded for free or ordered through the Government Printing Office, which can be reached through the Department's weblink at *http://www.doleta.gov/programs/onet.* The Occupational Outlook Handbook, published by the Department/s Bureau of Labor Statistics, may be found at *http://stats.bls.gov/ocohome.htm.*

Finally, the Department will continue its practice of making available speakers for groups affected by the Department's administration of the H–1B program. The Department will also furnish information and copies of its resource materials to both employee and industry organizations to facilitate distribution to their member organizations.

IV. Discussion of Provisions of Interim Final Rule and Comments

Issues arising under the Proposed Rule, including the Department's response to comments thereon are discussed below. For the convenience of the public, the numbering in this part of the Preamble remains the same as in the Proposed Rule unless otherwise indicated.

The Department notes that, in a few instances, it is requesting comments in the Interim Final Rule on a regulation or an approach to a regulation on which it has not previously sought comment. These provisions are not included in the Interim Final Rule, but rather will be considered when the Department promulgates the Final Rule after review of any comments. These issues are highlighted in the preamble.

The Department also notes that the new regulatory text published here generally includes all of the surrounding regulatory text in order to provide context to the reader. However, the only provisions which are open for comment are the issues discussed in the Preamble.

Further, the Department notes that the Interim Final Rule includes changes in the regulations to implement the October 2000 Amendments. These matters are discussed in the appropriate sections of the Preamble, and comments on the provisions are invited.

The Department has been working with the INS to coordinate our respective rulemaking efforts under the Act and to achieve consistency in the implementation of the ACWIA provisions and the October 2000 Amendments.

A. What Constitutes an ''Employer'' for Purposes of the ACWIA Provisions? (§ 655.736(b) and § 655.730(e))

Section 212(n)(3)(C)(ii) of the INA as amended by the ACWIA directs that ''any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as a single employer'' for purposes of defining an ''H–1B–-dependent employer.'' These provisions, found at 26 U.S.C. 414(b), (c), (m) and (o), concern the circumstances in which ostensibly separate businesses are treated by the Internal Revenue Code (IRC) as a single employer for purposes of pension and other deferred compensation plans.

Section 414(b), (c), and (m) of the IRC, respectively, define ''controlled group of corporations,'' ''partnerships, proprietorships, etc., which are under common control,'' and ''affiliated service group.'' Section 414(o) provides that the Department of the Treasury may issue regulations addressing other business arrangements, including employee leasing, in which a group of employees are treated as employed by the same employer. However, the Department of the Treasury has not issued any regulations under this provision; therefore Section 414(o) will not be taken into account in determining who is treated as a single

employer for ACWIA purposes unless regulations are issued by the Department of the Treasury during the period the H–1B-dependency provisions of the ACWIA are effective.

Section 414(b) of the IRC provides that all employees within a ''controlled group of corporations'' (within the meaning of section 1563(a) of the Code, determined without regard to sections 1563(a)(4) and (e)(3)(C)) are treated as employed by a single employer. Under section 1563(a) and the related Treasury regulations, a controlled group of corporations is a parent-subsidiary-controlled group, a brother-sister-controlled group, or a combined group. 26 U.S.C. 1563(a); 26 CFR 1.414(b)–1(a). A parent-subsidiary is, generally, one or more chains of corporations connected through stock ownership with a common parent corporation where at least 80 percent of the stock (by voting rights or value) of each subsidiary corporation is owned by one or more of the other corporations (either another subsidiary or the parent corporation), and the common parent corporation owns at least 80 percent of the stock of at least one subsidiary. In general terms, a brother-sister controlled group is a group of corporations in which five or fewer persons (individuals, estates or trusts) own 80 percent or more of the stock of the corporations and certain other ownership criteria are satisfied. A combined group is a group of three or more corporations, each of which is a member of a parent-subsidiary controlled group or a brother-sister controlled group and one of which is a common parent corporation of a parent-subsidiary controlled group and is also included in a brother-sister controlled group.

Section 414(c) of the IRC and the related Treasury regulations state that all employees of trades or businesses (whether or not incorporated) that are under common control are treated as employed by a single employer. 26 U.S.C. 414(c); 26 CFR 1.414(c)–2. Trades or businesses include sole proprietorships, partnerships, estates, trusts and corporations. Trades or businesses are under common control if they are included in a parent-subsidiary group of trades or businesses, a brother-sister group of trades or businesses, or a combined group of trades or businesses. Generally, the standards for determining whether trades or businesses are under common control are similar to the standards that apply to controlled groups of corporations. However, for these purposes, pursuant to 26 CFR 1.414(c)–2(b)(2), ownership of at least an 80 percent interest in the profits or capital interest of a partnership or the actuarial value of a trust or estate constitutes a controlling interest in a trade or business.

Section 414(m) of the IRC provides that all employees of the members of an ''affiliated service group'' are treated as employed by a single employer. 26 U.S.C. 414(m). In general terms, an affiliated service group is a group consisting of a service organization (the ''first organization''), such as a health care organization, a law firm or an accounting firm, and one or more of the following: (a) A second service organization that is a shareholder or partner in the first organization and that regularly performs services for the first organization (or is regularly associated with the first organization in performing services for third persons), or (b) any other organization if (i) a significant portion of the second organization's business is the performance of services for the first organization (or an organization described in clause (a) of this sentence or for both) of a type historically performed in such service field by employees, and (ii) ten percent or more of the interest in the second organization is held by persons who are highly compensated employees of the first organization (or an organization described in clause (a) of this sentence). IRS has issued proposed regulations at 52 FR 32502 (Aug. 27, 1987), which may be consulted to ascertain IRS's interpretation of these provisions.

In the event of an H–1B investigation involving the issue of what entity or entities constitute a single employer for purposes of the ACWIA dependency provisions, an employer will be required to provide documentation necessary to enable the Department to apply these IRC provisions. The Department emphasizes that if an employer wishes to use the definitions in section 414(b), (c) or (m) of the IRC, it will be the employer's burden to establish that it meets the requirements of the IRC and the regulations thereunder.

In the NPRM, the Department stated that it was considering the effect and implications of adopting this single definition of ''employer,'' as set forth in these IRC sections for all purposes under this program, to the extent it may serve to accommodate business activities and facilitate administration and enforcement of the H–1B program. Specifically, the Department sought comment on the consequences of a regulation which would provide that where an ''employer'' files an LCA and thereafter undergoes some change of structure (*e.g.,* buy-out by a successor corporation; corporate restructuring or ''spin-off'' of subsidiaries), the employer for LCA purposes would be the entity which satisfies the IRC definition of a single employer. The Department sought comment on whether and how it may be able to modify its current position that a new LCA must be filed when the employer's corporate identity changes and a new Employer Identification Number (EIN) is obtained. Thus, the Department raised the possibility an employer which changes its corporate identity through acquisition or spin-off would be allowed to forego the filing of new LCAs if it documented this change in its public access file, provided that it satisfies the IRC definition of a single employer and that the documentation includes an express acknowledgment of all LCA obligations on the part of the ''new'' entity. The Department also sought comments on whether another approach should be used to address corporate restructuring.

The Department received 17 comments on its proposals with regard to defining an employer for purposes of the H–1B program.

ACIP, AILA and the Information Technology Association of America (ITAA) strongly opposed using the relatively broad IRC definition of ''single employer'' for any purpose other than determining whether an employer is H–1B-dependent as provided in the ACWIA. These organizations generally asserted that there was no basis to infer that Congress intended to expand this extraordinarily broad definition to the entire H–1B law and that expanded use of this definition would not facilitate corporate concerns in administering an employer's obligations in the H–1B program.

AILA further asserted that the IRC ''single employer'' concept is designed to prevent the avoidance of employee benefit requirements through the use of separate organizations, employee leasing, or other arrangements. Therefore, AILA observed, to prevent discrimination in employee benefits in favor of highly compensated employees, the ''single employer'' encompasses all entities that are related by financial interest (ownership or transactional). In contrast, AILA averred, the H–1B program seeks to protect U.S. workers and, to promote this purpose, an ''employer,'' at a minimum, should have an employment relationship with respect to covered workers, as defined by the ability to hire, fire, pay and other indications of control. Thus, AILA concludes, to depart from the longstanding definition of ''employer'' in the H–1B program, without explicit statutory authority, would be improper.

Nine commenters (AILA, Cowan & Miller, ITAA, Rubin & Dornbaum, the

Small Business Survival Committee (SBSC), the U.S. Chamber of Commerce, White Consolidated Industries, Network Appliance, and the Fred Hutchinson Cancer Research Center (FHCRC)) stated their view that extending the use of the definition of ''single employer'' would serve no useful purpose in facilitating corporate restructuring and efficient H–1B administration. In fact, they asserted, broader application would have the opposite effect by requiring multi-entity corporations to coordinate many functions among the various entities, including benefits, wages, movement of H–1B employees among the entities, lay-offs, and other purposes, every time an H–1B worker is hired, promoted, or moved. The Chamber of Commerce, however, suggested that if a single employer analysis is required outside the H–1B-dependent employer context, the Department should adopt the four-factor test developed by the National Labor Relations Board and approved by the Supreme Court in single employer labor law cases, rather than the analyses required by IRC Section 414.

ITAA sought clarification on the calculation of H–1B dependency given the ACWIA's definition of ''employer.'' For instance, ITAA noted, a controlled group could consist of parent A and subsidiaries B, C and D. If subsidiary B were to file an LCA, would the H–1B dependency calculation be made using all employees of A, B, C, and D, or only the employees of B? The Department believes that, under the IRC definition of ''controlled group,'' all of the employees of A, B, C, and D would be included in the dependency calculation if any of the subsidiaries or the parent company filed the LCA.

Many employers and their representatives supported the Department's proposal to modify its current requirement for filing of a new LCA upon a change in the EIN. AILA, ACIP, Intel Corporation (Intel), ITAA and the Society for Human Resource Management (SHRM) urged a rule that a new or amended LCA and H–1B petition not be required upon an acquisition, merger, spin-off, transfer or other corporate reorganization regardless of whether there is a change in the EIN. ACIP further urged that no new or amended LCA and H–1B petition be required whether or not the new entity meets the IRC definition of ''single employer.'' Essentially, these groups endorsed a position that they stated is similar to the I–9 provisions of the INA, 8 CFR 274a.2(b)(1)(viii)(A)(6) & (7), whereby the new employer has the option of assuming the immigration-related liabilities of the old employer regardless of whether the employer assumes any other liabilities in the transaction. Similarly, AILA suggested application of established successor-in-interest rules. Two other commenters (Kirkpatrick & Lockhart, Jose E. Latour and Associates (Latour)) also urged consistency between INS and DOL rules.

ACIP elaborated on this issue, suggesting that continued corporate compliance responsibility in the event of restructuring could be accomplished via a simple memorandum placed in the public access file, rather than a new LCA, except where there is a material change in the worker's job duties or the worker is relocated to a site not covered by an LCA, or the new entity hires a new H–1B worker. ACIP stated that an employer should not be able to use positions on the previous entity's LCA to hire a new H–1B nonimmigrant.

The AFL–CIO opposed the Department's proposed modification to the current LCA filing requirements because, in its view, it could create the substantial risk that employers, through acquisition or spin-off, could in fact create an H–1B-dependent workforce and yet avoid the concomitant recruitment and non-displacement obligations of H–1B-dependent employers. The AFL–CIO pointed out that the governing IRS regulations use the ''common control'' test to determine whether a parent-subsidiary group of corporations or brother-sister trades or business satisfy the Code's definition of single employer. The AFL–CIO suggested that under the Department's proposal, a non-H–1B-dependent corporation that has filed an LCA, but has yet to hire any H–1B workers under that application, could create an H–1B-dependent subsidiary corporation that meets the ''common control'' test, but avoid filing a new LCA. The parent could then acquire the requested or remaining number of H–1B workers on its outstanding LCA, and place them in the subsidiary workforce without applying any of the new attestation requirements for H–1B-dependent employers.

The Department believes that the AFL–CIO's legitimate concerns are related to the statutory definition of ''dependent employer'' and not to the proposal to eliminate the requirement to file a new LCA when an employer, as defined by the ACWIA, undergoes a change in corporate structure. Thus, given the scenario presented by the AFL–CIO, under the ACWIA-imposed definition of ''employer'' the parent corporation and its subsidiaries (if they meet the ''common control test'') are a ''single employer'' whose entire, combined work force is assessed to determine dependency. Under the IRC definition, the H–1B employees of the ''subsidiary'' are considered part of the larger work force of the ''parent'' corporation, which then may or may not be a dependent employer required to comply with the ACWIA attestation requirements.

Based on a careful review of all the comments submitted on this issue, the Department agrees that the use of the IRC definition of ''employer'' should be limited to determining H–1B-dependent employer status, as set forth in section 212(n)(3)(C)(ii). The IRC rules do not appear useful to facilitate the resolution of issues involving changes in corporate status.

However, as urged by the commenters, the Department has concluded that it is appropriate to change its current requirement that a new LCA (and, as a result, a new H–1B petition) be filed when corporate identity changes result in a change in the employer's EIN number. In the past, the Department has taken the position that a new LCA must be filed to assure continued compliance responsibility by the ''new'' employer—a corporate entity other than the one that filed the LCA in the first place. The Department understands, however, that when a corporate identity changes, it is common for the H–1B worker(s) to continue to perform the same job duties in the same location for the new, restructured entity, and for the new entity to assume the obligations of the previous entity. In such circumstances, where the obligations are assumed and there is no real change in the H–1B worker's job and his/her ''new'' employer's responsibilities, filing a new LCA and H–1B petition solely because of the change in corporate structure would be an unnecessary and burdensome exercise for the employer, the State Employment Service Agency (SESA) responsible for a prevailing wage determination, the Department in reviewing the LCA, and the INS in adjudicating the H–1B petition.

Further support for the Department's position is found in the October 2000 Amendments, in which Congress specified:

> An amended H–1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner.

Section 314(c)(10) of the INA, 8 U.S.C. 1184(c)(10), as enacted by section 401 of

the Visa Waiver Permanent Program Act. While this new INA provision is directed to the INA's processing and adjudication of petitions, we consider it to be instructive as to Congress' intent that a restructured ''new'' corporate employer be authorized to continue the employment of existing H–1B nonimmigrants on the same terms and conditions as the ''original'' employer.

Therefore, the Department's Interim Final Rule, at § 655.730(e), provides that a new LCA will not be required merely because a corporate reorganization results in a change in corporate identity, regardless of whether there is a change in the EIN, provided that the new employing entity, prior to the continued employment of the H–1B nonimmigrant, agrees to assume the predecessor entity's obligations and liabilities under the LCA. The agreement to comply with the LCA for the future and assumption of liability for any past violations must be documented with a memorandum in the public access file, specifically identifying the affected LCAs and the EIN of the new employing entity, and describing the new employing entity's actual wage system (see IV.O.3, below). In addition, the employer will be required to retain in its records a list of the name and job title of each H–1B worker transferred to the new employer. It should be noted that the employer's status as a new employing entity which is not required to file a new LCA is not determined by traditional principles of successorship (although we anticipate that the new entity will commonly be a successor employer), but rather by the new entity's agreement to undertake the obligations and liabilities of the predecessor under the LCA. This position is consistent with the assumption of liability under the INA, 8 CFR 274a.2(b)(1)(viii)(A)(6) and (7), whereby a new employer may either assume liability for the old I–9 forms or prepare new ones, and provides the employer with flexibility to deal with the circumstances surrounding the particular corporate reorganization. These principles apply whether the reorganization is as a result of an acquisition, merger, sale of stock or assets (''spin-off''), or similar change in corporate structure. The Department cautions that an employer which undergoes a change in structure and EIN, but chooses not to insert the required memorandum in the public access file, is required to file new LCAs.

A new LCA (and H–1B petition) will be required if the H–1B worker changes jobs or where the new entity/employer seeks to hire a new H–1B worker or to extend an existing H–1B petition. Thus the ''new'' employer may not utilize H–1B ''slots'' left over from the previous entity's LCA for a worker hired after a reorganization or restructuring. The Department also understands that where there is a material change in duties (whether or not there is a change in occupation), INS may require the filing of a new H–1B petition.

The Department emphasizes that a change in a corporation's H–1B-dependency status as a result of a change in the corporate structure would have no effect on the employer's obligations with respect to its current H-1B workers. In other words, a corporation which was H–1B-dependent, and as a result of a change in structure becomes non-dependent, would be required to continue to comply with the secondary displacement attestation unless it chooses to file a new LCA and H–1B petition(s) for any H–1B worker(s) employed pursuant to the ''dependent'' LCA. Similarly, a non-dependent corporation which becomes dependent as a result of corporate restructuring would not be required to comply with the H–1B-dependent employer obligations for H–1B workers employed pursuant to a pre-existing LCA, provided the employer has assumed the obligations and liabilities of that LCA. Furthermore, as discussed, a new LCA (attesting to the newly acquired H–1B-dependent or non-dependent status) would have to be filed for all future H–1B petitions and extensions of status.

B. What Is an H–1B Dependent Employer or a Willful Violator? (§ 655.736(a) and (f))

The ACWIA requires non-displacement and recruitment attestations by ''H-1B dependent employers'' and by employers found, after the date of ACWIA's enactment, to have committed a willful violation or a misrepresentation of a material fact on an LCA during the five-year period preceding the filing of an LCA.

The ACWIA definition of ''H–1B-dependent employer'' provides a formula for comparing the number of H–1B nonimmigrants employed to the total number of full-time equivalent employees (FTEs) in the employer's workforce. The Act provides that an H–1B-dependent employer is one that employs in the United States:

- 25 or fewer FTEs, and more than seven H–1B nonimmigrants; or
- At least 26 but not more than 50 FTEs, and more than 12 H–1B nonimmigrants; or,
- At least 51 FTEs, and H–1B nonimmigrants in a number that is equal to at least 15 percent of the number of such FTEs.

Thus, the H–1B-dependency formula for all employers uses two dissimilar numbers: the number of H–1B nonimmigrants employed (a ''head count'' of all H–1B workers, both full-time and part-time) and the number of FTEs (including both H–1B workers and other employees). For larger employers (*i.e.,* those with 51 or more FTEs), the computation is made with the number of H–1B workers as the numerator and the number of FTEs as the denominator; if the ratio is greater than 15 percent, then the employer is H–1B-dependent.

The structure and application of this statutory definition was addressed by one commenter (Tata Consultancy Services (TCS)), which urged the Department to focus on the perceived purpose rather than the language of the statutory test. TCS described itself as the largest and oldest software consulting and development firm in Asia, employing some 12,000 workers hired and trained in India, and conducting business in the U.S. through contracts to provide services both at client locations and at TCS locations. TCS expressed concern that ''the Act and the Department's proposals literally include TCS as an H–1B dependent employer, since the number of TCS employees on H–1B visas is more than 15 percent of TCS' employees in the United States.'' While acknowledging that it is an H–1B-dependent employer under the literal language of the statute (and thus subject to the additional attestation obligations for such employers), TCS urged the Department to issue a regulation which focused not on the express statutory provision but rather on the intention of Congress to impose the new obligations on ''job shops.'' In TCS's view, its own operation should not be included in the definition of H–1B-dependent employer because its operation does not constitute a ''job shop,'' which it defines as companies which ''seek only to make money from the temporary placement of foreign personnel with respect to whom the job shoppers have no real employer/employee relationship.''

The Department has considered the TCS suggestion but has concluded that the regulation must reflect the express language of the ACWIA definition. There being no ambiguity in this provision, the Department has no authority to promulgate a regulation defining a ''job shop'' and substituting that definition for the mathematical computation prescribed in the statutory definition of ''H–1B-dependent employer.''

The ACWIA specifies that ''exempt H–1B nonimmigrants'' are not to be included in the employer's determination of its H–1B dependency

status during a certain period after enactment of the Act (*i.e.,* six months from the date of enactment (thus, until April 21, 1999), or until the date of the Department's final rule on this provision is issued (thus, the date of this Interim Final Rule)).

None of the comments on the H–1B-dependent employer issues addressed the limited exclusion of ''exempt'' H–1B workers from the determination of H–1B-dependency. The prescribed period for this limited exclusion expires with the issuance of this Rule, and all ''exempt'' H–1B workers are henceforth to be included in the employer's determination of H–1B-dependency status. Therefore, the Department has determined that it is not necessary or appropriate to include in this section of the regulation any language concerning this now moot limited exclusion for ''exempt'' H–1B workers.

As stated above, the new non-displacement provisions and recruitment requirements contained in the ACWIA also apply to employers found, after the date of ACWIA's enactment, to have committed a willful violation or misrepresentation during the five-year period preceding the filing of an LCA. Section 655.736(f) of the Rule provides that an employer who is a ''willful violator'' is one who is found in either a Department of Labor proceeding pursuant to these regulations, or a Department of Justice proceeding pursuant to section 212(n)(5) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(5), to have committed either a willful failure to comply with the requirements of Section 212(n) or a misrepresentation of material fact during the five-year period preceding the filing of the LCA in question. Furthermore, the final decision in the proceeding finding willful violation or a misrepresentation must have been entered on or after the date of enactment of the ACWIA. ''Willful failure'' is defined in accordance with the existing regulations at § 655.805(b).

The following discussion addresses the other matters raised in the NPRM and in the comments, including the meaning of ''FTE,'' the manner and time of determining H–1B-dependency status, documentation of the determination, and the designation(s) to be made on the LCA regarding an employer's status as an H–1B-dependent employer or a willful violator.

1. What Is a ''Full-Time Equivalent Employee''? (§ 655.736(a)(2))

The ACWIA definition of ''H–1B-dependent employer'' includes the term ''full-time equivalent employees'' (FTEs) as a critical part of the calculation to determine an employer's H–1B-dependency status. The term is not defined in the Act.

The NPRM explained that the Department considered various interpretations of the term ''full-time equivalent,'' some of which would significantly increase an employer's paperwork burden. The NPRM recognized that an employer's FTEs would include only its employees (both H–1B nonimmigrants and U.S. workers) and would not include *bona fide* consultants and independent contractors who do not meet the employment relationship test under the common law. The NPRM also recognized that the determination of the number of FTEs would need to include consideration of both the employer's full-time employees and its part-time employees (if any).

The Department pointed out that one possible approach to the FTE determination—presumably the most burdensome approach, from the employer's perspective—would be to maintain records of all hours of work by all employees (both hourly-paid and salaried workers, both full-time and part-time workers) during a certain period of time (*e.g.,* a year, a work week), and to divide that total by a number of hours constituting a full-time employee standard.

The Department proposed a less onerous approach, in which FTEs could be determined in a two-step process. First, the number of employees would be determined through the employer's quarterly tax statement (or similar document) (assuming there is no issue as to whether all employees are listed on the tax statement). Second, the employer would count its full-time workers using some standard threshold; each full-time worker would constitute one FTE. The employer's standard for full-time employment would be accepted, provided it was no less than 35 hours per week (or, where the employer has no standard, 40 hours per week). Third, the employer would aggregate its part-time employees into FTEs by identifying the workers' average number of hours of work per week, then aggregating these average weekly hours, and finally dividing that total by the employer's standard for full-time employment. The aggregation of the average hours of the part-time workers into FTEs would be made through an examination of the last payroll (or the payrolls over the previous quarter if the last payroll is not representative) or through other evidence as to average hours worked by part-time employees (such as evidence of their standard work schedule).

Thirteen commenters responded to the Department's proposal and offered alternatives for determining FTEs.

Four commenters addressed issues concerning the identification of ''employees.'' Three commenters (ACIP, AILA, SHRM) expressed concern at what they viewed as the NPRM's inappropriate inclusion of consultant and contractor personnel in the determination of FTEs based on ''indicia of an employment relationship'' with the employer. The commenters asserted that this approach was inconsistent with the statute, that the determination of FTEs should include only those persons whom the employer considered to be its employees, and that the application of an ''indicia'' test to all personnel including consultants and contractors would be burdensome. ACIP stated that the application of the test would be inconsistent with the NPRM proposal that FTEs be calculated by examining the employer's quarterly tax statements to determine the number of employees on the payroll; ACIP noted that consultants and contractors would not appear on these tax statements. The commenters suggested that the identification of ''employees'' for purposes of the determination of FTEs should be a simple head count of workers on the employer's payroll (*i.e.,* persons identified by the employer on these records as its employees).

On the related matter of the proposed sources of information as to the number of employees—the employer's payrolls and tax statements—the AFL–CIO recommended that the FTE determination use an average of the number of employees shown on the employer's last three quarterly tax returns, and not the last quarterly return and the last payroll period, because this averaging process would prevent employers from timing the filing of LCAs to coincide with a greater ratio of FTEs to H–1B workers so as to avoid H–1B-dependency status.

It appears to the Department that some commenters' assertions regarding ''indicia of employment'' are based on a misapprehension of one aspect of the proposal. The NPRM did not propose that an ''indicia of employment'' test would be applied in this context; the ''indicia'' test was created in the ACWIA for purposes of the secondary displacement prohibition. The NPRM stated that the common law test of ''employment relationship'' would be used in identifying the persons to be included as ''employees'' in the FTE computation, and that *bona fide* consultants and independent contractors would be excluded from the count. The Department is of the view

that it is not necessary for the employer to do a detailed analysis of application of the common law test to every worker in order to identify ''employees'' for purposes of FTE determinations. Instead, as indicated in the NPRM and supported by the commenters, the employer's existing identifications of workers as ''employees'' (as opposed to consultants or contractor personnel) will ordinarily be sufficient for this purpose and no additional analysis will be needed.

Thus, the Interim Final Rule, at § 655.736(a)(2)(i), provides that the determination of FTEs is to include those persons who are consistently treated by the employer as ''employees'' for all purposes, including payroll records and Internal Revenue Service statements. The determination of FTEs is not to include those persons who are consistently treated by the employer as consultants or independent contractors for all such purposes, and for whom the employer fills out IRS Form 1099, provided there is no issue as to whether this treatment is *bona fide.* For any persons who are not consistently treated as either employees or consultants/contractors, the facts and circumstances must be examined in accordance with the common law test for an employment relationship with the employer. The common law test is the required standard for this analysis, since the Act does not prescribe a standard and, as a matter of law, the common law test applies. See, *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318 (1992); *Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730 (1989). The Department notes that all H–1B workers are necessarily employees within the meaning of the INA, and therefore must be included in both the numerator and the denominator of the dependency determination.

Similarly, the Department is of the view that it is not necessary for an employer to compute an average number of ''employees'' based on a series of quarterly tax statements. The Department agrees with the AFL–CIO that it would be desirable to foreclose the possibility of potential abuse of the program by employers who have significant fluctuations in the numbers of ''employees'' and who might time their LCA submissions based on tax statements with ''employee'' numbers supporting non-H–1B-dependency status. However, the Department has concluded that the imposition of an averaging/computation burden on all employers would be an inappropriate means of foreclosing the possibility of an unknown—but presumably very small—number of abusive filings. The Department cautions that, where it appears that an employer has manipulated its employment numbers to avoid dependency just prior to filing LCAs or H–1B petitions, the Department will examine the situation closely and utilize an employer's normal payroll. Further, with regard to the use of quarterly tax statements, the Interim Final Rule also clarifies that after determining which workers are ''employees,'' it will be necessary in determining FTEs to separate those employees who are part-time, do a separate FTE determination for those workers, and then add those FTEs to the number of full-time workers to determine total FTEs.

One commenter (ITAA) objected to the Department's proposal to count all H–1B nonimmigrants (both full-time and part-time) in the numerator of the equation to calculate H–1B-dependency. ITAA suggested that, for fairness and mathematical accuracy, the regulation should be written so that part-time H–1B workers are counted in the numerator in the same manner as part-time employees are counted in the denominator. Similarly, AILA argued that whether the regulation uses a simple head count or a calculation of FTE taking into consideration part-time hours, there should be consistency in counting workers for both the numerator and the denominator.

The Department has considered these suggestions, but has concluded that they cannot be accepted because the statutory language requires the difference in counting as described in the NPRM. The ACWIA prescribes the computation of ''full-time equivalent employees'' for the entire workforce, and explicitly requires that the number of FTEs be compared to the number of ''H–1B-nonimmigrants'' (with no distinctions as to full-time or part-time status).

Nine commenters addressed the matter of determining what constitutes a full-time worker for purposes of computing the employer's FTEs. Three commenters (AILA, Hammond & Associates (Hammond), and Latour) recommended that ''full-time'' be determined by individual employers consistent with their standards and business practices. Five commenters (ACIP, Intel Corporation (Intel), Kirkpatrick & Lockhart (Kirkpatrick), Rapidigm Immigration Services (Rapidigm), and American Occupational Therapy Association (AOTA)) supported the NPRM proposal that the employer should use its payroll and tax records to count the number of workers it employs on a full-time basis, using some standard. However, these comments differed with regard to the appropriate benchmark for full-time hours (*e.g.,* 35 hours per week, 32 hours or more per week, 21 hours or more per week). Two commenters (AILA and Hammond) asserted that employers may be able to document that full-time work is a figure less than the 35 hours per week suggested in the NPRM. Two commenters (AOTA and American Physical Therapy Association (APTA)) suggested that the Department set a numerical standard for part-time employment and that all employees with hours above that standard be considered full-time.

After fully considering the comments, the Department has concluded that the NPRM proposed definition of full-time will be adopted since it provides considerable flexibility for employers while incorporating a reasonable and appropriate baseline standard. Thus, the Interim Final Rule, at § 655.736(a)(2)(iii)(A), provides that the employer may use its own standard for full-time employment, which the Department will accept provided that the standard is no less than 35 hours of work per week. The Department believes that this is a reasonable approach, that it is easily understood and applied, and that 35 hours as the minimum for full-time employment is a well-established labor standard, utilized by the Bureau of Labor Statistics for survey purposes. See, *e.g.,* the definitions of the terms utilized in U.S. Bureau of Labor Statistics, Employment and Earnings. This standard is the equivalent of seven hours of work per day, five days per week, with non-working time for lunch each day. The Rule also provides that, where the employer has no standard for full-time employment, the Department in an enforcement action will use the standard of 40 hours of work per week (the Fair Labor Standards Act standard).

Four commenters (ITAA, ACIP, AILA and SHRM) expressed concerns as to the need for and the methodology of aggregating part-time workers into FTEs for purposes of determining the employer's H–1B-dependency status. ACIP and SHRM suggested that no such aggregation or ''conversion'' should be required, and stated that the method proposed by the Department was burdensome, complex and unworkable. ITAA stated that the proposal would be burdensome because many part-time workers are salaried with no records of hours of work. AILA considered the proposed method to be burdensome, and offered its own proposed formula for calculation of FTEs—each full-time worker, each FLSA-exempt worker, and each part-time worker working more

than 20 hours per week would equal one FTE; part-time workers who work fewer than 20 hours per week and are not FLSA-exempt would be aggregated through an average of hours as proposed in the NPRM.

The Department recognizes that, for some employers, the aggregation of part-time workers into FTEs may be somewhat burdensome. However, in light of the clear statutory language, the Department is unable to dispense with the concept of ''full-time equivalent employees,'' which is not a mere head-count of workers in the workforce (number of employees) but instead is a calculation of the number of full-time workers needed to perform the total work done by the total workforce (number of ''equivalents'' of full-time workers). Congress explicitly prescribed the use of the FTE concept at three points in the ACWIA, and must be presumed to have used the concept with an understanding of its established meaning. The concept of ''full-time equivalent employees'' is well-known to Congress. For example, Congress considers FTEs each year in the enactment of the appropriations of operating funds for the Federal agencies, which submit their budget requests based on the Office of Management and Budget definition of FTEs:

''* * * the total number of regular straight-time hours (*i.e.,* not including overtime or holiday hours) worked by employees divided by the number of compensable hours applicable to each fiscal year. Annual leave, sick leave, compensatory time off and other approved leave categories are considered to be ''hours worked'' for purposes of defining full-time equivalent employment that is reported in the personnel summary.''

Office of Management and Budget, Circular No. A–11 (1998), p. 31. As stated in the NPRM, the Department considered but rejected the comprehensive computation that would be required under the OMB definition (*i.e.,* totaling all hours worked by all workers, and dividing by the normal standard of hours of work for a full-time worker); this approach could be extremely burdensome to employers. But the Department recognizes that some computation of FTEs—including a computation regarding part-time workers—was mandated by the ACWIA and must be reflected in the dependency computation.

In an effort to minimize the burden to employers, as suggested by SHRM and other commenters, the Department has modified its proposed method for the aggregation or conversion of part-time workers into FTEs. The Interim Final Rule, at § 655.736(a)(2)(iii)(B), provides the employer a choice between two methods. First, the employer may count each part-time worker (*i.e.,* each employee working less than a full-time schedule) as one-half of an FTE. This method requires no records of hours of work and no complex calculations; the employer simply counts the number of part-time workers and divides by two to arrive at the number of FTEs represented by its part-time workers. In the alternative, the employer may total the hours worked by all the part-time workers in a work week and divide that total by the standard hours for full-time employment (*e.g.,* 40 hours). The Department notes that the use of this alternative does not require the employer to have hours-worked records for its part-time workers; rather, the employer may use any reasonable method of approximating the average hours worked by its part-time workers, such as their standard work schedule.

One commenter (AILA) suggested that the regulations enable employers to avoid any complicated calculation whatsoever where it is ''readily apparent'' that an employer is not H–1B dependent based on the make-up of its work force. AILA stated that an employer should be allowed a ''safe harbor'' when a quick, simple and straightforward calculation shows non-dependency. It suggested a calculation: the number of H–1B workers would be divided by the number of full-time employees; if the result is less than 15 percent, no further or detailed computation would be necessary, but if the result is greater than 15 percent, the employer would calculate its FTEs to determine its H–1B-dependency status. Rapidigm and ACIP agreed that a test should be provided for ''readily apparent'' status.

The Department agrees with the suggestion that there should be a simple method for determining whether the employer's status as either H–1B-dependent or non-dependent is ''readily apparent.'' The NPRM stated the Department's belief that, for most employers, dependency status would be ''readily apparent'' and, therefore, they would not need to make a calculation of their FTEs in order to be able to attest to their status. The Department, in § 655.736(c)(1) and (2) of this Interim Final Rule, is adopting a provision which requires no computations by the employer with ''readily apparent'' status, and is also adopting the AILA-recommended 15 percent ''snap shot'' test as the means for an employer with borderline status to determine whether it must engage in the full computation of the number of FTEs in its work force in order to determine its H–1B-dependency status. The ''snap shot'' test allows small employers (*i.e.,* those with 50 or fewer employees in the U.S.) to simply compare their work forces to the definition for H–1B-dependent employer, counting all employees rather than computing FTEs. If such an employer appears to be H–1B-dependent based on the snap shot test, then the employer which believes itself to be non-dependent should make a complete computation. The snap shot test provides that large employers (*i.e.* those with 51 or more employees in the U.S.) may make a quick appraisal of the proportion of H–1B nonimmigrants in their work force. Where the number of H–1B workers divided by the number of full-time employees is greater than 0.15, any employer which has reason to believe it may not be H–1B-dependent (for example, because of the number of part-time workers in its work force), must calculate its FTEs. The employer whose ''snap shot'' clearly shows it is not H–1B-dependent, as well as any employer which admits it is dependent, may file its LCA(s) reflecting that status (as described in the following discussion), without engaging in further computations. In the event of an enforcement action, the employer may be required to verify its ''snap shot'' results and its H–1B-dependency status through available records (as discussed in IV.B.3 below).

2. When Must an Employer Determine H–1B Dependency? (§ 655.736(g))

The ACWIA definition of ''H–1B-dependent employer'' and the new LCA attestation elements that are required of such an employer do not clearly define the timing of the dependency determination. The questions therefore arise: When must a new LCA be filed and what obligations, if any, does an employer have if its dependency status changes?

The Department, in the NPRM, expressed concern that if H–1B-dependent employers are permitted to continue to use LCAs certified before this Rule is effective, they could avoid any application of the law's new attestation provisions (which are applicable only to LCAs filed after the issuance of this Rule and before October 1, 2003 (the ''sunset'' date as extended by the October 2000 Amendments). An LCA is ordinarily valid for up to three years from its date of certification by ETA and can provide for numerous H–1B nonimmigrants to be hired during that period. Thus an employer could use a previously-certified LCA to bridge the entire period during which the new LCA attestation elements would be required. H–1B-dependent employers could, in effect, disregard all of the new

worker protection provisions, with the potential effect of nullifying these provisions.

The Department proposed that, by operation of the regulation, any current LCA(s) would become invalid for an employer that is or becomes H–1B-dependent, for purposes of any future H–1B petitions (including extensions). The employer's previously certified LCA(s) would continue to be valid, however, and the obligations under that LCA(s) would continue with respect to any petitions filed before the effective date of these regulations (*i.e.,* pending petitions would not be affected). Thus, the Department proposed that the regulation would require that all H–1B-dependent employers with existing LCAs file new LCAs if they wish to petition for any new H–1B nonimmigrants or seek extensions of any existing H–1B visas on or after the effective date of the Rule. Likewise, the Department proposed that the regulation would require all non-dependent employers that experience a change of status (becoming H–1B-dependent) to file new LCAs if they wish to petition for new H–1B nonimmigrants or seek extension of existing H–1B visas after the date they become H–1B-dependent. The proposal contemplated that non-H–1B-dependent employers whose status remained unchanged would not be required to file new LCAs.

The NPRM discussed the timing and frequency of employers' determinations of their H–1B-dependency or non-dependency status. The Department recognized that the make-up of an employer's workforce—and, thus, its H–1B-dependency status—could change significantly over time. The Department therefore suggested that an employer's status would need to be redetermined at appropriate times, and reflected in the employer's actions, in order for the new LCA obligations to be appropriately implemented. The Department proposed that an employer would be required to make a determination of its status not just prior to or on the effective date of the regulation, but also when it files any new LCA or H–1B petition (including extensions) after that date. Thus a non-dependent employer (*i.e.,* one which is not H–1B-dependent on the effective date of the Interim Final Rule or at the time an LCA is filed) would have a continuing obligation to ensure that, if it later becomes dependent and wishes to file new H–1B petitions (or seek extensions), it takes steps necessary to comply with the requirements of the law and the regulation. The NPRM further stated that an employer which is H–1B-dependent and files an LCA indicating that status, but later becomes non-dependent, would not be required to comply with the attestation elements applicable to dependent employers with respect to any H–1B workers during any period in which it is not dependent.

The Department also described alternative approaches to the proposed timing of dependency determinations, such as having the dependency update determined on a set, regular basis (*e.g.,* each calendar quarter) or limiting the LCA's validity period to some period shorter than the current three years (*e.g.,* 90 or 180 days), with a new dependency status determination made in connection with each new LCA.

The NPRM explained that the Department believed that, as a practical matter, the continuing obligation of the non-dependent employer to ensure that its dependency status has not changed would not place an undue burden on employers. For most program users, their status as non-dependent would be readily apparent and they would have no obligations to perform the full computations or to file new LCAs. (*See* discussion of ''readily apparent'' status in IV.B.1, above).

The statements by Senator Abraham and Congressman Smith in the *Congressional Record* are silent regarding the effect of the ACWIA provisions on existing LCAs. Both Senator Abraham and Congressman Smith simply state, regarding the effective date, that the provisions are effective on the date the Secretary issues final regulations to carry them out. 144 Cong. Rec. S12752 (Oct. 21, 1998); 144 Cong. Rec. E2325 (Nov. 14, 1998).

Sixteen commenters responded to various aspects of these NRPM proposals.

Eleven commenters addressed the Department's proposal to invalidate the LCAs of H–1B-dependent employers for purposes of petitions for new or extended visas. Four commenters (Senators Abraham and Graham, AILA, ITAA, and Baton Rouge International, Inc. (BRI)) challenged the Department's authority to invalidate LCAs already in effect. Senator Abraham stated that Congress specified in ACWIA that the new attestation requirements would apply only to LCAs filed on or after the date of the Department's final regulations. Three of these commenters (BRI, AILA and ITAA) also asserted that the proposed rule would be invalid as retroactive rulemaking.

An attorney (Hammond) acknowledged the Department's reasons for its proposal as legitimate and did not challenge the Department's authority to invalidate existing LCAs; but questioned the proposal because of the paperwork and processing burden on the Department and the INS. Hammond recommended that, instead of invalidating the previously-certified LCA, the Department and INS should require an affidavit, mirroring the dependent employer attestations, on any new petitions filed using ''old'' LCA forms. Hammond further recommended that the proposed invalidation of existing LCAs be phased in over a six-month period. Another attorney (Latour) acknowledged that while the proposal was burdensome, there seemed to be no attractive alternative to requiring H–1B-dependent employers with existing LCAs to file new LCAs for the purpose of filing new H–1B nonimmigrant petitions. Another commenter (Simmons, Ungar, Helbush, Steinburg & Bright (Simmons, Ungar)) also recommended a phase-in period and suggested a three- to six-month window for filing new LCAs; this commenter expressed concern that the requirement of immediate new LCAs would lead to significant disruptions in ongoing critical projects.

The Department has carefully considered the views of the commenters who asserted that the proposed rule would be contrary to the meaning of the statute or invalid as retroactive rulemaking, but disagrees with their conclusions. To the contrary, the proposed rule is not inconsistent with the language of the ACWIA. The Act makes the new attestation elements apply to ''an application filed on or after the date final regulations are first promulgated to carry out this [provision], and before October 1, 200[3]'' (the ''sunset'' date having been extended from 2001 until 2003 by the October 2000 Amendments). The ACWIA is silent regarding the timing of the employer's determination of its dependency status or the effect of the ACWIA on previously certified LCAs, leaving a gap to be filled by these rules. *See Chevron* v. *Natural Resources Development Council,* 467 U.S. 837, 842–43 (1984). The proposed rule would require an employer to make that determination when and if it seeks access to new H–1B workers or wishes to extend their stay in the United States; if the employer then determines it is H–1B-dependent, it would be required to file a new LCA. Under the ACWIA language, such new LCAs would be subject to the new attestation elements.

Given the significance of the new attestation requirements in the ACWIA, we believe it is reasonable for the Department to avoid the nullification of these requirements by issuing regulations which require employers to make dependency determinations if they choose to file new H–1B petitions

or apply to extend existing visas after the effective date of these regulations. *B–West Imports, Inc.* v. *U.S.,* 880 F. Supp. 853, 863 (Ct. Int'l Trade 1995), aff'd, 75 F.3d 633 (Fed. Cir. 1996). In this connection, the Department notes that it has reviewed LCAs filed since the effective date of the ACWIA, and found that many employers filed LCAs for numerous H–1B workers. A list of the 20 users in each region which filed LCAs for the greatest number of aliens in the period October 1, 1998 through May 31, 1999, showed the average number of workers per LCA ranging from one worker per LCA to more than 500 per LCA. Out of the top 20 users in Region I (Boston), for example, only three employers averaged less than 10 workers per LCA, while eight averaged 50 or more per LCA, of whom four averaged 100 or more. This data supports the Department's view that—given the limited time these recruitment and non-displacement obligations will be in effect and the three-year validity period of the LCAs—this requirement is necessary to effectuate the worker protection provisions applicable to H–1B-dependent employers and willful violators.

It is also the Department's view that the regulation would not be invalid as retroactive rulemaking. The rule does not create a new obligation, impose a new duty or attach a new disability with respect to transactions already taken. *See, Landgraf* v. *USI Film Products,* 511 U.S. 244, 269 (1994). The regulation does not change the standards or consequences, or require adjustments or corrections, for completed transactions. The H–1B visas under previously certified LCAs remain valid and in effect, and the prevailing wage and other obligations under that LCA continue to apply to those visas. New LCAs are required only for H–1B-dependent employers and willful violators filing new H–1B petitions or applications for extension of existing visas. *See Association of Accredited Cosmetology Schools* v. *Alexander,* 979 F.2d 859, 865 (D.C. Cir. 1992). Nor does the rule impair vested rights. *See Landgraf* v. *USI Film Products,* 511 U.S. at 269–71. Furthermore, the LCA itself is only the first step by an employer in applying for H–1B visas, and for workers in seeking to enter the United States. Even after the LCA is certified, the employer has no vested right to hire H–1B nonimmigrants; the nonimmigrant in turn has no vested right, once the petition is granted, to obtain a visa or to enter the country. *Joseph* v. *Landon,* 679 F.2d 113, 115 (7th Cir. 1982). See *Pine Tree Medical Associates* v. *Secretary of Health and Human Services,* 127 F.3d 118, 122 (1st Cir. 1997).

The Department wishes to emphasize that an LCA certified prior to this Rule will continue in effect for the vast majority of program users who are not H–1B-dependent. Furthermore, such LCAs will remain in effect for H–1B-dependent employers and willful violators except that they may not be used to support new H–1B petitions or applications for extension of status. Thus, for example, the prevailing wage rate and obligation under the ''old'' LCA would remain in effect even for H–1B-dependent employers and willful violators with respect to any H–1B workers supported by the ''old'' LCA. A new LCA (and new wage rate) would be necessary only where an H–1B-dependent employer wants to petition for new workers or request extensions for existing workers (who would typically require a new LCA in any event).

The Department has also considered the suggestion by some commenters that the requirement of new LCAs be phased in over some period of weeks or months following the issuance of this rule. However, the Department is confined by the ACWIA language prescribing that the obligations are effective for LCAs that are filed on or after the date this rule is promulgated. Further, the Department is aware that the new attestation elements will be effective only with respect to LCAs that are filed during a relatively short period (*i.e.,* until October 1, 2003, the ''sunset'' date as extended by the October 2000 Amendments). We have, therefore, concluded that it would be contrary to the language and purposes of the legislation to provide an additional phase-in period which would have the effect of restricting an already limited period for the application of the new attestation elements. The Department notes that employers have already had considerable time to prepare for the ACWIA provisions since their enactment on October 21, 1998, and the publication of the NPRM on January 5, 1999.

The Department understands that INS plans to modify its petition form to obtain information about a petitioner's H–1B-dependency status, and in its adjudication of H–1B petitions, will review LCAs filed by dependent employers to ensure that the LCA reflects the employer's status as set forth on the petition. Thus, it is the Department's expectation that if a dependent employer seeks to support an H–1B petition with an LCA which does not identify itself as H–1B-dependent and attest to the new attestation elements for dependent employers, INS will advise the employer that it must obtain a new LCA.

Nine commenters addressed the Department's proposal concerning the timing or frequency of the employer's determination of its H–1B dependency status.

One commenter (AILA) supported the Department's proposal that the dependency determination be made each time an LCA is used by the employer in support of an H–1B petition. Four commenters (AFL–CIO, AOTA, APTA, and AILA) supported requiring that employers determine dependency when filing an LCA.

Five commenters (Intel, Computec International Resources (Computec), ACIP, SemiConductor Industry Association (SIA), and ITAA) objected to the Department's proposal requiring employers to make dependency determinations when filing an LCA or H–1B petition; they viewed the requirement as unrealistic and burdensome. SIA and ITAA suggested annual dependency determinations. ACIP suggested that determinations be made annually or at the time there is a large increase in H–1B staff. Intel and Computec suggested that dependency be determined on a quarterly basis, and Intel stated its view that an employer's dependency will not change from one filing to another.

Having considered the varying views of the commenters, the Department has concluded that the proposed approach is appropriate in that it achieves the purposes of the Act while not imposing an unreasonable burden. No employer will be required to make a determination of its dependency status unless it wishes to file petitions for new workers or to seek extension on the visas of existing workers (*i.e.,* the determination is required only when an employer seeks access to H–1B workers, on either new visas or extended visas—which typically require a new LCA in any event). The Department believes that the vast majority of the employers using the H–1B program are non-dependent and that for both dependent and non-dependent employers, their status would be readily apparent (see discussion of ''snap shot'' determination in IV.B.1, above). Further, the Department anticipates that the status of most employers would be unlikely to change, whether that status be dependent or non-dependent. At the same time, however, the Department considers the new attestation provisions to be important and believes the purposes of these provisions cannot be satisfied if an employer is permitted to continue to use an LCA for non-

dependent employers if its status changes.

Three commenters responded to the Department's alternative suggestion that the validity period of an LCA might be shortened from the current rule's maximum period of three years. The AFL-CIO recommended that the LCA validity period be shortened to six months. AOTA recommended a quarterly (three-month) filing requirement. BRI opposed the reduction of the LCA validity period, asserting that quarterly or semi-annual LCAs would overburden and backlog administering agencies.

The Department considered the comments pertaining to the possibility of reducing the validity period of the LCA. However, we see no advantage that would outweigh the significant increase in the burden on employers and government agencies due to the repeated submissions of new LCAs upon the expiration of short-lived LCAs. Therefore, the Interim Final Rule does not make any reduction of the LCA validity period of three years.

After consideration of all these comments, the Interim Final Rule, at § 655.736(c) and (g), adopts the proposal that H–1B-dependent employers be required to file a new LCA if they wish to file new H–1B petitions, or extensions of status, after the effective date of the regulations. In addition, if a non-dependent employer becomes dependent after the effective date of the regulations and wishes to file new H–1B petitions or extensions of status, it must file a new LCA attesting that it is dependent and agreeing to the new attestation requirements for H–1B-dependent employers. Thus an employer must consider and attest to its dependency status each time it files a new LCA; similarly, as discussed below, an employer seeking to file a new H–1B petition, or seeking an extension of status, must use an LCA in support of the petition that accurately attests as to its dependency status at the time it files the petition. An H–1B employer that changes its status to non-dependent but wishes to petition for additional H–1B nonimmigrants or extensions of stay using an approved ''dependent'' LCA continues to be bound by the dependent-employer attestation requirements unless it files a new LCA attesting to its non-dependency.

3. What Kind of Records are Required Concerning the H–1B Dependency Determination? (§ 655.736(d))

The Department, in the NPRM, discussed the issue of what records, if any, the employer would be required to create and retain concerning its dependency determination(s). The Department proposed that documentation be created and retained only when an employer's non-dependent status is not readily apparent. On the other hand, the Department also proposed that if the employer's dependency status is ''readily apparent'' (either dependent or not dependent), no records would need to be made or retained. The Department sought comments on whether there should be an explicit standard for when the employer's status is ''readily apparent.'' (See discussion of ''snap shot'' determination in IV.B.1, above). Further, the Department proposed that if the employer's dependency status changes, the employer should retain records in the public access file reflecting the change and, if the change of status is from dependent to non-dependent, the public access file must show the underlying computation. Finally, the Department requested comments on the feasibility and appropriateness of the regulation specifying that no records are required if the dependency determination could be made from publicly available records and, if so, what public records are generally available for this purpose.

The Department received 13 comments on these proposals.

Kirkpatrick & Lockhart, Latour and AOTA supported the NPRM proposals. The AFL-CIO, Rubin & Dornbaum, and White Consolidated Industries suggested that all employers be required to document not only their status but also the underlying mathematical computations. AILA stated that the Department should not require recordkeeping of the calculation by any employer, but especially it should not require non-dependent employers to retain dependency documentation and keep it in public access files. Intel and ACE agreed with the proposal that no record needs to be kept where the employer's non-dependent status is readily apparent. ITAA suggested that the regulation should prescribe a bright line test to show when employers are required to create and maintain records, and that no records at all should be required of employers that concede that they are H–1B-dependent. ACIP suggested that the Department should advise employers how long they are to keep records and should allow employers five working days to produce their dependency status records in the event of an investigation. Rapidigm suggested that the records used to make the dependency determination should be made accessible to the Department on a quarterly basis. Computec suggested that an employer be required to keep dependency records in only one location (apparently based on the misunderstanding that public access files must be maintained in numerous locations).

Having taken into consideration all of the commenters' varied views pertaining to the creation and retention of documentation regarding the determination of dependency status, the Department has concluded that modification of the proposal is appropriate to achieve the purposes of the ACWIA while avoiding unnecessary burdens on employers. The Department first notes that for the vast majority of employers using the H–1B program, their dependency status (either non-dependent or H–1B-dependent) will be obvious and stable and they, therefore, will have no documentation burden; a small number of employers with ''borderline'' status or changing status will be required to document their determinations of status and/or their changes of status, but the documentation burden will be minimal.

The Interim Final Rule requires that employers determine their dependency status the first time after the Rule is in effect that they file an LCA or an H–1B petition or extension under an existing LCA. Employers may use the ''snap shot'' test to determine if their dependency status is readily apparent, but must do the full computation if the number of H–1B workers divided by the number of full-time workers in their workforce is more than 0.15, and must retain a copy of the full computation if they then conclude that they are not H–1B-dependent. The regulations do not require that an employer do the computation, but do require that the employer consider its status, each time thereafter that an LCA or H–1B petition is filed; the employer must attest as to its status on each LCA, and may not use a non-dependent LCA to support new H–1B petitions or requests for extensions if its status changes from non-dependent to dependent. Furthermore, we understand that employers will be required to indicate their status on each H–1B petition or extension filed with INS. Thus it is important that employers remain cognizant of their dependency and do a recheck of their dependency status if the make-up of their work force changes sufficiently that their status might possibly change.

If an employer changes status from dependent to non-dependent, the employer will be required to retain a copy of the full computation of its status. The Interim Final Rule also requires a recheck of dependency (whether the ''snap shot'' test or the full

computation) if there is a change in corporate status, as discussed in IV.A, above. In addition, the Rule provides that if an employer utilizes the IRC single-employer test to determine dependency, it must maintain records documenting what entities are included in the single employer, as well as the computation performed (whether the ''snap shot'' or full computation), showing the number of workers employed by each entity who are included in the numerator and denominator of the equation. It is important that such employer retain copies of the records necessary to support the computation or be able to provide such records in the event of an investigation, since the records may not all be under its control. Finally, if an employer includes workers in its computation who do not appear as employees on its payroll, the employer must keep a record of its computation (whether the ''snap shot'' or the full computation) and be able to substantiate its determination that the workers are its employees.

The Department has concluded that it is not necessary, however, to include either the computations or a summary of the computations in the public access file. The Department believes that the notation on the LCAs as to dependency status constitutes the information necessary for the public. In addition, the Interim Final Rule, at § 655.736(d)(7), requires the employer to include a notation in the public access file listing any other entities which are considered to be part of a ''single employer'' for purposes of the dependency determination. Further, all employers are required to retain copies of H–1B petitions and requests for extensions filed with INS and to make petitions and payroll records available to the Department in the event of an investigation.

The current regulation contains guidance that meets the concerns of some commenters pertaining to location of public access files and the length of time that records must be retained. Section 655.760(a) directs the employer to make a public access file available in either of two locations (its principal place of business in the U.S. or at the worksite) and describes the required contents of the file. The regulation does not mandate a separate file for each H–1B worker or for each LCA. If the employer maintains one public access file for all of its LCAs, documentation specific to an LCA should be attached to the respective LCAs in the file; where documentation is common to all LCAs, only one document need be retained in the file. The record retention period is set forth in § 655.760(c), which has been clarified to require that records be retained for one year beyond the last date on which any H–1B nonimmigrant is employed under the LCA or, if no nonimmigrants were employed under the LCA, one year from the date the LCA expired or was withdrawn. The regulation further requires that payroll records be retained for a period of three years from the date(s) of the creation of the record(s). If there is an enforcement action, records shall be retained until the enforcement proceeding is completed.

With respect to the suggestion that the regulations allow employers five working days to produce records as to dependency status, the Department believes that such a provision in the regulations is unnecessary. Wage-Hour district offices commonly make appointments with employers before an investigation commences, thereby allowing employers time to produce necessary records. For employers who are required to make and retain computations of their dependency status, the Department would anticipate that the computations would be provided promptly to Wage-Hour. Wage-Hour will allow employers reasonable time to gather back-up documentation needed to support the computation, or for Wage-Hour to make the computation if none has been made by the employer, taking into consideration the fact that the statute provides that the investigation is to be completed within 30 days.

4. What Information Will Be Required on the LCA Regarding an Employer's Status as H–1B Dependent? (§ 655.736(e))

The Department proposed in the NPRM that the revised attestation form (LCA), at a minimum, would require that every employer which is H–1B-dependent at the time it files an LCA, affirmatively acknowledge its status and obligations by checking a box on the LCA attesting to its dependency and its compliance with the additional attestation requirements concerning non-displacement and recruitment of U.S. workers. With respect to an employer which is not H–1B-dependent at the time it files an LCA, the NPRM set out three alternatives for the LCA form:

1. The employer would expressly attest that it is not H–1B-dependent and that if it later becomes dependent, it will comply with the additional attestation requirements; or

2. The employer would not have to attest that it is not dependent, but the LCA would clearly state—and by signing the form the employer would agree—that the employer is required to comply with the additional attestation requirements if it does become dependent; or

3. The employer would not have to attest that it is not dependent, but the LCA would clearly state that it could not be used in support of any H–1B petition filed after the employer became dependent.

The NPRM included a draft revision of the LCA form, which included a ''box'' for the employer's acknowledgment of H–1B-dependent status but no ''box'' regarding non-dependent status. The draft also included a ''box'' for the employer to indicate that the LCA would be used only for ''exempt'' H–1B workers, as well as a ''box'' for the employer's acknowledgment of a finding of a willful violation or misrepresentation of material fact.

Thirty-two commenters, including 20 members of the general public, responded to the Department's proposals. The majority of commenters endorsed the ''check box'' approach for the LCA and favored the use of an LCA form which clearly reflects the employer's status and obligations. For example, Intel stated that ''[b]y checking a box, it will clearly be evident whether an employer is dependent or non-dependent.'' The majority of commenters (each of the 20 individuals, the AFL–CIO, Kirkpatrick & Lockhart, Latour, the Institute of Electrical and Electronics Engineers (IEEE), and the American Engineering Association (AEA)) suggested that all employers be required explicitly to attest to their status as dependent or non-dependent when filing LCAs. Three commenters (APTA, ITAA, and Cooley Godward) endorsed NPRM proposed alternative 2. BRI favored either option 1 or option 2. ITAA suggested that non-dependent employers should not be required to check any boxes, but should be given separate LCA forms. AILA suggested that an employer intending to use the LCA only for ''exempt'' H–1B workers should be allowed to check a single box indicating that intention and not be required to take any action with regard to determining H–1B-dependency or marking any boxes on the LCA as to dependency status. Several other commenters supported the proposal that the LCA should have a method by which the employer could explicitly designate that the LCA will be used exclusively for exempt H–1B workers. Two commenters (Intel) recommended that employers check one of three boxes, but suggested different approaches than those offered in the NPRM. Intel

suggested that employers be given three ''boxes'': (1) Non-dependent; (2) Dependent filing for exempt workers; and (3) Dependent filing for non-exempt workers. AILA suggested three different ''boxes'': (1) The LCA is used only for exempt workers and no additional attestations are made; (2) The employer is non-dependent and no additional attestations are required; and (3) The employer is H–1B-dependent, the workers sought are non-exempt, and the employer makes the additional attestations. ACIP suggested that separate LCAs be developed: one for non-dependent employers and dependent employers hiring exempt workers, and another for dependent employers and willful violators. With regard to the employer's history concerning finding(s) of willful violations or misrepresentations of material fact, the IEEE urged that there be an additional ''box'' by which the employer could attest to the absence of such finding(s) (the draft form having only a ''box'' to show that there was such a finding).

The Department has reviewed all of the comments and has determined that the proposed regulation and LCA revision will be modified along the lines recommended by Intel. In light of the strong views of the majority of the commenters, the LCA will require that every employer mark a ''box'' to explicitly designate its status as either H–1B dependent or non-dependent. The LCA will also provide a ''box'' by which an H–1B-dependent employer can designate that it will use the LCA only for exempt workers. It is our understanding that if the latter ''box'' is marked, the INS will examine each petition supported by the LCA to determine whether the beneficiary is ''exempt'' (see discussion in IV.C, below). After careful consideration, the Department has concluded that it would not be appropriate or feasible to allow all employers to mark only a ''box'' for exempt workers and then make no further determinations or designations as to dependent status as suggested by AILA and ITAA, because such an approach would impose an unreasonable administrative burden on the INS in examining the exempt status of workers employed by the vast majority of employers which are non-dependent. The Department believes that the burden of determining dependent status under the Interim Final Rule is minimal, especially for the vast majority of employers whose status is readily apparent, and that it is not unreasonable to require such employers to attest as to their non-dependent status.

In the event that an employer's dependency status changes (either to dependent or to non-dependent) after the LCA is filed and the LCA therefore no longer accurately reflects that status, a new LCA designating the new status would have to be filed if the employer wants to seek access to H–1B workers through either new petitions or requests for extensions (see discussion in IV.B.2, above). Similarly, an employer which attests that it will use an LCA only for exempt workers may not use the LCA for non-exempt workers. However, the LCA will provide that in the event an employer violates these provisions—by utilizing an LCA attesting that it is non-dependent when in fact it is dependent, or by utilizing an LCA for non-exempt workers where it has attested that it will only be used for exempt workers—the employer will be bound by the attestation requirements for dependent employers.

5. What Changes Are Being Implemented on the Labor Condition Application Form and the Department's Processing Procedures? (§ 655.720 and § 655.730)

In the NPRM, the Department provided advance public notice of an anticipated change in the existing system for processing LCAs. Such applications were previously required to be submitted by U.S. mail, FAX, or private carrier, to one of 10 ETA regional offices, as delineated in § 655.720. Since March of 1999, the Department has been operating a pilot program involving the automated processing of LCAs. Although the Department encountered a number of technical problems throughout the operation of the national pilot, we believe that these problems have been resolved. Despite these temporary setbacks, the program thus far has generally proven to be successful. Therefore, the Department intends to fully implement the automated processing of all LCAs submitted by employers of H–1B nonimmigrants.

The transition to the automated system will occur on February 5, 2001, the date on which the relevant sections of this Rule (§§ 655.720 and 655.721) become applicable as stated in the DATES provision of this Preamble. Because the new system requires ETA to create appropriate software, obtain necessary hardware (including telephone lines, scanners, and other facilities), and obtain and train new staff, as well as conduct field trials to verify the reliability of the system once it is in place, the Department has concluded that it will not be feasible for the system to be operable before February 5, 2001. This delay in the applicability of the new system will also enable ETA to process all ''old'' LCAs which may be in queue in the current system (including the current FAX-back system) on the effective date of the Interim Final Rule. During the interval between the effective date of the Interim Final Rule (January 19, 2001) and the applicability date of the new system (February 5, 2001), LCAs will not be accepted by FAX but must, instead, be submitted in hard copy. The Department recognizes that this hard copy filing will be an inconvenience to employers, but we anticipate that this short-term inconvenience will be fully offset by the increased efficiency and reliability of the automated system which will be available after February 5, 2001.

On the effective date of this Interim Final Rule, January 19, 2001, the revised version of Form ETA 9035 will become the sole form for use by employers and their attorneys; thereafter, prior versions of the Form ETA 9035 will not be accepted for processing. The redesigned Form ETA 9035 is being published as an appendix to this Rule. Note that Form ETA 9035 no longer contains the full statements of the attestations required by the Act and the regulations. Rather, these statements, together with the instructions for filling out the form, are contained in the new cover pages, Form ETA 9035CP, and incorporated by reference in Form ETA 9035. The employer, through its designated official, is required to read the attestation statements set forth in the cover pages and indicate on the Form ETA 9035 its concurrence with the statements in Form ETA 9035CP.

The revised form is to be completed with a program that will be made available for download from the Department's World Wide Web site at *http://ows.doleta.gov.* For those employers who are unable to or choose not to use the form-fill program to complete the form, a blank hard copy of the form will also be available from any ETA regional office. The hard-copy forms may still be typewritten or completed by hand.

During the interim period as described above, the LCA may be submitted in hard copy by U.S. mail or private carrier. After February 5, 2001, the LCA may be submitted in hard copy by U.S. mail to the ETA Application Processing Center at the P.O. Box address identified in § 655.720(b) of the Interim Final Rule; delivery by private carrier will no longer be allowed because such carriers cannot deliver

items to U.S. Post Office boxes such as the address of the Processing Center. Alternatively, after the automated processing system becomes applicable on February 5, 2001, the LCA may be submitted by FAX transmission to a toll-free 1–800 number (1–800–397–0478), which will route incoming FAXes to an automated servicing center.

The automated processing system will electronically scan the incoming facsimile, extract the information contained in the application, record the information in a database, and make the appropriate determination to certify or to reject the application. LCAs that are mailed to ETA will be electronically scanned and entered into the automated processing system. As under the current manually-operated system, the application will be certified and FAXed (or mailed) back to the submitter if the appropriate boxes are checked, the required information is provided on the form, and the form has been signed and dated by the employer. If the form is incomplete or contains obvious inaccuracies, it will be rejected and sent back to the submitter with an addendum that identifies the deficiencies in the application.

At the present time, the ETA Web Site at *http://ows.doleta.gov* lists the submission date of the LCAs that the computer is currently processing. If the employer has submitted an LCA and has not received a response after a reasonable period of time has elapsed (*e.g.,* seven working days), it is suggested that the employer check the ETA Web Site, and if it indicates a current processing date which is later than the date on which the employer submitted the LCA, either re-submit the application (if using the automated system after February 5, 2001, re-FAXing to the 1–800 number identified above) or call the information number listed on the Web Site. The employer should not, however, submit unnecessary duplicates of an original application (*e.g.,* by FAXing the application to the LCAFAX system and also mailing a hard copy of the application, or by re-FAXing the application before seven days have passed). The Department will provide user support in the form of a help line for employers to call to verify that the system is up and running, and to obtain other information such as the date of receipt of LCAs that are currently being processed by ETA staff designated for the H–1B program. However, given the architecture of the LCAFAX system, it will be technologically infeasible for ETA to verify receipt of a particular LCA.

The Department received 10 comments on the proposed form and automated processing system. Most commenters generally favored the Department's proposal but expressed the desire that it be thoroughly tested before being implemented on a nationwide basis. We believe that the system has had an extensive pilot test. In Fiscal Year 2000 alone (October 1, 1999 through September 30, 2000), the Department processed nearly 300,000 applications using the automated system. Since the inception of the system in March of 1999, each of the two nodes of the system has processed over 200,000 applications. While a number of technical problems have been encountered, the Department is confident that the system should be fully implemented.

Six commenters were critical of the Department for not producing a version of the form-fill program that will run on the Apple Macintosh operating system. The program that was utilized during the pilot test was a Windows-based program that ran only on computers with a Windows operating system. These commenters urged the Department to develop a version of the program that will run on Macintosh computers or, alternatively, to use a platform-neutral format such as Adobe Acrobat. The Department agrees with these commenters and has developed a program to be used to complete the form in a platform-neutral format, Adobe Acrobat. This software will be widely distributed and, as previously stated, will be available for download from multiple locations on the World Wide Web.

One commenter (ACIP) expressed concern that since much of the print on the form is in such a small font, the form may be rendered illegible in the FAX transmission process from the attorney to the employer to the automated processing system.

The Department is aware of this potential problem and has identified technologies that would allow the form to be transmitted via electronic mail which will be included as part of the program. Under this scenario, after the employer's attorney or agent completes the form using the program, the form could then be e-mailed to the employer and printed out for the employer's signature and subsequent FAX transmittal to the automated processing system. Thus, the form FAXed by the employer to the Department would still be an original document. The pilot test has shown that documents other than an original (*e.g.,* a FAX of a FAX) are often unable to be read properly by the system and their submission usually results in either a rejection of the application or a notification that the form was not able to be read by the automated system.

Intel and ACIP stated that the proposed four-page form is impractical to ''post'' to satisfy the employer's obligation of notice to workers. These commenters suggested that the form be redesigned so that all of the information that is required to be contained in the notice (set forth at § 655.734(a)(1)(ii)) appear on the same page.

The Department does not believe this to be practical, given the amount of information that is required to be contained in the notice and the amount of space taken up by those items on the form. However, the Department has modified the proposed LCA form, compressing it to three pages rather than four pages as proposed. The Department is exploring technologies that would allow an employer, in addition to printing the pages of the form itself, print a separate page with those data elements from the form that are required to be contained in the notice. The employer will have a choice of posting the three-page form or another notice containing the required information. Should the Department's efforts to modify the software to enable an employer to print a one-page posting addendum with the requisite data elements from the form prove successful, posting the addendum would also satisfy the notice requirement. The Department notes, however, that the employer is required by the current regulations at § 655.734(a)(2) to provide the entire certified LCA to the H–1B workers no later than when they report to work.

One commenter (ACIP) inquired as to whether the pages of the form may be stapled together or whether the pages must be posted side-by-side. The Department believes that a posting consisting of the pages stapled together would satisfy the notice requirement, provided of course that it is done in such a fashion as to permit interested parties to readily view each page of the form.

Another commenter expressed concern that the proposed form would not permit an employer readily to take advantage of the new provision which permits an employer to satisfy the notice requirement electronically. Notwithstanding the fact that the form itself does not need to be posted electronically—only certain data contained therein—the Department has also identified technologies that allow an employer to directly notify its employees by sending a copy of the application by electronic mail to

similarly employed employees at the place of employment.

The Department has also made a slight modification to the proposed form to allow employers to continue to have the option of expressing the rate of pay as a pay range. This option was omitted from the draft form which appeared with the proposed rule published in the **Federal Register** on January 5, 1999 (64 FR 673). Since 1992, the H–1B regulations have provided that ''[w]here a range of wages is paid by the employer * * *, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.'' (57 FR 1316) This provision, now at § 655.731(a)(2)(vi), remains in effect. Thus, the LCA form that appears with this Interim Final Rule has been modified accordingly.

Several commenters expressed concern that the Department would not devote adequate resources, including personnel and infrastructure, to support the automated processing system. The Department notes that the new system will be supported by the monies allocated to the Department to reduce the processing time of LCAs as part of the $1,000 fee imposed upon employers of H–1B nonimmigrants (*i.e.*, the $500 fee enacted by ACWIA, increased to $1,000 by the October 2000 Amendments). The Department believes that with the supplemental resources it receives as part of that fee account, it will be able to operate the program in an efficient and timely manner, once the system becomes applicable.

The regulations have been modified at §§ 655.720 and 655.730 to reflect the changes in the processing of the LCA, and to require that the revised Form 9035 be either FAXed to the 1–800 number identified above or transmitted by U.S. mail to the ETA Application Processing Center at the address specified in the regulation and on the Form. Revised § 655.720, along with new § 655.721, becomes applicable on February 5, 2001.

The Department cautions employers that the changes being made in the LCA form and the LCA filing and processing system do not modify the substantive obligations of employers concerning their attestations (*e.g.*, wages, notices, strike/lockout) or the necessity for obtaining ETA certification of the LCA prior to employment of the nonimmigrant. In our view, a ''new'' employer which hires an H–1B nonimmigrant from another H–1B employer, pursuant to the October 2000 Amendments' ''portability'' provision, must have a certified LCA to support the visa petition when it is filed and the nonimmigrant begins work

C. What H–1B Workers Would Be ''Exempt H–1B Nonimmigrants''? (§ 655.737)

The ACWIA relieves H–1B-dependent employers and willful violators from the additional attestation elements if the LCA is used only for ''exempt'' H–1B nonimmigrants. In the words of Senator Abraham, ''* * * employers required to include the new statements on their applications are excused from doing so on applications that are filed only on behalf of 'exempt' H–1B nonimmigrants.'' (144 Cong. Rec. S12751 (Oct. 21, 1998)). See also the statement by Congressman Smith, 144 Cong. Rec. E2325 (Nov. 12, 1998).

In addition, for a limited time after the ACWIA's enactment, neither the numerator nor the denominator of the ratio of H–1B nonimmigrants to full-time equivalent workers, used to determine H–1B dependency, was to include ''exempt'' H–1B workers. Because that time will have expired with the promulgation of this Rule, this provision no longer has effect and it is not incorporated in the regulations.

The ACWIA establishes two tests for whether an H–1B nonimmigrant is ''exempt.'' The H–1B nonimmigrant must either (1) ''receive[] wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000,'' or (2) ''ha[ve] attained a master's or higher degree (or its equivalent) in a specialty related to the intended employment''.

In introducing the topic of exempt status, the NPRM noted that the statutory language seems clear. A dependent employer or willful violator is required to attest and comply with the new attestation elements unless the only H–1B nonimmigrants employed pursuant to the LCA are exempt workers. It was the Department's reading of this ACWIA language that if a covered employer used an LCA in support of any nonexempt worker, that employer would be obligated to comply with the new attestations with respect to all H–1B nonimmigrants hired pursuant to that LCA, exempt as well as nonexempt. However, the NPRM noted that the employer would be free to file separate LCAs for its exempt and nonexempt workers. (**Note:** because this issue is closely related to IV.C.4 (''Should the LCA be Modified to Identify Whether it Will be Used in Support of Exempt and/or Nonexempt H–1B Nonimmigrants?''), below, the comments and discussion on this issue will be included in IV.C.4.)

The NPRM also specified that initial determinations of workers' exempt status will be made by INS while adjudicating petitions filed on their behalf by their prospective employers. The Department proposed that copies of the approved H–1B petition, with the INS determination as to exempt status, should appear in the employer's public access file. The Department stated that, in the event of an investigation, considerable weight would be given to the INS determinations of exempt status based on educational attainment. However, if the exemption was claimed based on earnings, the employer would be expected to document that the exempt H–1B nonimmigrant actually received sufficient pay to satisfy the statutory wage ''floor'' of $60,000.

Six commenters responded to these proposals.

The proposal that INS initially determine exempt status when it adjudicates petitions evoked a mixed response. Senators Abraham and Graham stated that the ACWIA does not grant either INS or DOL the authority to prevent approval of a visa on the basis of whether or not an individual qualifies as ''exempt.'' Similarly, AILA questioned the authority of DOL to delegate this review to INS and expressed concern that INS lacks the resources to make timely assessments of this issue; AILA stated that such review is contrary to the nature of the LCA as an employer attestation document, and that a worker's status should be reviewed only pursuant to a DOL investigation. AILA further suggested that DOL should accept an employer's reasonable determination of exempt status, or at a minimum should not assess penalties if the employer's reasonable determination is in error.

Conversely, ACIP, ITAA and Rapidigm agreed that the INS should make the exempt determination and suggested that its determination of educational relevance should be dispositive; ACIP pointed out that employers should first have an opportunity to challenge rejected claims. BRI questioned how INS can make an ''initial'' determination of the exemption status since employers must make the determination at the time the LCA is filed.

It is the Department's understanding that INS will examine the exempt status of any nonimmigrant whose petition is accompanied by an LCA that indicates that it is to be used exclusively for exempt workers. This INS review will not be pursuant to a delegation from DOL. Rather, INS has advised that it considers this review to be an appropriate adjunct to its role in

adjudicating the admissibility of the individual workers, since an LCA for exempt workers cannot validly be used for a worker unless the worker is in fact exempt. INS will not deny a petition on the basis that the worker is not exempt; however, it will require that the information on the accompanying LCA correspond with the characteristics of the worker for whom the petition was submitted. Thus, just as INS verifies that the worker's occupation and the LCA occupation correspond, it will verify that the worker is exempt where the employer has attested that the LCA will be used only to support exempt workers. If INS initially determines that a worker is nonexempt, the employer will be given an opportunity either to submit additional documentation in support of the worker's exempt status or to submit an LCA with no claim of exemption.

The Department anticipates that in most cases, INS will need to do no more than review the stated wage level to ensure that it would equal at least $60,000 per year. Only where the wage standard would not be met will it be necessary for INS to review a worker's educational qualifications. As discussed in IV.C.2 and IV.C.3, below, the Department believes that this determination too can be easily made in most cases, and therefore that INS review of valid exemptions should not ordinarily delay approval of a petition.

The Department in an investigation will ensure that a worker whom an employer attested will be paid more than $60,000 per year has in fact received the required compensation. Only if the employer had so attested and the earnings floor has not been satisfied will the Department determine whether the worker is exempt based on educational attainment (including the field of study). However, where the employer did not attest that a worker would be paid more than $60,000 per year but instead makes its claim of exemption based only on educational attainment, and INS has determined that an H–1B worker is exempt based on the evidence submitted to it of educational attainment, that INS determination will be conclusive unless the Department finds that the INS determination was based on false information.

The Department notes that this ''up front'' review by INS should generally avoid the situation which could arise in DOL enforcement if an employer erroneously determined a worker is exempt based on educational attainment, but DOL later determines the worker is not in fact exempt. In such situations, the employer would face possible penalties for misrepresentation and failure to perform the required attestation elements. DOL cannot agree with AILA's suggestion that the special attestation protections for U.S. workers would not apply where an employer has made a reasonable but erroneous determination as to exempt status. Furthermore, the Department believes that penalties are a particularly important remedy since, as a practical matter, it will often be impossible to cure such violations after the fact. Nor does the Act provide any relief from debarment for a failure to perform the attestation elements regarding displacement of U.S. workers. Debarment and other penalties may be imposed for recruitment violations, however, only where such violations are ''substantial.'' The circumstances regarding the exemption determination, as well as the facts regarding the recruitment performed by the employer, will be taken into consideration in determining whether a recruitment violation is ''substantial.'' The circumstances will also be taken into consideration in assessing civil money penalties and in determining whether an employer has made a misrepresentation in its attestation that the LCA will only be used for exempt workers.

With regard to BRI's question of how INS can make an ''initial'' determination when the employer has already done so on the LCA, the Department clarifies that the term ''initial'' is used to distinguish between determinations made by the INS at adjudication and the occasional determination which might occur during Departmental investigation. It is of course necessary for the employer to make its own similar assessment as to the worker's exempt status prior to submitting the LCA and the worker's petition.

Rapidigm commented that exempt H–1B nonimmigrants should not be included in the ratio in making the dependency determination. The Department notes that the statute imposes a time limit upon the period in which exempt H–1B nonimmigrants are excluded from the ratio (*i.e.,* six months after ACWIA enactment or the effective date of these regulations). Since that time limit has now expired, the determination of H–1B-dependency now must include exempt workers.

Finally, ITAA disagreed with the proposed requirement that employers maintain a copy of the H–1B petitions with the INS determinations of workers' exempt status in the public access file. On further consideration, the Department agrees that because of privacy considerations, these documents need not be included in the public access file. However, the Department believes that it is important for the public to know which workers are supported by an LCA for exempt workers, so that the public will know which workers are not covered by the new attestation elements, and be able to challenge exemption determinations where there is reason to believe the basis for the exemption is invalid. Therefore, employers will be required to include in their public access file a list of the H–1B nonimmigrants supported by an LCA attesting that it will be used only for exempt workers, or in the alternative, a simple statement that the employer employs only exempt H–1B workers. Furthermore, employers will need to retain H–1B petitions and any evidence regarding workers' exempt status (*i.e.,* pay records and evidence related to educational attainment) so that they may be provided to DOL in the event of an investigation.

1. How Would the $60,000 Annual Rate be Determined? (§ 655.737(c))

The ACWIA provides that H–1B nonimmigrants will qualify as ''exempt'' if they receive wages (including cash bonuses and similar compensation) at an annual rate of at least $60,000. Those who receive this level of compensation will qualify as ''exempt'' without satisfying the alternative, educational standard.

In the NPRM, the Department proposed that, to ensure this standard is met, it should be interpreted consistently with the existing DOL regulations for determining if an employer has satisfied its other wage obligations under the H–1B program (20 CFR 655.731(c)(3)). Future (*i.e.,* unpaid but to-be-paid) cash bonuses and similar compensation would be ''counted'' toward the required wage if their payment is assured, but not if they are conditional or contingent on some event such as the employer's annual profits, unless the employer guarantees that the nonimmigrant will receive compensation of at least $60,000 per year in the event the bonus contingency is not met. The Department also proposed that bonuses and compensation are to be paid ''cash in hand, free and clear, when due,'' meaning that they must have readily determinable market value, be readily convertible to cash tender, and be received by the worker when due. The bonuses and compensation for purposes of this ACWIA requirement must be received by the worker within the year for which the employer wants to ''count'' the compensation.

In addition, the Department interpreted the statutory language

''receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000'' to mean that the worker actually receives at least $60,000 compensation in each year. Therefore, the NPRM provided that an H–1B nonimmigrant who, because of part-time employment, receives less than $60,000 in compensation in a year would not qualify as exempt on the basis of compensation, even if his or her hourly wage, projected to a full-time work schedule, would exceed $60,000 in a year.

Ten commenters responded to the Department's proposals on this issue.

The AFL–CIO stated that exempt workers must receive $60,000 in wages annually as an entitlement. The AEA stated that exempt workers should receive $60,000 or higher without including any benefits or bonuses. APTA and AOTA stated that an exempt worker must receive wages equal to at least $60,000, which must not include other employee benefits, such as health insurance, retirement plans, and life insurance.

Senators Abraham and Graham and ACIP contended that the statutory language ''at an annual rate equal to'' requires the Department to permit part-time workers and workers who work only part of the year to be considered exempt if their rate of pay, extrapolated to full-year, full-time work would meet the $60,000 threshold. Latour noted that in the information technology industry, some of the most highly compensated and distinguished experts work part-time for several employers, and therefore suggested that the Department allow the $60,000 minimum compensation to be computed on an hourly, weekly, or other basis. The National Association of Computer Consultant Businesses (NACCB) expressed concern about nonimmigrants who terminate during the year, and therefore suggested the Department interpret the statutory provision to allow a worker to receive $1,200 in wages per week.

The Department concurs in the view expressed by employee representatives that fringe benefits in the nature of health insurance, pension, and life insurance, are not similar to cash bonuses and are not wages within the meaning of the definition of ''exempt H–1B nonimmigrant.'' Therefore benefits will not count toward the required $60,000 level under the Interim Final Rule.

The Department does not concur, however, with the view that the $60,000 minimum compensation requirement may be prorated for part-time employees. Congressman Smith, in describing the legislation prior to its enactment, stated that the additional attestation requirements will apply to H–1B-dependent employers petitioning for H–1B nonimmigrants without masters degrees who ''plan to pay the H–1Bs less than $60,000 a year.'' 144 Cong. Rec. H8584 (Sept. 24, 1998). Later statements in the *Congressional Record* by both principal sponsors of the ACWIA also describe the annual wage standard as firm. Senator Abraham stated: ''An 'exempt' H–1B nonimmigrant is defined * * * as one whose wages, including cash bonuses and other similar compensation, are equal to at least $60,000. * * *'' (144 Cong. Rec. S12751 (Oct. 21, 1998)). Similarly, Congressman Smith stated: ''An 'exempt' H–1B nonimmigrant is defined * * * as one whose annual wages, including cash bonuses and other similar compensation, will be equal to at least $60,000 (and will remain at such level for the duration of his or her employment while under an H–1B visa).'' (144 Cong. Rec. E2325 (Nov. 12, 1998); see also E2324). These statements underscore the statutory objective of ensuring that only highly compensated H–1B workers are exempted on the basis of their compensation. If the workers are not, in fact, highly compensated (*i.e.*, if they do not actually receive wages of $60,000), then this objective is not achieved. Furthermore, allowing a *pro rata* of the $60,000 compensation would necessitate that the employer be able to demonstrate that the part-time worker received an appropriate ''share'' of the annual compensation, based on the portion of a full-time year's work that he/she performed. The Department considered allowing an employer to claim the exemption for workers who would be employed part-time by more than one employer and would earn combined wages of at least $60,000 per year. However, the Department concluded that this approach would not be feasible since an employer would not be able to ensure effectively that workers did in fact receive the statutory wage level of $60,000 and since such an exception could not be effectively administered. The Department notes that part-time employees could still qualify as exempt based on their education, notwithstanding their relatively lower annual compensation.

However, it is the Department's view that H–1B workers who are hired at compensation of at least $60,000 per year, but who are employed for less than a year, will satisfy the statutory requirement if they receive at least $5,000 for each month worked. For example, a worker who resigned after three months would be required to have been paid at least $15,000. Similarly, if the Administrator conducted an investigation and found that a worker had not yet worked a year, the Administrator would determine whether the worker had been paid $5,000 per month, including any unpaid, guaranteed bonuses or similar compensation.

ITAA concurred with the Department's view that unconditional, noncontingent bonuses or other payments may be counted toward the $60,000 compensation to qualify for the exemption. AEA opposed inclusion of bonuses at all, expressing concern that some employers might pay a very low wage and promise a bonus at the end of the year, but never pay the bonus unless ''caught'' before the end of the year. BRI suggested that the Department should allow an annual bonus to be paid on a specified date, contingent only upon compliance with the contract.

Since the ACWIA expressly permits inclusion of cash bonuses, the Department does not believe it has the discretion to exclude them from the required minimum compensation, as suggested by AEA. With regard to the bonus described by BRI, the Department is of the view that such a bonus would be in compliance only where the employer ensures that a worker who terminates employment before the end of the year in fact receives $60,000, prorated for the amount of time worked. An employer's remedy against the worker in such a case of early termination may be afforded by state law relating to the recovery of liquidated damages under the contract, as discussed in IV.J, below.

2. How Would the ''Equivalent'' of a Master's or Higher Degree be Determined? (§ 655.737(d)(1))

Also defined as ''exempt'' for purposes of the additional attestations are H–1B nonimmigrants who have ''attained a master's or higher degree (or its equivalent) in a specialty related to the intended employment.'' The Department proposed to define ''or its equivalent'' to mean a foreign academic degree equivalent to a master's degree or higher degree earned in the United States, and not to allow equivalency to be established through work experience.

The Department received ten comments on this proposal.

The AFL–CIO and AOTA agreed with the Department's interpretation limiting this prong of the exemption to nonimmigrants with a foreign academic degree equivalent to a U.S. master's or

higher degree, with no substitution of work experience. AOTA observed that the occupational therapy profession is moving toward a master level education requirement for entry to the profession, and believes it is reasonable for foreign workers to meet the same education and training as U.S. workers. Because a master's degree will be the benchmark for the physical therapist profession after January 1, 2002, APTA would go even further and require that a nonimmigrant have a doctorate degree to qualify for the exemption. ACIP also agreed with the Department's proposal that an exempt H–1B worker must hold a U.S. master's degree or its foreign academic equivalent.

Other trade associations and employers who commented on this issue generally disagreed with this interpretation. Six commenters (AILA, BRI, ITAA, Rapidigm, TCS, Satyam) contended that the Department's position is inconsistent with statutory language and current INS regulations. AILA asserted that the ACWIA's use of the phrase ''master's degree or equivalent'' rather than ''master's or equivalent foreign degree'' supports the well-established INS procedure of allowing equivalencies to be established through either degree equivalence or work experience in its adjudication of whether an applicant has the equivalent of a bachelor's degree for H–1B admission and whether an applicant has the equivalent of a master's degree for certain second preference employment admissions. Rapidigm and Satyam stated that different ''equivalency'' standards for H–1B admission and exempt status should not apply to the same pool of immigrants. TCS expressed concern that the Department's interpretation would lead to inquiries into the quality of education in foreign countries, rather than the level of education as contemplated by ACWIA; TCS contended further that since all foreign master's degrees are already incorporated under the term master's degree, the ACWIA phrase ''its equivalent'' must refer to something else.

Additionally, this Department requested the views of the U.S. Department of Education regarding this element of the ACWIA. The Department of Education, through its Office of Educational Research and Development, responded to this Department's inquiry.

The Office of Education Research and Improvement (OERI) expressed the general view that ''possession of a master's degree or its equivalent'' referred to master's degrees awarded by accredited United States institutions or degrees granted by foreign academic institutions, which as measured by educators within the United States, are at least equivalent to master's degrees awarded by accredited United States institutions. With regard to nonimmigrants possessing a United States degree, the OERI suggested a three-prong inquiry: (1) Was the awarding institution accredited at the time of the award by an association recognized by the Secretary of Education or is/was the institution a *bona fide* member of the Council on Higher Education Accreditation; (2) was the program of study for which the degree was awarded either included in the Classification of Instructional Program or incorporated by reference from an international program classification; and (3) is/was the program of study related to an occupation classified in the Standard Occupational Classification or an international occupation classification.

The OERI expressed the view that basically the same inquiry should take place where the academic credentials are granted by a foreign educational institution. The OERI recommended that the inquiry begin by determining whether the awarding institution is/was a recognized institution under the laws and policies governing accreditation in the institution's country. It suggested that the second and third prongs of the test could be met by applying the guidelines, recommendations, and practices of the National Council on the Evaluation of Foreign Educational Credentials, a group managed by the American Association of Collegiate Registrars and Admissions Officers. The OERI explained that these standards are utilized by U.S. educators in assessing the *bona fides* of a foreign degree or a program of study abroad and determining their equivalence to U.S. degrees and standards.

The Department is of the view that Congress intended exempt status to apply only to highly qualified employees. The Department therefore believes that Congress did not intend to substitute work experience for education, but rather required the attainment of an advanced academic degree (or the alternative $60,000 wage standard) for dependent employers and willful violators who may hire H–1B nonimmigrants without complying with the new attestation elements. In introducing the ACWIA on the floor, Congressman Smith explained: ''[T]he compromise eases requirements on companies when they are petitioning for workers who have advanced degrees. * * * The point I want to make is that the term 'or its equivalent' refers only to an equivalent foreign degree. Any amount of on-the-job experience does not qualify as the equivalent of an advanced degree.'' 144 Cong. Rec. H8584 (Sept. 24, 1998).

The commenters are correct in noting that the INS regulations they have cited, governing minimal qualifications for H–1B admission, do recognize work experience in lieu of an academic degree. However, the ACWIA employs the phrase ''or its equivalent'' in a subparagraph distinguishing minimally qualified ''nonexempt'' H–1B nonimmigrants from better qualified ''exempt'' workers. ''A master's or higher degree (or its equivalent)'' is one of two higher thresholds provided to draw this distinction. If the educational standard could be satisfied by relevant work experience alone, the wage threshold would serve no independent purpose. The added value of the $60,000 threshold is that it exempts well-compensated workers even if they have not attained a master's or higher degree, or have done so in a specialty not related to their intended employment. The ''work equivalency'' interpretation advocated by employers and their representatives blurs this clear statutory distinction between exempt and nonexempt nonimmigrants.

Moreover, it is the Department's view that its interpretation is fully consistent with the plain language of the statute, especially when contrasted with the language in section 214(i) of the INA, 8 U.S.C. 1184(i), which explicitly authorizes work experience in lieu of a bachelor's degree for admission as an H–1B nonimmigrant. The ACWIA exempts all H–1B nonimmigrants who have attained a master's or higher degree (or its equivalent) in a specialty related to their intended employment—with no suggestion that this requirement can be satisfied with work experience. The Department does not believe it is relevant that the INS regulations concerning admission of immigrants under the second preference employment category treat certain work experience as equivalent to a master's degree. Not only are those regulations unrelated to the H–1B nonimmigrant program, but the statutory language in section 203(b)(2)(A) of the INA, 8 U.S.C. 1153(b)(2)(A), is clearly distinguishable, granting preference to ''qualified immigrants who are members of the professions holding advanced degrees or their equivalent.'' Unlike the specific term ''master's degree'' cited in the ACWIA, the generic term ''advanced degree'' encompasses all post-graduate academic credentials. Consequently, the expression ''advanced degrees or their equivalent'' would seem to be without

meaning if not interpreted to include work experience.

The phrase ''or its equivalent'' in the ACWIA is not without meaning under the Department's interpretation. In fact, it is not uncommon for the titles of foreign degrees to differ from those used within the U.S. educational system, or for the same title to have different educational requirements. Differences in academic nomenclature can create significant confusion for government programs and universities that deal with persons educated abroad. The existence of credential evaluation services and academic guidelines for admission of foreign students to colleges and universities are indications that degree equivalency is not always readily apparent.

There is, however, a readily available source of information concerning degree equivalence. The National Council on the Evaluation of Foreign Educational Credentials (NCEFEC) and the American Association of Collegiate Registrars and Admissions Officers (AACRAO) have developed specific guidance for most countries regarding which education and training credentials are considered to be reasonably similar to corresponding U.S. credentials. AACRAO published these guidelines in 1994 in a publication entitled Foreign Educational Credentials Required for Consideration of Admission to Universities and Colleges in the United States (4th ed), which is widely used by admissions offices and credential evaluation services. These guidelines reflect the prevailing opinion and considered judgment of experienced foreign student admissions officers in U.S. colleges and universities. The Department will use this publication as a guide for determining degree equivalence. The AACRAO publication is available for a fee of $30 and can be obtained by contacting AACRAO Distribution Center, P.O. Box 231, Annapolis Junction, MD 20701, or through their website, *www.aacrao.com/pubsale/grade.html.*

The AACRAO guidelines explain that a Ph.D. entry level document—*i.e.,* the diploma or degree required for entry at the Ph.D. level (equivalent to a U.S. master's degree)—''represents a minimum of one full-time year of study beyond a bachelor's equivalent. The study must also be viewed as advanced as opposed to supplemental.'' For example, post-graduate training to earn a teacher's certificate is considered supplemental rather than advanced, and would not be equivalent to a master's degree. Where documents with the same name are awarded at more than one level, the publication includes parenthetical guidance such as ''earned after a three-year program.''

Because the AACRAO publication identifies academic prerequisites for entry into various levels of U.S. education, it must be used carefully. Three columns of information are provided for each country of origin: level of entry into the U.S. educational system; foreign certificates, diplomas or degrees required for admission at this level; and necessary supporting documentation. The first column displays the levels at which students are normally admitted into U.S. undergraduate or graduate programs. Within the graduate tier, the three levels of admission shown are Master, Ph.D., and Unclassified/Special. Persons entering Ph.D. programs would possess degrees equivalent to a U.S. master's, as set forth in the second column. Persons in the category ''Unclassified/Special'' would ordinarily possess degrees equivalent to a U.S. doctorate (Ph.D.), as set forth in the second column. (Persons whose credentials correspond to the entry ''Master'' currently have the equivalent of a U.S. bachelor's degree, qualifying them to begin master's level study.)

The Department seeks comments on whether it should incorporate the AACRAO publication in the Final Rule for use in determining whether a degree an H–1B nonimmigrant has obtained from a foreign educational institution is equivalent to a U.S. master's degree. In the alternative, employers would be able to present evidence of degree equivalence from a credential evaluation service where there is no foreign degree listed as equivalent to a U.S. master's, or where a worker obtained a degree in the past, and the terminology in the foreign country has changed.

As recommended by the OERI of the Department of Education, the Interim Final Rule requires that the institution from which the worker obtained its degree be recognized or accredited under the law of the country. The Interim Final Rule further provides that where an employer claims an H–1B nonimmigrant is exempt based upon educational attainment (rather than wages), the employer will be required to provide, upon request of INS or DOL, evidence that the worker has received the degree in question, as well as a transcript of the courses taken and grades earned.

3. How Is ''a Specialty Related to the Intended Employment'' Defined? (§ 655.737(d)(2))

The ACWIA specifies that the H–1B nonimmigrant who holds a master's or higher degree (or an equivalent degree) qualifies as ''exempt'' only if that degree is in ''a specialty related to the intended employment.'' The Department proposed that in order for the nonimmigrant's degree specialty to be sufficiently ''related'' to the intended employment to qualify for exempt status, that specialty must be generally accepted in the industry or occupation as an appropriate or necessary credential or skill for the person who undertakes the employment in question. Furthermore, the Department stated that it would give considerable weight to INS determinations concerning the academic credentials of H–1B nonimmigrants who are claimed to be ''exempt'' on this basis.

Six commenters responded to the Department's proposals on this issue.

AILA asserted that there is no statutory authority for the ''appropriate or necessary'' standard and that these terms are very different in that ''related'' does not mean ''necessary.'' AILA suggested that an employer should be able to determine what specialty degrees it considers to be ''appropriate'' and that it should be able to establish the relationship by a variety of means, such as through specific course work, or by showing that it is a standard company requirement and that all others in the same position have the same credentials.

ACIP acknowledged the statutory requirement that the master's degree or equivalent be in a field relevant to the occupation and suggested that due deference be given to an employer's determination that a degree is relevant. ACIP observed that employers are better placed than the government to track evolving occupations, job duties, and degrees. Other commenters (Kirkpatrick & Lockhart, Latour, TCS) went further and urged the Department to defer to an employer's good faith determination of what fields of study are related to the employment in question. One commenter noted that only one quarter of information technology professionals possess a computer science, computer engineering, or MIS degree.

The AFL–CIO suggested that the Department utilize the new North American Industrial Classification System (NAICS) in making the determination that a specialty is related to the employment; it stated that the NAICS includes job qualifications by occupational classification, formulated by the Bureau of Labor Statistics with the input of labor and business.

In addition, two law firms (Kirkpatrick & Lockhart and Latour) expressed the view that DOL should not judge the relevance of the alien's

educational background to their job if that alien is receiving $60,000 or more per year.

The Department agrees that a worker may qualify as exempt by meeting either the salary or educational standard, and is not required to qualify under both tests. However, where the compensation level is not met, the Department cannot simply disregard the statutory requirement that the individual hold a master's or equivalent degree in a specialty related to the intended employment, nor can it automatically defer to an employer's judgment, as some commenters seemed to suggest. The Department considers it appropriate to provide guidance as to the meaning of the statutory requirement. As Congressman Smith stated, ''It is also important to note that the degree must be in a specialty which has a legitimate, commonly accepted connection to the employment for which the H–1B nonimmigrant is to be hired.'' (144 Cong. Rec. E2325 (Nov. 12, 1998)). The Department believes that its proposed standard—that the degree be generally accepted in the industry or occupation as an appropriate or necessary skill or credential—is an appropriate articulation of this requirement, and this standard is adopted in the Interim Final Rule. The Department does not intend to imply that a master's degree in a specific field must be a prerequisite for employment in the occupation in order for a worker to meet the ''related'' requirement for the exemption. On the other hand, the employer's statement of relevance cannot be accepted without substantiation since the employer would have little incentive to consider the relevance of the field in which a master's degree was earned if the occupation does not normally require a master's degree. For example, many employers seeking a systems analyst require a bachelor's degree in computer science, information science, computer information systems, or data processing, but not an advanced degree. In contrast, computer scientist jobs in research laboratories or academic institutions generally require a Ph.D. or at least a master's degree in computer science or engineering. U.S. Bureau of Labor Statistics, 1998–99 Occupational Outlook Handbook. The Department does agree, however, that a field not ordinarily considered relevant to an occupation could be related to a specific job. For example, a master's degree in public health could be a related field for a computer specialist in the health industry.

The Department concurs with the AFL–CIO proposal that an objective standard is appropriate as a guide in determining whether a field is related to an occupation. However, it is the Department's view that the NAICS is not appropriate since it spells out industrial rather than occupational codes. The Department believes that there are two occupational data systems that provide information better suited to the related field inquiry: the U.S. Bureau of Labor Statistics Occupational Outlook Handbook, and 0*NET 98.

The Occupational Outlook Handbook is a well-recognized source of job and career information. Revised every two years, the Handbook describes for about 250 of the most common occupations, what workers do on each job, their working conditions, earnings, and other pertinent information. For each job, the Handbook identifies the training, education, and licensing requirement for the occupation, if any, as well as the educational background desired by employers and the common educational background of persons in the occupation. The Handbook can be purchased from the Government Printing Office in paper, hard cover, and CD–ROM format. Groups of related jobs covered in the Handbook are available for purchase as individual reprints. The Handbook also can be accessed free of charge on the Bureau of Labor Statistics' website, at *http://stats.bls.gov/ocohome.htm.* The Handbook's easy-to-use electronic version can be accessed by specific jobs or occupational clusters.

O*NET 98 was recently developed by the Labor Department, with the input of both labor and business. This user-friendly electronic data system, designed to replace and expand upon the Dictionary of Occupational Titles (DOT), links various occupational classifications to one another and to the Department of Education's Classification of Instructional Programs (CIP). For each of the over 1,100 occupations in this system, an O*NET 98 occupational profile lists the principal fields of study appropriate to that occupation under the heading ''instructional programs.'' O*NET 98 can be purchased on CD–ROM or diskette from the Government Printing Office and can also be downloaded free of charge from the Department's website at *www.doleta.gov/programs/onet.* In addition, like the Occupational Outlook Handbook, O*NET 98 can be accessed over the Internet at any public library.

The Handbook and O*NET 98, in the Department's view, provide useful, objective guidelines for determining whether a specific academic discipline is related to the occupation, i.e., whether a degree in the field is generally accepted in the industry or occupation as an appropriate or necessary skill or credential. The Department will therefore utilize these sources as guides. The Department also will consider other industry studies obtained by employers or the opinions, solicited by the employer, from a bona fide credentialing organization attesting that a nonimmigrant's academic specialty is generally accepted by the pertinent industry or occupation as appropriate or necessary for the employment in question. Employers are encouraged to rely on these sources in determining whether a master's degree (or its equivalent) is in a field related to the job in question.

The Department also seeks comment on whether the Final Rule should incorporate the Occupational Outlook Handbook and O*NET as the primary sources for determining fields of study related to specified occupations. The Department realizes, however, that there may be other instances where a master's degree in a specialty that is not identified in either of these sources still may be recognized by the industry or occupation in question as related to the employment in question. The Department proposes that if an employer chooses not to rely on O*NET or the Occupational Outlook Handbook, or these sources fail to establish the required relationship, an employer seeking to establish such relationship could obtain a report by a credentialing organization that a degree in the field is recognized by the industry or occupation as an appropriate or necessary skill or credential. The Department seeks comment on whether this is an appropriate task for credentialing services, and whether there are other recognized sources of information which can and should be utilized for this purpose—in addition to, or in place of, the sources cited.

4. Should the LCA Be Modified to Identify Whether it Will Be Used in Support of Exempt and/or Non-Exempt H–1B Nonimmigrants? (§ 655.737)

As discussed above, the ACWIA provides that ''[a]n application is not described in this clause [i.e., is not subject to the new attestation requirements] if the only H–1B nonimmigrants sought in the application are exempt nonimmigrants.'' The Department therefore proposed that a dependent employer or willful violator would be required to attest and comply with the new attestation elements unless the only H–1B nonimmigrants employed pursuant to the LCA are exempt workers. If a covered employer used an LCA in support of any nonexempt worker, that employer would be obligated to comply

with the new attestations with respect to all H–1B nonimmigrants hired pursuant to that LCA, exempt as well as nonexempt.

The NPRM stated that the Department considered proposing that employers file separate LCAs for their exempt and nonexempt H–1B workers. However, the Department noted that two different workers might very well both be qualified for the same occupation, but one might be exempt and another nonexempt. Therefore the Department preliminarily concluded that it was not appropriate to restrict an employer's freedom to utilize an LCA for both exempt and nonexempt workers, provided that the employer in such circumstances complied with the additional attestation requirements for all of the H–1B nonimmigrants under the LCA. The Department noted in the NPRM that an H–1B-dependent employer or willful violator would be free to file separate LCAs for its exempt and non-exempt workers, thereby obviating the requirement of complying with the new attestation elements for its exempt workers. Furthermore, the NPRM provided that a dependent employer or willful violator who planned to utilize an LCA only for exempt workers would be required to so attest on the LCA.

Five commenters responded to this proposal.

The AFL–CIO strongly agreed that when exempt and nonexempt H–1B workers are included on the same LCA, the new attestations should apply to both. In its view, it would be illogical for a single document to impose different obligations on the employer with respect to different nonimmigrants supported by the same document. TCS, on the other hand, stated that while it does not itself use a single LCA for multiple workers, DOL should not take away an appropriate exemption when the LCA of an exempt worker also includes nonexempt workers. Rapidigm questioned why dependent employers should be required to submit two LCAs where, under the same circumstances, other employers are permitted to submit just one. BRI suggested that employers have one LCA and check a box to indicate that they will comply with the attestations for nonexempt workers only. ITAA expressed concern that DOL will not be able to handle the increased workload from multiple LCAs.

It is the Department's view that the unambiguous language of the statute relieves dependent employers and willful violators from the special attestation requirements only if the LCA is used only for exempt H–1B nonimmigrants. The Department points out that such employers are not required to submit separate LCAs for exempt and non-exempt workers. However, the Department notes that if an employer attests that an LCA will only be used for exempt employees, but the LCA in fact is used for both exempt and nonexempt workers notwithstanding the employer's attestation, the employer is required to comply (from the beginning of the LCA's effective period) with the special requirements with respect to all workers on the LCA (both exempt and nonexempt).

With regard to concern about the Department's ability to handle the additional volume of LCAs associated with separate applications for exempt and nonexempt workers, the Department estimates that this requirement will affect not more than 150 to 250 employers, with a midpoint of 250. Furthermore, the Department has instituted a new FAX-back system for processing and certifying LCAs, which will help streamline the process.

There were only two comments on the narrow issue of what form the revised LCA should take. The AFL–CIO stated that employers should indicate on the face of the LCA whether or not it will be used in support of H–1B petitions for exempt H–1B workers. BRI suggested that a box should be provided on the LCA which the employer could check, agreeing to comply with the attestations for non-exempt workers only; a separate written statement regarding the worker's exempt status would then be filed with INS.

As noted above, the Department will permit dependent employers and willful violators to utilize one LCA for both exempt and nonexempt workers, but the employer taking this course will be obliged to comply with the new attestation elements for all workers under the LCA. Therefore the Department does not consider it necessary to require such employers to indicate on the form that it will be used for nonexempt workers. However, the language on the LCA form is modified to make it clear that if an employer checks the box attesting that it will only use the LCA for exempt workers, the employer will not be permitted to use the LCA for nonexempt workers. This will permit the employer, the public, and the workers, as well as DOL, to know whether the additional attestation elements apply with respect to the workers under an LCA, and will permit INS to know whether the worker's exempt status must be verified. The LCA form is further modified to state that if an employer utilizes the LCA for a nonexempt worker in violation of its attestation, the employer will have been required to comply with the new attestation elements with respect to all H–1B nonimmigrants supported by the LCA.

D. What Requirements Apply Regarding No ''Displacement'' of U.S. Workers Under the ACWIA? (§ 655.738)

Section 212(n)(1)(E) and (F) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(E) and (F), imposes requirements upon H–1B-dependent employers and employers who have been found to have willfully violated their H–1B obligations that are designed to protect certain U.S. workers from being ''displaced'' by H–1B workers. As noted in the NPRM, such an employer is prohibited from displacing a U.S. worker who is ''employed by the [H–1B-dependent] employer'' and from displacing a U.S. worker who is employed by some other employer at whose worksite the H–1B dependent employer places an H–1B worker (where there are ''indicia of employment'' between the H–1B worker and the other employer). Thus, the prohibition may apply to the dependent employer's own workforce (primary displacement) or to the workforce of another employer with whom the dependent employer does business (secondary displacement). With respect to the dependent employer's own workforce, the prohibition applies during a period beginning 90 days before and ending 90 days after the date of the filing of an H–1B petition on behalf of the H–1B worker. With respect to a customer's workforce, the prohibition applies during a period beginning 90 days before and ending 90 days after the placement of the H–1B worker. As discussed at IV.C, above, the displacement prohibitions do not apply to LCAs that are used only to support the employment of ''exempt'' H–1B workers. See Section 212(n)(1)(E)(ii).

In introducing the compromise ACWIA bill to the Senate, Senator Abraham explained:

''[T]his legislation provides three types of layoff protection for American workers.

''Let me add that throughout the process of working on this legislation, we have been very mindful of the concerns people have that somehow these H–1B temporary workers might end up filling a position where an American worker could have filled the slot. Our goal is to make sure that does not happen, and we have built protections into this agreement which we and the administration feel will accomplish that objective.

''First, any company with 15% or more of its workforce in the United States on H–1B visas must attest that it will not lay off an American employee in the same job 90 days

or less before or after the filing of a petition for an H–1B professional.

''Second, an H–1B dependent company acting as a contractor must attest that it also will not place an H–1B professional in another company to fill the same job held by a laid off American 90 days before or after the date of placement.

''Third, any employer, whether H–1B dependent or not, will face severe penalties for committing a willful violation of H–1B rules, underpaying an individual on an H–1B visa, and replacing an American worker. That company will be debarred for 3 years from all employment immigration programs and fined $35,000 for each violation.''

144 Cong. Rec. 10878 (Sept. 24, 1998). (**Note:** the third type of layoff protection, discussed in IV.M.5, below, applies enhanced penalties for willful violations of any of the attestation provisions, by both H–1B-dependent and non-dependent employers, where a U.S. worker is displaced in the course of the violations. See Section 212(n)(2)(C)(iii) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(2)(C)(iii).)

The Department received virtually identical requests from several individuals that the Department provide additional information to U.S. workers so that they could better understand their rights; these individuals expressed their concern that H–1B workers might be used to replace older U.S. workers. As discussed in III.B, above, the Department plans extensive education activities in an effort to ensure that both U.S. and H–1B workers are aware of the provisions of the H–1B program as modified by the ACWIA. The Department acknowledges the concern among older workers that their employment may be placed at risk through the potential hire of younger H–1B workers, who may be willing to perform the same work at a reduced level of pay and benefits. Although the ACWIA may operate to reduce this possibility by requiring that H–1B workers be employed at no less than the higher of the prevailing wage or the actual wage paid by the employer for the work in question, the concerns of U.S. workers in this regard are more directly addressed by the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, which is administered by the Equal Employment Opportunity Commission (EEOC). The Department suggests that workers or employers with particular concerns regarding possible instances of age discrimination should contact their local EEOC office.

The Department also notes that section 417 of the ACWIA directs the National Science Foundation to contract with the National Academy of Sciences to conduct a study to assess the status of older workers in the information technology field, including ''the relationship between rates of advancement, promotion, and compensation to experience, skill level, education, and age.'' See ACWIA, Section 417(b). The National Science Foundation also has been charged with conducting a study and preparing a report to assess labor market needs for workers with high technology skills during the next ten years. See ACWIA, Section 418(a) . The ACWIA further directs the Executive Branch to bring to the attention of Congress any reliable economic study that suggests that the increase in the number of H–1B workers effected by the ACWIA ''has had an impact on any national economic indicator, such as the level of inflation or unemployment, that warrants action by the Congress.'' See ACWIA, Section 418(b). Both of these reports were required to be submitted to Congress no later than October 1, 2000. NAS, through the Computer Science and Telecommunications Board, National Research Council, has invited submission of ''white papers'' and has scheduled a series of meetings to discuss and receive input for a single study addressing both sets of issues. Further information about this study, and the means by which members of the public may furnish input, can be found at *http://www4.nationalacademies.org/cpsma/ITWPublic2.nsf.*

1. What Constitutes ''Employed by the Employer,'' for Purposes of Prohibiting a Covered Employer from Displacing U.S. Workers in Its Own Workforce? (§ 655.715)

The ACWIA displacement protections only apply to U.S. workers ''employed by the employer'' and to U.S. workers ''employed by the other employer'' where the H–1B worker is placed at another employer's worksite and there are indicia of employment. See Section 212(n)(2)(E)(i) and (F) of the INA as amended by ACWIA, 8 U.S.C. 1182(n)(2)(E)(i) and (F). The ACWIA contains no definition of the phrase ''employed by the employer.'' The Department stated its view in the NPRM that where Congress has not specified a legal standard for identifying the existence of an employment relationship, the Supreme Court requires the application of ''common law'' standards, as held in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318 (1992); *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989). Noting the Supreme Court's teaching that the common-law test contains ''no shorthand formula or magic phrase that can be applied to find the answer, * * * [and requiring that] all of the incidents of the relationship must be assessed and weighed with no one factor being decisive'' (*NLRB* v. *United Ins. Co. of America*, 390 U.S. 254, 258 (1968)), the Department proposed regulatory language setting out 16 factors (adapted from EEOC Policy Guidance on Contingent Workers, Notice No. 915.002 (Dec. 3, 1997)) that would indicate the existence of an employment relationship under the common law test. The NPRM sought comments regarding the proposed test and alternative formulations of the common law or other tests for determining whether an employment relationship exists, such as the test under the FLSA and the test used in the federal tax context.

The Department received nine comments on its proposal.

The NACCB agreed that, in light of the absence of a statutory standard for determining the existence of an employment relationship, the common law standard should be used. It also observed that the common law test used under the Internal Revenue Code should be the same as the common law test set forth in the NPRM and should provide consistent results. The NACCB opposed application of the Fair Labor Standards Act test. The AFL-CIO also agreed that the common law test was appropriate and stated that this determination should be based on objective criteria. It urged the Department to prevent employers from hiding behind artificial titles and job descriptions; it also noted its belief that many individuals deemed independent contractors (or employees of a staffing firm) are actually common law employees.

Four commenters (AILA, ITAA, Latour, Chamber of Commerce) rejected the common law test as unnecessary, failing to reflect contemporary realities within the regulated community, or lacking predictability. ITAA also asserted that the ACWIA did not signal a departure from the definitions of an ''employer'' under the current regulations of this Department (20 CFR 655.715) and the INS (8 CFR 214.2(h)(4), 274a.1(g)). Three of these commenters recommended using the standards set forth by the Internal Revenue Service, noting that these standards are already used by the industry and would eliminate confusion and promote predictability. BRI and Baumann recommended that the Department eliminate ''skill'' as a factor because it is essentially a requirement of the H–1B program. Senators Abraham and Graham expressed the view that the proposed test was ''unnecessarily complicated and subjective'' and

suggested that ''[t]he Department's regulation should follow the statute and our intent by using [as a sole factor whether] 'the worker is considered an employee of the firm or the client for tax purposes, *i.e.,* the entity withholds federal, state, and Social Security taxes.''' Similarly, AILA suggested that any worker who is classified as an independent contractor for tax and benefit purposes should not be considered an employee. The Chamber of Commerce commented that if the Department lists the common-law factors, it should use the list in the Supreme Court opinions, not the somewhat longer list of factors utilized by EEOC.

After careful consideration of the comments, the Department has concluded that it should utilize the common law standards for determining whether a United States worker is employed by a dependent employer—the status that invokes the statute's protection against displacement. As noted in the NPRM, the Department believes that it is required by Supreme Court precedent to apply the common law test for employment relationship in the absence of plain statutory language directing the use of a different test. None of the comments submitted persuade the Department that it may craft a different test under the ACWIA.

Upon reflection, however, the Department has concluded that the regulation should not include a detailed list of prescribed factors. The Department believes that the factors identified in the NPRM provide a useful framework, based on the common law, for distinguishing between employees and independent contractors. Nevertheless, to avoid any potential misunderstanding that the factors on the list are exclusive or that factors not listed are less deserving of consideration, the Department has decided that no list of factors should be included in the Interim Final Rule. The Interim Final Rule reiterates that the common-law test requires an assessment of all the factors bearing on the employment relationship, with the right to control the means and manner of work being the key determinant but with no one factor controlling.

Some commenters expressed a concern that there is tension between the NPRM's formulation and the IRS test. However, the Department has not been persuaded that such a tension exists between these tests, which are both drawn from the common law multifactor analysis. The NPRM list of factors is quite similar to the factors identified in IRS Rev. Rul. 87–41, 1987—Cum. Bull. 296, 298–99. As noted in the NPRM, the proposed list of factors for determining whether an employment relationship exists was drawn from a framework developed by the EEOC for its policies on contingent workers. And as the EEOC recognized, its framework was derived from non-exclusive lists of factors in *Darden* and the other sources for the common law test cited by the Supreme Court in *Darden: Reid*, the IRS ruling, and the Restatement (Second) of Agency 220(2) (1958).

Each of these sources for the common law test recognizes ''the right to control'' as the key determinant in ascertaining the existence of an employment relationship. As stated by the EEOC: ''The worker is a covered employee * * * if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself.'' Similarly, the IRS Revenue Ruling states: ''[G]enerally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is to be accomplished. * * * It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.'' See also the Supreme Court in the *Darden* and *Reid* and Section 220(1) Restatement (Second) of Agency. Thus, an employer that properly applies any formulation of the common law test, grounded upon the cited authorities, should obtain the same conclusion regarding an individual's employment status.

In the Department's view, the EEOC's approach (in EEOC Policy Guidance on Contingent Workers, Notice No. 915.002, Dec. 3, 1997) provides an especially useful model for identifying particular factors that can be applied in the context of H–1B employment, particularly where workers are placed at third-party employer worksites. The EEOC established the list as guidance for ascertaining an individual's employment status in the analogous context of staffing firm workers, *i.e.,* workers who are ''placed in job assignments by temporary employment agencies, contract firms, and other firms that hire workers and place them in job assignments with the firms' clients.'' As such, the list is oriented towards individuals providing services, and it provides a focus that facilitates a differentiation among individuals who may possess attributes of both employees and independent contractors. This focus, the Department believes, makes the EEOC formulation useful for resolving employee status questions in the H–1B environment, with its mix of individuals working at a facility operated by one employer, but who may be self-employed or employees of another employer(s). Employers may wish to consider other sources in determining employee status, including IRS materials. The IRS, for instance, has identified the following factors that may be helpful in determining employee status in the H–1B context: the firm or the client provides training to the worker so that the worker may perform services in a particular manner or method; the worker performs services for only one firm at a time; and the worker has been personally selected to perform the job by the client or firm. See IRS Rev. Rul. 87–41, 1987–Cum. Bull. 296, 298–99.

The Department is not persuaded that Congress evinced any intention that tax law principles should be applied by employers or this Department in determining employee status for purposes of the H–1B program. The statute evinces only that the common law test be applied, not any particular formulation of the test. The Department disagrees with the further suggestion that the IRS formulation of the common law test should be the preferred method for making employee status determinations. Such use could pose some problems in administering the H–1B program. While the IRS has developed a list of factors that it will consider in making employee independent contractor decisions, Congress, for an extended period of time, has limited that agency's interpretation and application of its common law-based test. Congress has imposed significant statutory limitations upon the IRS in collecting taxes from employers who fail to withhold taxes from individuals whom employers claim to be independent contractors. See, *e.g.,* Section 530 of Pub. L. 95–600, as amended, 26 U.S.C. 3401 note, discussed in *Hospital Resource Personnel, Inc.* v. *United States,* 68 F.3d 421 (11th Cir. 1995). Section 530(b) also prohibits the IRS from issuing any regulations or Revenue Rulings that would further clarify the employment status of individuals for purposes of the employment taxes. Consequently, the Department cannot be confident that an employer's treatment of a worker as an independent contractor or an employee for tax purposes accords with the common law test. Accordingly, the Department does not consider an

employer's designation of a worker's status for tax purposes to be controlling on the matter of that worker's status for purposes of the H–1B program. The fact that an employer has treated a worker as an independent contractor for tax purposes, without protest by the IRS, will not excuse an employer's non-compliance with its H–1B obligations toward that worker as an employee if the common law test shows the worker to be an employee.

The Department is not persuaded that the factor relating to a worker's level of skill or expertise should be eliminated from the common law test. While the Department agrees with the observation that the occupations for which H–1B workers are sought require more advanced skills than those required for many other jobs, it remains true that a worker's advanced skill is one of the factors weighing against an employment relationship and must be examined in determining whether a worker who may have been displaced was an employee or an independent contractor.

Finally, the Department notes that although this test is most important in the context of displacement, the common law test applies in any situation under the H–1B program where the question of employment relationship may arise (see the discussion in IV.B.1, above, regarding application of the formula for determining whether an employer is H–1B-dependent). The Interim Final Rule states, however, that every H–1B nonimmigrant is by definition an employee of the petitioning employer since only employees are granted entry/status as H–1B nonimmigrants.

2. What Constitute ''Indicia of an Employment Relationship,'' for Purposes of the Prohibition on Secondary Displacement of U.S. Workers at Worksites Where the Sponsoring Employer Places H–1B Workers? (§ 655.738(d)(2)(ii))

Section 212(n)(1)(F)(ii) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(F)(ii), prohibits the displacement of U.S. workers employed by another (''secondary'') employer, if an H–1B-dependent employer or willful violator intends or seeks to place its own H–1B workers with that other employer in a situation where, among other things, there are ''indicia of an employment relationship between the nonimmigrant and such other employer.''

In his *Congressional Record* statement, Senator Abraham characterized the secondary placement provision as applying ''where the H–1B worker would essentially be functioning as an employee of the other employer.'' Senator Abraham further stated that the requirement that there be ''indicia of employment'' is ''intended to operate similarly to the provisions in the Internal Revenue Code in determining whether or not an individual is an employee.'' 144 Cong. Rec. S12751 (Oct. 21, 1998).

In the NPRM, the Department stated its view that this protection would be invoked where the relationship between the business receiving the services of the H–1B individual possesses some, but not all, of the attributes of an employment relationship. Thus, the Department proposed as a test for this relationship a list of factors that it derived from the common law test which the Department had proposed for ''primary displacement'' (discussed above in IV.D.1). The Department identified nine factors it believed to be most useful in determining whether the H–1B worker and the business at which he or she has been placed by the primary employer possess the requisite ''indicia of an employment relationship.'' The Department requested comments on its proposed test and any alternative formulations for determining secondary displacement coverage.

Several commenters responded to the proposal on this issue. Two employee organizations (AOTA, APTA) generally endorsed the Department's proposal, but sought assurances that the Department will hold recruitment/staffing firms to the same standard as other employers. One individual (Miano) urged that workers on H–1B visas should be considered employees of a company if they work at that company's facility and take direction from the company's management. Rapidigm asked the Department to explain how it settled on the factors it identified in the proposal.

Senators Abraham and Graham and three representatives of employers (AILA, ITAA, Latour) asserted that the legislative history of the ACWIA notes that ''indicia of employment'' was meant to operate in a manner similar to IRS provisions and that the focus of the regulations should be on that test. Senators Abraham and Graham continued: ''[O]ur intent was simple * * *. Anyone without [a contract directly with the putative employer], whether an independent contractor, or an employee of a third-party employer, would not be 'employed by the employer.' '' The Chamber of Commerce reiterated its opposition to application of common law standards, but urged that if the Department does adopt these standards, both the quantity and quality of common law factors sufficient to establish ''indicia of an employment relationship'' should be substantially the same as those necessary to establish the ''employed by the employer requirement.'' The Chamber of Commerce also requested that the Department strike from the list of the ''indicia'' factors that ''the client can discharge the worker from providing services to the client'' because this factor, it asserts, places an unnecessary burden on typical contracting and subcontracting business arrangements, under which a client retains the right to insist that a worker be removed from the client's jobsite. TCS expressed concern that the Department's proposal may improperly lead to the result that its consultants will be seen as meeting the ''indicia'' nexus. In this regard, it stated that the Department fails to mention what TCS believes to be the most important criterion—who pays, assigns, and trains the individual at issue, and who possesses ultimate control over him—and does not indicate how various factors are to be weighed. AILA and ACIP expressed concern that a worker supplied by another company will often be subject to the controls identified by the Department as ''indicia.'' ACIP contended that the Department may be misinterpreting the common law, asserting that a client-firm's typical control of hours, location, access, etc. should not turn an individual into the client's employee—a relationship that should be rare, not commonplace. Both groups also suggested that this test will operate contrary to settled subcontracting practices.

The Department has carefully considered these comments. As explained previously, the Department is not persuaded by the suggestion that it could use anything other than the common law test for an employment relationship as the starting point for interpreting the ''indicia of an employment relationship.'' The Department proposed a subset of the common law factors, which, in its view, are relevant and useful in determining the relationship between the H–1B worker and the client business, as distinct from those factors of the test that simply focus on whether an individual is self-employed.

The Department sees no merit to the suggestion that Congress intended the use of the ''employment relationship'' test to determine the ACWIA-specific relationship between an H–1B worker and the secondary employer, which, in the language of the statute, possesses ''indicia of an employment relationship.'' If Congress had wanted to use the same test for both purposes, it could have done so by using the same

language as it did for the relationship between a U.S. worker and his or her employer. That congress chose different language is a strong indication that it had a different intention than suggested by the commenters.

Furthermore, how the employee is treated for IRS purposes is simply not pertinent, and is contrary to the clear intent of the provision. IRS is concerned only with the entity which is paying the worker—in this case necessarily the H–1B employer, not the secondary employer. Thus 26 U.S.C. 3401(d) defines ''employer'' for purposes of payroll deductions as ''the person for whom an individual performs or performed any service, of whatever nature,'' except that if that person does not have control of payment of wages, the person having such control is the employer. Regulations which followed the IRS approach would thus have the result of nullifying the secondary placement protections of the ACWIA.

Finally, reading the provision as requiring less than a full employment relationship is congruent with the purpose of the statute to assist U.S. workers in retaining their employment where their jobs may be threatened by the actual or potential placement of H–1B workers. Congressman Smith commented that the legislation is intended to address the problems posed by ''job shops.'' In his introduction of the compromise ACWIA bill to the House of Representatives, he stated:

> ''The employers most prone to abusing the H–1B program are called job contractors or job shops * * *. They are in business to contract their H–1Bs out to other companies. The companies to which the H–1Bs are contracted benefit by paying wages to the foreign workers often well below what comparable Americans would receive. Also, they do not have to shoulder the obligations of being the legally recognized employers; the job shops remain the official employers.''

144 Cong. Rec. H8584 (Sept. 24, 1998). Senator Abraham also stressed the importance of the layoff protections of the bill, ''very mindful of the concerns people have that somehow these H–1B temporary workers might end up filling a position where an American worker could have filled the slot. Our goal is to make sure that does not happen.'' 144 Cong. Rec. S10878 (Sept. 24, 1998). There is certainly no suggestion in Senator Abraham's explanation of this provision that it should be narrowly construed: ''An H–1B dependent company acting as a contractor must attest that it also will not place an H–1B professional in another company to fill the same job held by a laid off American 90 days before or after the date of placement.'' *Ibid.*

In the NPRM, the Department did not indicate the point at which the relationship between a customer and an H–1B worker would trigger the displacement obligation. In this regard, the Department stated that it had considered, but rejected, an approach that would require the presence of at least some unspecified number of factors as a litmus test. No commenter expressed disagreement with this decision.

Upon review, the Department has decided that, as with the test of employment relationship, the single most important consideration will be whether the customer has the right to control when, where, and how the worker performs the job, *i.e.,* the manner or method by which the particular duties of the job are to be performed. Thus, the presence of this element alone suggests that the relationship between the customer and the H–1B worker approaches that of employee to employer. Although a consideration, the displacement obligation would not be triggered simply because the H–1B worker performed duties on the customer's premises.

The Department disagrees with the suggestion that the approach it proposed is likely to upset usual contracting relationships. The triggering of the secondary displacement liability of the H–1B employer does not itself mean that there is an employment relationship between the secondary employer and the H–1B worker. The fact that the placing employer ordinarily will control important aspects of the relationship, such as the pay, assignment, and training of the H–1B worker, does not mean that the relationship between the worker and the employer's client will not bear sufficient ''indicia of employment'' for the secondary displacement provisions of the ACWIA to apply. However, these provisions apply to the primary employer, which becomes liable under the terms of its LCA—not to the secondary employer, which incurs no liability under the ACWIA for the displacement.

The Department is unpersuaded that it should eliminate any of the criteria it proposed as ''indicia.'' Contrary to the suggestion of some commenters, it is fully consistent with the purposes of the Act that the proposed test may result frequently in a conclusion that the secondary displacement prohibition is applicable.

3. What Constitutes an ''Essentially Equivalent Job,'' for Purposes of the Non-Displacement provisions of the ACWIA? (§ 655.738(b)(2))

Section 212(n)(4)(B) of the INA as amended by the ACWIA provides that displacement occurs if the employer ''lays off the [U.S.] worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.'' The area of employment is defined as ''the area within normal commuting distance of the worksite or physical location where the work of the H–1B nonimmigrant is, or will be, performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.''

Congressman Smith explained that Congress intended to prevent covered employers from replacing or displacing American workers with H–1B workers. In his words:

> ''Congress ma[de] clear that the prohibition is directed to circumstances in which a covered employer hires H–1B workers with similar qualifications to those of laid off American workers in similar jobs.
>
> ''This language should not be interpreted as prohibiting and preventing only a one-for-one replacement of a particular laid off American worker; such an interpretation would be an overly rigid reading and a mischaracterization of Congressional intent. The focus of the provision is on the placement of H–1B workers in the kinds of jobs previously held by American workers. If an American worker was laid off from a job and the employer then hires an alien (on an H–1B visa) with sufficiently similar skills and experience to perform a sufficiently similar job, a prohibited displacement has taken place. This is a violation of the attestation regardless of whether the replacement was intentional or unintentional, or whether it was done in bad faith or not.''

144 Cong. Rec. E2324 (Nov. 12, 1998). He also noted that a dependent employer or willful violator is prohibited from ''concealing a lay off/displacement by making a modest or cosmetic change in job duties and responsibilities [or] * * * by some other subterfuge or pretense.''

On the other hand, Senator Abraham remarked:

> ''The reason for the change from ['specific employment opportunity'] is that it was thought desirable to include within the scope

of this prohibition situations where an employer sought to evade this prohibition by laying off a U.S. worker, making a trivial change in the job responsibilities, and then hiring the H–1B worker for a 'different'' job' * * *. For similar reasons, especially given the nature of the jobs in question, the geographical reach of the prohibition was extended so as potentially to cover other worksites within normal commuting distance of the worksite where the H–1B is employed. This was to cover the eventuality that an employer might try to evade this prohibition by laying off a U.S. worker, hiring an H–1B worker to do that person's job, but assigning the H–1B worker to a different worksite very close by in order to conceal what was going on.''

144 Cong. Rec. S12750 (Oct. 21, 1998).

Senator Abraham contrasted the provision in the ACWIA with the original definition in the House, which did not contain the phrase ''from a job that is essentially the equivalent of the job for which the [H–1B worker] is being sought.'' Senator Abraham stated that ''[t]hat phrase was added to make clear that this provision is not intended to be a generalized prohibition on layoffs by covered employers seeking to bring in covered H–1Bs, but rather a prohibition on a covered employer's replacing a particular laid-off U.S. worker with a particular covered H–1B.''

In the NPRM, the Department explained that the comparison required to determine whether an unlawful displacement has taken place involves: a comparison first of the job held by the H–1B worker with the job held by the U.S. worker to determine if the jobs involve essentially the same responsibilities; a comparison of the U.S. worker with the H–1B worker to determine if they have substantially equivalent qualifications and experience; and a determination of the areas of employment, which must be the same for each worker in question.

The Department proposed that when comparing the job responsibilities component of the provision, the focus should be on the core elements of the job, such as supervisory duties, design and engineering functions, or budget and financial accountability, and on whether both workers are capable of performing those duties. The Department further proposed that peripheral, non-essential duties that could be tailored to the particular abilities of the individual workers would not be determinative. The Department suggested that it might be useful to apply the standards under the Equal Pay Act (''EPA'') (29 U.S.C. 206(d)(1)) for determining the essential equivalence of jobs. See 29 CFR 1620.13 *et seq.* In this regard, the Department noted that the EPA standards focus on actual job duties and responsibilities, rather than a comparison of sometimes artificial job titles and position descriptions. The Department noted its concern that the protection for U.S. workers could be thwarted if essential equivalence required a match of insubstantial aspects of jobs.

As to the qualifications and experience of the workers, the Department proposed that the comparison be confined to matters which are normal and customary for the job, and which are necessary for its successful performance. In this regard, the Department proposed that although it would be appropriate to compare the relative qualification of the H–1B and U.S. workers by virtue of their education, skills, and experience, it would be inappropriate to compare their relative ages or their ethnic identities, or whether they are exactly alike in their educational background and work experiences. As an illustration, the Department stated its view that unlawful displacement could occur where an H–1B worker is ''overqualified'' for the job under comparison.

With regard to ''area of employment,'' the NPRM noted that the definition is much the same as the Department's regulatory definition at § 655.715 (see IV.P.5, below).

The Department received five comments on its proposals on this issue.

The AFL–CIO stated that the Department recognized that employers might seek to hide behind ''artificial job titles and position descriptions,'' and that the comparison is between the U.S. worker's and the H–1B worker's qualifications for the job in question. The AFL–CIO stated that the Department must continue to rely on objective criteria such as the North American Classifications (NAICS), ''rather than the employer's self-serving declarations . . . of 'intangible' qualifications, such as being a 'team player,' * * *''

Senators Abraham and Graham took issue with the Department's use of the EPA standard for a ''job'' which, they contended, takes the Department beyond the one-for-one displacement definition provided by the statute for determining whether an H–1B nonimmigrant displaced a U.S. worker in the same job. They stated that the EPA applies a ''substantially similar''definition, which, in their opinion, is much broader than the ACWIA's ''essentially equivalent'' jobs standard. ITAA requested the Department to adopt a narrow reading of the displacement prohibition, suggesting that the Department's proposal improperly attempted to put in place an approach that had been rejected during the legislative process. ACE urged the Department to reconsider its plan to ''strip away'' the relevant information about job responsibilities; it suggested that the Department, instead, should require that comparisons take into account the context and the actual, specific requirements and skills of a particular job.

AILA took issue with the ''core elements'' approach as too broad and too difficult for an employer to apply. For example, AILA contended that under the ''core responsibilities'' analysis, a software engineer for a telecommunications project would appear to have the same core responsibilities as a software engineer for administrative functions, although the positions are very different and require different expertise and knowledge. On the other hand, AILA stated that the essential equivalence analysis of the EPA is more in keeping with legislative intent. AILA proposed a test that would compare the employer's existing job requirements and duties to those of the H–1B employee.

AILA also stated its approval of the Department's proposals on ''substantially equivalent'' and ''area of intended employment.''

The Department continues to believe the distinction between core and peripheral elements of a job is important. The Department believes that its reference to the ''core elements'' of the job may have been misunderstood. The Department did not mean to imply, for example, that if each job required design and engineering functions, for example, there would be a match of core elements of the job, but rather that the design and engineering functions of a job such as software engineer are core rather than peripheral elements. The Department would agree with AILA that a job as software engineer for telecommunications would not ordinarily be similar to a job as software engineer for administrative matters—assuming the employer does not treat the job of ''software engineer'' as fungible and move workers from one project to another without regard to its content.

The Department finds no merit to the suggestion, in effect, that the Department's interpretation of the phrase ''essentially equivalent'' is not based on the language of the ACWIA, but on an approach that was discarded during the legislative process. The Department believes that its interpretation of this term is well-grounded in the specific language of the ACWIA. The Department is not

persuaded that the ACWIA's displacement provisions only operate on a ''one-to-one'' basis. Where the workforce in question is small, it is quite possible that the comparison will be so focused, but in other situations a wider inquiry will have to be undertaken. For example, where an employer, through reorganization, eliminates an entire department with several employees and staffs this function with one or more H–1B workers, any U.S. worker(s) in that Department who occupies(d) an essentially equivalent job as that filled or to be filled by the H–1B worker(s) would be protected against displacement. The Department will also look closely at situations where a U.S. worker is laid off and his/her job is filled by a U.S. worker colleague whose own job is then filled by an H–1B nonimmigrant; the Department would seek to determine whether the first U.S. worker was, in fact, the subject of a prohibited displacement.

The Department also continues to believe that the regulations implementing the EPA provide a useful source of standards for assessing the ''essential equivalence'' of jobs. Neither the EPA nor the ACWIA requires that the jobs under comparison be identical as a condition for invoking their provisions. Although the two statutes have operative language that differ in their specifics, each requires a determination of ''equivalence'' if an employee is to secure its protection. Thus, the EPA, at 29 U.S.C. 216(d)(2), provides: ''[No employee shall receive less pay than an employee of another gender] for equal work on jobs the performance of which requires equal skill, effort and responsibility under similar working conditions.'' This compares with the ACWIA, at Section 212(n)(4)(B), which provides: ''[A U.S. worker is displaced] from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the [H–1B worker or workers] is or are sought,'' *i.e.,* the job ''involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.'' With regard to each statute, the regulatory challenge is to determine the point at which two arguably different jobs that share some but not all characteristics become essentially alike for the purpose of the required statutory comparison. See also the Department's regulations under the Family and Medical Leave Act, 29 U.S.C. 825.115(a), which use the same concept in defining ''equivalent position.'' On the other hand, it is not the Department's intention to adopt wholesale the EPA regulations, but rather to adapt those provisions which it considers relevant and appropriate in satisfying the analogous but somewhat different statutory test under the ACWIA. Significantly, under neither statute did Congress require an identity of jobs as a condition to invoke the statutory protection afforded workers.

As noted in the NPRM, it is important that the comparison of the job filled by an H–1B worker and the job held by a U.S. worker take into account the actual duties of the jobs. See 29 CFR 1620.13(e), 1620.14(a). U.S. workers would receive little protection if the comparison were to be made simply by job titles or position descriptions that easily can be tailored to disguise jobs, which in their actual performance, are essentially alike. The same concerns require that the comparison take into account the most significant components (*i.e.,* core elements) of the jobs—so that a U.S. worker does not lose the Act's protection where the differences between the job and the workers themselves are insubstantial, peripheral, or reflect discrimination against U.S. workers. See 29 CFR 1620.14(a).

As under the EPA, the jobs will be viewed as different if the skill required to perform the job the U.S. worker was holding is substantially different than that required to perform the job of the H–1B worker. This does not end the inquiry, however, because the ACWIA requires in addition the comparison of the experience and qualifications of the workers, considering the experience, training, education, and ability of the workers as measured against the actual performance requirements of the jobs. Thus an inquiry must first be made into whether both workers possess the minimum qualifications for the job. Unlike the EPA, however, the comparison includes not only the experience and qualifications required to perform the job, but also experience and qualifications which are directly relevant in that they would materially affect a worker's relative ability to perform the job better or more efficiently. Furthermore, the statutory standard requires only that the workers' qualifications and experience be ''substantially equivalent;'' certainly no two workers would have identical experience and qualifications. For example, the Department would consider a bachelor's degree from one accredited university to be substantially equivalent to a bachelor's degree another accredited university. Similarly, the Department would consider 15 years of experience to be substantially equivalent to 10 years of experience. Finally, a worker's qualifications or experience that are not needed or useful in performing the specific requirements of the job are not relevant to the comparison. For example, the Department would not ordinarily consider experience or a degree in an unrelated field to be relevant.

As suggested in the NPRM, the Department's Interim Final Rule utilizes the current definition of ''area of intended employment'' at § 655.715 to define ''same area of performance.''

4. How Does the ACWIA Distinguish Between a Prohibited ''Layoff'' and a Permissible Termination of an Employment Relationship? (§ 655.738(b)(1))

The ACWIA's non-displacement prohibition applies only to a ''layoff'' as that term is defined by the ACWIA. Section 212(n)(4)(D)(i) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(4)(D)(i), states that a ''layoff'' means ''to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, [or] voluntary retirement.'' Furthermore, where loss of employment is caused by ''the expiration of a grant or contract (other than a temporary employment contract entered into in order to evade [the displacement provisions of the ACWIA],'' it is not a layoff within the meaning of the ACWIA.

Congressman Smith and Senator Abraham both stated that Congress intended that the expiration of a temporary employment contract would be treated as a layoff if an employer enters into such a contract with the intent of evading the displacement prohibition. 144 Cong. Rec. E2324 (Nov. 12, 1998); 144 Cong. Rec. S12750 (Oct. 21, 1998).

The Department explained in the NPRM that it would closely scrutinize any situation where there is some question regarding the voluntariness of the resignation or retirement of a U.S. worker. The Department also proposed that it would look to well-established principles concerning the ''constructive discharge'' of workers who are pressured to leave employment.

In the NPRM, the Department stated its view that the statutory exception where the U.S. worker's loss of employment is caused by the expiration of a grant or contract was meant to address the common situation where scientists and other academic personnel

are expressly hired to work under a contract or grant from another institution. Thus, the Department proposed that where the funding is lost, and the worker is not replaced because of this loss, no layoff would occur within the meaning of the ACWIA. The Department similarly proposed that where a staffing firm or other commercial firm hires an employee expressly to work on a specific project under a contract with another business entity, it may choose, in appropriate circumstances, to discontinue his or her employment without violating the ACWIA.

By way of illustration, the Department described a situation where no displacement violation occurs—the contract project ends and is not renewed, and the employer does not have a practice of then moving its employees to work under other contracts, or placing its employees on a call back list or its equivalent, but instead terminates the relationship for lack of work. The Department distinguished the preceding situation from one where a staffing firm places employees at other businesses, does not hire employees for a specific client or contract, and ordinarily moves its employees to perform work under other contracts. The Department proposed that in this latter situation, the Department might find a displacement if the employer terminates U.S. workers and hires H–1B workers to perform essentially the same job under a different contract or on a different project. The NPRM also noted the Department's intention to closely scrutinize situations where it appears that a particular contract, including commercial contracts and grants as well as employment contracts, has been used to evade the dependent employer's obligation not to displace U.S. workers.

The Department received several comments on this issue.

AOTA and the AFL–CIO generally supported the Department's approach. The AFL–CIO endorsed the Department's recognition of constructive discharge. The Chamber of Commerce, AILA and ACIP pointed out that the Department's proposal fails to mention that the ACWIA expressly excludes from ''layoff'' any discharge for inadequate performance, violation of workplace rules, or cause.

The Department acknowledges its oversight in failing to paraphrase the introductory clause to the ACWIA's definition of ''lays off'' in the NPRM discussion of this point. This clause lists those personnel actions, such as a discharge for poor performance or cause, that should not be mistakenly considered as a ''layoff.'' The omission of this language from the NPRM was not intended to signal that this part of the definition was insignificant—only that this portion of the statute did not seem to require any regulatory explication. The Interim Final Rule, however, contains a complete statement of the statute's layoff provision, including the statutory exceptions.

AOTA stated that the Department should scrutinize arrangements that may appear to be limited to the duration of a contract or grant; in its view, this would prevent staffing firms from falsely claiming that it had hired a person specifically for the contract in question. The AFL–CIO suggested that employers who claim that a U.S. worker was not laid off due to expiration of contract or grant must document that they have not engaged in a pattern or practice of denying workers assignment to other projects. Two commenters (Kirkpatrick & Lockhart, Latour) noted that the Department correctly recognized that the expiration of a contract leading to the termination of employment is not a ''layoff'' for ACWIA purposes.

Senators Abraham and Graham and ITAA stated that there should be no distinction between academic and other situations involving the expiration of a contract or grant. They expressed disagreement that it would be a layoff where a staffing firm deviates from its practice of continuing the employment of a worker after the expiration of a contract and fails to continue the employment of a U.S. worker. ITAA also objected to what it viewed to be an apparent presumption by the Department that temporary contracts ordinarily would be used to evade the displacement prohibition. The NACCB asserted that the distinction between employers that usually transfer employees from contract to contract and those that do not have that practice is impractical and unworkable in the information-technology staffing industry. It also provided examples of situations that it believed would be problematic under the Department's proposal. BRI expressed concern that the Department's approach would fail to account for situations where a particular worker was not qualified for positions under other contracts held by the employer.

The Department does not presume that temporary contracts ordinarily will be used to evade the statute's displacement obligations. The Department also does not hold the view that Congress believed that employment contracts tied to the life of a grant or contract were solely a creature of academia. While one of the examples discussed in the NPRM concerned the use of such academic contracts, the NPRM also discussed the applicability of the provision to staffing firms, whose contracts typically are with more commercially-oriented businesses.

As the NPRM suggested, the Department recognizes that the employment of workers on a contract or grant basis could pose some problematic issues. The comments received confirmed the Department's view. While the statute recognizes that a layoff typically will not occur where ''a worker's loss of employment * * * [is caused by] the expiration of a grant or contract,'' it expressly distinguishes this situation from an unlawful ''temporary employment contract entered into in order to evade a [displacement] condition.'' Section 212(n)(4)(D)(i)(I). The Department intends to look closely at such contracts to ensure that employers do not attempt to evade the statutory obligations.

Upon further review of this matter and consideration of the comments received, the Department has decided to continue the approach described in the NPRM. The Department, however, believes it appropriate that the totality of the circumstances be considered to determine whether a layoff has occurred. In many situations, the Department expects that it will be obvious whether a layoff has occurred (*e.g.,* where a worker has voluntarily retired). In other cases, it will be unnecessary to resolve the question of whether the loss of the job was because of the expiration of a contract or grant because the jobs are clearly not equivalent.

In the more difficult cases, a determination of whether the expiration of a grant or contract caused the loss of employment such that a layoff did not occur will require an examination of the practice of the employer (in cases of primary displacement) or the customer (where secondary displacement is at issue) insofar as it bears on the following questions: whether the U.S. worker's job, in fact, was tied to the life of a particular contract or grant; whether the employer has a practice, either as a general matter or with respect to the employee in question, to continue the individual, without interruption in his employment on other contracts or grants; whether the employer has a practice, again either as a general matter or with respect to the employee in question, that the employee will be called back when a contract for which he or she is qualified becomes available; whether the employer departed from its usual practice insofar as the hire or

placement of the H–1B worker is concerned; whether the reason for the departure from the practice was for a reason unrelated to the employment of the H–1B worker; whether there is any evidence to suggest that the employer intended to evade its displacement obligations; and the employer's previous history of compliance with its displacement and other H–1B obligations. This analysis will be used by the Department to determine whether it is the expiration of the contract or grant which has caused the termination of the employee or some other consideration such as the hiring of the H–1B worker.

The Department notes that where an employer has a practice of continuing employees on different projects or grants where work is available, but of laying workers off if there is no work available that fits the worker's skills and later offering the worker work under a new contract when one becomes available, the Department would expect the employer to contact the U.S. worker and offer the position prior to petitioning for an H–1B worker for the position. The Department will closely examine such situations to determine if the U.S. worker has been unlawfully displaced, and if not, if the employer's failure to contact such former employees is a recruiting violation.

5. What Constitutes ''a Similar Employment Opportunity'' for a U.S. Worker, Which—if Offered—Would Not Constitute a Prohibited ''Layoff'' or Displacement of the Worker?

Section 212(n)(4)(D)(i)(II) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(4)(D)(i)(II), provides that, even where an H–1B worker is placed in a job formerly held by a U.S. worker, no ''displacement'' or ''layoff'' is considered to have occurred if the U.S. worker was first offered but refused ''a similar employment opportunity with the same employer.''

As stated by Congressman Smith: ''The intent of Congress is that the 'similar employment opportunity with the same employer at equivalent or higher compensation and benefits' would be a meaningful offer.'' 144 Cong. Rec. E2324 (Nov. 12, 1998). Senator Abraham stated that it ''is the intent of Congress that the determination of similarity take into account factors such as level of authority and responsibility to the previous job, level within the overall organization, and other similar factors, but that it not include the location of the job opportunity.'' 144 Cong. Rec. S12750 (October 21, 1998).

In the NPRM, the Department described this provision as allowing a dependent employer an affirmative defense to its displacement of a U.S. worker if the employer can establish that it offered a *bona fide* transfer opportunity to the worker. The Department proposed that the U.S. worker would need to be offered not simply another job with a similar title, but that the offered position also carry with it attributes such as a similar level of authority and responsibility within the organization, a similar opportunity for advancement within the organization, similar tenure, and a similar work schedule.

Four commenters responded to this proposal.

The AFL–CIO asserted that by using the term ''employment opportunity'' rather than ''job'' or ''position,'' Congress intended that working conditions, such as schedules, worksite location, level of authority and discretion, and potential to advance, be factors that determine the similarity of opportunity, and that the term does not simply reflect a comparison of compensation and benefits. One commenter (Latour) urged the Department to be sensitive to the geographic needs of employers in administering this section of the ACWIA, noting that U.S. workers often are less willing to go to some localities than H–1B workers.

Most of the factors listed by the AFL–CIO are included in the Interim Final Rule. The Department notes that, apart from the economic comparison proposed by the Department, as discussed in the next section, no commenter objected to the other illustrative factors proposed by the Department in measuring ''similar employment opportunity.'' AILA stated that it agreed that the factors listed by the Department in the NPRM are appropriate for determining the similarity of an employment opportunity offer. The AFL–CIO identified as an additional factor, ''the level of * * * discretion'' of the two positions, which, it asserted, should be taken into account. This factor, the Department believes, is inherent in any comparison between two jobs, and it has specifically included this factor in the Interim Final Rule.

The Department has not included ''worksite location'' as an additional factor, as had been suggested by the AFL–CIO. The intended meaning of this term is not clear to the Department. To the extent it is intended to require a comparison of the relative costs of living in the areas of the jobs—a consideration discussed in the next section of the Preamble—the Department's proposal already accommodated the suggestion. If the AFL–CIO is suggesting that an employer should not be able to offer a job in a different geographic location, the Department disagrees with this suggestion. Although the ACWIA's language does not foreclose an interpretation that would require an offered position to be within the same geographic area in order to satisfy the test of ''similarity,'' the Department believes that this would unnecessarily limit an employer's ability to restructure its operations in order to ensure that no U.S. workers are displaced by an H–1B worker. Although the Department has not included worksite location as an explicit consideration in evaluating similarity of the employment opportunity, the Department notes that the offer of a similar employment opportunity must be *bona fide.* The Department would not consider an offer to be *bona fide* if all of the facts and circumstances indicate it is designed to be rejected by the employee and therefore is a subterfuge for a layoff.

6. What Constitutes ''Equivalent or Higher Compensation and Benefits'' for a U.S. Worker, for Purposes of the Other Job Offer to That Worker so as to Not Constitute a Prohibited ''Layoff'' or Displacement? (§ 655.738(b)(1)(iv)(C))

Section 212(n)(4)(D)(i)(II) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(4)(D)(i)(II), provides that no prohibited ''layoff'' of a discharged U.S. worker occurs if the U.S. worker is offered another employment opportunity with the same employer ''at equivalent or higher compensation and benefits than the position from which the employee was discharged.''

Congressman Smith stated: ''It is Congress'' intent that an employer should not be able to evade attestation by making an offer of an alternative employment opportunity without considerations such as relocation expenses and cost of living differentials if the alternative position was in a different geographical location.'' 144 Cong. Rec. E2324 (Nov. 12, 1998). Senator Abraham stated that ''the determination of similarity * * * [does] not include the location of the job opportunity.'' 144 Cong. Rec. S12750 (Oct. 21, 1998).

In the NPRM, the Department proposed that an ''opportunity'' could not be considered to provide ''equivalent or higher compensation and benefits,'' if that ''opportunity'' would provide the worker a lower disposable income, or would require the worker to incur expenses that drive down his financial standing. The Department also noted that Congress, by specifying ''equivalent or higher'' pay and benefits,

must have intended that the U.S. worker be offered a positive, rather than negative, ''employment opportunity.''

The Department also proposed that, ''[a]ssuming the regulations provide that a 'similar employment opportunity' may include a transfer to another commuting area,'' that opportunity must take into consideration matters such as cost of living differentials and relocation expenses (*e.g.,* a New York City ''opportunity'' offered to a worker ''laid off'' in Kansas City). The Department also noted that it was considering whether it would be appropriate for this purpose to use principles adapted from regulations defining equivalent compensation and benefits under the Equal Pay Act and the Family and Medical Leave Act. See 29 CFR 1620; 29 CFR 825.215(c).

The Department received five comments on this issue and its proposals.

The AFL–CIO agreed with the Department's proposal, noting that a position resulting in an actual loss of ''real wages'' for a U.S. worker should not be considered equivalent compensation and benefits. The AFL–CIO also observed that a change of employment that results in higher dependent care costs for an employee has the same consequences of decreasing real wages as cost-of-living and relocation expenses.

AILA, ITAA, the Chamber of Commerce, and Senators Abraham and Graham, on the other hand, contended that the Department's proposal that the cost of living and relocation costs should be considered in determining whether the offered job offers the employee ''equivalent or higher compensation and benefits'' is without support in the ACWIA, and that ''similarity'' should not take into account the geographic location of a job opportunity. The Chamber of Commerce noted that COLAs and other expenses will not necessarily increase with an offer of similar employment, such as where the position offered to the U.S. worker is located in an area with lower costs than the position from which he has been or will be laid off.

The Department believes that whether an employment opportunity provides equivalent or higher compensation and benefits requires consideration of the costs associated with the location of the jobs, *i.e.*, if the employment opportunity takes into consideration both the cost of living and any costs expenditures necessary to relocate to another location. The Department believes this accords with the most natural meaning of the provision. The Department does not believe that an employment opportunity can be *bona fide* if it does not take into consideration these costs which would erode compensation under the job offer.

The Department disagrees with the argument that Congress, by prescribing a geographical condition in section 212(n)(4)(B) for determining if a job offer would provide ''equivalent or higher compensation'' of the job offered to a U.S. worker, but not in section 212(n)(4)(D)(i)(II), evinced an intention that the jobs' locations are to be disregarded in making this latter comparison. The Department notes that the two provisions measure different aspects of the employer's displacement obligation. The first provision defines the universe of jobs which should be compared to determine if a displacement has taken place as those within the same geographical area. The second provision compares the equivalency of jobs which the U.S. worker occupies and is offered. The Department certainly does not believe that where the statutory language in one provision explicitly restricts the comparison to the same locality and in another provision it is silent, it follows that the cost of relocation and the cost of living cannot be taken into consideration in determining the equivalency of compensation between two positions in different localities. In fact, the Department believes that a more appropriate inference would be that Congress intended no such limitation.

The Department, in determining whether a *bona fide* job offer was made, does not intend to second-guess an employer's reasonable good-faith efforts to achieve economic comparability. Ordinarily this could be achieved if the job offer takes into account cost of living adjustments between localities and relocation costs which the employer ordinarily provides. If such cost of living adjustments are not ordinarily provided by the employer, the Department would accept an adjustment based on any published index of pay differentials or cost of living, or use of the adjustments provided by the Federal Government to its employees. In this regard, the Department agrees with the observation by the Chamber of Commerce that if the transfer is to an area with a less expensive cost of living, an employer may offer a position at a reduced rate of pay, provided this accords with the employer's normal policy.

AILA urged the Department not to adopt the EPA and the FMLA standards for equivalency. AILA objected to the use of the FMLA standard on the basis that it requires ''virtual identity,'' rather than the ACWIA's test of ''substantial equivalence.'' With regard to the possible use of the EPA regulations, AILA stated that its use would be inappropriate because ''substantial equivalence'' would be defeated whenever a job offered was located in another geographic area. AILA, instead, requested that ''equivalent or higher'' be determined on a case-by-case basis, in light of all circumstances of the job offer.

The Department notes that AILA has misstated the relevant ACWIA standard, which is ''equivalent or higher compensation and benefits,'' not ''substantial equivalence.'' The Department continues to believe that both EPA and FMLA regulations provide a proper basis for making the comparison of compensation and benefits, although the FMLA regulations are somewhat less useful since they provide less detailed guidance in making an economic comparison of jobs. Accordingly, the Interim Final Rule is based on the following principles drawn from the EPA regulations, 29 CFR 1620.10: Wages include:

> ''all payments made to [or on behalf of] an employee as remuneration for employment [*e.g.*,] all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name. Fringe benefits are deemed to be remuneration for employment. * * * Thus, vacation and holiday pay, and premium payments for work on Saturdays, Sundays, holidays, regular days of rest or other days or hours in excess or outside of the employee's regular days or hours of work are deemed remuneration for employment * * *.''

Consistent with 29 CFR 1620.11(a), ''fringe benefits'' include, *e.g.*, such benefits as medical, hospital, accident, life insurance and retirement benefits; profit sharing and bonus plans; leave; and other such benefit programs.

While the Department's interpretation allows for an inclusive definition of compensation and benefits, the Department expects that since the comparison will involve jobs with the same business, the benefit components of the employee's compensation often will be the same, leaving the cost of living differential as the sole or primary variable in most situations. As discussed above, the regulations specifically allow the job opportunity to be in a different locality, provided there is an adjustment for cost of living, and relocation costs are paid.

7. What Is Required of an H–1B–Dependent Employer or Willful Violator Which Seeks to Place H–1B Workers at a Secondary Employer's Worksite? (§ 655.738(d))

Section 212(n)(1)(F) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(F), requires that H–1B-dependent employers and willful violators not place any H–1B worker at another employer's worksite ''unless the [H–1B] employer has inquired of the other employer as to whether, and has no knowledge that * * * the other employer has displaced or intends to displace a United States worker employed by the other employer'' within the period beginning 90 days before and continuing until 90 days after the H–1B worker's placement at that worksite. This requirement applies where there are ''indicia of an employment relationship'' between the H–1B worker and the customer-client of the dependent employer. section 212(n)(1)(G)(ii) further provides: ''The [LCA] application form shall include a clear statement explaining the liability under subparagraph (F) of a placing employer if the other employer * * * displaces a United States worker. * * *'' Additionally, section 212(n)(2)(E) provides that where an H–1B-dependent employer places a non-exempt H–1B worker with another employer in accordance with section 212(n)(1)(F) (*i.e.*, after having made the required inquiry), ''such displacement shall be considered * * * a failure, by the placing employer, to meet a condition specified [in an LCA]. However, the employer may not be debarred unless the Secretary finds that the placing employer ''knew or had reason to know of such displacement at the time of the placement,'' or the employer has been sanctioned ''based upon a previous placement of an H–1B nonimmigrant with the same other employer.''

In explaining these provisions and their interrelationships Congressman Smith stated: ''* * * [T]he legislation prohibits a covered employer in certain circumstances from placing an H–1B nonimmigrant with another employer where the 'other' employer has or will displace an American worker. * * * Congress intends that the employer make a reasonable inquiry and give due regard to available information. Simply making a pro forma inquiry would not insulate a covered employer from liability should the 'other' employer displace an American worker from a job sufficiently similar to the one which would be performed by an H–1B worker. That is one of the reasons why subsection 412(a)(2) of the legislation requires that the employer be notified through a clear statement on the labor condition application (LCA) regarding the scope of a covered employer's liability with respect to a lay off by a secondary employer. Through the LCA form, the Department of Labor will make clear to covered employers their obligation to exercise due diligence in ascertaining whether the placement of H–1B nonimmigrants may correspond with the lay off or displacement of American workers in similar jobs. Some of the most egregious cases involving the abuse of the H–1B visa program have involved American workers being retained only long enough to train their H–1B replacements under contract with a different employer. * * *''

144 Cong. Rec. E2324 (Nov. 12, 1998).

Similar statements were made by Senator Abraham:

In particular, the covered employer must promise to inquire whether the other employer will be using the H–1B worker to displace a U.S. worker whom the other employer had laid off or intends to lay off within 90 days of the placement of the H–1B worker. The covered employer must also state that it has no knowledge that the other employer has done so or intends to do so.

144 Cong. Rec. S12751 (Oct. 21, 1998).

Congressman Smith and Senator Abraham agreed that an employer who makes the required inquiries remains liable if the other employer displaces U.S. workers notwithstanding the inquiry made. Thus Congressman Smith stated:

''If the other employer has displaced an American worker (under the definitions used in this legislation) during the 90 days before or after the placement, the attesting employer is liable as if it had violated the attestation.

''In all instances, the sanction may be an administrative remedy (including civil monetary penalties and 'make-whole' remedies to the American worker affected). The attesting employer can only receive a debarment, however, if it is found to have known or to have had reason to know of the secondary displacement at the time of the placement of the H–1B worker with the other employer, or if the attesting employer was previously sanctioned for a secondary displacement under 212(n)(2)(E) for placing an H–1B nonimmigrant with the same other employer. If an employer has conducted the required inquiry prior to any placement with a ''secondary'' employer, and has no information or reason to know of that employer's past or intended displacement of U.S. workers, then the attesting employer should ordinarily be presumed not to have willfully violated the secondary displacement attestation. Congress anticipates that the Department of Labor, in promulgating and enforcing regulations, would require a reasonable level of inquiry.''

144 Cong. Rec. E2327 (Nov. 12, 1998).

Similarly, Senator Abraham stated:

''Making the required inquiries will not insulate a covered employer from liability should the secondary employer with which the covered employer is placing the covered H–1B worker turn out to have displaced a U.S. worker from the job that it has contracted with the covered employer to have the H–1B worker fill. That is why subsection 412(a)(2) of this legislation adds a new requirement to section 212(n)(1) that the application contain a clear statement regarding the scope of a covered employer's liability with respect to a layoff by a secondary employer with whom the covered employer places a covered H–1B worker. * * * If the other employer has displaced a U.S. worker (under the definitions used in this legislation) during the 90 days before or after the placement, the attesting employer is liable as if it had violated the attestation. The sanction is a $1,000 civil penalty per violation and a possible debarment. The attesting employer can only receive a debarment, however, if it is found to have known or to have had reason to know of the displacement at the time of the placement with the other employer, or if the attesting employer was previously sanctioned under 212(n)(2)(E) for placing an H–1B nonimmigrant with the same employer. If an employer has conducted the inquiry that it is required to attest that it has conducted before any such placement, and (as that attestation requires) acquired no knowledge of displacement of a U.S. worker in the course of that inquiry, it should ordinarily be presumed not to have known or have reason to know of a displacement unless there is an affirmative showing that it did have such knowledge or reason to know.''

144 Cong. Rec. S12750, S12751 (Oct. 21, 1998).

In order to achieve the purposes of this provision, the Department proposed to develop a regulatory provision which requires that the H–1B employer make a reasonable effort to inquire about potential secondary displacement. The NPRM set out a non-exclusive list of methods that could be used by an employer to demonstrate its efforts to assure compliance with its inquiry obligation. The methods suggested included obtaining a written assurance from the secondary employer that it does not intend to displace a similarly-employed U.S. worker during the 90-day period before or after the placement of the H–1B worker; a written memorialization of such a verbal assurance; or the inclusion of a non-displacement clause in a contract with the secondary employer. The NPRM noted that the Department had read the language and structure of the statutory provisions to reflect an intention that a dependent employer must take pro-active steps to determine whether the placement of H–1B workers would correspond with the layoff of similarly-employed U.S. workers. The NPRM proposed that an employer, even with the receipt of a ''no displacement'' assurance, should not be able to ignore other information, coming to its attention before placement of the H–1B worker, that calls into question the original assurance. The Department

proposed that in such circumstances the dependent employer would be expected to recontact its customer and obtain credible assurances that layoffs have not occurred or are planned during the relevant statutory time frame.

Several commenters responded to the Department's proposals on this issue.

One commenter (TCS) generally agreed with the Department's approach, urging the Department to clarify that usually all that will be required of a dependent employer is to make the layoff inquiry with its customer and to memorialize the customer's response. ITAA stated that it found helpful the Department's identification of a variety of methods by which an employer may satisfy its inquiry obligation.

The AFL–CIO asserted that a refusal by a secondary employer to respond to the staffing firm's inquiry should result in the disqualification of that LCA. ACE and IEEE stated their belief that the Department's proposal puts an unfair burden on the placing employer and that, at the very least, the secondary employer should share liability for violation of the displacement provision. The IEEE expressed particular concerns regarding the effect of the Department's approach on smaller businesses. Two other commenters (BRI and Cooley Godward) asserted that the NPRM neglected to address the treatment of primary employers who, despite reasonable efforts, receive no or an inadequate response from the secondary employer. BRI requested that the final regulation address a ''reasonable minimal effort'' threshold.

AILA, Rapidigm, and Satyam contended that getting written assurances from secondary employers will jeopardize negotiations and placement of H–1B workers. Rubin & Dornbaum and White Consolidated Industries, on the other hand, stated that although only H–1B-dependent employers and willful violators need obtain assurances, the effect of that requirement is to impose a paperwork requirement on the secondary employer.

AILA asserted that the proposal, in effect, required a dependent employer to conduct an ''interrogation'' of its customer regarding its layoff plans in order to satisfy its non-displacement obligation, and stated that the proposal lacked ''an articulable point at which the H–1B employer is deemed to have made sufficient, reasonable efforts.'' AILA requested that the Department allow flexibility to ascertain whether there is a realistic possibility of displacement, such as where the H–1B worker is only providing services for a special project or on a short-term basis.

The Department has given careful consideration to the divergent comments received on this proposal. The expressed concern regarding the impact which the inquiry will have upon the dependent employer's ability to place H–1B workers, in the Department's view, is misplaced. The obligation has been imposed by Congress as a condition for the employment of H–1B workers by H–1B-dependent employers and willful violators. While a dependent employer has discretion as to how it will meet this obligation, it must make the inquiry in every case where there will be indicia of an employment relationship (see IV.D.2, above).

The Department is not persuaded that its proposal imposes any undue burden on dependent employers or their customers. The Department believes that the statute contemplates due diligence in the inquiry, taking into consideration the circumstances of the case, rather than just a *pro forma* inquiry. Ordinarily, if the customer provides the assurance and there is no reason to suspect to the contrary—as where the project is only for a short-term, to satisfy a special need—an employer would need only make the relevant inquiry of its customer and memorialize the customer's intention not to displace any U.S. workers. The Department does not believe that the nature of the inquiry creates a significant burden in those instances where there is no reason to believe that a displacement may be contemplated. On the other hand, if the employer has any reason to believe the secondary employer may displace its employees—as where the H–1B workers will be performing services that the secondary employer performed with its own work force in the past—a greater inquiry may be necessary. The Department notes that the employer is not constrained by the Department's examples; it can choose an alternative means to assure itself that there will not be displacement and to minimize its potential liability, such as by an indemnity clause, as suggested by IEEE.

Furthermore, the Department has no reason to believe that the customer would have difficulty in answering the inquiry, especially where no layoffs are contemplated. If a customer balks at providing the lay-off information—an unlikely circumstance given the customer's demonstrated operational needs—the ACWIA does not allow the dependent employer to place an H–1B worker with that customer.

The Department disagrees with ACIP's contention that the Department's proposal effectively dictates contract terms through regulation and as such imposes an unauthorized and unwarranted burden. So long as the dependent employer meets its inquiry obligation and it does not have reason to believe there may be displacement, it is free to structure its contractual arrangements with its customers as it chooses.

The AFL–CIO commented that the Department had set ''an incredibly low bar'' for employers to meet this obligation, urging that the inquiry requirements should be supplemented by imputing knowledge of public facts about the actions and intentions of secondary employers to the H–1B-dependent employer. On the other hand, ITAA expressed concern that an employer would be held accountable for any public information relative to a layoff that might call into question a customer's assurance that it had no layoff plans—even where the information is buried in a local newspaper outside the area where the placing employer is based.

The Department disagrees with the suggestion that it should impute to the employer any public knowledge that layoffs by the customer had or would occur. With regard to this matter, the statute sets up a reasonableness standard. Although the H–1B employer is liable for civil money penalties and other appropriate remedies in every case where a displacement violation occurs, the ACWIA limits the imposition of the debarment sanction to circumstances where the H–1B employer ''knew or had reason to know of such displacement at the time of placement of the nonimmigrant with the other employer.'' Section 212(n)(2)(E)(i). Such a determination obviously will depend upon the particular circumstances presented, including the nature of the inquiry conducted by the employer. The Department established no presumptions about the employer's knowledge of public information, including newspaper articles. On the other hand, the employer cannot put its head in the sand and feign ignorance or disregard information that comes to its attention through the press or otherwise. As the proposal stated, ''[Where a] placing H–1B employer [receives information] such as newspaper reports of relevant layoffs by the secondary employer * * * the [placing] employer would be expected to recontact the secondary employer and receive credible assurances that no layoffs are planned or have occurred in the applicable time frame.''

ACIP asserted that the secondary employer might be unwilling to assist the placing employer if the latter were

investigated by the Department. It suggested that the receiving employer should be allowed to participate as an intervener in an enforcement proceeding involving an alleged displacement violation. The Department notes that pursuant to 20 CFR 655.815, service of the Administrator's determination is made on known interested parties, and that any interested party may request a hearing or participate in the proceeding (20 CFR 655.820). The Department believes that the secondary employer who has allegedly displaced a U.S. worker would generally qualify as an interested party even though it is not directly liable under the ACWIA. See also the rules of practice of the Office of Administrative Law Judges, which provide a right to participate in a proceeding where the ALJ determines that ''the final decision could directly and adversely affect [the applicants for participation] * * *, and if they may contribute materially to the disposition of the proceedings and their interest is not adequately represented by existing parties.'' 29 CFR 18.10(b).

ITAA requested a ''safe harbor'' provision for employers who make a demonstrated (*i.e.,* written agreement with secondary employer) good-faith effort to ascertain that no layoffs have occurred or will occur. ACIP and AILA urged the Department to include regulatory language to the effect that good faith efforts to cure violations should preclude sanctions.

The Department's discretion in this area is limited. The ACWIA imposes strict liability upon a dependent employer where a U.S. worker is displaced by a secondary employer. Section 212(n)(2)(E) specifically provides: ''If an H–1B-dependent employer places a non-exempt H–1B worker with another employer * * *, such displacement shall be considered * * * a failure by the placing employer, to meet a condition [of its LCA].'' At the same time, the ACWIA's three-tier penalty provisions require consideration of a violator's culpability which should minimize the liability of a dependent employer who has acted in good faith to comply with its displacement obligation. Additionally, the Department notes that the regulatory provisions applicable to the assessment of civil money penalties consider an employer's ''good faith'' as a factor affecting the level of the penalty assessed. See 20 CFR 655.810(b).

8. What Documentation Will be Required of Employers About the ACWIA's Non-Displacement Provisions? (§ 655.738(e))

In order to assure compliance with the ACWIA's non-displacement provisions, the Department proposed to require that an H–1B-dependent employer or willful violator retain certain documentation with respect to any U.S. workers (in the same locality and same occupation as any H–1B nonimmigrants it hired) who left its employ in the period 90 days before or after the employer's petition for the H–1B worker(s), and for any employees with respect to whom the employer took any action in the 180-day period to cause the employee's termination. The NPRM proposed that for all such employees, these documents must include: The employee's name, last-known mailing address, occupational title and job description; any documentation concerning the employee's experience, qualifications, and principal assignments; notification by the employer regarding termination and the employee's response; job evaluations; and information regarding offers of similar employment and the employee's response. The Department noted its belief that these records are required to be retained by EEOC regulations, 29 CFR 1602.14, therefore their retention would not present an additional burden on employers.

The Department received four comments on this proposal.

ITAA stated that it does not object to any documentation retention already mandated. It stressed the distinction between maintaining records already created and creating records. Senators Abraham and Graham asserted that the ACWIA imposes no requirement of maintaining records of job offers made to departing employees as proposed by the Department. Two commenters (AILA, Chamber of Commerce) stated their belief that the proposal imposes new record creation and retention burdens, disagreeing with the Department's assessment that the EEOC already requires the retention of such documents. The Chamber of Commerce stated that this burden will unduly impact upon small businesses that normally do not maintain such records.

The Department notes that pursuant to § 655.731(b), employers are already required to maintain basic payroll information for all employees in the specific employment at the place of employment, including name, home address, and occupation. This information is also required by other statutes such as the Fair Labor Standards Act and the Equal Pay Act. See 29 CFR 516.2; 29 CFR 1620.32. The Department does not believe that any prudent business person would fail to have such information.

The commenters correctly recognized that the EEOC regulation cited in the NPRM, 29 CFR 1602.14, does not establish a general requirement that employers create the records encompassed by the Department's displacement proposal. Section 1602.14 instead, requires the preservation of records, for purposes of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA), where the employer chooses to make or keep personnel records, including situations where an employee is involuntarily terminated, or a discrimination charge is filed against the employer. As noted, § 1602.14 does not require an employer to create any records, but rather requires an employer to preserve all personnel or employment records which the employer ''made or kept.'' The Department believes that every prudent employer would ''make or keep'' the described records relating to the circumstances in which employees leave their employ. Once made or kept (*i.e.,* where records received from others are not immediately discarded), EEOC regulations require that these records be preserved.

Furthermore, the EEOC does require the preservation of the same or similar records under other statutes it administers, whether or not they would otherwise be kept. Under the Age Discrimination in Employment Act (ADEA), for example, there is an obligation to retain certain records and an obligation to retain broad categories of personnel documents which an employer ''in the regular course of his business, makes, obtains, or uses.'' 29 CFR 1627.3. In particular, employers are required to retain any and all documents it makes, obtains, or uses regarding ''[p]romotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee, * * *.''

Against this regulatory backdrop, it is clear that employers already are required by the EEOC, pursuant to Title VII and the ADEA, to retain (*i.e.,* preserve) the personnel documents that are encompassed by the Department's proposal for documenting an employer's displacement compliance. The Department repeats that it is not requiring employers to create any documents other than basic payroll information.

The Interim Final Rule provides that, for the purposes of meeting the

ACWIA's displacement requirements, a dependent employer or willful violator is required to preserve the following documents with respect to any U.S. worker(s) (in the same area of employment and occupation as any H–1B nonimmigrants) who left its employ in the period 90 days before or after the employer's petition for the H–1B nonimmigrant(s), and for any U.S. worker(s) with respect to whom the employer took any action during that 180-day period to cause the employee's termination (*e.g.,* a notice of termination): any documentation concerning the employee's experience, qualifications, and principal assignments; notification by the employer or the employee regarding the termination of employment and any response thereto; and job evaluations. The Department explains that the employer is not required to create any such records, if they do not exist.

In addition, if the employer offers the U.S. worker another employment opportunity, the employer shall maintain a record of the offer, including the position offered and terms of compensation and benefits, and the employee's response thereto. The Department believes that most employers would make such offers in writing, but recognizes that there may be a small burden to the employer in keeping a record if the employee response is not in writing. The Interim Final Rule continues the practice under the current regulations of applying a uniform period for retaining documentation required by this part. See § 655.760(c).

The Department wishes to clarify, as it has with regard to other documentation proposals in this part, that an employer is not required to retain these records in any particular form so long as they are maintained and retrievable upon this Department's request in accordance with the requirements of 29 CFR 516.1(a) (setting forth recordkeeping requirements under the FLSA, including the EPA). The Department also wants to make clear that such records need not be kept in the employer's LCA public access file.

As discussed in IV.D.7, the Interim Final Rule also requires employers to document their inquiry to secondary employers and any response. This inquiry may be done in any manner the employer deems appropriate under the circumstances. However, if the inquiry and response were not in writing, the employer will be required to keep a written memorandum detailing the substance of the conversation, the date of the communication, and the names of the individuals involved in the conversation.

E. What Requirements Does the ACWIA Impose Regarding Recruitment of U.S. Workers, and Which Employers are Subject to Those Requirements? (§ 655.739)

Section 212(n)(1)(G)(i)(I) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(G)(i)(I), requires that an H–1B-dependent employer or an employer found by DOL to have committed willful H–1B violations take ''good faith steps to recruit, in the United States using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H–1B nonimmigrants * * *, United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought.'' The Department is charged with enforcing the recruitment obligation, while the Attorney General administers a special arbitration process to address complaints regarding an H–1B employer's companion obligation to ''offer the job to any United States worker who applies and is equally or better qualified for the job for which the nonimmigrant or nonimmigrants is or are sought.'' The ACWIA further provides that ''nothing in subparagraph (G) [the new attestation element] shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved so long as such criteria are not applied in a discriminatory manner.''

The recruitment requirement does not apply where the LCA solely involves ''exempt'' H–1B workers (see Section 212(n)((1)(E)(ii)). In addition, the recruitment requirement does not apply to an application filed on behalf of an H–1B worker described in Section 203(b)(1)(A),(B), or (C) of the INA. Section 203(b)(1) establishes the first preference among employment-based immigrants to the United States. This group includes aliens with extraordinary ability, aliens who are outstanding professors and researchers, and aliens who have been employed by multinational corporations as executives or managers who will enter the U.S. to continue to provide executive or managerial services to the same employer or to its subsidiary or affiliate.

The Department noted in the NPRM that the literal language of the recruitment provision would require recruitment efforts be undertaken before an LCA is filed (''prior to filing the application—[the employer] has taken good faith steps to recruit''). The Department noted that this language appears to have been based on a presumption that employers file LCAs for individual workers at the time that need arises (see, *e.g.,* the statements by both Senator Abraham and Congressman Smith that an employer must state that it has taken good faith steps to recruit U.S. workers ''for the job or which it is seeking the H–1B worker'' (144 Cong. Rec. S12751 (Oct. 21,1998); 144 Cong. Rec. E2324 (Nov. 12, 1998))—a presumption that is contrary to the actual, longstanding practice of many employers in the H–1B program. Under the Department's regulations, §§ 655.730, .750, an LCA is in effect for three years and an employer is permitted to file an LCA for multiple positions so that it may use the LCA, during the three-year period it is in effect, to support future H–1B petitions when the actual need for employment arises. Many employers avail themselves of this procedure.

In light of this common practice (which had not been at issue in crafting the ACWIA), the Department set forth its view that it would not be reasonable to assume that Congress intended to require a separate LCA for each worker; nor was it reasonable to assume that Congress intended that the employer would already have recruited in good faith for every position it would fill over the three-year life of the LCA, and offered a job to every equally or better qualified U.S. worker who applied for each such position. The Department observed that this would be virtually impossible since employers would not yet have identified every job opportunity which would arise in the future.

Thus, the Department proposed that ''the 'good faith' recruitment attestation must be read, interpreted, and applied to mean that the employer promises—and agrees to be held accountable—that it has, or will recruit with respect to any job opportunity for which the application is used, whether that recruitment occurs before or after the application is filed (if the application is to be used in support of multiple petitions for future workers).'' The Department invited comments on this approach and any alternative approaches to appropriately balance employers' good faith recruitment obligations in the context of the statutory language.

The Department received no comments on this proposal from the employer community. The AFL–CIO, on the other hand, objected to this proposal, stating, in effect, that Congress intended that the good faith recruitment requirement be satisfied as a precondition to filing an LCA, not

merely a promise of future compliance with this obligation. The AFL–CIO contends that the three-year validity period of the LCA is in direct conflict with the worker protection requirements of the ACWIA, and suggests that the goal of protecting workers would be best served by a six-month validity period.

The Department disagrees with this view, noting that the AFL–CIO's interpretation would upset a long-settled practice that has promoted the efficient processing of LCAs, a goal which the ACWIA was not intended to impede. Furthermore, the House Report on H.R. 3736, whose language on recruitment is very similar to that in ACWIA as enacted, and is identical with respect to the timing of the recruitment, states that the bill ''endeavors to protect American workers by ensuring that companies at least make an attempt to locate qualified American workers before petitioning for foreign workers under the H–1B program.'' H.R. Rep. No.105–657, 105th Cong., 2d Sess. 47 (1998) (emphasis added). In the absence of any suggestion that Congress intended this result, the Department is unpersuaded that Congress intended the recruitment provision to be applied literally. Without drastically reducing the effective period of the LCA or limiting the LCA to a single job opportunity, the Department believes that it would be virtually impossible for major users of the program—namely the H–1B-dependent employers to whom the provision applies—to comply with the AFL–CIO's construction of the Act.

The Department received one comment that addressed the ''first preference'' exception to the recruitment obligation. The commenter (Cooley Godward) expressed the concern that an employer's utilization of this provision may prove problematic because determinations of ''first preference'' status require discretionary judgments, typically exercised by the INS, which if applied incorrectly by an employer, could subject the employer to sanctions for violating its recruitment obligation. Cooley Godward recommended that the Department promulgate a regulation that would protect employers who have made a reasonable good faith determination that an employee would qualify for first preference immigration status.

The Department agrees that such determinations might be problematic in some rare cases. The Department believes that it is likely that H–1B nonimmigrants who would meet the first-preference criteria would also be ''exempt H–1B nonimmigrants'' for purposes of LCA designations and obligations. The Department will consult with the INS if the issue of ''first preference'' status arises, and will take into account the employer's good faith efforts in any assessment of appropriate remedies.

1. How Are ''Industry-wide Standards'' for Recruitment To Be Identified? (§ 655.739(e))

The INA, at section 212(n)(1)(G)(i)(I), requires a dependent employer to attest that it ''has taken good-faith steps to recruit in the United States using procedures that meet industry-wide standards * * * United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought.''

In discussing the meaning of this provision, Congressman Smith stated:

> ''Congress intends for an employer to at least use industry-wide recruiting practices (unless the employer's own recruitment practices are more successful in attracting American workers), and, in particular, to use those recruitment strategies by which employers in an industry have successfully recruited American workers. The Department of Labor, in defining and determining whether certain recruitment practices meet the statutory requirements, should consider the views of major industry associations, employee organizations, and other interest groups.''

144 Cong. Rec. E2324 (Nov. 12, 1998). Senator Abraham stated, on the other hand, that this provision ''allows employers to use normal recruiting practices standard to similar employers in their industry in the United States; it is not meant to require employers to comply with any specific recruitment regimen or practice, or to confer any authority on DOL to establish such regimens by regulation or guideline.'' 144 Cong. Rec. S12751 (Oct. 21, 1998).

Consistent with these statements, the Department stated in the NPRM that ''[t]he statute does not require employers to comply with any specific recruitment regimen or practice, [and the Department does not] believe it is authorized to prescribe any explicit regimen.'' The Department also proposed that the benchmark ''industry-wide standards'' requires the employer's recruitment efforts be ''at a level and through methods and media which are normal, common or prevailing in an industry * * * including at least the medium most prevalently used in the industry and shown to have been successfully used by employers in an industry * * * to recruit U.S. workers.'' The Department explained that ''industry-wide standards'' does not refer to the lowest common denominator among employers in a particular industry, *i.e.,* the minimum or least effective recruitment methods used by companies in an industry to recruit U.S. workers. The Department solicited the views of major industry associations, employee organizations and other interest groups concerning successful recruitment practices and strategies.

The NPRM identified a number of recruitment methods recognized as appropriate for recruiting U.S. workers (*e.g.,* advertising in publications of general interest, advertising in trade and professional journals, advertising on Internet sites such as the Department's own ''America's Job Bank,'' use of public and private employment agencies, including ''headhunters,'' outreach to educational and trade institutions, job fairs, and development and selection from among the employer's own workforce). The Department further stated its expectation that good faith recruitment ordinarily will involve several of these methods, ''both passive (where potential applicants find their way to an employer's job announcements, such as to advertisements in the publications and the Internet) and active (where the employer takes proactive steps to identify and get information about its job openings into the hands of potential applicants, such as through job fairs, outreach at universities, use of ''headhunters,'' and providing training to incumbent employees in the organization).''

The NPRM requested comment on a proposed presumption of good faith recruitment where the employer in good faith used a mix of prescribed recruiting methods (at least three, one or two of which are active). This presumption would be available to employers who did not want to go to the trouble of demonstrating that their recruitment methods meet the standards for their industry.

Under the proposal, an employer would not have to avail itself of the presumption, but good faith recruitment, at a minimum, would need to involve ''advertising in relevant and appropriate print media or the Internet (where common in the industry), in publications and at facilities commonly used by the industry * * *, as well as solicitation of U.S. workers within an employer's organization.'' The Department also expressed the view that there should be a general recognition that good faith recruitment must ''involve some active methods of solicitation, rather than just passive methods such as posting job announcements at the employer's worksite(s) or on its Internet web page.''

Finally, the Department proposed that employers utilize recruitment methods

that are used by employers competing for the same potential workers, *e.g.,* a hospital, university, or software development firm would be required to use the standards developed by the health care, academic, or information technology industries for the occupations targeted for recruitment. Similarly, a staffing firm seeking to place workers at other employers' worksites would be required to utilize the standards of the industry in which it seeks to place workers, not the standards that exist within the staffing firm's own industry.

Thirty-two commenters, including 21 individuals, responded to the Department's proposals relating to ''industry-wide standards.''

The individuals were consistent in urging the Department to strengthen recruitment requirements. They generally urged that, at a minimum, posting job openings in major publications, trade journals, state employment service offices, and local colleges be a prerequisite to the issuance of H–1B visas for particular workers. Many of these individuals also urged a requirement that a company expend a minimum amount, such as $1,000, on advertising a position as a precondition to petitioning for an H–1B nonimmigrant.

APTA, AOTA and IEEE supported the Department's proposals. AOTA stated its belief that it is especially important to require employers to undertake several methods of active recruitment, and that those methods comport with those undertaken by the specific industry. IEEE agreed specifically with the requirement that employers be held accountable for recruiting for each job they fill under an LCA and with the Department's listed methods of recruitment and standards for good faith steps.

The AFL–CIO opposed the idea of a presumption, noting that it is wrong to assume that some arbitrary combination of recruitment methods will equate with the ''industry-wide standards.'' In this regard, the AFL–CIO suggested that for some industries, including the information technology industry, no form of passive recruiting should be considered to meet the industry-wide standard.

The AFL–CIO endorsed the Department's proposal that employers must conform their recruitment practices to those used within the industry for which the workers are sought. It stated that staffing firms must conform to the methods used by the industry in which they are seeking to place workers, not the methods used by employers within the staffing industry.

Senators Abraham and Graham, ACIP, AILA, and TCS contended that the Department's proposed presumption represented an attempt to prescribe a specific regimen, contrary to the statute's intent to allow employers to use recruiting practices similar to other employers in the industry. The common thread through employer, trade association, and attorney comments was that there is no single template for recruitment to fit all situations, and that recruitment procedures vary by industry, size, geographic location, and market conditions. One commenter (Simmons) asserted that the Department's recruitment proposal will set up an infrastructure that some small employers and foreign-based employers will be unable to meet.

A number of commenters responded to the Department's proposal that an employer use a combination of approaches, some of which must be proactive. The IEEE agreed with the Department's approach, stating that this approach would ensure a ''fair and level playing field'' for all applicants by requiring that employers utilize methods that do not skew the process against U.S. workers or otherwise put them at a disadvantage in competing against H–1B workers for positions covered by an LCA. One commenter (Hammond), though expressing the view that the statutory requirement that an employer utilize an industry-wide standard did not need any detailed regulations, indicated its approval of the Department's recognition that an employer cannot use the least common denominator within its industry, but must instead use methods that are normal, common, or prevailing in the industry. Intel (although stating that it is not a dependent employer itself) commended the Department for listing many of the recruitment methods used in the information technology industry today, but suggested changing the terms from ''active'' and ''passive'' to ''on-going'' recruitment and ''targeted'' recruitment to better describe recruitment practices. Similarly, ACIP commented that employers commonly undertake both ''on-going'' and ''targeted'' recruitment.

The Department continues to be of the view that some guidance is appropriate to assist employers in determining industry-wide standards. The Department sees no merit in the suggestion that an employer should be able to use any legitimate process utilized by employers in the industry. The statute requires that an industry-wide standard be utilized. There likely will be considerable variance among the methods used by different employers within the same industry. An employer who selects a method that falls short of the standard will not satisfy the statutory requirement. Such an interpretation of the statute (allowing use of any single practice used within its industry, even if it is the least common denominator, to pass muster) would allow an employer's recruiting practice to be self-validating, thereby frustrating statutory intent as well as its plain meaning.

The Department therefore has decided to go forward with its proposal to list the most common recruiting methods, and stating its expectation that good faith recruitment ordinarily will involve several of these methods, both passive and active. In this connection, the Department finds helpful the distinction between ongoing recruitment efforts to find candidates for ''generic'' positions always in short supply as contrasted with its targeted recruitment for a particular opening. However, the Department believes the active/passive distinction is a different standard and is more useful in guiding an employer's compliance with its recruitment obligations. The Department continues to believe that ''industry-wide standards'' cannot reflect the lowest common denominator. Rather, they must include methods that are normal, common or prevailing in the industry—defined as those employers competing for the same potential workers—including the methods which have been most effective at recruiting U.S. workers.

In view of the comments regarding the Department's proposed presumption, however, the Interim Final Rule does not include any presumptive level of recruitment that constitutes good faith recruitment. Employers will be expected to demonstrate in the event of an investigation, that their recruitment was consistent with industry-wide standards.

The rule requires that employers at a minimum recruit both internally—among their own work force and workers whose employment recently terminated because of expiration of a contract or grant—and externally—among U.S. workers elsewhere in the economy. The Department believes that such practices are the norm in all industries. Furthermore, given employers' testimony at Congressional hearings regarding widespread shortages of workers, the Department is confident that active recruitment is also the norm, and the rule will require some active recruitment (either internally, such as by training other employees, or externally). Employers are cautioned that disproportionate recruitment

through some sources, such as college campuses, can have the unintended effect of discriminating against older workers. The Department also encourages employers to recruit among underrepresented populations (*e.g.,* minorities, persons with disabilities) and in rural areas.

Several comments were received regarding the particular methods of solicitation utilized by employers. Intel, among other commenters, noted a dramatic shift away from the use of traditional methods such as print advertisements to other methods such as electronic media and specialized contacts. The IEEE, while agreeing with the Department's approach, encouraged the Department to consider imposing a requirement that employers make greater utilization of Intranet and Internet publication of job openings. Others (AFL–CIO, Malyanker) expressed the view that the utility of the Internet is overstated. Another commenter (Satyam) noted that the use of the Internet for recruitment is common, but stated that its review of the NPRM left it with the impression that it is disfavored by DOL.

The Department did not intend to leave the impression that it does not favor the Internet. As the NPRM recognizes, recruitment within the industries for which H–1B workers are sought—especially the information technology industry—often involves the use of electronic media. The Department encourages the use of this method in industries where it has proven effective and where it has the potential to attract the widest relevant audience. The Department notes that this method has shown itself to be inexpensive and expeditious (and in the case of services such as America's Job Bank, this method is free and accessible by any personal computer with an Internet connection). At the same time, as some commenters have noted, the effectiveness of electronic advertising is sometimes overrated and, in any event, it is not a substitute for active methods of recruitment, which can be better targeted to U.S. workers who are qualified for a particular position.

AILA and Rapidigm contend that the Department's proposal is more stringent than the reduction-in-recruitment (RIR) guidelines established under GAL 1–97 (Oct. 1, 1996) (recently published for comment at 64 FR 23984 (May 4, 1999)) for the permanent program for occupations in which there is little or no availability.

The Department notes that the ACWIA establishes a specific recruitment requirement that employers recruit in accordance with industry-wide standards. Furthermore, unlike the H–1B program, the recruitment efforts and accompanying documentation of industry practice for each RIR application under the permanent program are reviewed by the State agency and ETA Regional Office, which base their determinations on local labor market conditions. Because under the H–1B program recruitment efforts by H–1B-dependent employers and willful violators will be reviewed only in the event of an investigation, the Department believes that an explication of the industry-wide requirement is appropriate in these rules.

It should be noted, however, that the Department has not suggested that an employer is required to undertake separate recruitment efforts for every position listed on the LCA. In a particular situation, an employer may reasonably decide to solicit for all similar positions listed on an LCA(s) at the same time, particularly where the employer plans to hire for the positions at or about the same time. Similarly, as commenters pointed out, employers which regularly experience large numbers of vacancies may undertake ongoing recruitment. The Department will not second-guess an employer's good faith, reasonable decision in such circumstances, provided it accords with the relevant ''industry-wide standards'' applicable to the employer.

Finally, with regard to the comments by numerous individuals, the Department believes there is no statutory support for measuring an employer's recruitment efforts by the amount of money expended by the employer. Accordingly, the Department is not persuaded that there is merit to the suggestion that an employer must make a threshold showing that it has incurred solicitation expenses at or above some prescribed amount.

2. What Constitute ''Good Faith Steps'' in Recruitment? (§ 655.739(h))

In the NPRM, the Department expressed the view that good faith recruitment requires employers to ''maintain a fair and level playing field for all applicants,'' and to ''be able to show that they have not skewed their recruitment process against U.S. workers.'' The Department stated its belief that the ''good faith'' recruitment obligation encompasses the pre-selection treatment of the applicants, not merely the steps taken by an employer to communicate job openings and solicit applicants. The Department indicated that, where an employer's recruitment efforts have been demonstrably unsuccessful, it would examine closely the entire recruitment process. This examination would include the pre-selection treatment of applicants, ''to insure that U.S. workers are given a fair chance for consideration for a job, rather than being ignored or rejected through some tailored screening process based on an employer's preferences or prejudices with respect to the makeup of its workforce.'' The NPRM proposed that an employer would not meet its good faith recruitment obligation if, for example, it only interviewed H–1B applicants or used different staff to screen or interview the H–1B applicants than the staff used for U.S. workers. The NPRM also stated that the Department would not second-guess work-related screening criteria or the hiring decision regarding any particular applicant (the latter assigned by the ACWIA to the Attorney General). The Department did not propose any specific regimen or practice for the pre-selection treatment of applications and applicants. However, the Department considered whether to craft a presumption of good faith recruitment based on an employer's hiring of a significant number of U.S. workers and, thereby, accomplishing a significant reduction in the ratio of H–1B workers to U.S. workers in the employer's workforce. The Department indicated that it would refer any potential violation of U.S. employment laws to the appropriate enforcement agency.

As stated by Representative Smith:

> ''Any 'good faith' recruitment effort, as required by this legislation, must include fair, adequate and equal consideration of all American applicants. The Act requires that the job must be offered to any American applicant equally or better qualified than a nonimmigrant. Congress recognizes that 'good faith' recruitment does not end upon receipt of applications, but rather must include the treatment of the applicants. In evaluating this treatment, the Department should consider the process and criteria for screening applicants, as well as the steps taken to recruit for the position and obtain those applicants. . . . Employers who consistently fail to find American workers to fill positions should receive the Department's special attention in this context of 'good faith' recruitment.''

144 Cong. Rec. E2324, 2325 (Nov. 12, 1998). Regarding the interface with the Attorney General's enforcement of the ''failure to select'' requirement, Congressman Smith stated:

> ''[The Act] also contains a savings clause that states that the provision should not be construed to affect the authority of the Secretary or the Attorney General with respect to 'any other violations.' This savings clause means that while the Secretary is not authorized to remedy a violation of (1)(G)(i)(II) regarding an individual American

worker, the Secretary retains the broad authority to investigate and take appropriate steps regarding the employer's 'good faith' recruitment efforts, including 'good faith' consideration of American applicants.

144 Cong. Rec. E2325 (Nov. 12, 1998).

Senator Abraham cautioned:

''[The Act] does not contemplate, for example, recharacterizing a 'failure to select' complaint as a 'failure to recruit in good faith' and then using the enforcement regime for the latter category of violations to pursue what in fact is a 'failure to select' complaint.''

144 Cong. Rec. S12754 (Oct. 21, 1998).

The Department received generally supportive comments from AOTA, APTA, IEEE, and the AFL-CIO. The AFL-CIO stated that the proposal represents ''a very important step in protecting the rights of U.S. job applicants by clearly stating that 'good faith steps' in recruiting also include fair pre-selection treatment of job applicants.'' It also stated that the Department's approach does not intrude upon the Department of Justice's duty to arbitrate wrongful selection cases because the proposal deals only with pre-selection treatment that necessarily precedes a selection decision. IEEE stated its agreement with the Department that employers are required to maintain a fair and level playing field for all job applicants, and that employers must be able to show that their recruitment and selection processes have not been skewed so as to disadvantage U.S. workers.

Several commenters opposed parts of the proposal. AILA and ACIP stated their view that the proposal violated the ACWIA's clear mandate that the Department not interfere with the enforcement of the ''selection'' aspects of an employer's recruitment practice. AILA observed that the statute specifically sets up a separate remedial mechanism for alleged violations of the ''selection'' portion of the recruitment attestation, while including a savings clause that states that this provision does not restrict either the Department's or the Attorney General's enforcement authorities with respect to other violations.

Several commenters opposed the proposed presumption based on an employer's success in hiring U.S. workers. The AFL-CIO stated that employer hiring of an arbitrary number of U.S. workers in no way establishes that an employer did not discriminate against others. Senators Abraham and Graham recognized that scrutiny of an employer's recruitment process may be proper in an investigation, but opposed the proposed presumption. Senators Abraham and Graham and AILA urged the Department to remember that the premise of the legislation was that at least in some cases recruitment had been demonstrably unsuccessful. ACIP, TCS, BRI and SBSC objected to the proposal that successful recruitment would be equated with good faith recruitment. Some commenters noted that the positions sought by LCAs often may be filled only from a small labor pool and that the filing of the LCA reflects the relative scarcity of U.S. workers for the job(s) involved.

After review of the comments, the Department no longer believes that it would be useful to create a presumption that an employer has met its recruitment obligation by demonstrating its ''success'' in recruiting U.S. workers. Apparently, there is a strong concern that a negative presumption will arise that any dependent employer who is unable to demonstrate success—a situation which the commenters believe to be commonplace—will be presumed not to have acted in good faith. This was not the Department's intention. The Department, however, believes that this misperception may persist and could divert the focus away from the statutory test—an employer's adherence to industry-wide standards in meetings its recruitment obligations. For this reason, the Department's Interim Final Rule does not establish ''successful recruitment'' as a basis for a presumption of compliance. However, in its enforcement, the Department intends to look particularly carefully at the recruitment practices of employers who have not had success in hiring U.S. workers.

In the Department's view, its proposal is faithful to the statute's provision charging the Attorney General, not the Secretary, with overseeing the mechanism designed to resolve a particular U.S. worker's allegations that the dependent employer failed to offer him a position for which an H–1B worker was sought. The NPRM explicitly recognizes the concern that the Department should not supplant the specific statutory mechanism by which a U.S. worker can adjudicate his or her complaint that an H–1B worker was unlawfully hired for a position for which the U.S. worker was qualified and should have been hired pursuant to Section 212(n)(1)(G)(i)(II) of the ACWIA. However, at the same time, the Department believes that an employer cannot engage in good faith recruitment if it does not give good faith consideration to U.S. applicants. The Department believes it entirely appropriate to consider the process and methods by which an employer screens applicants for a position in order to ensure that U.S. workers receive the protections accorded them under the ACWIA. As noted in the NPRM, the Department has no intention of second-guessing work-related screening criteria used by an employer or intruding upon the role provided for the Attorney General with respect to any hiring decision involving a particular applicant.

Nothing in the Department's proposal suggested that the Department was interpreting the ACWIA in a way that would require a departure from the way in which employers customarily recruit workers for positions with their companies. The Department recognizes, as Senator Abraham also observed, that a multitude of legitimate factors, objective and subjective, go into recruiting and hiring decisions. As discussed in greater detail in the following section of the Preamble, the Department's inquiry will be limited to ensuring that an employer's recruitment efforts meet the statutory standard, *i.e.,* that they are based on ''legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.'' See Section 212(n)(1)(G)(ii).

Finally, Senators Abraham and Graham and the Congressional commenters stated that there may be legitimate business reasons for a company to use different personnel to interview H–1B applicants than U.S. workers, such as where the employer lacks personnel who speak the language of an applicant, or where the company recruits specialists from other countries who are familiar with the foreign culture.

The Department agrees that there may be circumstances in which using different staff to interview U.S. and H–1B workers may be appropriate. In these situations, however, it is important, in the Department's view, that the personnel who interview the H–1B applicants not have a more effective say in the recruitment/hiring process than the personnel interviewing U.S. applicants. A U.S. worker's ability to compete for the position covered by the LCA should not be adversely affected by the status of the interviewer within the company or its recruitment/selection process. Furthermore, it is important that U.S. workers not be interviewed by employees or agents who have a financial interest in hiring H–1B nonimmigrants rather than U.S. workers.

3 & 4. How are ''Legitimate Selection Criteria Relevant to the Job that are Normal or Customary to the Type of Job Involved'' to be Identified and Documented? What Actions Would Constitute a Prohibited ''Discriminatory Manner'' of Recruitment? (§ 655.739(f) and (g))

Section 212(n)(1) of the INA as amended by the ACWIA provides that ''nothing in subparagraph (G) [of Section 212(n)(1), which establishes the dependent employer's recruitment obligation] shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.''

In explaining this provision, Senator Abraham stated:

''The purpose of this language is to make clear that an employer may use ordinary selection criteria in evaluating the relative qualifications of an H–1B worker and a U.S. worker. It is intended to emphasize that the obligation to hire a U.S. worker who is 'equally or better qualified' is not intended to substitute someone else's judgment for the employer's regarding the employer's hiring needs. * * *. Moreover, its judgment as to what qualifications are relevant to a particular job is entitled to very significant deference. * * *. It is not intended to allow an employer to impose spurious hiring criteria with the intent of discriminating against U.S. applicants in favor of H–1Bs and thereby subvert employer obligations to hire an equally or better qualified U.S. worker.''

144 Cong. Rec. S12750 (Oct. 21, 1998).

Congressman Smith explained:

''The employer's recruitment and selection criteria therefore must be relevant to the job (not merely preferred by the employer), must be normal and customary (in the relevant industry) for that type of job, and must be applied in a non-discriminatory manner. Just because an employer in good faith believes that its selection criteria meet such standards does not necessarily mean that they in fact do. Any criteria that would, in itself, violate U.S. law can clearly not be applied, including criteria based on race, sex, age, or national origin. The employer cannot impose spurious hiring criteria that discriminate against American applicants in favor of H–1Bs, thereby subverting employer obligations to hire an equally or better qualified American worker.''

144 Cong. Rec. E2324 (Nov. 12, 1998).

In the NPRM, at Section E.3., the Department noted that employers are authorized to apply criteria that are legitimate (excluding any criterion which itself would be violative of any applicable law); relevant to the job; and normal or customary to the type of job involved—rather than the preferences of a particular employer.

The Department suggested the North American Industrial Classification System as one means of showing a match between the employer's criteria and the accepted practices for a job. In essence, the Department stated that employers cannot impose spurious criteria that discriminate against U.S. workers in favor of H–1B workers. The Department also proposed that in evaluating an employer's ''good faith'' in the pre-selection treatment of applicants it would limit its scrutiny of screening criteria to these factors. The Department proposed to issue a rule encapsulating the requirement that an employer conduct its recruitment ''on a fair and level playing field for all applicants without skewing the recruitment process against U.S. workers.'' The Department proposed that the rule would apprize employers that hiring criteria proscribed by applicable discrimination laws cannot be used in solicitation or screening processes, nor may employers apply such processes in a disparate manner.

As earlier noted, the Department's overall recruitment proposals generally received the support of the AFL–CIO, APTA, AOTA, and IEEE. Additionally, Intel specifically endorsed this aspect of the Department's proposal, stating: ''Legitimate selection criteria should be based on the 'core' requirements to the position [involved], which varies by position and the specific project.'' Intel continued: ''We agree with [the Department] that the selection criteria be legitimate, relevant to the job, and be normal and customary to the type of job involved.''

A general theme in many comments was that the Department should not define legitimate hiring criteria in advance, but rather should make determinations only in the context of individual enforcement cases.

AILA expressed the view that the statute does not intend the ''legitimate selection criteria'' provision as an affirmative requirement for employers, but rather as a savings clause where the Department or the Attorney General, in enforcement, believes that the employer's enforcement criteria were not ''legitimate'' or ''relevant,'' or were applied in a discriminatory manner. AILA further stated its view that the Department's entire proposal with regard to selection criteria is beyond its statutory authority. ACIP expressed its concern about the Department's reference to the NAICS, which it stated was unnecessary micromanagement and would be difficult for employers to use since it is not yet available to employers. Latour and Kirkpatrick & Lockhart commented that subjective factors cannot be removed from the hiring process, including considerations such as personality, attitude, and other intangible issues.

Miano, on the other hand, stated that it is important that H–1B nonimmigrants meet all the qualifications posted in the recruiting notices. In an apparent reference to employer recruitment prior to petitioning for immigrant workers under the permanent program, Miano observed that employers often advertise with more requirements than anyone can meet and then lower the requirements to bring in the foreign worker.

The Department has no intention of specifying which hiring criteria are legitimate and which are not. The Department's Interim Final Rule, like the proposal, simply makes plain that the statutory obligation of dependent employers and willful violators is to base their recruitment and selection decisions on criteria that are legitimate, relevant, and normal to the type of job involved. Nor does the Department intend to undertake any elaborate scrutiny of selection criteria in its enforcement. The Department's review of the process, as the Interim Final Rule provides, is designed to ensure that U.S. workers are not subject to criteria that deny them a fair opportunity, as fashioned by the ACWIA, to compete for jobs for which nonimmigrant workers are being sought.

The Department, however, has eliminated its reference to the North American Industrial Classification System as one means of showing a match between the employer's criteria and the accepted practices for a job. Upon review, the Department has determined that the online service ''O*NET,'' an enhanced version of the Dictionary of Occupational Titles, and the U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, will serve better than NAICS as a means by which an employer may choose to demonstrate the nexus between its recruitment/screening criteria and accepted practices for the job in question. As explained in IV.C.3 above (which addresses ''exempt workers'' under the ACWIA), both O*NET and the Occupational Outlook Handbook are readily available on the Internet. The Department wishes to stress, however, that both O*NET and the Handbook are being suggested only as tools to employers, and to the Department in its enforcement. Employers are not required to use these tools. Although these sources represent a statement by the Department of common qualifications for the occupations listed, they are not intended to be definitive

lists of all the criteria which the Department would find meet the statutory test in the event of an investigation.

The Department also wishes to specifically caution against recruitment practices and selection criteria or practices which have the effect of discriminating against U.S. workers or other groups of workers, as the comment by Miano recognizes. In this connection, workers are advised that the three federal agencies ordinarily recognized as responsible for enforcement of anti-discrimination laws are the Equal Employment Opportunity Commission (EEOC), the Department of Justice's Office of Special Counsel (OSC), and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The EEOC administers several statutes prohibiting discrimination in employment based on factors such as age, race, color, religion, sex, or national origin. OFCCP administers several statutes and an executive order prohibiting discrimination by Federal government contractors and subcontractors based on factors such as race, color, religion, sex, national origin, disability, and veteran status. EEOC and OFCCP offices are located throughout the United States and can be located in the blue pages of the telephone directory. Complaints can be made to the EEOC by telephone at: (202) 275–7377; see also their website at *www.eeoc.gov.* Complaints can be made to OFCCP by telephone at: (202) 693–0102, –0106, or by contacting the local offices, which can be located at its website, *www.dol.gov/dol/esa/public/contacts/ofccp/ofcpkeyp.htm.*

OSC administers several statutes concerning employment discrimination based on national origin, citizenship status, and immigration document abuse. OSC can be contacted at P.O. Box 27728, Washington, DC 20038–7728; telephone: 1–800–255–7688 (workers) or 1–800–255–8155 (employers); and e-mail address: *osc.crt@usdoj.gov;* see also OSC's website at *www.USDOJ.gov/crt/osc.*

TCS described its own hiring practices, which it contended should be allowed as legitimate under the Department's regulations. Specifically, TCS recruits its employees from university campuses (apparently in India) and places them in a 12-to 18-month training program in India. At the same time requiring a three-year commitment from its employees, whom it sends on assignments in India and throughout the world. TCS suggested that the Department's proposal could be read to require TCS instead to recruit U.S. workers for assignments in the United States without regard to the employment terms and conditions it applies to its other employees—a requirement which it suggested could potentially subject it to anti-discrimination claims. TCS argued that the Department's proposal incorrectly focused on the recruitment/employment for the particular job listed on an LCA rather than the dependent employer's hiring criteria for a position with the dependent employer—a position that encompasses duties and responsibilities beyond those required for the performance of the particular job covered by an LCA. TCS explained that its employees, including those it places in H–1B positions, serve as team members of consulting groups that will move from job to job in the United States and elsewhere. It stated that it hires employees with this enduring employment relationship in mind, not for the employee's particular assignment to a job in the United States.

Similar practices are described by Simmons, which asked whether a foreign-based employer may give preference to its own (foreign) workers, who are familiar with the specific technologies and protocols of an ongoing project, and whether it would be required to offer permanent as distinguished from temporary positions to employees in the U.S., since it otherwise would only temporarily transfer its permanent, foreign workers to perform the job in the U.S. Simmons also commented that it provides extensive training to its employees in India, and asked if it could require that U.S. workers have such skills, or would it be required to use the hiring criteria it utilized to hire the workers in India. Finally, Simmons asked if it could require U.S. workers to have the precise, specialized skills to meet a specific customer need.

In the Department's view, an employer's recruitment obligation attaches to the position for which an H–1B worker is sought in the United States (the employer is obliged to take, in the words of the statute, ''good faith steps to recruit . . . United States workers for the job for which the [H-1B worker(s)] is or are sought''). Additionally, the employer is required to offer the job to the U.S. worker if the worker is at least as qualified as the H–1B worker. Accordingly, the focus must be on the particular job(s) in the United States which is/are covered by the LCA, not the position an H–1B applicant already occupies or will occupy with the dependent employer. An employer will fail to meet its recruitment obligation if it utilizes recruitment/selection criteria that have the effect of precluding an equally or better qualified U.S. worker from being hired for the position. The Department also notes that L visas, where the criteria are met, may be available as an alternative method to accommodate intra-company transfers.

5. What Documentation Would Be Required of Employers? (§ 655.739(i))

Concerning documentation to show that good faith recruitment was conducted in accordance with industry-wide standards, the NPRM stated that an employer would not need to retain actual copies of advertisements, provided it kept a record of the pertinent details. The Department proposed that an employer's public access file need only contain information summarizing the principal recruitment methods used in soliciting potential applicants and the time frame in which such recruitment was conducted. The NPRM also requested comments on how employers can and should determine industry-wide standards and how to make the employer's determination available for public disclosure.

With regard to documentation concerning pre-selection treatment of applicants for employment, the Department proposed in the NPRM that employers should retain any documentation they receive or prepare concerning the consideration of applications by U.S. workers, such as copies of applications and/or related documents, test papers, rating forms, records regarding interview and job offers. The Department stated its view that the EEOC already requires employers to retain such records and therefore this requirement imposes no new obligations on employers.

With regard to the proposed documentation requirement, Senator Abraham stated: ''The intent is not to require employers to retain extensive documentation in order to be able retroactively to justify recruitment and hiring decisions, provided that the employer can give an articulable reason for the decisions that it actually made.'' 144 Cong. Rec. S12751 (Oct. 21, 1998).

AILA and ACIP cited Senator Abraham's statement in the *Congressional Record* for the principle that the ACWIA did not impose any extensive documentation requirements. ACIP, however, stated its belief that prudent employers of their own volition may want to retain documentation and that it is appropriate for the Department to provide guidance on how long employers should retain such documentation.

The Department disagrees with the view that the ACWIA denies the

Department the usual regulatory authority to require recordkeeping as a means of ensuring compliance with an employer's statutory obligations—either generally or with specific reference to the recruitment obligation. The fact that the H–1B program is primarily complaint-driven with only attestations of compliance filed initially with the Department makes it all the more important that documentation be retained so that the Department can determine compliance in the event of an investigation. In response to AILA's comment about the length of time which documents must be retained, the Department notes that its standard record retention requirements are set forth in § 655.760(c) of the regulation, which has been clarified as discussed in IV.B.3, above.

With regard to documents concerning recruitment practices, the AFL–CIO and Miano urged that employers be required to retain copies of all job advertisements or other recruiting efforts. AILA asserted that the Department's statement that an employer need not keep copies of advertisements is an illusory saving because as a practical matter saving these documents is the only way to document the information the Department proposed to require. AILA recommended that employers only be required to keep a summary of their recruitment for the past six months, similar to the requirements of the RIR procedures in the permanent labor certification program—especially when an employer is still recruiting for open positions and it is its practice to hire U.S. as well as H–1B workers. However, AILA stated that employers should not be required to keep recruitment information in public access files because it invites competitor intrusion into an employer's recruitment practices.

The Interim Final Rule, like the proposal, requires employers to retain documentation of the recruiting methods used, including the places and dates of the recruitment, advertisements, or postings; the content of the advertisements and postings; and the compensation terms (if not included in the content). The Department continues to believe that copies of print advertisements are not necessary since publication can be verified if necessary. Rather, the documentation may be in any form, such as a copy of an order or response from the publisher, an electronic or print record of an Internet notice, or a memorandum to the file. Similarly, the documentation of recruitment of positions filled by H–1B nonimmigrants need not be segregated from other records provided it is available to the Department upon request in the event of an investigation.

In addition, as proposed, the employer will be required to maintain a summary of the recruitment methods used and time frames of recruitment in its public access file. The Department does not believe that information in this summary nature will unduly disclose proprietary information since advertisements and attendance at job fairs are public in any event.

ACIP was the only commenter responding to the Department's request for comments on how employers should determine industry-wide recruitment standards, stating only that it is unaware of any source that catalogues standard recruiting practices within an industry. The Department repeats its request for further information on this point. The Department has determined that employers will not be required to maintain evidence of industry practice. However, in the event of an investigation, the employer will be required to substantiate its assertion as to industry practice through credible evidence, such as through trade organization surveys, studies by consultative groups, or a statement from a trade organization regarding the industry norm(s). The Department will look behind such evidence as it deems appropriate in the context of the particular recruitment performed by an employer.

With regard to documentation concerning pre-selection treatment of applicants, AILA disagreed with the Department's characterization of EEOC guidelines, stating that EEOC only requires that if documentation is created or retained, it must be done consistently. It also stated that it is impractical to expect an employer to retain what may be thousands of resumes submitted to it at a job fair, especially since many resumes do not even relate to positions offered.

As discussed in detail in IV.D.8, above, in connection with the retention of records relating to displacement of U.S. workers, the Department disagrees with AILA's characterization of the EEOC requirements. The Department continues to believe that most employers are already required to preserve copies of the records listed and that retention of the documents is necessary to demonstrate fair treatment of U.S. applicants. ADEA regulations, for example, require an employer to preserve all records it makes, obtains or uses relating to ''[j]ob applications, resumes, or any other form of employment inquiry whenever submitted to the employer in response to his advertisement or other notice of existing or anticipated job openings, including records pertaining to the failure or refusal to hire any individual, * * * [j]ob orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings, * * * [a]ny advertisements or notices to the public or to employees relating to job openings, promotions, training programs, or opportunities for overtime work.'' 29 CFR 1627.3(b)(i).

The Department emphasizes that it is not requiring employers to create any documents regarding treatment of applicants for employment, but rather to preserve those documents which are created or received. With regard to the comment regarding job fairs, this rule would not require employers to retain any resumes which do not relate to the positions to be filled by H–1B nonimmigrants. Nor does the Interim Final Rule require that any information relating to treatment of applications be maintained in the public access file.

F. What Are the Requirements for Posting of Notice? (Combined With Section O.5 of the Preamble to the NPRM) (§ 655.734(a)(1)(ii)(A) and (B))

Section 212(n)(1)(C) of the INA, 8 U.S.C. 1182(n)(1)(C), requires that, at the time of filing the LCA, an employer seeking to hire an H–1B nonimmigrant shall notify the bargaining representative of its employees of the filing or, if there is no bargaining representative, post notice of filing in conspicuous locations at the place of employment. As amended by the ACWIA, Section 212(n)(1)(C) further provides (where there is no bargaining representative) that the notice may be accomplished ''by electronic notification to employees in the occupational classification for which the H–1B nonimmigrants are sought.''

1. What Are the Requirements for Posting of ''Hard Copy'' Notices at Worksite(s) Where H–1B Workers Are Placed? (NPRM Section O.5) (§ 655.734(a)(1)(ii)(A))

Regulations with respect to this notification requirement were published by the Department as a Final Rule on December 20, 1994 (59 FR 65646, 65647). That Final Rule (set forth in the current Code of Federal Regulations) required, among other things, that an employer, who sends an H–1B worker to a worksite within the area of intended employment listed on the LCA which was not contemplated at the time of filing the LCA, post a notice at the worksite on or before the date the H–1B nonimmigrant begins work. 20 CFR 655.734(a)(1)(ii)(D). The purpose of the

provision was to enable employers to place H–1B workers at worksites where posting had not occurred without filing a new LCA. This provision was among those enjoined for lack of notice and comment by the court in *National Association of Manufacturers* v. *Reich (NAM)*, 1996 WL 420868 (D.D.C. 1996). On October 31, 1995, during the pendency of the *NAM* litigation, the Department republished the regulation for comment (60 FR 55339).

In the 1999 NPRM, the Department proposed for comment § 655.734(a)(1)(ii)(A) (previously published for notice and comment in the October 31, 1995 proposed rule as § 655.734(a)(1)(ii)(C) and (D)). The provisions regarding ''hard copy'' notice requirements remained essentially unchanged from the 1995 proposed rule. Subclause (A)(3) requires employers to post notice at worksites on or within 30 days before the date the LCA is filed. Subclause (A)(4) requires that where the employer places an H–1B nonimmigrant at a worksite which is not contemplated at the time of filing the LCA, but is within the area of intended employment listed on the LCA, the employer is to post notice at the worksite (either by hard copy or electronically) on or before the date any H–1B nonimmigrant begins work there. The preamble explained that posting is not required if the location is not a ''worksite,'' as discussed in proposed Appendix B of the NPRM.

Fourteen commenters responded to the 1995 proposed rule on notification. Eight of those commenters (AILA, ACIP, Intel, Microsoft, Motorola, NAM, Complete Business Solutions, Inc. (CBSI), and Moon, Moss, McGill & Bachelder (Moon)) objected to posting at worksites not controlled by the LCA-filing employer. These commenters asserted that many employers' customers would not allow posting at their worksites. In addition, because the regulations define ''place of employment'' as the worksite or physical location at which the H–1B nonimmigrant's work is actually performed, some commenters expressed a concern that strict application of this definition of place of employment could lead to absurd and/or unduly burdensome notice requirements such as posting notice at a restaurant when an H–1B nonimmigrant has a business lunch, at a courthouse when the nonimmigrant makes a court appearance, or at an out-of-town hotel when the nonimmigrant attends a training seminar. One commenter (Microsoft), expressed concern about the burden of notification and suggested that the notice provision should not apply to employers who do not make great use of the H–1B nonimmigrant worker visa program.

The Department received six comments on these provisions in response to the 1999 NPRM.

The AFL–CIO emphasized the importance of giving notice to all affected employees, including employees of the secondary employer and employees of other staffing firms. The AFL–CIO stated that the purpose of the notice is to provide information to affected workers that they may have certain rights and that the employer has certain duties regarding placement of the H–1B worker which are not diminished because the worksite is ''short-term'' or ''transitory.''

Four employer organizations (ACIP, AILA, ITAA, NACCB) commented on the issue of notification (whether hard-copy or electronic) to affected workers at third-party worksites. These groups contended that the statute requires an employer to notify only its own employees and that it is unreasonable to hold a primary employer responsible for notifying employees at worksites over which it lacks control. AILA gave as an example, workers such as service engineers who travel to a number of worksites during the course of a day or a week. AILA stated that if a client refuses to post notice, an H–1B worker cannot be sent to the site, resulting in a potential loss of business.

One commenter (Latour) requested that the regulation specify that worksite posting requirements do not apply to rehabilitation professionals providing home health care.

The Department has carefully considered the comments submitted in response to the 1995 proposed rule and the 1999 NPRM. The Department notes first that the statute requires that notice be posted at the place of employment. See Section 212(n)(1)(C)(ii). The Department's regulations have consistently defined ''place of employment'' as ''the worksite or physical location where the work is performed.'' 20 CFR 655.715 (1992).

This definition was modified slightly in the 1994 Final Rule (currently in effect) to provide ''where the work actually is performed.''

Furthermore, the purposes of notification can only be satisfied by notice to all of the affected workers—*i.e.,* all of the workers in the occupation in which the H–1B worker is employed at the place of employment, including employees of a third-party employer. This is critical because of the real possibility of displacement by the H–1B employees. Although this would only be a violation if the employer is an H–1B-dependent employer or willful violator, there remains a real possibility that U.S. workers of other employers could be harmed by the placement of the H–1B worker. Thus the notice alerts affected employees to the fact that an LCA has been filed and that H–1B workers will be placed at the worksite. Without such notice affected workers would not be able to file complaints regarding H–1B violations either with regard to themselves (if they are displaced because of a placement by an H–1B-dependent employer or willful violator), or with regard to the H–1B workers (which might indirectly affect themselves).

The Department observes that a number of employers' concerns with respect to notification of affected employees, either by hard copy posting or electronically, at third-party work sites, have been addressed by the interpretation of ''place of employment''/''worksite'' discussed in detail in IV.P.1 and .2 of the preamble and § 655.715 of the Interim Final Rule (see Appendix B of the NPRM). As stated in § 655.715, the Department interprets ''place of employment'' as excluding locations where the H–1B worker's presence either is due to the developmental nature of his/her activity (*e.g.,* management seminar; formal training seminar), or is short-term (not exceeding five consecutive workdays for any one visit) and transitory due to the nature of his/her job (*e.g.,* computer ''troubleshooter,'' sales representative, trial witness). Under this interpretation, employers would not be required to give notice in many of the situations about which concerns have been expressed, but would be required to give notice in those instances where the Act and its purposes require. If a location does not constitute a ''worksite,'' the employer is not required to post notice.

Although the Department recognizes that in some instances it may be inconvenient for an employer to post notice at a worksite controlled by another business (such as the customer of an employer), the Department notes that its experience in enforcement is that no employer has been unable to post notices at a customer's worksite when the operator, owner, or controller of the worksite was informed that posting was required by the statute and the regulations.

The Department agrees with the comment that notice need not be provided where a rehabilitation professional is providing services in the client's home. The Interim Final Rule provides in paragraph (2) of the definition of ''place of employment'' in § 655.715, that ''a physical therapist

providing services to patients in their homes within an area of employment'' is an example of a non-worksite location; in these situations notice must be posted at the worker's home station or regular work location.

2. What is Required for ''Electronic Posting'' of Notice to Employees of the Employer's Intention to Employ H–1B Nonimmigrants? (§ 655.734(a)(1)(ii)(B))

The Department also proposed a regulation, § 655.734(a)(1)(ii)(B), which would implement the ACWIA provision allowing electronic notification of employees. The ACWIA modified the statutory requirement for worksite posting of notices (where there is no collective bargaining representative), to permit an H–1B employer to use electronic communication as an alternative to posting ''hard copy'' notices in conspicuous locations at the place of employment.

Senator Abraham explained: ''An employer may either post a physical notice in the traditional manner, or may post or transmit the identical information electronically in the same manner as it posts or transmits other company notices to employees. Therefore, use of electronic posting by employers should not be restricted by regulation.'' 144 Cong. Rec. S12751 (Oct. 21, 1998).

Congressman Smith elaborated: ''By providing this flexibility, Congress intended to improve the effectiveness of posting in the protection of American workers. Therefore, the electronic notification must actually be transmitted to the employees, not merely be made available through electronic means such as inclusion on an electronic bulletin board.'' 144 Cong. Rec. E2325 (Nov. 12, 1998).

As the NPRM explained, in providing this alternative method for notification to affected workers, Congress indicated no intention of reducing the effectiveness of the notice requirement which has been an element of the H–1B program from its inception. The proposed regulation therefore provided that electronic notice may be accomplished by any means the employer ordinarily uses to communicate with is workers about job vacancies or promotion opportunities. Thus the NPRM stated that notice would be permitted through the employer's ''home page'' or ''electronic bulletin board'' where employees as a practical matter have direct access; or through e-mail or other actively circulated electronic message such as the employer's newsletter, provided the employees have computer access readily available. Where such computer access is not readily available, the NPRM explained that notice may be accomplished by posting a ''hard copy'' at the worksite.

The preamble further explained at Section O.5 that where the H–1B nonimmigrant(s) will be employed at the worksite of another employer, the H–1B employer is required to provide notice to the affected workers at that worksite. Thus, the H–1B employer may make arrangements with the other employer to accomplish the notice (*e.g.,* the other employer may ''post'' the electronic notice on its Intranet or employee newsletter, or may ''post'' hard copy notice in conspicuous locations at the place of employment).

The Department received 30 comments, including 22 from individuals, on the 1999 NPRM provisions regarding electronic notice.

The individuals generally objected to the statutory provision allowing electronic posting as an alternative to hard copy posting, asserting that Internet posting alone allows companies to hide replacement of American workers with foreign workers. The AEA essentially expressed a similar view on electronic posting, noting that the Internet/Intranet method of notification is unworkable.

The AFL–CIO commented that electronic posting should only be allowed if employers can show that all workers have access to e-mail or the Internet site, and that all notices are flagged to them. Another employee organization, IEEE, emphasized that to be an effective notice, electronic communications must be readily available and accessible to all affected U.S. and foreign workers.

ACE, ACIP and SHRM commended the Department for its flexibility on methods of electronic posting. ACIP recommended that the Department distinguish between ''indirect'' and ''direct'' electronic notices, suggesting that where ''indirect'' notice is given, such as on a bulletin board, the employer should have to make the notice available for 10 days. If, however, the employer provides direct notice, such as e-mail to each employee, ACIP suggested that notice should only have to be sent to each affected employee once. SHRM urged the Department to allow an employer to document that notice has been given by permitting the employer to place a signed notice in the public access file regarding how notice was provided. AILA recommended amending the regulations to clarify that an employer may satisfy its electronic posting obligation by providing the notification on its internal network or website. AILA also recommended that with respect to employers which send the notice by e-mail, the regulation should specify that notification sent to a distribution group of ''affected workers'' satisfies the electronic posting requirement. Another commenter (Cooley Godward) sought clarification on the issue of how electronic posting can comply with the requirement of § 655.734(a)(1)(ii)(A) that the LCA be posted in two or more conspicuous places, and on whether or not all four pages of the LCA must be posted.

With regard to posting at third-party worksites, AILA suggested that a primary employer should be able to satisfy its obligation to document that an electronic posting was made at the work site of a third-party employer in any one of the following three ways: (1) A statement in the contract between the parties requiring the notification to be made; (2) a written statement by a responsible party at the third-party location; or (3) a printout of the electronic communication with a certification about when, how, and to whom it was sent.

The statute does not give the Department the discretion to disallow electronic posting, as suggested by the individual commenters. The Department agrees with the AFL–CIO and the IEEE, however, that the critical consideration is that the notice is readily available and accessible to the affected workers. The Department believes that the proposed regulation, as drafted, meets these concerns. Posting must be by the means the employer ordinarily uses to communicate with its workers about job vacancies or promotion opportunities. Posting on the employer's ''home page'' or electronic bulletin board is allowed where employees as a practical matter have direct access to these resources. Where employees lack computer access, a hard copy must be posted or the employer may provide employees individual copies of the notice.

The Interim Final Rule clarifies the operational requirements for electronic posting. Like the physical posting, the electronic notice need not incorporate a copy of the LCA, although it would be permissible since a copy of the LCA would satisfy the substantive requirements (see § 655.734(a)(1)(ii)). (Employers are reminded that all H–1B nonimmigrants must be given a copy of the LCA. See § 655.734(a)(2).) Like ''hard copy'' posting, electronic posting on a ''home page'' or electronic bulletin board must be posted for 10 days. If direct notice is given to each affected employee, as through e-mail or ''hard copy'' notices, the notice need only be given once during the regulatory time

period. Notice by e-mail may be provided by notification to an e-mail group consisting of all of the affected employees. Electronic posting, unlike hard copy posting, need not be posted in two locations, provided all the affected employees, as a practical matter, have access to the website or bulletin board. Another method of posting would have to be used to reach those employees who do not have such access. For example, home care therapists may not have practical access to a computer at all as a part of their job. Where there is no such access, physical posting at two sites in the home office or individual copies of the notice would be necessary. The Department believes the existing documentation provision is broad enough to encompass electronic posting, both at the employer's own worksite and at another employer's worksite.

The Interim Final Rule also clarifies that electronic notification, like other physical posting, shall be provided in the period on or before 30 days before the date the LCA is filed. Where H–1B nonimmigrants are placed at a worksite not contemplated when the LCA was filed, the notification shall be provided on or before the date the H–1B nonimmigrant begins work at the site.

Finally, upon review of the provisions of the ACWIA, the Department has concluded that some modification of the required notice is appropriate. Specifically, the Department has concluded that the content of the notice should be modified to require dependent employers and willful violators to notify affected workers, through the methods provided herein, that they are H–1B-dependent or a willful violator, subject to the requirements for recruitment and non-displacement of U.S. workers. Where the employer is dependent (or a willful violator) but will employ only exempt workers, the notice must so provide, and further state that it is not subject to the recruitment and non-displacement requirements. In addition, the notice about filing complaints with the Department of Justice for failure to offer employment to an equally or better qualified U.S. worker will only be required for H–1B-dependent employers and willful violators. Finally, because the full attestations are set forth in the cover sheet, Form ETA 9035CP, the provision in § 655.734(a)(3) requiring employers to give copies of the LCA to all H–1B nonimmigrants has been modified to provide that copies of the cover sheet shall be given to the H–1B nonimmigrant upon request.

G. What Does the ACWIA Require of Employers Regarding Benefits to H–1B Nonimmigrants? (§ 655.731(c)(3), § 655.732)

Section 212(n)(2)(C)(viii) of the INA as amended by the ACWIA states that ''[i]t is a failure to meet a condition of paragraph 1(A) [the wage and working condition attestation requirements] * * * to fail to offer an H–1B nonimmigrant, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and noncash compensation such as stock options (whether or not based on performance) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.''

Senator Abraham and Congressman Smith described the operation of this provision in similar terms. Senator Abraham explained:

> This obligation is only an obligation to make benefits available to an H–1B worker if an employer would make those benefits available to the H–1B worker if he or she were a U.S. worker. Thus, if an employer offers benefits to U.S. workers who hold certain positions, it must offer those same benefits to H–1B workers who hold those positions. Conversely, if an employer does not offer a particular benefit to U.S. workers who hold certain positions, it is not obligated to offer that benefit to an H–1B worker. Similarly, if an employer offers performance-based bonuses to certain categories of U.S. workers, it must give H–1B workers in the same categories the same opportunity to earn such a bonus, although it does not have to give the H–1B worker the actual bonus if the H–1B worker does not earn it.

144 Cong. Rec. S12753 (Oct. 21, 1998). See also the statement of Congressman Smith, 144 Cong. Rec. E2326.

Senator Abraham continued:

> While this clause is not intended to require that H–1B workers be given access to more or better benefits than a U.S. worker who would be hired for the same position, it does not forbid an employer from doing so. For example, an employer might conclude that it will pay foreign relocation expenses for an H–1B worker whereas it will not pay such relocation expenses for a U.S. worker.

144 Cong. Rec. S12753 (Oct. 21, 1998).

Congressman Smith, on the other hand, stated that ''[t]he statement 'on the same basis' is intended to mean equal or equivalent treatment, not preferential treatment for any group of workers. Thus, if an employer offers benefits to American workers, it must offer those same benefits to H–1B workers.'' 144 Cong. Rec. E2326 (Nov. 12, 1998).

Senator Abraham also explained that ''care must be taken to find the right U.S. worker to whom to compare the H–1B worker in terms of access to benefits. * * * If a particular benefit is available only to an employer's professional staff, then it only need be made available to an H–1B filling a professional staff position. If an employer's practice is not to offer benefits to part-time or temporary U.S. workers, then it is not required to offer benefits to part-time H–1B workers or temporary H–1B workers employed for similar periods.'' 144 Cong. Rec. S12753 (Oct. 21, 1998).

Senator Abraham and Congressman Smith differed in their view as to the application of the provision to multinational corporations. Thus Senator Abraham stated:

> If an employer's practice is to have its U.S. workers brought in on temporary assignment from a foreign affiliate of the employer remain on the foreign affiliate's benefits plan, then it must allow its H–1B workers brought in on similar assignments to do the same. Likewise, in that instance, it need not provide the H–1B workers with the benefits package it offers to its U.S. workers based in the U.S. Indeed, even if it does not have any U.S. workers stationed abroad whom it has brought in this fashion, it should be allowed to keep the H–1B worker on its foreign payroll and have that employee continue to receive the benefits package that other workers stationed at its foreign office receive in order to allow the H–1B worker to maintain continuity of benefits. In that instance, the basis on which the worker is being disqualified from receiving U.S. benefits (that he or she is receiving a different benefits package from a foreign affiliate) is one that, if there were any U.S. workers who were similarly situated, would be applied in the same way to those workers. Hence the H–1B worker is being treated as eligible for benefits on the same basis and according to the same criteria as U.S. workers. It is just that the criterion that disqualifies him or her happens not to disqualify any U.S. workers. Or to put the point a little differently: The H–1B worker is being given different benefits from the U.S. workers not because of the worker's status as an H–1B worker but because of his or her status as a permanent employee of a foreign affiliate with a different benefits package.

Ibid.

Congressman Smith had a different perspective:

> There is particular concern regarding such erosion in instances where a foreign affiliate of a petitioning employer is involved as the agent for payment of wages and provision of benefits to the H–1B workers. The statutory obligations must be fully met in such instances. Congress intends that the ultimate and complete responsibility for all employer obligations under this Act, including the provision of benefits to the H–1B worker equal to those offered the employer's

American workers based in the U.S., lies with the American (United States) employer who brings nonimmigrant workers into the country. Ultimately, it is the American employer, not the foreign subsidiary, pledging a benefit package similar to that of its American workers. Congress would expect the Secretary to look with particular care at circumstances involving a foreign subsidiary where there is an appearance of contrivance to avoid the obligation to provide equal wages and benefits to H–1B and American workers.

144 Cong. Rec. E2326 (Nov. 12, 1998).

1. What Does ''Same Basis and Same Criteria'' Mean With Respect to an Employer's Treatment of U.S. Workers and H–1B Workers With Regard to Benefits? (§ 655.731(c)(3), § 655.732)

In the NPRM, the Department proposed that: (a) An employer is required to offer H–1B workers the same benefit package it offers to U.S. workers; (b) the package must be offered on the same basis as it is offered to U.S. workers, *i.e.,* the employer may not impose more stringent eligibility or participation requirements on the H–1B workers than those applied to U.S. workers; (c) the comparison between the benefits offered U.S. and H–1B workers should be between similarly employed workers, *i.e.,* those in the same employment categories, such as full-time compared to full-time, professional to professional; and (d) the benefits actually provided to the H–1B workers, as distinguished from the benefits offered, might be different than those provided to U.S. workers because of an individual's choice among options. The Department also sought comments regarding whether the ACWIA would allow an employer to provide a different, but ''equivalent package'' to satisfy its benefits obligation, noting the difficulty of making an evaluation of the benefits—particularly a qualitative evaluation of the benefits, as distinguished from one based on the relative costs to the employer of providing such benefits.

The Department further proposed that an employer, consistent with its attestation to adhere to minimum standards for H–1B workers, may provide greater benefits to H–1B workers than to U.S. workers. The Department acknowledged, however, that the phrases ''same basis'' and ''same criteria,'' applied literally, could require that U.S. and H–1B workers be offered the same (or possibly equivalent) benefits.

The Department noted the possible complications that might arise with respect to benefits afforded employees of a multinational corporate operation, particularly where the H–1B worker works in the U.S. for only a short period of time. In this situation, the NPRM noted, it might not be practical for the U.S. employer to provide the H–1B worker with benefits identical to those provided its U.S. workers. The Department proposed that while the U.S. employer may cooperate with its corporate affiliate in the worker's home country with regard to the payment of wages to the worker and the maintenance of his or her ''home country'' benefits (such as that country's retirement system), the U.S. employer remains ultimately responsible for ensuring that the H–1B worker is provided benefits at least equal to those offered U.S. workers. The Department stated that it would look closely into situations involving a foreign affiliate where there was the appearance of a contrived arrangement to avoid the U.S. employer's obligation to provide to its H–1B workers wages and benefits at least equal to those provided its U.S. workers. At the same time, the Department proposed that it would carefully examine the circumstances to consider non-equivalent but nonetheless equitable benefits, including the H–1B worker's actual length of stay in the United States.

The Department also proposed to modify § 655.732 of the current regulations to clarify that an employer must provide the H–B worker with fringe benefits and working conditions at least equal to those provided U.S. workers. The NPRM noted that such a modification would make it clear that the requirement that the H–1B employer provide working conditions, including benefits, that will not adversely affect those provided similarly employed U.S. workers, requires consideration of similarly employed workers in the employer's own workforce and, in some circumstances, the prevailing conditions in the area of employment.

Finally, the Department sought comment on whether it would be beneficial to develop a regulatory definition of ''benefits'' within the meaning of the ACWIA or merely to provide a list of examples. The NPRM noted that the ACWIA contemplates the inclusion of various forms of cash and non-cash compensation, such as bonuses and stock options, which ordinarily are considered wages.

Several commenters, including AOTA, APTA, IEEE, and an attorney (Latour), generally endorsed the Department's NPRM approach in this area. IEEE stated that the Department's proposal ''will help implement the letter and the spirit of the law that the wages and working conditions of U.S. workers not be adversely affected'' and, at the same time, ''help to reduce the likelihood that employers will discriminate against H–1B workers by offering them less generous benefits.''

Senators Abraham and Graham and AILA noted that the NPRM created some confusion by failing to make it clear that an employer must offer ''benefits and eligibility for benefits'' on the same basis as offered to U.S. workers. Citing to Senator Abraham's statement in the Congressional Record, these commenters stated that this phraseology was important because workers must be or make themselves eligible to obtain benefits—*e.g.,* by selecting a plan, providing partial payment, working for a period of time, or performing at a high level. Similarly, ACE requested the Department to make clear that a comparison should be made between the benefits offered to workers, not the benefits actually selected by the workers. ACE mentioned, as one example, ''cafeteria plans'' offered by many employers. Under these plans, it explained, employees choose certain benefits and not others for a variety of reasons.

The Department agrees that the ACWIA requires an employer to offer H–1B workers benefits and eligibility for benefits on the same basis and in accordance with the same criteria as U.S. workers. Because employers often offer workers a choice of benefits, the ACWIA does not require that U.S. workers and H–1B workers actually receive the same benefits. Similarly, some employees may opt for ''family'' coverage of certain benefits, while others opt for ''individual'' coverage. Furthermore, as the commenters noted, workers may be required to meet certain criteria or take certain action to avail themselves of the benefits. However, an employer cannot satisfy its statutory requirement by ''offering'' benefits which it never actually provides to selecting workers. Thus, as discussed below, employers are required to retain documentation showing that employees actually receive the benefits that they have selected. While the Department believes that the NPRM comported with the statutory language, the Interim Final Rule clarifies these requirements in order to eliminate any ambiguity.

AILA and ACIP agreed with the Department's proposal that an employer lawfully may offer and provide greater benefits to H–1B workers than those offered to U.S. workers. The AFL–CIO asserted the contrary position. In the AFL–CIO's view, an employer should be required to provide identical benefits to H–1B and U.S. workers, a result it argues is consistent with the ACWIA's ''same basis'' requirement. Senators

Abraham and Graham suggested that the statute would allow employers to offer benefit incentives above and beyond normal benefits to lure foreign-based employees with critical skills to work in the United States. The Senators suggested that so long as the packages are offered on the same basis to U.S. and foreign nationals based abroad, the practice should be permitted.

In the Department's view, the statute does not require that H–1B workers and U.S. workers be offered the same benefits. While perhaps Section 212(n)(2)(C)(viii), read in isolation, could be read to require this result, this provision must be read in the context of the entire statute. Section 212(n)(2)(C)(viii) provides that it is a failure to meet paragraph (1)(A)—the wage requirements of the Act—to fail to provide the required benefits. Section 212(n)(1)(A)(i) in turn provides that the employer must offer wages that are ''at least'' those paid to similar workers. The Department notes, however, that an H–1B-dependent employer or willful violator, when it conducts good faith recruitment pursuant to section 212(n)(1)(G)(i), must offer U.S. workers the same compensation (including benefits) as it will offer the H–1B workers in the recruited positions. Furthermore, providing greater benefits to H–1B workers may violate requirements of the various discrimination laws. The agencies that enforce discrimination requirements and their telephone numbers and website addresses are set forth above in IV.E.4, above.

Senators Abraham and Graham asserted that the Department should look at the employer's entire benefits structure as it concerns ''benefits eligibility for its workforce generally'' to make sure that the comparison is made to the right employees. These Senators and AILA suggested that comparisons could appropriately be made on such bases as part-time vs. full-time workers, positions requiring extensive travel vs. those that do not, relative seniority, the particular organizational component to which the workers are assigned, and whether the individual occupies a position for which special incentives should apply. Similarly, ACIP suggested that the Department look beyond a simple full-time/part-time distinction.

The Department agrees that it should look at an employer's benefits structure. Employers commonly provide different benefits, for example, based on part-time vs. full-time status, seniority, union vs. non-union, organizational component, etc. The Department agrees that H–1B workers should be provided benefits based on their position in the organizational structure, provided the employer utilizes the same distinctions on an organization-wide basis. However, the Department will not accept artificial distinctions which are not generally accepted in the industry and which have the result of denying benefits to H–1B workers on the basis that there are no comparable workers in the organization or which otherwise have the effect of discriminating between workers on the basis of citizenship, nationality, or other prohibited grounds.

The Interim Final Rule incorporates these principles. The Interim Final Rule also prohibits employers from denying benefits based on the H–1B worker's temporary status since all H–1B workers, by virtue of their visa restrictions, are temporary workers. Thus, an employer by utilizing ''temporary'' as a basis for comparison could evade offering to these workers the benefits that typically would be paid to workers hired on a ''permanent basis,'' even though the tenure of workers in each group might be of comparable duration, thereby effectively nullifying the statutory provision. An employer would, however, be allowed to require that an H–1B workers meet eligibility and vesting requirements.

Sun Microsystems suggested that to the extent there was a perceived need for greater scrutiny over fringe benefits, the Department's efforts should be restricted to dependent employers. The Department disagrees. Unlike some other provisions of the ACWIA, the ''same basis''/''same criteria'' provision applies to all H–1B employers.

TCS asserted that the Department ''should clarify that, where length of service is applicable to the amount of the benefit, only the H–1B non-immigrant's length of service in the United States, and not the H–1B's entire length of service with the employer should be included in the calculation.''

It is the Department's view that an employer is required to offer benefits on the same basis as it offers benefits to its U.S. employees. If an employer offers benefits based on length of service for the employer, it must offer benefits to its H–1B workers on that basis as well. (See the discussion below regarding treatment of multinational organizations.)

APTA suggested that the INS inform all H–1B workers of their right to be offered the same benefits as U.S. workers, to better ensure that they receive the benefits due them. The Department notes that every H–1B worker is required to receive a copy of the LCA, which contains a brief reference to this requirement. Section III.B of the Preamble, above, discusses in greater detail the Department's plans to disseminate information regarding the program's requirements.

In response to the Department's query, BRI and AILA contended (without citing support for their position) that the ACWIA contemplates that an employer may satisfy the benefits attestation by offering H–1B workers different but ''equivalent'' benefit packages relative to the benefits offered to U.S. workers. BRI further stated that such benefits should be compared according to their monetary value.

The Department has concluded, as a general matter, that the statute's ''same basis'' provision does not permit an employer to offer its H–1B workers benefits ''equivalent'' to but different from those offered its U.S. workers. The Department notes that these commenters, like other commenters, appeared to be concerned with benefits provided by multinational corporations, which are discussed separately below.

Intel and ACIP stated that a few countries prohibit their citizens from owning stock in foreign corporations. Cooley Godward also raised the question of benefits such as stock options whose accrual will terminate after an H–1B employee's period of status ends.

Although there is nothing which requires an employee to take advantage of a stock option, it is the Department's view that if an employer is aware that its H–1B worker(s) is prohibited from taking advantage of a stock option because of laws of the worker's home country, the employer should offer such worker(s) an alternative benefit of comparable value. With regard to the question of stock options or benefits which will accrue after termination of an H–1B worker's period of status, such benefits should be provided on the same basis as they would otherwise be provided to workers who are no longer in the firm's employ (or who have transferred back to the home office). If other workers have a right to exercise the option or receive the benefit even if they are no longer in the firm's employ, the same would be true with regard to H–1B workers.

Turning to the question of treatment of employees of multinational firms, Senators Abraham and Graham asserted that the Department's proposal ''appear[s to provide no] consideration of the question of who the right similarly situated worker to compare [the transferee] is, and whether there actually is one.'' They, instead, suggested that the Department should focus on the transferee's status as a permanent employee with the

employer's foreign affiliate, rather than his or her status as an H–1B worker.

TCS stated that it appreciated the Department's sensitivity to the issue of the application of the benefits requirement to employees who receive a range of benefits from their foreign employer and are only in the United States on short-term assignments in connection with their long-term employment with the foreign employer. TCS contended, however, that the requirement that H–1B workers be provided benefits equivalent to those received by U.S. workers is contingent upon the existence of ''similarly employed'' workers in the United States. TCS argued that because it is an Indian company and its employees receive India-based benefits, they are not similarly employed to any computer engineers it might hire in the United States, and that TCS would therefore be relieved from any obligation to offer new benefits to its workers during the period of their temporary employment in the United States.

ACIP commented that a ''length of status'' test ''wrongly assumes that the practice of maintaining a foreign benefits program is a matter of convenience, when, in fact, the practice is maintained because the disruption often causes the employee to lose vested interest in a benefit plan.'' Instead, they suggested, ''[t]he Department should adopt a rule that allows for a transferee to maintain his or her foreign benefits as long as such benefits plan is administered abroad continuously without interruption and as long as the company typically offers this option to all international transferees.'' Similar comments were made by AILA and Intel, which stated that it is in the employees' best interest to stay on ''home country'' pay and benefits. SIA also stated that if it is an employer's practice to have its workers continue to receive ''home country'' benefits when they are on a short-period assignment in the United States, it should be allowed to continue to do so.

Some commenters (ACIP, Intel, Latour) indicated that multinational corporations typically offer similar benefit packages to all their employees. Thus, ACIP stated that ''most employers already provide the same benefits to all workers and do not distinguish between U.S. and foreign nationals.'' At the same time, it noted that ''in dealing with a global workforce, it is sometimes necessary to provide different benefit packages to workers from different countries, depending upon the laws and social services of that country.'' Intel similarly stated that the vast majority of its regular full-time H–1B workers are on U.S. benefits; it noted that a small percentage of these workers are on their ''home country'' pay and benefits. Intel further stated that all its H–1B workers are put on U.S. medical benefits, because of ''out of country'' coverage problems. ACIP explained that currently employers may provide certain benefits to workers depending upon standards in the workers' home countries and the employer's international relocation policies. As stated by ACIP: ''Benefits may include relocation expenses, schooling for children, housing allowance, travel expenses, additional vacation time and assistance with health care or other items the worker is accustomed to receiving.''

ACIP applauded the Department's effort to deal with this issue and supported the Department's statement that ''should the U.S. worker remain on the foreign plan, the U.S. employer will be held responsible for compliance with all H–1B regulations.''

AILA's comment, that flexibility is needed to preserve the ability of the H–1B workers to preserve their existing ''home country'' benefits (which if interrupted could have significant and perhaps long-term negative impact on the worker and the worker's family), was representative of several comments on this point.

The Department has carefully considered the question of application of the benefits requirements of the ACWIA to multinational firms. The Department cannot agree with the construction of the statute that would deprive foreign-based employees of the benefit protections enacted by the ACWIA on the basis that they are not ''similarly employed.'' On the other hand, the Department believes it is appropriate to provide some accommodation for multinational corporate operations where ''home country'' benefits are equitably equivalent to the benefits provided to employees.

The Department has crafted a two-part Interim Final Rule, distinguishing between workers who are in the United States for a short period of time (90 days or less) and workers who are in the United States for a longer period. Where H–1B workers permanently employed in their ''home country'' (or some other country) are not transferred to the United States but remain on the payroll of their permanent employer in their ''home country'' and continue to receive benefits from the ''home country'' without interruption, the Department will require nothing further, provided the worker is in the United States for no more than 90 continuous days in any one visit to the United States. Moreover, the employer must also provide reciprocity to its U.S. workers *i.e.,* U.S. workers based abroad and U.S. workers based in the United States must receive the benefits of their home work station (the station abroad or in the United States, respectively) when traveling on temporary business. It should be noted that this provision would allow H–1B workers who are not in the United States more than 90 continuous days in one trip to go back and forth between countries without any consideration to cumulative days of employment in the United States, provided there is no reason to believe the employer is trying to evade the Act's benefit requirements, such as where a worker remains in the United States most of the year but returns to the home country on brief visits.

Once the H–1B worker has worked in the U.S. for more than 90 continuous days (or from the point where the worker is transferred or it is anticipated that the worker will likely remain in the United States for more than 90 continuous days), the H–1B employer is required to offer that worker the same benefits on the same basis as provided to its U.S. workers unless: (1) The worker continues to be employed on the ''home country'' payroll; (2) the worker continues to receive ''home-country'' benefits without interruption; (3) the ''home-country'' benefits are equitable relative to the U.S. benefit package; and (4) the employer provides reciprocity (*i.e.,* similar treatment as discussed above) to its U.S. workers (if any) on assignment away from their home work station. In the Department's view, this strikes an appropriate balance between meeting the statutory requirement (thereby protecting the benefits of U.S. workers employed in the U.S. against erosion), and protecting the H–1B worker's interest in preserving long-term ''home country'' benefits which may be threatened by the disruption of these benefits.

Furthermore, as Intel noted in its comments, many health care plans fail to provide coverage, or fail to provide full coverage, outside their country's boundaries. Therefore any employer that offers health coverage to its U.S. workers must offer similar coverage (same plan and same basis) to its H–1B workers in the United States for more than 90 continuous days unless the H–1B workers' home-country plan provides full coverage (*i.e.,* coverage comparable to what they would receive at their home work station) for medical treatment in the United States.

In addition, employers will be required to provide H–1B workers who are in the United States more than 90

continuous days those U.S. ''benefits'' which are paid directly to the worker—namely paid vacation, paid holidays, and bonuses. H–1B workers must also be provided working conditions and eligibility for working conditions (hours, shifts, vacation periods, etc.) on the same basis and criteria provided to U.S. workers.

TCS argued that if the Department requires the same or even equivalent benefits for its workers, they will receive double benefits—the U.S. benefits plus their ''home country'' benefits. In the Department's view, TCS is mistaken. The Department's proposal tracks the ACWIA. Neither the proposal nor the statute requires the employer to continue to maintain ''home country'' benefits in such situations. While an employer in such situations, either by contract or otherwise, might be required to maintain such benefits (or it may decide to do so as a matter of company policy), the ACWIA does not impose such an obligation, nor does this rule.

The Department received a number of comments regarding whether a multinational employer continuing ''home country'' benefits to H–1B workers need establish that the benefits provided are equivalent or equitable in relation to benefits provided U.S. workers. ACIP expressed the view that ''it [would be] extremely burdensome to put a dollar value on benefits received.'' Similarly, AILA stated that multinational employers should be able to provide equitable but non-equivalent benefits to H–1B workers. BRI, on the other hand, took the position that benefits should be equivalent, comparing their monetary value. The AFL-CIO, as discussed above, contended that employers should be required to provide identical benefits to H–1B and U.S. workers.

The Department agrees that a multinational firm, under the circumstances described, should not be required to make a valuation of the benefits it offers and provides to U.S. and H–1B workers, but rather should be required, in the event of an investigation, to establish only that it provides benefits which are equitable in relation to U.S. workers' benefits. The Department finds very persuasive the arguments that it is in the workers' interest to allow employers to continue their permanent employees on ''home country'' benefits when working temporarily in the United States. At the same time, the Department believes that establishing benefits in terms of cost is unduly burdensome, and would not further the objective of establishing comparable benefits since there is no reason to believe even identical benefits abroad would cost the same as benefits in the United States.

Only ACIP provided comments on the meaning of the phrase ''equitable benefits.'' ACIP suggested that ''[t]he emphasis should be on whether the benefits package is equitable in light of basic human needs, similarity in treatment of all workers, how U.S. workers transferred abroad are treated, and the facts and circumstances of each H–1B worker.'' ACIP further stated: ''While we agree that the Department should look closely at 'contrived cases,' we stress that the Department should look closely at the facts of each case to determine whether equitable benefits have been provided. * * * [T]he Department should not place undue emphasis on any one factor such as the employee's length of stay in the U.S.''

The Department agrees that ''equitability'' between ''home country'' and U.S. benefits does not reduce to a bright-line test. In the event of an enforcement action, the Department will look into all the circumstances bearing upon the benefits to ensure that the H–1B worker's continued receipt of these benefits is not less advantageous to him than the benefits offered U.S. workers. This examination entails a qualitative rather than a quantitative review. In other words, an employer in these circumstances must be able to demonstrate that the worker's ''home-country'' benefits are equitable in relation to the benefits provided its U.S. workers based in the United States, similarity in treatment of all workers, how U.S. workers temporarily stationed abroad are treated, and the facts and circumstances of each H–1B worker. Where the employer makes this demonstration, and there is no appearance of contrivance to avoid payment of U.S. benefits, the Department will not second-guess the employer.

Several commenters responded to the Department's request for comments on whether it should define ''benefits'' as that term is used in Section 212(n)(2)(C)(viii), which provides that the requirement to offer benefits and eligibility for benefits includes: ''the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and noncash compensation such as stock options (whether or not based on performance). * * *''. Senators Abraham and Graham and AILA stated that they did not see the need for further defining ''benefits,'' noting that the statute contains several examples of benefits. ACIP also stated that a regulatory definition was unnecessary, suggesting that instead the Department should examine the facts and circumstances of each case. TCS contended that the statutory list of benefits is exclusive; alternatively, it argued that the Department should specify the benefits so that employers do not have to guess about what is covered—*e.g.,* is a separate office a benefit? ACIP asserted that ''[c]ertain cash and non-cash bonuses considered benefits under ACWIA are considered wages under other laws. Adopting definitions from other laws further confuses immigration law, does not address practices abroad, and may have unintended tax consequences.'' Similarly, ACIP, SHRM and Cowan & Miller commented that further definition of benefits is unnecessary. Rapidigm asked for clarification of the Department's statement.

The Department agrees with the position of most commenters that the existing statutory definition is sufficient to administer effectively this aspect of the statute. The language of section 212(n)(2)(C)(viii) provides a fairly comprehensive list of the benefits that may be offered to workers in the U.S. While the use of ''including'' evinces an intention that the list is not exhaustive, the list, in the Department's view, is representative of the types of benefits that must be considered. Thus, an employer, by analogy, may determine whether other particular benefits should be taken into account. In this regard, the Department notes that the regulatory schemes under other employment-related statutes such as FMLA, the Equal Pay Act, the ADEA, and ERISA also provide guidance in this area. The Interim Final Rule takes this approach in lieu of an attempt to more fully define benefits. Under the Department's approach, it would appear clear that office accouterments—the example used by TCS—ordinarily would not constitute a benefit within the meaning of the statute. At the same time, it bears noting that the ACWIA does not relieve employers from any obligations they may have incurred through collective bargaining or otherwise with regard to particular working conditions, or of its obligation not to discriminate based on citizenship or national origin.

With regard to the Department's stated intention to modify the current regulatory provision concerning the working condition attestation, ACIP, AILA, and TCS expressed the concern that the Department was seeking to impose a new requirement, *i.e.,* that an employer was required to offer benefits to H–1B workers at least equivalent to the higher of those offered to their own U.S. employees or those prevailing in

the area. ACIP asserted that the Department lacks authority to require employers to consider conditions outside their own workforces. Rapidigm requested clarification on the meaning of the provision.

After review of the ACWIA and the provisions of the H–1B program as a whole, the Department concurs with commenters that Congress intended that the requirement for offering benefits and eligibility for benefits to H–1B workers on the same basis and same criteria as they are offered to U.S. workers employed by the employer includes both benefits paid as compensation for services rendered and working conditions. The Department has therefore concluded that it is inappropriate to continue the provision in § 655.732 which provides for consideration under some circumstances of prevailing conditions in the area of employment. Section 655.732 therefore is revised in the Interim Final Rule to clearly require that working conditions be provided to H–1B workers on the same basis and same criteria as they are offered to U.S. workers.

The Department also believes that certain benefits appropriately are in the nature of compensation for service rendered, and have a monetary value to workers and monetary cost to employers. Such benefits include cash bonuses, paid vacations and holidays, and termination pay, which are paid directly to workers and are taxable when earned. Also included are benefits such as health, life and disability insurance, and deferred compensation such as retirement plans and stock options which are funded by employers, either directly as costs are incurred or through contributions to fringe benefit plans or insurance companies. The Department has concluded that such benefits are more in the nature of wages than working conditions, although the Department cautions that only benefits which meet the criteria of § 655.731(c)(2) count toward satisfaction of the required wage since such benefits are not included in surveys used to determine the prevailing wage. On the other hand, benefits which do not have a direct monetary value to workers or cost to employers, are in the nature of working conditions, including matters such as seniority, hours, shifts, and vacation periods, and preferences relating thereto. Sections 655.731 and 655.732 are amended to reflect this distinction.

2. What Documentation Will Be Required? (§ 655.731(b))

The Department proposed to require H–1B employers to retain copies of fringe benefit plans and summary plan descriptions provided to workers, including all rules relative to eligibility and benefits, and documents showing the benefits actually provided and how the costs are shared between the workers and the employer. The Department sought suggestions as to exactly what records would demonstrate the value of benefits and satisfy the other retention requirements. The Department expressed the view that such records already are required for IRS and ERISA purposes (although noting in the paperwork analysis, at 64 FR 630, that a small percentage of employers might be required to keep records that otherwise would not be kept). In connection with the Department's query whether it might be possible to provide different ''home country'' benefits to employees of a multinational corporate operation in lieu of those provided to U.S. workers, the Department sought comment on what records would be necessary to demonstrate the relative value of the ''home-country'' benefits and the benefits provided to U.S. workers.

Many of the commenters opposed the notion of maintaining particular documentation in order to demonstrate compliance with the benefits attestation. ACIP and AILA asserted that the statute does not authorize the Department to require employers to retain documentation, suggesting that it is up to an employer to decide what documentation, if any, it should retain in order to demonstrate its compliance if it is investigated. Similarly, Senators Abraham and Graham stated: ''DOL is not authorized to require employers to maintain any particular documentation.'' The Department cannot, they asserted, include as part of the proposed LCA a ''new attestation'' that ''[the employer] will develop and maintain documentation of working conditions and benefits.''

ACIP addressed particular burdens it perceived in retaining such documentation, noting, for example, that they already maintain such documentation in a location or in a format different than that contemplated by the Department. While ACIP recognized that the Department correctly stated that employers now keep documents related to their fringe benefit plans, ACIP stated that these documents may be housed in various departments and urged the Department to let the employer decide where documentation must be kept. ACIP further explained that much information is sensitive and confidential (*e.g.,* stock option and incentive pay plans), requiring the Department, in its view, to allow an employer flexibility in documenting these benefits.

Intel stated that summary plan descriptions are a U.S. requirement. It noted that no other countries required the same depth and detail regarding the documentation of benefits, though stating that about one-half of its foreign subsidiaries have some benefits documentation. Intel explained that all its employees at orientation receive information regarding the company's benefits; in the U.S., it stated that employees receive a book that describes benefits, and that each year employees receive a particularized benefit portrait. Intel asserted that further documentation should not be required; it contends that a memorandum to the public access file that its employees are advised of the company's benefits at time of their hire should suffice.

Satyam questioned whether current requirements under other statutes and regulations relating to the retention of benefits documents would suffice for H–1B purposes; it suggested that the Department should not require putting specific information in the public access file. It also inquired whether it would be necessary to retain information relevant to the comparison group. ITAA said that the Interim Final Rule should recite rather than refer to IRS and PWBA requirements. AILA expressed the concern that the Department will make it a violation to fail to keep copies of benefits documents in a public access file and that requiring documentation to be kept up front would impose a huge burden. AILA recommended instead that an employer, for example, be simply required to bear the burden of proving the ''equivalency'' of foreign benefits in the event of an investigation.

None of the commenters took issue with the Department's statement that the documents sought are required already by IRS or ERISA.

Based on our review of the comments received on the proposal, it is apparent that the documentation requirements proposed in the NPRM have been misunderstood. With the exception of documentation specifically required to be retained in the public access file, there is no requirement that information be kept in any particular format or place, or that information be segregated by LCA, by locality, by H–1B versus U.S. workers, or in any other way from the employer's records for the entire company.

Nothing in the ACWIA suggests that documentation requirements are unauthorized or otherwise improper. To the contrary, section 212(n)(1) specifically requires employers to make the LCA ''and such accompanying documents as are necessary'' available for public examination. The Department believes that this provision clearly permits the Department to determine what documents must be created or retained by employers to support the LCA. The documentation that is required by the Interim Final Rule simply effectuates the more specific requirements imposed by the ACWIA. Furthermore, as the NPRM stated, the documents sought for the most part are already required by the IRS or ERISA, and would be kept by an ordinary prudent businessman in any event. Thus, the Department's ERISA regulations require at 29 CFR part 2520 that summary plan descriptions be provided to participants, and require employers to submit lengthy forms (Form 5500) to IRS with detailed information regarding their fringe benefits plans, which must be substantiated by records. In addition, EEOC rules under the ADEA, 29 CFR 1627.3(b)(2), require that every employer retain copies of all employee benefit plans, as well as copies of any seniority systems and merit systems which are in writing. Where the plan is not in writing, a memorandum fully outlining its terms and how it has been communicated to employees is required.

The Department believes that it is essential that employers, in order to establish that H–1B workers have in fact been offered the same benefits as U.S. workers (or that the special benefit requirements for certain employees of multinational firms are met), retain a copy of any document provided to employees describing the benefits offered to employees, the eligibility and participation rules, how costs are shared, etc. (*e.g.,* summary plan descriptions, employee handbooks, any special or employee-specific notices that might be sent). It is also important that employers keep a copy of all benefit plans or other documentation describing benefit plans and any rules the employer may have for differentiating among groups of workers. In addition, the employer will be required to retain evidence as to what benefits are actually provided to U.S. and H–1B workers. Where employees are given a choice of benefits, employers will be required to retain evidence of the benefits selected or declined by employees.

For multinational employers who choose to keep H–1B workers on ''home country'' benefit plans, the employer will be required to maintain evidence of the benefits provided to the worker before and after the employee went to the United States. In the event of an investigation, the employer will also be required to demonstrate that the other requirements for multinational firms are met, as appropriate—*e.g.,* that the employer maintains reciprocity by treating U.S. workers coming to the United States temporarily from abroad the same as H–1B workers, and likewise continues U.S. workers temporarily overseas on U.S. benefits, that the worker was not in the United States for more than 90 continuous days, that ''home country'' benefits are equitable in relation to U.S. benefits, etc.

With regard to the public access file, the employer need only maintain a summary of the benefits offered to U.S. workers in the same occupation as H–1B workers, including a statement explaining how employees are differentiated where not all employees in the occupation are offered the same benefits. If an employer has workers receiving ''home country'' benefits, the employer may place a simple notation to that effect in the file. The public access file need not show the proprietary details of a plan (such as a stock option or incentive distribution plan), the costs of providing the benefits, or the choices made by individual workers.

Since the regulations do not allow an employer to provide equivalent benefits as a general matter, and provide an ''equitable'' rather than an ''equivalent'' test for multinational benefits, no special documents regarding the cost of benefits are required.

H. What Does the ACWIA Require of Employers Regarding Payment of Wages to H–1B Nonimmigrants for Nonproductive Time? (§ 655.731(c)(7))

On October 31, 1995, the Department republished for comment a provision of the December 20, 1994 Final Rule which articulated the Department's position regarding payment of the required wage for nonproductive time. This provision, § 655.731(c)(5), required payment of the required wage beginning no later than the first day the H–1B nonimmigrant is in the United States and continuing throughout the nonimmigrant's period of employment, including periods when the nonimmigrant is in nonproductive status due to employment-related reasons such as training or lack of assigned work. The provision did not require payment of such wages where the nonproductive status is due to reasons unrelated to employment (*e.g.,* caring for an ill relative), provided the nonimmigrant's unpaid status is acceptable to the INS and is not subject to a wage payment obligation under some other statute (*e.g.,* Family and Medical Leave Act). The provision distinguished between full-time and part-time workers as provided on the I–129 petition filed with INS, but stated that in the event a part-time employee regularly worked a greater number of hours than stated on the I–129, the employer would be held to the actual hours disclosed in the enforcement action. Section 655.731(c)(5) was among the provisions of the December 20, 1994 Final Rule which had been enjoined from enforcement, due to lack of notice and comment, by the court in *National Association of Manufacturers* v. *United States Department of Labor.*

Subsequently, the ACWIA, amending section 212(n)(2) of the INA, enacted an explicit requirement, consistent with the Department's regulation, providing that it is a violation of the wage attestation in section 212(n)(1)(A) for an employer to fail to pay an H–1B worker the required wage for certain nonproductive time. Like the Department's regulation, an exception was created for nonproductive status which is due to non-work-related factors such as the worker's own, fully voluntary request, or circumstances rendering the worker unable to work. Under this provision, workers designated as full-time on the petition filed with INS must be paid full-time wages, and employees designated as part-time on the petition must be paid the hours designated in the petition. This obligation is effective ''after the H–1B worker has entered into employment with the employer,'' but in any event, not later than 30 days after the worker's date of admission to the United States (if entering the country pursuant to the petition) or 60 days after the date the worker ''becomes eligible to work for the employer'' (if already in the country when the petition is approved). The statute also contains a special provision regarding academic salaries which is discussed in IV.I, below.

Congressman Smith and Senator Abraham, in their remarks after enactment of the ACWIA, noted that the most extreme examples of ''benching'' occur when workers are brought to the United States on the promise of a certain wage, but only receive a fraction of that wage because the employer does not have enough work for the H–1B worker. 144 Cong. Rec. E2326 (Nov. 12, 1998); 144 Cong. Rec. S12753–54 (Oct. 21, 1998). They also both agreed that employers must pay full wages and benefits during an H–1B worker's non-productive status when that status is due to the employer's decision—based

on factors such as lack of work for the worker—or due to the worker's lack of a license or permit. Congressman Smith also remarked that Congress anticipated the Secretary's close scrutiny of ''voluntariness'' in circumstances that appear to be contrived to take advantage of unpaid time. Senator Abraham listed the following examples of H–1B employees taking unpaid leave which he stated would not be considered ''benching'': leave under FMLA or other corporate policies, annual plant shutdowns for holidays or retooling, summer recess or semester breaks, or personal days or vacations. Senator Abraham also stated that this provision does not prohibit an employer ''from terminating an H–1B worker's employment on account of lack of work or for any other reason.'' Congressman Smith stated that an attempt by an employer to avoid compliance with the ''benching'' provision by laying off an American worker ''would trigger the enforcement and penalty provisions of the Act.''

Congressman Smith and Senator Abraham agreed that the benching provision is not intended to preclude part-time H–1B employment, agreed to between the employer and the H–1B worker when the worker was hired. 144 Cong. Rec. E2326 (Nov. 12, 1998); 144 Cong. Rec. S12754 (Oct. 21, 1998). Congressman Smith stated that ''the employer's misrepresentation of this material fact should be scrutinized by the Secretary'' in determining whether a benching violation or misrepresentation has been made, with particular attention to whether U.S. workers would receive paid leave for nonproductive time. Senator Abraham stated that the Act is not intended to give the Secretary the authority ''to reclassify an employee designated as part-time based on the worker's actual workload after the employee begins employment.''

In the NPRM, the Department proposed regulatory text which, except for the different statutory language triggering the beginning of the period in which the ''benched'' worker must be paid, is very similar to its current regulation. In the preamble, the Department stated that it was considering whether the H–1B worker ''enters into employment'' when he first makes himself available for work, such as by reporting for orientation or training, or when the worker actually begins receiving orientation or training or ''otherwise performs work or comes under the control of his employer.'' In commenting on the purpose of the ''benching'' provision, the Department observed that an H–1B nonimmigrant is not permitted to be employed by another employer while ''benched'' (unless another employer files a petition on behalf of the worker or the worker adjusts his or her status under the INA), and is without any legal means of support in the country. In contrast, a U.S. worker can seek other employment and would be eligible for Federal programs such as food stamps. The Department also observed that the employer, at any time, may terminate the employment of the worker, notify INS, and pay the worker's return transportation, thereby ceasing its obligations to pay for non-productive time under the H–1B program. The Department proposed that payment of wages would not be required where the nonproductive status is due to reasons unrelated to employment, unless such payment is required by INS as a condition of the worker maintaining lawful status, or is required by some other Act such as FMLA. On the other hand, the employer would not be relieved from the wage obligation for any required leave of absence, even if it includes U.S. workers.

The Department received three comments on the 1995 proposed rule on this issue. Regarding the requirement in the 1995 NPRM that the employer pay the required wage for nonproductive time beginning no later than the first day the H–1B nonimmigrant is in the United States and continuing throughout the nonimmigrant's period of employment, AILA suggested that it would be more reasonable to require the employer to begin paying on the day that the nonimmigrant actually reports to work, provided that the date is no later than 30 days after the date the nonimmigrant enters the U.S. or otherwise becomes eligible to work for the employer. AILA also suggested that an exception be made where the nonimmigrant is given an unpaid leave of absence pursuant to a uniformly-enforced company policy. Similarly, another commenter, an electronics manufacturer (Motorola), complained that in the case of a temporary reduction in force, the employer would have to retain the H–1B nonimmigrant at full salary, while U.S. workers are off the payroll.

The Department received 33 comments on the 1999 NPRM proposals addressing the ACWIA's ''benching'' provisions. APTA stressed the importance of the Department ensuring that H–1B nonimmigrants are aware of their wage rights for nonproductive time. Miano commented that companies should not be allowed to use the H–1B program to create stables of available employees in anticipation of openings that do not yet exist, but should be required to demonstrate that an unfilled position actually exists.

The Department agrees that it is important that H–1B nonimmigrants be aware of their rights. For this reason, § 655.734(a)(3) requires that all H–1B nonimmigrants be provided a copy of the LCA which supports their petition. In addition, the Department is planning a comprehensive educational program, as discussed in III.B, above.

AILA suggested that the Department add to its list of exceptions situations where objective economic reasons are present, such as annual retooling in the automobile industry for production model changes. ACIP and SIA urged the Department to adopt Senator Abraham's October 21, 1998 comments as examples of what is not benching, *i.e.* leave under the Family and Medical Leave Act; or other corporate policies for no payment such as annual plant shutdowns for holidays or retooling, summer recess or semester breaks, or personal days or vacations. ACIP also urged that similar situations be included in the list of examples which do not constitute benching, such as disciplinary action, mandatory unpaid pre-employment training or orientation, mandatory vacation leave, and periods of downturn where all workers are treated the same. ACIP suggested that the facts and circumstances of each case be considered, including whether similarly-situated U.S. workers are placed on leave and whether H–1B workers knew before accepting employment of the possibility of such leave. ACIP and SIA encouraged the Department to exercise flexibility to avoid the potential effect of companies laying off U.S. workers to avoid the benching of H–1B workers by allowing for periods attributable to regular, objective business occurrences such as cyclical business downturns, holiday plant shutdowns, and plant retooling. They observed that when these events occur all workers are treated equally, according to the same standards.

The AFL–CIO and other commenters observed that the provision's prohibition against ''benching'' may lead employers to treat H–1B employees better than U.S. workers, and may create the situation where an employer retains an H–1B worker over an American worker during a lay-off to avoid paying full wages to the H–1B worker. The AFL–CIO stated its belief that U.S. workers who are laid off to avoid the benching provision may have grounds for a discrimination complaint based on nationality and immigration status and that the regulation should so indicate.

The Department believes that the statutory language is clear. The statute

requires payment, after a nonimmigrant has entered into employment with an employer, whenever nonproductive status is due to a decision by the employer or to the nonimmigrant's lack of a permit or license. In contrast, payment is not due when the nonproductive time is due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work. Therefore the Department cannot interpret the Act to allow employers to be relieved from payment for periods where the employer's business is shutdown, regardless of whether it affects U.S. workers as well, whether for economic downturn, annual retooling, or holiday shutdown; nor can the employer be relieved from liability for mandatory vacation, pre-employment training, or disciplinary action. All of these situations are caused by the employer, rather than at the voluntary request of the nonimmigrant. The Department notes that training or orientation required of an employee before productive work starts has always been considered compensable time under the Fair Labor Standards Act, and that the Department has required payment for such time in its enforcement of the H–1B attestation requirements since the injunction entered in the NAM litigation. If an employer finds need to discipline an H–1B nonimmigrant, it must find a method other than loss of pay, or it may terminate the employment relationship.

The Department understands the concern expressed regarding the possibility of an employer laying off U.S. workers while continuing to pay H–1B workers because of its obligation to continue paying H–1B workers during periods of nonproductive status. Congressman Smith suggested that an employer's action in laying off U.S. workers to avoid placing H–1B workers in nonproductive status for which they must be paid would be a violation of the ACWIA. We agree, with respect to H–1B-dependent employers and willful violators, where the required showing for a prohibited displacement under section 212(n)(1)(E) or (F) is made. In addition, we note that a displacement in connection with a willful violation of the attestation requirements or a willful misrepresentation can bring enhanced penalties pursuant to section 212(n)(2)(C)(iii). Additionally, other laws provide U.S. workers with rights and remedies for an employer's discriminatory practices. The names, telephone numbers, and websites of the three federal agencies responsible for enforcement of anti-discrimination laws are set forth in IV.E.4, above.

The Department notes that—in determining whether the statutory criteria have been met, including the exception for nonpayment based on ''the voluntary request of the nonimmigrant for an absence''—it will look closely at any situation where there is any question about whether the period of nonproductive time is truly voluntary. The Department will not under any circumstances consider the employer to be relieved of wage liability where there is a plant shutdown. Nor will the Department relieve an employer from liability simply because the employee agreed to periods without pay in the employment contract.

ACIP and AILA questioned the basis for the Department's proposed requirement that workers be paid where required by other statutes such as FMLA or the ADA, and that the worker's period of unpaid leave be consistent with maintenance of status under INS regulations.

The Department intended to say nothing more than that an employer must comply with other laws. The Department notes that FMLA only requires paid leave where the employer has a paid leave plan and either the employer or the employee wishes to substitute the paid leave for unpaid FMLA leave. Since the employer is required to offer H–1B workers the same benefits as U.S. workers, an employer would be required to provide H–1B workers with paid leave under any circumstances in which it is provided to U.S. workers. Enforcement of this requirement during periods where the employee voluntarily takes leave or is unable to work, is in accordance with the benefit obligations at section 212(n)(2)(C)(viii). The Department also wishes to point out, as stated by both Senator Abraham and Congressman Smith, that during periods of nonproductive time, employers are required to provide fringe benefits as well as wages.

ACIP and AILA agree with the proposal that an employer may choose to terminate an H–1B worker without violating the benching provision. ACIP also suggests that employers should not be held liable for the nonimmigrant's failure to leave the country.

The Department agrees that an employer is no longer liable for payments for nonproductive status if there has been a *bona fide* termination of the employment relationship. The Department would not likely consider it to be a *bona fide* termination for purposes of this provision unless INS has been notified that the employment relationship has been terminated pursuant to 8 CFR 241.2(h)(11)(i)(A) and the petition canceled, and the employee has been provided with payment for transportation home where required by section 214(E)(5)(A) of the INA and INS regulations at 8 CFR 214.2(h)(4)(iii)(E). In accordance with current INS policy (see 76 *Interpreter Releases* 378), once an employer terminates the employment relationship with the H–1B nonimmigrant, regardless of any arrangements for severance pay or benefits, that H–1B employee must either depart the United States upon termination of his or her services, or seek a change of immigration status for which he or she may be eligible. Therefore, under no circumstances would the Department consider it to be a *bona fide* termination if the employer rehires the worker if or when work later becomes available unless the H–1B worker has been working under an H–1B petition with another employer, the H–1B petition has been canceled and the worker has returned to the home country and been rehired by the employer, or the nonimmigrant is validly in the United States pursuant to a change of status.

Commenters also offered their views on the phrase ''entered into employment,'' one of the alternative triggers for an employer's obligation to pay the H–1B worker wages during periods of nonproductive status. The Department proposed that this term means the date when the H–1B worker makes himself/herself available for work, *e.g.,* reports for orientation or training, performs work for the employer, or is under the control of the employer. One attorney-commenter (Hammond) expressed appreciation for this ''bright line test'' and described the 30–day allowance as reasonable.

The Department received twenty essentially identical comments on this issue from individuals who urged payment of wages to nonimmigrants immediately on their arrival to the United States. The AEA suggested that the H–1B visa holder be given a firm starting date from his/her employer and that wages start from that date. AOTA commented that ''entered into employment'' should mean when the nonimmigrant makes himself or herself available for work. ACIP urged the Department to look at the facts of the case, but urged as a general matter that an H–1B worker has entered into employment when he or she has reported to the worksite, has been placed on the payroll, and has completed an I–9 form; ACIP stated that H–1B workers should not be required to be paid for short periods of unpaid

training or orientation or medical examinations, since U.S. workers are not. AILA suggested that ''entered into employment'' occurs when the employee actually commences the orientation, training or work because ACWIA, in mandating payments by the 30–day and 60–day deadlines, appears to provide the employer with discretion regarding the starting date prior to those deadlines.

The statutory language does not permit the Department to define the term ''entered into employment'' as the date the H–1B worker arrives in the United States. Likewise, payment of wages by the employer cannot be required before the H–1B petition is approved. On the other hand, the Department notes that the Fair Labor Standards Act itself requires that where there is an employment relationship (including where the worker has been promised employment, even if the employee is not yet on the payroll), both H–1B and U.S. workers be paid for orientation or training time required by the employer.

The Department has concluded that the term ''entered into employment'' means the date on or after the date of need on the H–1B petition when the worker makes himself or herself available for work or otherwise comes under the control of the employer and includes all activities thereafter, such as waiting for an assignment, going to an interview or meeting with a customer, attending orientation, studying for a licensing examination.

Several employers, attorneys and organizations also commented on the meaning of the phrase ''eligible to work for the employer.'' (Sixty days thereafter an H–1B nonimmigrant already in the United States legally under another visa (*e.g.,* F–1 student visa) or on another H–1B visa with another employer must be paid for nonproductive time, even if the H–1B nonimmigrant has not yet entered into employment.) One law firm (Hammond) encouraged flexibility on the 60–day test. An employer (BRI) urged that ''eligible to work for the employer'' should be based on the agreement of employment terms between the employer and employee and determined by the date an employment agreement is entered into between the employer and employee or the completion of the visa process, whichever comes last.

ACIP and Intel requested a specific exception from the benching regulations for export control licenses. ACIP explained that an employee who awaits a license to practice his or her profession in the United States, and is subject to the ACWIA benching provisions, is distinguishable from an export control license which must be procured by an employer in a process which can take three to six months. Therefore, ACIP suggested that the rule provide that where an export license and H–1B petition were filed concurrently but the export license is not approved within the 60–day window, the employer has an additional 90 days to obtain the license before being required to rescind the H–1B petition or pay the worker.

The Department continues to believe that an employee is eligible to work on the date of need stated in the petition, provided that the petition has been processed and the employee has either received a visa or had his/her status adjusted (where the employee is in the United States). The Department sees no basis for any exception based on the export control license. Clearly the employee is legally eligible to work, but work is simply not available (even if due to circumstances beyond the employer's control). The Department agrees that a worker need not be compensated if the H–1B nonimmigrant voluntarily chooses not to make himself or herself available for work, such as where the nonimmigrant has not yet finished school or chooses to remain with another employer in order to finish a project. In each case, although the H–1B nonimmigrant is eligible to work for the employer, he or she need not be paid because of the nonimmigrant's voluntary action. The Department notes, however, that the nonimmigrant may be out of status if he or she does not report to work on the date of need.

In response to the NPRM's proposals on nonproductive pay for part-time workers, Senators Abraham and Graham and AILA objected to the regulatory language requiring workers be paid for hours that exceed the part-time number of hours on the INS petition where in practice the worker regularly works a longer schedule. AILA seeks to allow an employer which has less work than anticipated after filing an I–129 petition for full-time work, to secure approval of a new I–129 petition for part-time work, after which the employer is obliged to pay only for the part-time work.

In addition, Latour commented that the traditional 40-hour week is rapidly changing. It stated that some firms engage workers to perform a project which is completed in less than a year, and then the worker has several months off and may ''moonlight'' at a second job (presumably under a second petition). Latour assumed this practice would be considered ''part-time,'' and suggest that DOL focus on three issues in determining if there is a violation of the ''benching'' provision: (1) Whether the prevailing wage is being paid; (2) whether the worker is making a plausible living; (3) whether the nature of the employment schedule is usual and reasonable for the type of work.

The Department agrees that nonproductive pay is based on the number of hours per week on the H–1B petition. The LCA has therefore been amended to alert employers that their H–1B employees should not regularly work more than the number of hours shown on the petition, which may be expressed as a range of hours. If the H–1B worker normally works full-time or a greater number of hours than shown on the petition, the Department will examine the facts and circumstances and charge the employer with misrepresentation where appropriate. In light of the importance of the distinction between part-time and full-time employment for purposes of the employer's wage obligations, the Department has modified the proposed LCA form to specify that the employer is to designate that the position(s) covered will be either part-time or full-time; a combination of part-time and full-time positions cannot be entered on a single LCA form.

The Department cautions employers that time spent in training or studying to get a license is ordinarily compensable hours worked under the Fair Labor Standards Act without regard to any rules on payment for nonproductive time under the H–1B program.

The Department agrees with AILA's comment that an employer may secure approval of a new H–1B petition for part-time work, after which the employer is obliged to pay only for the part-time work. The nonproductive pay computation is based on the petition that is in effect at the time the H–1B worker is in nonproductive status. Correspondingly, before INS approves a new petition that changes the work time (part-time to full-time or vice versa), the employer will need to file a new LCA that reflects the change.

Finally, the Department disagrees that the scenario described by Latour is part-time work. Rather, it is full-time work with periods where no work is available due to actions of the employer, rather than the employee. This period of non-productive work must be paid unless the worker is temporarily unable to return to work because of alternate commitments or other factors within the control of the employee.

I. What Special Rule Does the ACWIA Provide for Academic Salaries? (§ 655.731(c)(4))

The ACWIA provision on non-productive time (''benching'') (discussed in IV.H, above) has a special rule permitting ''a school or other education institution'' to apply an established salary practice which might result in an H–1B worker appearing to be ''unpaid'' for some part of a calendar year. *See* Section 212(n)(2(C)(vii)((V) of the INA as amended by the ACWIA. Specifically, that provision allows an education institution to disburse an annual salary to its H–1B workers and U.S. workers in the same occupational classification over fewer than 12 months if: (1) The H–1B worker agrees to the compressed annual salary payments prior to commencing payment, and (2) the salary practice does not otherwise cause any violation of the H–1B worker's authorization to remain in the United States.

Congressman Smith and Senator Abraham both explained that this provision ''is intended to make clear that a school or other educational institution that customarily pays employees an annual salary in disbursements over fewer than 12 months may pay an H–1B worker in the same manner without violating clause (vii), provided that the H–1B worker agrees to this payment schedule in advance.'' 144 Cong. Rec. E2326 (Nov. 12, 1998); 144 Cong. Rec. S1275 (Oct. 21, 1998). Congressman Smith explained that Congress ''specifically limited this exemption to schools and educational institutions in recognition of their unique salary patterns.'' 144 Cong. Rec. E2326. Senator Abraham, on the other hand, stated:

> Because Congress is not aware of all the possible kinds of legitimate salary arrangements that employers may establish, the situation covered by subclause (V) may be merely illustrative of other kinds of legitimate salary arrangements under which an employee's rate of pay may vary. Accordingly, so long as an H–1B worker is not being singled out by such a salary arrangement, it is not Congress's intent that such a salary arrangement be treated as suspect under or violative of clause (vii) merely because there is no special provision like subclause (V) addressing it. To the contrary, if it is an arrangement that the employer routinely uses with U.S. employees as well as H–1B workers, it should be treated as presumptively not a violation of that clause.''

144 Cong. Rec.S1275 9 (Oct. 21, 1998).

The one commenter on this provision, ACE, urged the Department to follow the law as written with no further regulation.

As the Department explained in the NPRM, the Department believes that this provision is directed to the common practice by which colleges, universities, and other educational institutions disburse faculty salaries over a nine-or ten-month period, with no salary payments during the summer, between academic quarters, or over some other period during which the faculty member may be away from the institution. As the statute provides, this special rule applies only to schools and other educational institutions. Any attempts to apply the more general definition of organizations to which the special prevailing wage requirements apply (see section 212(p)(1) of the INA as amended by the ACWIA) would change the statutory mandate. The Department has concluded that the NPRM properly implements the statutory mandate and will adopt the provision as proposed.

J. What Actions or Circumstances Would be Prohibited as a ''Penalty'' on an H–1B Nonimmigrant Leaving an Employer's Employment? (§ 655.731(c)(10)(i))

Section 212(n)(2)(C)(vi)(I) of the INA as amended by the ACWIA prohibits an employer from ''requir[ing] an H–1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.'' This section requires the Department to ''determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.'' As discussed in Sections L and M of the NPRM, section 212(n)(2)(C)(vi)(III) provides that the Department, after notice and opportunity for a hearing, ''may impose a civil money penalty for each such violation and issue an administrative order requiring the return to the [H–1B worker] of any amount paid in violation * * *, or if [the H–1B worker] cannot be located, requiring payment of any such amount to the general fund of the Treasury.''

Senator Abraham explained:

> New clause (vi)(I) * * * directs that the Secretary is to decide the question whether a required payment is a prohibited penalty as opposed to a permissible liquidated damages clause under relevant State law (*i.e.* the State law whose application choice of law principles would dictate). Thus, this section does not itself create a new federal definition of ''penalty'', and it creates no authority for the Secretary to devise any kind of federal law on this issue, whether through regulations or enforcement actions.''

144 Cong. Rec. S12752 (Oct. 21, 1998). Congressman Smith further explained that ''[t]his provision was added because of numerous cases that have come to light where visa holders or their families were required to make large payments to employers because the worker secured other employment.'' 144 Cong. Rec. E2325 (Nov. 12, 1998).

In the NPRM, the Department proposed to prohibit employers from attempting to enforce any such liquidated damages provisions without first obtaining a State court judgment ordering the H–1B worker to make such a payment. The Department explained its view that State courts were better versed than the Department to resolve State law questions posed by such matters. The Department also stated its intention to make it clear that employers cannot collect the additional $500 petition fee in the guise of liquidated damages, and noted its concern that some employers might attempt to collect liquidated damages in situations where the employers' unlawful conduct may have caused the H–1B worker to prematurely leave the employment.

A number of commenters responded to the Department's proposals on this issue. Two commenters (Latour, Padayachee) endorsed the approach taken in the NPRM. Padayachee also expressed the view that only quantifiable liquidated damages should be claimable. A third commenter (TCS), generally agreed with the Department's approach, although noting some specific objections as identified below.

The view most frequently expressed by other commenters was that the Department's approach was contrary to the intent of the ACWIA. These commenters (Senators Abraham and Graham and other Congressional commenters, ACIP, AILA, and other employers and employer representatives) viewed the proposal as inconsistent with the role intended for the Department under the ACWIA, *i.e.*, to determine whether or not a specific liquidated damages provision is legal under State law. Nallaseth and SBSC asserted that it would be discriminatory to require employers to first secure a State court judgment in enforcing an agreed damages provision against an H–1B worker when none is required to enforce a similar provision involving a U.S. worker. While some commenters recognized that the Department's concern about the difficulty of identifying and applying State law to a particular dispute was well-founded, it was their view that Congress intended the Department, not the State courts, to shoulder this burden. Senators Abraham and Graham asserted that the proposal that an employer obtain a State court judgment as a precondition to enforcing its contractual agreement—a practice,

they stated, they were not aware of under any State's law—constituted an attempt by the Department to create federal law on this question in contravention of the statute's direction that State law was to be applied in resolving such matters. They stated that it was the intention of Congress not to require litigation over each such agreement, but instead to allow the Department to bring an enforcement action if it believes an agreement is punitive as a matter of State law.

Congressional commenters and Network Appliance objected to any requirement that employers obtain a state court judgment where there is no disagreement between the parties. ACIP asserted: ''Requiring a state court judgment to enforce any part of a contract is an unreasonable intrusion upon the ability of parties to contract and limits their ability to settle disputes through mediation, arbitration or other forms of alternative dispute resolution. * * * [A]lthough we agree that individual state courts are much better versed in this area of their law for their state than the Secretary, it clearly was not Congress' intent to impose such a high burden on employers.'' TCS, on the other hand, asserted that a State court judgment should be a prerequisite to any finding of a violation by the Department, limiting its objection primarily to the Department's proposal that a State court judgment must be obtained, even where there is no dispute by the parties or they choose to resolve the dispute by settlement or otherwise.

As an alternative to the Department's proposal, ACIP, AILA, and SIA suggested that the regulation set forth examples of acceptable reimbursements and examples of prohibited penalties. AILA and TCS requested that the Department prohibit any class-based complaint or relief in the administrative proceeding, *i.e.,* to limit the relief to the particular H–1B worker who initiated the complaint. In a similar vein, AILA and ACIP argued that whether a provision is a penalty or liquidated damages should be inferred from the facts and circumstances of the case; thus the fact that a penalty is found in one case does not automatically mean all similar provisions are void. TCS asserted that the Department should adopt a rule that an employer cannot be held in violation of the ACWIA unless a State court first holds that an agreed damage provision is a penalty, and, that even where a State court so holds, the Department should not find an employer in violation unless it fails to cure the violation within a reasonable amount of time.

TCS also objected to any required notice to employees that would suggest that an employer's ability to enforce a damages provision contained in the employment contract is limited, expressing concern that such notification would encourage H–1B workers to disregard their contractual obligations. AILA encouraged the Department to avoid a presumption that any ''agreed damage'' is an unenforceable penalty. ACIP objected to the Department's statement that it would examine ''attempts by employers to collect damages where their violations of the INA [the H–1B program], or other employment law may have caused the H–1B worker to cease employment''—apparently viewing this statement as suggesting that employers might contrive to get workers to quit their employment in order to collect contract damages.

Notwithstanding the Department's continued reluctance to identify and interpret State law, the Department now concurs with the view that Congress intended the Department to determine whether a provision is liquidated damages or a penalty. For the same reason, it believes there is no merit to the suggestion by TCS that the Department cannot find that an employer has violated the ACWIA's bar against punitive damages, unless a State court first rules that a violation has occurred. Furthermore, the Department agrees that it is unnecessary to obtain a court judgment or a ruling from the Department of Labor if an employee pays voluntarily or the matter is settled. The Interim Final Rule reflects the Department's revised position on this question.

Under the Interim Final Rule, a complaint regarding an alleged attempt to enforce a penalty provision will be processed and investigated in the same way as other complaints by aggrieved parties under Subparts H and I. Thus, an individual who believes that an employer has sought to enforce a penalty provision should file a complaint with the Wage and Hour Administrator. After investigation, Wage and Hour will issue a determination in accordance with its analysis of the relevant State law, and, where violations are found, may assess a civil money penalty of $1,000 for each violation and order the return of any money paid by the worker(s) to the employer (or, if the worker(s) cannot be located, to the U.S. Treasury). A party aggrieved by Wage and Hour's determination may request a hearing before an ALJ; a party may obtain review of the ALJ's determination by the Department's Administrative Review Board.

The Department agrees with the suggestion that the regulations contain some of the general principles applied in resolving whether a provision is a permissible liquidated damages provision or an impermissible penalty. It is drawn primarily from two legal reference publications (American Jurisprudence 2d; Restatement (Second) Contracts) that provide a general discussion regarding the differences between liquidated damage and penalty provisions. However, the decisional and statutory law of a particular State, as applied to the particular circumstances relating to the employment and contract at issue—not these general principles—will control the resolution of most disputes. Furthermore, we do not address other legal remedies that may be available to the parties to recover damages for an alleged breach of the employment agreement—matters outside the Department's charge under the ACWIA. Individual State law also will determine the particular state whose law will apply to the dispute, where significant aspects of the contract and employment relationship involve different States (or nations).

The Department has also incorporated into the Interim Final Rule its proposal to examine attempts by employers to collect damages where violations of employment law may have caused the H–1B worker's premature termination of his or her employment. It is the Department's expectation that where there is a constructive discharge, or the employer has committed substantive violations of the H–1B provisions directly impacting on the employee (such as wage and benefit violations), State law would not permit the employer to collect the payment.

The Department reiterates the point it made in the NPRM that, although State law will govern the enforceability of liquidated damage provisions in agreements, an H–1B employer nevertheless must comply with the requirements of Federal statute and regulation bearing upon the H–1B employment relationship. For example, irrespective of any contractual agreement to the contrary, an employer is prohibited from directly or indirectly allocating any of the $500 LCA fee (recently increased to $1,000) or other employer expenses to the H–1B worker (see Section 212(n)(2)(C)(vi)(II)). Thus an employer is barred from directly withholding the $500 or $1,000 fee from the H–1B worker's pay or from indirectly collecting the fee through a liquidated damages provision in the contract. The Department agrees that

liquidated damages may encompass other costs the employer has borne on behalf of the employee, such as transportation and visa processing assistance. Employers should be aware that liquidated damages may be withheld from the required wage only if permitted under the criteria for allowable deductions at 20 CFR 655.731(c)(7).

With regard to the suggestion that the Department issue a rule limiting the relief available to the particular worker rather than allowing a particular determination to affect other cases or other workers, the Department will apply principles of administrative collateral estoppel (the legal principle limiting consideration of a dispute to only one court action), where appropriate, just as it would for any other employment law violation.

The Department sees no merit to the proposal by TCS that an employer may be held in violation of the ACWIA' s punitive damages bar only where it fails to cure the violation within a reasonable time after a determination that an agreed damages provision is an unenforceable penalty. There is nothing in the language of the statute to suggest that penalties under this provision should be assessed differently than penalties under other provisions.

K. What Standards Apply To Determine If an Employer Received a Prohibited Kickback of the Additional $500/$1,000 Petition Filing Fee From an H–1B Worker? (§ 655.731(c)(10)(ii))

The ACWIA prohibits an employer from ''requir[ing] an alien who is the subject of a [visa] petition * * * for which a fee is imposed under section 214(c)(9), to reimburse, or otherwise compensate, the employer for part or all of the cost of such fee. It is a violation for such an employer otherwise to accept such reimbursement or compensation from such an alien.'' The referenced filing fee is the ACWIA-enacted filing fee applicable to H–1B petitions, which is in addition to any other fees imposed by INS for filing H–1B petitions. The fee was created by the ACWIA, in the amount of $500; the October 2000 Amendments increased the fee to $1,000. The H–1B worker is not, in any manner, to pay or absorb the cost of any of the additional fee.

Senator Abraham explained that new clause (vi)(II) ''prohibits employers from requiring H–1B workers to reimburse or otherwise compensate employers for the new fee imposed under new section 214(c)(9), or to accept such reimbursement or compensation.'' 144 Cong. Rec. S12752 (Oct. 21, 1998); see also, 144 Cong. Rec. E2325 (Nov. 12, 1998). Congressman Smith explained that ''Congress included this provision to make it very clear that these fees are to be borne by the employer, not passed on to the workers.'' *Id.*

The proposed rule stated that the employee is not to be forced, encouraged, or permitted to rebate any part of the filing fee to the employer, directly or indirectly, *e.g.,* through an intermediary such as an attorney, relative, or co-worker.

The Department received three comments on this issue. All the commenters agreed that the statute prohibits employers from accepting reimbursement from the H–1B worker for the filing fee.

AILA asserted that not all third-party reimbursements are prohibited (*e.g.,* joint employment arrangements, cooperative or joint ventures). The Department agrees that the statute does not prohibit payment of the filing fee by a third party, nor does it require payment only from the employer. However, the Interim Final Rule does prohibit third-party payment if the third party receives or asks for reimbursement from the alien. The employer is held accountable even if it is a third party which violates the statute.

The AFL–CIO asserted that the Department should state specifically that deductions from the alien's wages will be scrutinized to prevent subterfuge for repayment of the filing fee. The Department intends to be alert to abuse or subterfuge. The Interim Final Rule makes it clear that deductions to cover the fee are not allowed, even if the H–1B worker's pay is higher than the required wage.

A third commenter (ITAA) contended that the Department does not have the authority to prohibit the alien from paying the expenses other than the filing fee. This issue regarding other expenses is discussed at § 655.731(c)(7) and Section P.3 of the NPRM, concerning allowable deductions from the required wage.

The Department has determined that the NPRM properly implements the statutory mandate that the employer not force, encourage, or permit an employee to rebate any part of the fee back to the employer or a third party, directly or indirectly, including payments through an intermediary such as an attorney, relative or co-worker. The Interim Final Rule, therefore, embodies the proposed rule. In addition, the Interim Final Rule takes into account the increased petition filing fee, enacted by the October 2000 Amendments. The Rule prescribes that for H–1B nonimmigrants admitted on petitions filed prior to December 18, 2000, the fee ''kickback'' prohibited by this statutory provision is $500 (the amount of the filing fee as created by ACWIA), and that for nonimmigrants admitted on petitions filed on or subsequent to December 18, 2000, the prohibited fee ''kickback'' is $1,000 (the increased fee enacted by the October 2000 Amendments). In the event of an investigation, the Administrator will determine the amount of the statutorily-prohibited ''kickback,'' based on the filing date of the petition.

L. What Penalties and Remedies Apply If the Employer Imposes an Impermissible Penalty or Receives an Impermissible Rebate? (§ 655.810)

The ACWIA enforcement provision on early termination penalties and filing fee kickbacks is self-contained and provides its own sanctions authority. The Department may impose a civil monetary penalty of $1,000 for each violation, whether willful or non-willful, and may order the employer to reimburse the worker (or the Treasury, if the worker cannot be located) for any such payment. The ACWIA provision does not authorize debarment for the penalty and kickback violations.

The Department proposed to adopt the ACWIA language verbatim. Three commenters (ACIP, AILA, TCS) encouraged an express provision prohibiting any class-based relief or res judicata effect and limiting an administrative finding of penalty and corresponding remedy to the particular H–1B worker for whom the violation was found. As discussed in IV.J, above, the Department will follow traditional principles of administrative collateral estoppel, if applicable, as it does under other employment laws.

The Interim Final Rule adopts the statutory language without further elaboration.

M. How Did the ACWIA Change DOL's Enforcement of the H–1B Provisions? (Subpart I)

Section 212(n)(2) of the INA as amended by the ACWIA provides specific authority to undertake ''random'' investigations of employers found to have previously violated their H–1B obligations and to undertake investigations of employers, in limited circumstances, based on information received from other sources that otherwise would be unable to submit complaints as aggrieved parties. The ACWIA also provides explicit employee whistleblower protections and enhanced monetary and debarment sanctions against employers who willfully violate H–1B requirements. The Department proposed to modify Subpart I of the current regulations to

reflect these additional provisions, integrating them into the existing regulatory scheme.

1. What Changes Has the ACWIA Made in the DOL's Enforcement Based on Complaints From ''Aggrieved Parties''? (§ 655.715)

Section 212(n)(2) of the INA as amended by the ACWIA, states that ''nothing in this subsection shall be construed as superseding or preempting any other enforcement-related authority under this Act * * *'' Senator Abraham and Congressman Smith both explained that this provision ''clarifies that none of the enforcement authorities granted in subsection 212(n)(2) as amended should be construed to supersede or preempt other enforcement-related authorities the Secretary of Labor or the Attorney General may have under the Immigration and Nationality Act or any other law.'' 144 Cong. Rec. S12755 (Oct. 21, 1998); 144 Cong. Rec. E2329 (Nov. 12, 1998). For this reason, and because the ACWIA did not by its terms purport to amend the Secretary's authority to investigate based upon complaints from an ''aggrieved party'' or the Secretary's regulations defining ''aggrieved party,'' the Department proposed no changes to the existing regulation defining ''aggrieved party'' at § 655.715. Accordingly, any changes to those regulations would be outside of the scope of this rulemaking.

Two comments were received regarding the issue of ''aggrieved party.''

AILA asserted that a fair reading of ACWIA suggests that governmental entities other than DOL should be removed from the current regulatory definition of aggrieved party and should instead present ''other source'' claims. The U.S. Department of State stated that requiring the Department of State to submit information only as an ''outside source,'' with the compelling standard required by section 212(n)(2)(G), discussed below, would be a mistake, as it could limit the effect of what could be an excellent source of information, and would therefore be detrimental to the effectiveness of the H–1B category.

The Department has consistently defined ''aggrieved party'' to include ''a government agency which has a program that is impacted by the employer's alleged non-compliance with the [LCA].'' 20 CFR 655.715. The State Department is an aggrieved party, for example, because its mission is adversely affected if H–1B petitions are erroneously granted. Because of the responsibility of consular officers to reject visa applications of anyone the officer ''knows or has reason to believe * * * is ineligible to receive a visa'' (8 U.S.C. 1201(g); 22 CFR 41.121(a)), the State Department would be required to expend its own investigative resources to ferret out illegal practices visa by visa if it did not provide information to the Administrator. Similarly, the State Department is required to withhold the granting of a visa and exclude the alien from the U.S. if it determines that the alien will become a public charge (8 U.S.C. 1182(a)(4); 22 CFR 40.41)—a possibility that increases significantly if an employer fails to pay its H–1B worker the required wage. Many of these violations would otherwise go undetected because of the inclination of H–1B workers and their employers to hide such matters from INS and the Labor Department.

Therefore the Department has made no change in the definition of ''aggrieved party.'' However, the Department will not consider information contained on the LCA or associated petition(s), including the documentation supporting the petition, to be the sole basis of a complaint under section 212(n)(2)(A) while section 212(n)(2)(G) remains in effect.

2. What Procedures Does the ACWIA Provide for Random Investigations? (§ 655.808)

Section 212(n)(2)(F) of the INA as amended by the ACWIA authorizes random investigations of employers found by the Secretary, after the ACWIA's enactment on October 21, 1998, to have committed a willful failure to meet an LCA condition or a willful misrepresentation of material fact on an LCA. The statute authorizes such random investigations over a period of five years, beginning on the date of the willful violation finding. The same special scrutiny exists where an H–1B-dependent employer or willful violator is found by the Attorney General to have willfully failed to meet its obligation under section 212(n)(1)(G)(i)(II) to offer a job to an ''equally or better qualified'' U.S. worker. The requirements of section 212(n)(2)(A) regarding investigation of complaints are not applicable to these random investigations.

Senator Abraham observed that this provision adds a new section 212(n)(2)(F) granting the Secretary authority to conduct random investigations of employers found after enactment of this act to have committed a willful violation or willful misrepresentation for five years following the finding. 144 Cong. Rec. S12754 (Oct. 21, 1998). Congressman Smith explained that this authority is ''in addition to the existing investigative authority in section 212(n)(2)(A), as heretofore exercised by the Secretary.'' 144 Cong. Rec. E2327 (Nov. 12, 1998).

The Department proposed that the date of the willful violation ''finding'' (which invokes the ''random investigation'' authority) would be the date of the agency's final determination of a violation for debarment purposes. 20 CFR 655.855(a); 59 FR 656757 (Preamble to the Final Rule). Although the NPRM proposed this interpretation, the Department sought comment on whether an earlier date, such as that of the Administrator's investigation finding or an ALJ's finding would be appropriate.

Three comments were received relating to the proposed regulation on random investigation authority.

IEEE expressed strong support for the new random enforcement provision in ACWIA and recommended that the regulations not be written or interpreted so strictly as to effectively prevent the Department from exercising this authority. Malyankar suggested directly surveying H–1B workers themselves at short intervals to determine how the program is being used and to detect possible abuses.

AILA responded that only final action finding a willful violation or willful misrepresentation should trigger its authority to conduct random investigations.

The Interim Final Rule, consistent with the AILA suggestion and the manner in which the current regulations address other Secretarial ''findings,'' states that a willful violation ''finding'' within the meaning of the statutory provision occurs when the administrative review process is completed, as described in § 655.855(b) of the regulations.

3. What Procedure Does the ACWIA Provide for Investigation Arising From Sources Other Than Aggrieved Parties? (§ 655.807)

Section 212(n)(2)(G) of the INA as amended by the ACWIA authorizes the Secretary to investigate possible violations based on information provided to the Department by sources other than aggrieved parties. The Department may, upon personal certification by the Secretary, undertake an investigation under this authority when it receives specific credible information that provides reasonable cause to believe that a particular type of violation has occurred. The types of violations covered are: A willful failure to meet statutory conditions relating to wages, working conditions, a strike/lockout, and the displacement and recruitment provisions applicable to dependent employers and willful

violators. In addition, such an investigation may be undertaken where the information provides reasonable cause to believe that the employer has engaged in a pattern or practice of failures to meet any of these conditions; or a substantial failure to meet such a condition that affects multiple employees. The Department is also charged with developing a form for receiving information on these potential violations. The ACWIA specified that this provision would be effective until September 30, 2001; the October 2000 Amendments extended the effective period to September 30, 2003.

The ACWIA limits the source who may provide information under this provision to a known source who is likely to have knowledge of the employer's practices, and specifically excludes information provided to the Secretary or to the Attorney General for purposes of securing employment of a nonimmigrant. However, the Secretary is authorized to commence an investigation under this provision if the information was obtained by the Secretary in the course of an investigation under the INA or any other Act.

To allow employers to respond to the allegations before an investigation is commenced, the ACWIA provides that the Secretary shall ordinarily provide notice to the employer concerning the allegations. However, the Secretary is authorized to withhold the source's identity and is not required to provide this notice if the Secretary determines it would interfere with efforts to secure compliance with the requirements of the H–1B program.

In explaining the purpose and effect of this provision, Senator Abraham stated:

> Subsection 413(e) grants the Secretary limited additional authority with respect to other employers to investigate certain kinds of allegations of failures to comply with labor condition attestations. The Secretary's authority under current law is limited to investigating complaints concerning such violations that come from aggrieved parties. * * * The rationale for this grant of authority is to make sure that if DOL receives specific, credible information from someone outside the DOL that an employer is doing something seriously wrong but that information comes from someone who is not an aggrieved party, DOL can nevertheless pursue the lead. * * *. Thus, this provision does not authorize 'self-directed' or 'self-initiated' investigations by the Secretary.

144 Cong. Rec. S12754 (Oct. 21, 1998).

In contrast, Congressman Smith stated:

> Subsection 413(e) specifies a particular investigative process, to be used by the Secretary during the three-year period following enactment of this legislation. This process does not supplant or curtail the Secretary's existing authority in paragraph (2)(A) and does not affect the Secretary's newly-created authority under paragraph (2)(F) ('random investigations')* * *. This provision does not address the matter of ''self-directed'' or ''self-initiated'' investigations by the Secretary. * * * Congress' intent in enacting this special enforcement process was to endorse the Secretary's efforts to be more vigilant and effective in the enforcement of this Act, especially given the authorization of a substantial increase in temporary foreign workers.

144 Cong. Rec. E2327 (Nov. 12, 1998).

The Department proposed regulatory language to integrate this ''other source'' protocol with the Department's other enforcement procedures in a new § 655.806. The Department additionally noted in the NPRM that it was developing a form to be used in receiving information from ''other sources'' that would be published for public comment.

Eight comments were received regarding this provision.

Three organizations representing employees (AFL–CIO, AOTA, IEEE) supported these provisions as essential to careful monitoring of the program. IEEE stated its view that it is important that the regulations not be written or interpreted so restrictively as to effectively prevent the Department from exercising this authority. The AFL–CIO commented that the ''integrated procedures'' for handling complaints from other sources will make it easier for workers and job applicants to follow the status of the complaint and ensure that the Department examines complaints against an employer in full.

AILA commented that Congress, in providing DOL with the new other source enforcement authority, ''repudiated and eliminated the so-called 'self directed' authority to initiate investigations.''

The Department has long believed that directed (no complaint) investigations are appropriate where the Department becomes aware of a possible H–1B violation, whether in the course of an investigation of another employer, an investigation under another statute, or as the result of the receipt of information from some other source. To do otherwise would place Department staff in the untenable position of being forced to ignore knowledge of potentially serious H–1B violations secured in performance of their official duties, and would be a departure from the Department's practice under the H–1A nonimmigrant nurses program. The Department is also of the view that directed investigation authority is not precluded by the Act.

However, the Department also believes that the explicit provisions of the ACWIA concerning random investigations of willful violators and investigations based on credible information from sources other than aggrieved parties allow it to conduct ''directed'' investigations in virtually all situations in which it might have done in the past. Consequently, at least through September 30, 2003 (the date the ''other source'' investigation authority sunsets), it is the Department's intention to conduct only investigations pursuant to complaints from aggrieved parties, investigations based on information from sources other than aggrieved parties (including information obtained by the Secretary during an investigation under the INA or any other Act), and random investigations of willful violators.

AILA also requested that the Department define the terms ''substantial'' and ''pattern and practice.''

In the Department's view, it is unnecessary to define these terms in the regulations. The concept of a ''substantial'' violation, like ''willful'' violation, has been in the statute since enactment of MTINA in 1991. Furthermore, ''pattern and practice'' is a recognized concept in employment law which requires no definition. Finally, the determination of whether there is reason to believe there is a pattern or practice of failures or a substantial failure to meet a condition that affects multiple employees are determinations that are necessarily fact-specific, based upon the facts and circumstances of a particular case.

ACIP suggested that employers should be notified of receipt of complaints within 48 hours of receipt, and that a decision not to notify the employer should be a rare occurrence, happening only if the Department possesses clear evidence that the employer is likely to impede the investigation.

The Department anticipates that a decision not to notify an employer of the substance of allegations against it is likely to be a rare occurrence. It is also the Department's experience that many employers quickly remedy violations when brought to their attention. However, the Department does not believe it is appropriate to specify the time period in which notification will occur, or to delineate a standard in the regulations.

Kirkpatrick & Lockhart and Latour expressed their views that investigations should be initiated only on information from injured parties, while acknowledging that the scope of the provision goes beyond

''whistleblowers.'' The firms expressed particular concern about competitor complaints.

Contrary to the views expressed by Kirkpatrick & Lockhart and Latour, the Department is of the view that the ''other source'' provision of the ACWIA was intended to extend to any source likely to have knowledge of the employer's practices or employment conditions, or of an employer's compliance with its attestation obligations. Furthermore, the Department has long considered a competitor to be an ''aggrieved party,'' as defined in its current regulations at § 655.715.

ITAA noted that the proposed regulations correctly state that the ''other source'' provisions expire on September 30, 2001, unless continued by future legislation, and suggested that the regulations should also identify other provisions that will ''sunset'' absent further action by Congress. The point is well taken. The Department notes that Congress in the October 2000 Amendments has, in fact, extended the effective periods for this and other provisions until 2003. The Interim Final Rule identifies the provisions that will expire on particular dates, absent their extension by future legislation.

AILA requested the opportunity to review and comment on the form that is being developed to receive ''other source'' information. One commenter (BRI) asserts that Department employees should not be allowed to complete forms on behalf of a ''source,'' suggesting that the Department's involvement might have a coercive effect.

The Department has attached its proposed form to this rule in order to obtain the views of the public, as required by the Paperwork Reduction Act. The Department notes that for the convenience of the public and of the Department, it has designed one form for use both by aggrieved parties and by other sources. This will allow the Department to make a determination as to whether the source is aggrieved, and if not, whether the statutory standard is met, after review of the information submitted. The Department disagrees with the comment by BRI, noting that the ''other source'' procedure is initiated by the individual who has submitted information to the Department—not vice-versa—and that the ACWIA expressly authorizes the Department to complete the form on behalf of the individual.

The Department has made other procedural changes. Sections 655.800(b), 655.806(a), and 655.807(b) of the Interim Final Rule provide that the Administrator may interview the complainant or other person supplying information to determine whether the statutory standards are met. (As a courtesy, the Administrator will notify the person providing the information if the standards have not been met, or if, after the determination by the Secretary, an investigation will be conducted.)

The section has been restructured, in accordance with the Department's reading of the statute, to provide that the employer will ordinarily be provided information regarding the allegations and given an opportunity to respond after the Administrator has made an initial determination that the statutory standards are met, rather than prior to this determination. The Administrator will then review this information in order to determine if the allegations should be referred to the Secretary for a determination as to whether an investigation should be commenced. Where the Administrator has determined that notification to the employer should be dispensed with, the Secretary will be advised in the referral; there will be no review of this determination other than by the Secretary.

Section 655.806(a)(3) (and the corresponding provision in § 655.807(i)) is clarified based on the Department's enforcement experience to provide that the time to conduct an investigation may be increased where, for reasons outside of the control of the Administrator, additional time is necessary to obtain information from the employer or other sources to determine if a violation has occurred. It has been the Department's experience that employers do not always timely provide requested information; in other circumstances Wage-Hour must obtain documentation from other agencies, such as information from INS regarding petitions filed (especially where employers have not provided requested information or where needed to verify information supplied by employers).

4. What Protections Are Provided to Whistleblowers by the ACWIA? (§ 655.801)

Section 212(n)(2)(C)(iv) of the INA as amended by the ACWIA provides explicit protection for H–1B employees who exercise their H–1B rights by complaining about a violation of the Act or cooperating with an investigation. An employer may not ''intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against [such] employee.'' ''Employee'' is defined to include former employees and applicants for employment. Like other whistleblower statutes, the ACWIA provision protects an employee's ''internal'' complaint to the employer or to any other person, as well as an employee who cooperates in an investigation or proceeding concerning an employer's compliance with the Act and these regulations. As Senator Abraham stated, this provision ''essentially codifies current Department of Labor regulations concerning whistleblowers.'' 144 Cong. Rec. S12752 (Oct. 21, 1998).

Section 212(n)(2)(C)(vi) directs the Department and the Attorney General to establish a process to enable an H–1B worker who files a whistleblower complaint to remain in the United States and seek other appropriate employment for a period not to exceed the maximum period provided for the H–1B classification. As noted in the NPRM, the Department and the INS are working in close cooperation to develop this process. This mechanism, however, is not within the scope of this rulemaking.

The whistleblower enforcement provision elicited five comments.

APTA, AOTA, and IEEE expressed strong support for the statute's whistleblower provisions.

AILA suggested that the ACWIA's anti-retaliation language protecting an employee from retaliation where the employee has disclosed information that the employee ''reasonably believes evidences a violation'' of the H–1B provisions covers only ''genuine infractions of law.'' It therefore suggested that the Department should amend its rule to make clear that the disclosure ''must be other than a de minimis violation.''

The Department rejects this interpretation. The Department is of the view that Congress intended that the Department, in interpreting and applying this provision, should be guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department (see 29 CFR part 24). The Department also believes that, as in those programs, the parameters of the provision are best developed through adjudication rather than through rulemaking. The Department points out that the statutory test is whether the employer has discriminated against an employee because the employee disclosed information the employee reasonably believed evidenced a violation, or because the employee cooperated or sought to cooperate in an investigation or other proceeding. The Department believes that there is no basis for inferring an intention to protect only complaints of actual infractions of

law, or to exclude potential *de minimis* violations.

BRI commented that the employer should not be liable for wrongful termination until found guilty by the appropriate authority. The Department agrees that an employer is not liable for wrongful termination until a final decision is issued in a Department of Labor proceeding.

5. What Changes Does the ACWIA Make in Enforcement Remedies and Penalties? (§ 655.810)

Prior to the ACWIA's enactment, the INA authorized the assessment of a civil money penalty (up to $1,000 per violation) and debarment from the sponsorship of nonimmigrant aliens for employment (at least one year), among other unspecified remedies, for H–1B violations. In place of this ''unitary'' scheme, section 212(n)(2)(C)(i)–(iii) of the INA as amended by the ACWIA established a three-tier scheme for sanctions and remedies, depending upon the nature and severity of the violations. The first tier provides for up to $1,000 per violation and debarment for at least one year (for violations of the attestation provisions regarding a strike or lockout, or the dependent employer/willful violator provisions regarding displacement; or for substantial violation of the attestation provisions regarding notice, the details of the attestation, or the dependent employer/willful violator provisions regarding recruitment). The second tier provides for up to $5,000 per violation and debarment for at least two years (for willful violations of any of the attestation provisions, willful misrepresentation, or violation of the whistleblower provisions). The third tier provides for up to $35,000 and debarment for at least three years (for willful violations of any of the attestation provisions or willful misrepresentation, in the course of which violation or misrepresentation the employer displaced a U.S. worker within the period beginning 90 days before and ending 90 days after the filing of an H–1B petition supported by the LCA). In each of the three penalty tiers, as in the previous statutory provision, the ACWIA authorizes the imposition of ''such other administrative remedies as the Secretary determines to be appropriate.''

In explaining new clause (iii), Senator Abraham explained:

> The rationale for this new penalty is that there have been expressions of concern that employers are bringing in H–1B workers to replace more expensive U.S. workers whom they are laying off. Current law, however, requires employers to pay the higher of the prevailing or the actual wage to an H–1B worker. Thus, the only way an employer could profitably be systematically doing what has been suggested is by willfully violating this obligation. Otherwise, the employer would have no economic reason for preferring an H–1B worker to a U.S. worker as a potential replacement. Thus, the new penalty set out in new clause (iii) is designed to assure that there are adequate sanctions for (and hence adequate deterrence against) [willful violations of the wage provisions] by imposing a severe penalty on a willful violation of the existing wage-payment requirements in the course of which an employer 'displaces' a U.S. worker with an H–1B worker.
>
> At the same time, Congress chose not to make the layoff itself a violation. The reason for this is that there are many reasons completely unconnected to the hiring of H–1B workers why an employer may decide to lay off U.S. workers. * * * Accordingly, it is important to understand that unlike the new attestation requirements imposed by the amendments to section 212(n)(1), clause (iii) of section 212(n)(2)(C) provides no new independent basis for DOL to investigate an employer's layoff decisions. The only point at which DOL can do so pursuant to clause (iii) is after it has already found that the employer has committed a willful violation of one of the pre-existing labor condition attestations.
>
> * * * At that point, and not before, provided that there is reasonable cause to believe that an employer had also displaced a U.S. worker in the course of committing that violation, it would be proper for DOL to investigate, but only in order to ascertain what penalty should be imposed. The definitions concerning ''displacement'' and the like, set out in new 212(n)(3) and 212(n)(4) of the Immigration and Nationality Act, and discussed in the previous portion of this section-by-section analysis dealing with the amendments to that Act made by section 412 of this legislation, apply in this context as well.

144 Cong. Rec. S12752 (Oct. 21, 1998).

Congressman Smith explained that new clause (iii) ''clarifies that certain kinds of employer conduct constitute a violation of the prevailing wage attestation, and that other kinds of employer conduct are also prohibited in the H–1B program. * * * Congress intends that this new penalty will assure that there are adequate sanctions for (and hence adequate deterrence against) any willful violation of the existing wage-payment requirements in the course of which an employer 'displaces' an American worker with an H–1B worker.'' 144 Cong. Rec. E2325 (Nov. 12, 1998).

These penalty provisions do not apply to the ACWIA prohibitions on penalizing an H–1B worker for his or her early cessation of employment, or on requiring an H–1B worker to reimburse the filing fee. For these violations, the Department, instead, may impose a civil money penalty of $1,000 for each violation and reimbursement of the H–1B worker (or the Treasury if the worker cannot be located). Debarment is not available as a sanction for these violations.

In the NPRM, the Department proposed that ''appropriate administrative remedies'' would include the imposition of curative actions such as providing notice to workers and affording ''make-whole'' relief for displaced workers, whistleblowers, or H–1B workers who failed to receive proper benefits or eligibility for benefits.

Senator Abraham and Congressman Smith had divergent views regarding the Secretary's authority to impose such remedies. Senator Abraham stated that these remedies ''do not include an order to an employer to hire, reinstate, or give back pay to a U.S. worker as a result of any violation an employer may commit.'' 144 Cong. Rec. S12752 (Oct. 21, 1998). Congressman Smith, on the other hand, stated that ''Congress intends that such remedies will include 'make-whole' relief for affected American workers (such as, in appropriate circumstances, monetary compensation to the American worker or reinstatement to the job from which the American worker was dismissed or placement in the job to which the American worker should have been hired).'' 144 Cong. Rec. E2325 (Nov. 12, 1998).

Several commenters (Senators Abraham and Graham, AILA, Network Appliance, Rubin & Dornbaum, Satyam, and White Consolidated Industries) stated that the authority to seek make-whole relief has never been asserted by the Department and is beyond the authority granted to the Department by the ACWIA. Other Congressional commenters commented that the proposed regulations on the scope of administrative remedies go far beyond what the statute contemplates, without specifically referring to make-whole relief.

After careful consideration, the Secretary remains persuaded that the plain language of the ACWIA (''the Secretary * * * may * * * impose such other administrative remedies * * * as the Secretary determines to be appropriate'') provides the Secretary the authority to award whatever relief is appropriate in the circumstances of a case, including make-whole relief. Since the Act already contains explicit authority for civil money penalties, back wages, and debarment, it seems apparent that Congress intended to allow the Secretary to order other appropriate remedies to cure the violations. In the case of displacement

or whistleblower violations in particular, such relief must logically include reinstatement and back pay. Nor does the Department believe that the fact that explicit language concerning such relief was not contained in the ACWIA, as Senator Abraham indicates was sought by the Administration, equates to an express legislative denial of such remedial authority to the Secretary.

ITAA, ACIP, and Intel requested that the Department define the various terms used in the statute's three-tier scheme for violations.

The Department notes that ''willful failure'' is currently defined in the regulations at § 655.805(b). As discussed above, it is the Department's view that it is unnecessary to define these terms further in the regulations.

SBSC sought assurances that ''punitive approaches'' would not be applied where there is an absence of negligence, fraud, or other blameworthy action. Intel and ACIP suggest that the Department should recognize, in effect, a good faith defense for an employer that is found in violation of the statute. Intel suggests that the Department should establish a practice akin to that provided for I–9 violations by 8 U.S.C. 1324a(b)(6). This provision stipulates that under certain circumstances ''a person is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with this requirement.''

In the Department's view, the ACWIA does not provide a general defense in the nature of those suggested by SBSC and Intel. Entirely missing from the statute is any provision comparable to 8 U.S.C. 1324a(b)(6). At the same time, however, it should be noted that the Department is vested with some enforcement discretion and intends to exercise this discretion in accordance with the purposes served by the statute and the public interest. Where appropriate, the Department will consider the totality of the circumstances, including an employer's demonstrated good faith attempts at compliance, in fashioning remedies appropriate to the violation. In this regard, the Department notes that its regulations providing the factors to be considered in assessing the amount of civil money penalties include an employer's good faith efforts to comply, the gravity of the violations, and the violator's explanation of the violations. See § 655.810(c) of the current regulations.

Several individuals urged the imposition of heavy penalties upon violators. The AFL–CIO suggested in particular that the Department should make greater use of the debarment penalty in cases that are resolved through consent judgments or other means of settlement.

The Department, of course, will be guided by the penalty scheme established by Congress and the Department's regulatory provisions governing debarment and the assessment of penalties. The ACWIA establishes a three-tier system for debarment and civil money penalties; the remedy in a particular case will depend upon the category of the violation involved and consideration of the regulatory factors, which may enhance or reduce a civil money penalty under the particular circumstances of the violation. The Department notes that the ACWIA particularly recognizes the gravity of willful violations, as demonstrated by the longer debarment period and authority to conduct random investigations. Accordingly, the Secretary will insist on debarment in appropriate cases.

The individual commenters urged the Department to issue a regulation that informs American workers of their rights under the statute. ITAA also suggested that the regulations should address the Attorney General's role under the statute.

The Interim Final Rule lays out the obligations of H–1B-dependent employers and willful violators, including the requirements—as laid out in Sections D and E of the NPRM—that they not displace workers, that they not place H–1B workers at worksites of other employers where U.S. workers are being displaced, that they recruit U.S. workers using industry-wide procedures, and that they offer the job to any U.S. worker who applies who is equally or more qualified than the H–1B workers. The rule also explains the provision for filing complaints with the Attorney General for violations of the hiring requirement. In addition, although there is no direct remedy for U.S. workers who are not employed by dependent employers or willful violators, they may file complaints with the Department.

ITAA requested that the Department clarify enforcement regulations as they pertain to recruitment violations and specify that only H–1B-dependent employers may be liable for such violations. The Interim Final Rule has been clarified to make clear that only an H–1B-dependent employer or willful violator may be held liable for a recruitment violation. The recruitment obligations of dependent employers are discussed in much greater detail in IV.E, above.

Finally, on review of the NPRM, the Department notes that it had misconstrued the scope of the third tier of penalties. The highest level of penalties (up to $35,000 per violation and a minimum of three years of debarment) are applicable whenever any employer displaces a U.S. worker in the course of committing a willful violation of any of the attestation provisions or a willful misrepresentation—regardless of whether the employer is a dependent employer or willful violator subject to the new attestation provisions of the ACWIA. In the Department's view this construction is clear from a careful reading of the statutory language, as well as the statement describing this provision by Senator Abraham, quoted above, at 144 Cong. Rec. S12752 (Oct. 21, 1998). Application of this higher penalty will arise only where the Department determines that the employer has committed a willful violation of an attestation requirement—*e.g.,* the employer has willfully failed to pay the required wage to H–1B workers. If the Department determines that the employer has displaced a U.S. worker within the period between 90 days before and 90 days after the LCA was filed, and that the employer has replaced that worker with an H–1B worker whom the employer has willfully failed to pay the required wage, the employer will be subject to a CMP of up to $35,000 per violation of the attestation requirements; in addition, the Department will advise INS, which shall not approve any petitions for at least a three-year period. The Interim Final Rule has been amended to correct this provision.

In addition, the H–1B enforcement provisions contained in Subpart I of Part 655 have been restructured to make them clearer and more user-friendly. Changes have also been made to comport with the Department's enforcement experience. Specifically, as discussed in IV.M.3, above, § 655.806(a)(3) (and the corresponding provision in § 655.807(i)) clarifies that the time to conduct an investigation may be increased where, for reasons outside of the control of the Administrator, additional time is necessary to obtain information from the employer or other sources to determine if a violation has occurred. Sections 655.800(b), 655.806(a), and 655.807(b) provide that the Administrator may interview the complainant or other person supplying information to determine whether the statutory standards are met.

Various clarifying changes have been made to proposed § 655.810, setting forth the remedies available to the Administrator upon a finding of violations. As discussed in IV.G, above, the Department has determined that certain benefits are in the nature of compensation for services rendered, and have a monetary value to workers and monetary cost to employers. Therefore such benefits are more in the nature of wages than of working conditions. Paragraph (a) of § 655.810 makes it clear that payment of unpaid benefits can be ordered by the Administrator pursuant to the Administrator's authority to order payment of back wages under section 212(n)(2)(D).

In addition, the Interim Final Rule clarifies at §§ 655.810(a)(14) and 655.810(a)(16) that the Department will issue CMP assessments for violations of the public access provisions of the Act, or for regulatory violations, such as a failure to cooperate in the investigation (see § 655.800(c)). The Department will also assess CMPs for violations of the recordkeeping requirements, where the violation impedes either the ability of the Administrator to determine whether a violation of the H–1B requirements has occurred, or the ability of members of the public to have information needed to file a complaint or information regarding alleged violations of the Act. Under the existing regulations (§ 655.810(b)), CMP assessments may be imposed for any violations of the regulations.

Finally, in conformance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (see 28 U.S.C. 2461 note), new § 655.810(f) provides for inflationary adjustments to be made, by regulation, to civil money penalties in accordance with a specified cost-of-living formula. Such adjustments will be published in the Federal Register. The amount of the penalty in a particular case will be based on the penalty in effect at the time of the violation.

N. What Modification to Part 656 Does the ACWIA Provide for the Determination of the Prevailing Wage for Employees of ''Institutions of Higher Education,'' ''Related or Affiliated Nonprofit Entities,'' ''Nonprofit Research Organizations,'' or ''Governmental Research Organizations''? (§ 655.731(a)(2), § 656.40)

The ACWIA amends the INA (Section 212(p)(1), 8 U.S.C. 1182(p)(1)) to require that the computation of the prevailing wage for employees of institutions of higher education, nonprofit entities related to or affiliated with such institutions, nonprofit research organizations, and Governmental research organizations only take into account the wages paid by such institutions and organizations in the area of employment. In addition, section 212(p)(1) provides that with respect to professional athletes as defined in section 212(a)(5)(A)(iii)(II), where the job opportunity is covered by professional sports league rules, the wage prescribed by those rules shall be considered the prevailing wage. This ACWIA directive concerning academic and research institutions affects both the H–1B program and the Permanent Labor Certification program, since both programs use the prevailing wage computation procedures set out in the Permanent program regulation at 20 CFR 656.40. The provision regarding professional athletes affects only the Permanent program.

On March 20, 1998 (63 FR 13756), the Department published a Final Rule amending its Permanent Labor Certification regulation to change the effects of the *en banc* decision of the Board of Alien Labor Certification Appeals in *Hathaway Children's Services* (91–INA–388, February 4, 1994), which required prevailing wages to be calculated by using wage data obtained by surveying across industries in the occupation in the area of intended employment. The 1998 Final Rule, in effect, allows prevailing wage determinations made for researchers employed by colleges and universities, Federally Funded Research and Development Centers (FFRDCs) operated by colleges and universities, and certain Federal research agencies to be made by using wage data collected only from those entities. The Department stated in the Preamble to that Final Rule that the amendment to the regulation also changed the way prevailing wages are determined for those entities filing H–1B labor condition applications on behalf of researchers, since the regulations governing the prevailing wage determinations for the Permanent program are followed by State Employment Security Agencies (SESAs) in determining prevailing wages for the H–1B program as well.

The ACWIA provision goes considerably beyond the regulatory amendments made by the Department. The ACWIA provisions extend to all nonprofit research organizations and Governmental research organizations. In addition, the ACWIA provisions extend not only to researchers, but to all occupations in which institutions of higher education, nonprofit entities related to or affiliated with such institutions, and nonprofit research organizations or Governmental research organizations may want to employ H–1B workers or aliens immigrating for the purpose of employment.

In describing the application of this provision, Senator Abraham stated in pertinent part:

> Paragraph 212(p)(1) provides that the prevailing wage level at institutions of higher education and nonprofit research institutes shall take into account only employees at such institutions. The provision separates the prevailing wage calculations between academic and research institutions and other non-profit entities and those for for-profit businesses. Higher education institutions and nonprofit research institutes conduct scientific research projects, for the benefit of the public and frequently with federal funds, and recruit highly-trained researchers with strong academic qualifications to carry out their important missions. The bill establishes in statute that wages for employees at colleges, universities, nonprofit research institutes must be calculated separately from industry.

144 Cong. Rec. S12756 (Oct. 21, 1998).

The Department consulted with the INS on the definitional issues, since that agency has addressed similar issues with regard to the implementation of the additional fee required for petitions on behalf of H–1B nonimmigrants. The employers excluded from that fee are the same as the employers specified in the ACWIA provision concerning prevailing wage determinations. The Department worked with the INS in developing the following definitions contained in its Interim Final Rule published on November 30, 1998 (63 FR 65657), 8 CFR 214.2(h)(19)(iii)(B):

> ''*An institution of higher education,* as defined in section 801(a) of the Higher Education Act of 1965;
>
> ''*An affiliated or related nonprofit entity.* A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation, operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary;
>
> ''*A nonprofit research organization or Governmental research organization.* A research organization that is either a nonprofit organization or entity that is primarily engaged in basic research and/or applied research, or a U.S. Government entity whose primary mission is the performance or promotion of basic and/or applied research. Basic research is research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial

interest. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services.''

The INS Interim Final Rule also provides, in relevant part, that a nonprofit organization or entity is one that is qualified as a tax exempt organization under Section 501(c) (3), (4) or (6) of the Internal Revenue Code of 1986 (IRC) and has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

In the NPRM, the Department sought comments on the proper definitions of the entities to which the ACWIA prevailing wage provisions apply. The Department shared these comments with INS in the development of definitions to apply to both the INS and Departmental regulations. Comments received by INS concerning these definitions have also been considered by the Department and are included in the record of this rule.

In order to determine prevailing wages as required by the ACWIA, the Department explained that it is also necessary to determine the appropriate universe(s) to survey, and to determine the availability of relevant, reliable data. The Act sets forth the four types of organizations in two groups: educational institutions and related research organizations; and other nonprofit research organizations and Governmental research organizations. The Department stated, however, that the Act does not seem to require that prevailing wages be determined separately for those two groups, as distinguished from a universe consisting of all four groups, or surveys of the four types of organizations separately, or some other combination.

The Department explained in the NPRM that it has reason to believe that it may not be feasible to identify the different kinds of entities that might comprise educational institutions' related or affiliated nonprofit entities, or nonprofit research organizations. If those entities cannot be identified, it may not be possible to properly define the universe that should be surveyed to determine the appropriate prevailing wages. One possible alternative the Department said it would explore is the use of the prevailing wage data it currently collects in surveying institutions of higher education to determine prevailing wages for one universe consisting of institutions of higher education, affiliated or nonprofit research institutions, and nonprofit research organizations. The Department also stated that data currently being collected by the Office of Personnel Management (OPM) may be able to be used to determine prevailing wages for Federal Governmental research organizations.

The Department sought comments on the appropriate universes to use in determining prevailing wages for the entities (employers) mentioned in the ACWIA, methods to develop an appropriate universe, and the feasibility and appropriateness of the Department's using data collected from institutions of higher education and Federal Governmental research organizations to determine prevailing wages.

In the period since the NPRM was published, INS has published its Final Rule implementing the fee provisions of the ACWIA (65 FR 10678; February 29, 2000). These regulations include provisions defining organizations which are exempt from the H–1B petition filing fee. As discussed above, the ACWIA defines exempt organizations as those organizations described in section 212(p)(1). More recently, the October 2000 Amendments (Pub. L. 106–311) amended section 214(c)(9) of the INA to provide a modified definition of organizations exempt from the fee. However, this recent provision has no effect on the Department's prevailing wage obligation.

The Department received six comments on this section of the NPRM. The American Council on Education (ACE) also attached a copy of its comments on the INS Interim Final Rule. The Department also reviewed the comments received by INS pertaining to this issue.

With respect to definitions of covered entities, ACE and the Association of Independent Research Institutes (AIRI) commended the efforts of federal agencies to jointly develop regulatory definitions, and urged that all regulations that implement ACWIA sections include identical definitions, regardless of the agency source of the regulation.

AIRI stated that the proposed definitions adequately cover its member institutions—independent, nonprofit research institutions performing basic and clinical research in behavioral sciences. Similarly, the Smithsonian Institution stated that it had no problem with the definitions, stating that it believes that it qualifies as both a nonprofit research organization and as a governmental research organization.

ACE observed that the new section 212(p)(1) references only those institutions included in section 101(a) of the Higher Education Act of 1965. (ACE pointed out a typographical error in the NPRM, which referenced section 801 of the Higher Education Act rather than section 101(a).) The Higher Education Amendments of 1998 (Pub. L. No. 105–244, 112 Stat. 1581 (Oct. 7, 1998)), reauthorized the Higher Education Act and made a number of amendments. Institutions contained in sections 101(a) and (b) of the Act as amended in 1998, 20 U.S.C. 1001(a) and (b), were formerly contained in 20 U.S.C. 1201(a), which itself incorporated 20 U.S.C. 1088. ACE stated its belief that Congress inadvertently neglected to reference section 101(b) as well as section 101(a) of the Higher Education Act as amended in 1998 when it passed the ACWIA. ACE requested that the definition of an ''institution of higher education'' contained in the NPRM therefore be modified to include both section 101(a) and section 101(b), pending clarification by the Department of Education or a technical amendment. Unless this is done, ACE contends, some categories of higher education, such as independent medical colleges or graduate universities, might not qualify for the academic prevailing wage determination.

ACE further stated, with respect to definitions, that the NPRM did not define a ''governmental research organization.'' Both AILA and ACE stated that the definition should indicate that such organizations include all federal, state, and local government laboratories conducting scientific and/or scholarly research. ACE also noted that FFRDCs are operated by contractors rather than the Federal Government itself. ACE suggested that FFRDC contractors should be eligible for the academic prevailing wage if they are institutions of higher education, affiliated or related nonprofit entities, nonprofit research organizations, or governmental research organizations. ACE also recognized the problem inherent in applying the prevailing wage methodology provided for by section 212(p)(1) to for-profit contractors that operate FFRDCs. Nonetheless, ACE indicated it considered all FFRDC's to be members of the academic research community, and expressed hope that the Department will work with the ACE and the FFRDC contractor community to develop an appropriate solution to allow all academic researchers to be treated equally.

ACE also urged that the definition of ''affiliated or related nonprofit entity'' include, in addition, those nonprofit research hospitals which have an

historic affiliation with universities but do not meet the strict definition of ''affiliation'' in the INS Interim Final Rule. ACE proposed a specific modification of the definition to accommodate these hospitals. Similarly, AILA maintained in the comments it submitted to INS, that ''[c]ertain non-profit or governmental (non-research) institutions may have arrangements for the sharing of information, training or research with educational institutions, yet would not by this definition [of affiliated or related non-profit entity] be exempt from the fee.''

Finally, ACE urged that the definition of nonprofit organizations or entities be modified so that a state or local organization exempt from tax under IRC Section 115 or under an applicable state law qualifies as a nonprofit organization or entity for purposes of the ACWIA. By doing so, ACE contends, the Department's regulation would be consistent with the INS Interim Final Rule.

The Research Corporation of the University of Hawaii (RCUH) sought clarification regarding its status. RCUH explained that it was established by the State of Hawaii as a ''public instrumentality,'' part of the University of Hawaii ''for administrative purposes only,'' and non-profit under state law but not under the IRC. It expressed the view that both DOL and INS had failed to consider the special category of public/private semi-autonomous, non-profit research organizations created by other government agencies, and that they fit within the intent of the ACWIA language regarding non-profit research organizations.

In its comments on the definition provisions of the NPRM pertaining to nonprofit research organizations and Governmental research organizations, AILA maintained that the use of the word ''scientific'' connotes a natural science like chemistry or physics, but not a social science like history or sociology. In addition, AILA opined that the distinction between basic research and applied research is often a distinction drawn within the natural sciences, and that the NPRM therefore implies that DOL believes that ACWIA amendments covers only nonprofit organizations engaged in natural science research. The ACWIA amendments, according to the AILA, broadly refer to research and nowhere introduce the language limiting the amendment to natural science research.

With respect to the definition of ''nonprofit research organization,'' AILA opined that nonprofit research organizations engaged in substantial research should be covered by the ACWIA amendments, whether or not research is the nonprofit's primary purpose. AILA suggested that the Department's definition of nonprofit research organizations include ''organizations primarily engaged in research and organizations engaged in research as an essential or significant element of their operations.''

A law firm representing Texas school districts and private schools (Tindall and Foster) commented that elementary and secondary educational institutions should be exempt from the filing fee because they operate on tighter budgets than institutions of higher education and because of the critical shortage of bilingual teachers. That commenter also stated that ACWIA prevailing wage provisions should include elementary and secondary education institutions.

With regard to the comments by ACE that the definition of ''(a)n institution of higher education'' presented in the NPRM should be modified to include those institutions contained in section 101(b), as well as those contained in section 101(a) of the Higher Education Act, as amended by the Higher Education Amendments of 1998, the Department believes it is constrained by the unambiguous statutory language to include only those institutions in section 101(a). Furthermore, there is no indication in the legislative history as viewed in conjunction with the history of the Higher Education Amendments to indicate Congress intended to include section 101(b).

Concerning the view expressed by ACE and AILA that the definition of a ''Governmental research organization'' should include state and local government laboratories conducting scientific and/or scholarly research, the Department has concluded that by Congress' use of the initial capital ''G'' in the word ''Governmental'' in the statute, Congress intended to limit the provision to the Federal research organizations. In the INA, the words ''Government'' and ''government'' appear numerous times. It appears that only when a small ''g'' is used, does the term include state and local as well as Federal government agencies. See the discussion in C. Stine, ''Out of the Shadows: Defining 'Known to the Government' in the Immigration Reform and Control Act of 1986,'' 11 Fordham Int'l L.J. 641, 653 (Spring 1988); see also *Kalaw* v. *Ferro,* 651 F. Supp. 1163 1169–70 (W.D.N.Y. 1987). Furthermore, throughout the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (Oct. 21, 1998), of which the ACWIA is a part, it appears that a capital ''G'' is used to mean the United States government or the government of a foreign nation, while a small ''g'' is used to refer to state, local, and tribal governments (unless the complete term ''Federal government'' is used). See also, *State Bank of Albany* v. *United States,* 530 F.2d 1379, 1382 (Ct. CL. 1976).

The Department agrees with the view expressed by ACE that the status of entities contracting with FFRDCs determines the application of the special provisions of Section 212(p)(1). An academic institution operating an FFRDC, for example, would obtain the prevailing wage determination applicable to academic institutions. The determination of prevailing wages for for-profit employers that operate FFRDCs is outside the scope of the proposed rule and is not addressed in this document.

As noted above, ACE recommended that the definition of ''[a]n affiliated or nonprofit entity'' be modified to include other ''nonprofit research hospitals'' that do not meet the definition of ''affiliation'' in the Department's NPRM and the INS Interim Final Rule and, because their primary mission is patient care, do not meet the definition of a ''nonprofit research organization.'' Specifically, ACE recommended that the phrase ''or through a documented understanding or affiliation'' be added to the definition. The Department is of the view, however, that the definition of ''affiliated or related nonprofit entity'' in the NPRM and the INA Interim Final Rule is consistent with the ordinary meaning of the phrase. The definition proposed by ACE is inappropriately broad and would likely include many entities in addition to the ones about which ACE and AILA are concerned. Consequently, the Department has decided not to adopt the modification to the definition of ''affiliated or nonprofit entity.''

In support of its view that the definition of a nonprofit organization or entity should be modified to include organizations exempt from tax under section 115 of the IRC (26 U.S.C. 115) or under an applicable state law as a nonprofit organization or entity, ACE stated that INS covers such organizations in its interim rule. To the contrary, the INS Interim Final Rule at 8 CFR 214.2(h)(iv) does not provide that organizations can qualify as nonprofit entities on the basis of being exempt from tax under IRC Section 115 or under an applicable state law, but instead provides at § 214.2(h)(iv):

For purposes of paragraphs (h)(19)(B) and (C) of this section, a nonprofit organization or entity is one that is qualified as a tax exempt organization under section 501(c)(3),

(4) or (6) of the Internal Revenue Code of 1966 (26 U.S.C. 501(c)(3), (c)(4) or (c)(6)) and has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

The preamble to the INS Interim Final Rule (63 FR 65658) does acknowledge that certain organizations (*e.g.,* churches) qualify for nonprofit status without a notice from the IRS confirming such status. (It is unlikely that such organizations would be institutions of higher education and related or affiliated institutions, or nonprofit and Governmental research organizations.) The INS goes on to state that it believes that most employers of specialty occupation workers claiming an exemption will be able to meet the evidentiary requirement specified in the rule, either with a notice from the IRS or other documents demonstrating the United States employer's nonprofit status. The Department agrees with these statements by INS. The preamble to the INS rule does not indicate that nonprofit status will in any instance be determined by the employer's tax exempt status pursuant to IRC Section 115 or state law. Moreover, we see no reason to include entities encompassed by Section 115 within the definition of nonprofit entities. Section 115 does not purport to be a list of tax-exempt organizations, but rather is a reference to the kinds of state income which are excluded from gross income in determining income tax. Furthermore, the Department believes that it is generally accepted that nonprofit status is determined by an entity's status under section 501(c). If Congress wanted an entity's nonprofit status to be determined by state law, Congress could have expressly so provided.

Based on the foregoing, this rule provides, as does INS' Interim Final Rule, that a nonprofit organization or entity is one that is qualified as a tax exempt organization under IRC section 501(c)(3), (c)(4) or (c)(6), and has received approval from the Internal Revenue Service as it relates to research or educational purposes.

As indicated above, AILA believed the Department was implying in the NPRM that the ACWIA amendments and the definitions in the NPRM pertaining to nonprofit research organizations and Governmental research organizations only applied to organizations engaged in natural science research. The definitions of basic research and applied research used in the NPRM (and the INS interim rule) are based on the definitions of ''Basic Research'' and ''Applied Research'' found on pages 4–9 of Science & Engineering Indicators—1996, published by the National Science Foundation (NSF). The materials contained in the NSF publication indicate that these definitions apply to the social and behavioral sciences (which include psychology, sociology and other social sciences), as well as the natural sciences (which include all physical, earth, atmospheric, biological and agricultural sciences). NSF staff have confirmed that the NSF definitions of basic and applied research apply to both the social and natural sciences. These definitions are used in NSF's resource surveys and are well understood by members of the research community. The Department has revised the regulation to provide that ''research'' includes research in the sciences, social sciences, and humanities.

The Department has also concluded that the definition of nonprofit research organization should be limited to organizations primarily engaged in research. We believe this is most consistent with the statutory phrase ''research organization.'' Furthermore, Senator Abraham's statement, quoted above, indicates a specific Congressional intent that the determination of the prevailing wage not include other types of nonprofit entities. In addition, since workers in all occupations for which nonprofit research entities file H–1B labor condition applications or applications for alien employment certification are potentially affected by the ACWIA prevailing wage amendments, the proposed modification could affect large numbers of H–1B workers not engaged in research or related activities, thereby increasing the possibility of an adverse effect on U.S. workers who are not engaged in research or related activities. The Department believes such a construction would not be consistent with Congressional intent.

As indicated above, AILA indicated in its comments that the groups included in prevailing wage determinations should only include ''similarly employed'' individuals. This issue is outside the scope of this rulemaking. However, it is the Department's position that all occupations included within an OES occupational group for which prevailing wage determinations are provided are ''similarly employed.'' The Department also notes that the OES does collect data for faculty members by certain disciplines in accordance with an agreement reached with the academic community.

With regard to the collection of prevailing wage data and prevailing wage determinations, ACE and AIRI strongly supported the Department's approach as the most feasible solution to meeting the ACWIA requirements. These two organizations observed that institutions of higher education, affiliated and related research institutions, and nonprofit research organizations, are comparable for prevailing wage purposes due to the similarity of their missions and employment of H–1B nonimmigrants. ACE recommended a separate category for governmental research organizations based on their understanding that pay scales and wages for government research labs and other related activities are established and predetermined by federal, state and local governments, and do not necessarily correspond to the other three groups. The Smithsonian Institution opposed this approach, and urged the Department to treat all groups as a single universe for purposes of determining prevailing wage levels. The Smithsonian also noted that the NPRM did not address the issue of how organizations in the four groups are to make their status known to the local SESA for prevailing wage determinations. Moreover, the Smithsonian recommended that the Department follow the example of the INS for I–129W, with no additional evidentiary requirements.

ACE also expressed concern regarding the Department's treatment of independent academic wage surveys, stating its view that much DOL and state and local government academic wage information is inaccurate due to inclusion of an insufficient number of academic institutions. It therefore encouraged the Department to adopt independent surveys of academic wages.

AILA argued that the division of employer groups into two distinct subparagraphs in section 212(p)(1) is indicative of Congressional intent to treat the two groups separately. AILA further commented that the groups included in the prevailing wage determination should only include similarly employed individuals, as distinguished from a group of occupations. AILA also stated that similarly employed workers should include reference to the skills and knowledge required by the position.

As noted in the NPRM, the Department does not believe that the ACWIA requires that the four types of organizations be grouped in any particular way in determining the universe for prevailing wage surveys. The Department agrees with AIRI and ACE that there are substantial similarities among employment found in colleges and universities, affiliated or

related nonprofit entities, and nonprofit research organizations. Therefore, the Department plans to use the data it currently collects in surveying institutions of higher education to determine prevailing wages for institutions of higher education, related or nonprofit entities, and nonprofit research organizations.

The Department also agrees with ACE that pay scales for Governmental research laboratories and other related activities are established by the Federal government and do not necessarily correspond with the three other groups mentioned above. For this reason, the Department does not contemplate including Governmental research organizations in the same universe as the other three types of organizations unless the technical problems in determining prevailing wages for the Government research organizations prove to be insurmountable. The Department intends to use data currently being collected by the Office of Personnel Management relating to Federal Government employment to determine prevailing wages for Federal Government research organizations if certain technical issues can be satisfactorily resolved. One possible alternative approach would be to use Government-wide prevailing wage data by occupation as a proxy for prevailing wages in Government research organizations.

As an interim measure, since the prevailing wage provisions were effective on enactment of the ACWIA, the Department has issued a directive that provides that prevailing wages for institutions of higher education, affiliated or nonprofit entities, nonprofit research organizations and Government organizations should be based on the wages now being collected by the Occupational Employment Statistics Program for colleges and universities. General Administrative Letter No. 2–99, (GAL 2–99) dated April 23, 1999, ''Subject: Availability and Use of Occupational Employment Statistics Survey Data for Alien Labor Certification Purposes.'' With regard to ACE's comments on use of independent academic wage surveys, the Department points out that its guidance in GAL 2–98, dated October 31, 1997, ''Subject: Prevailing Wage Policy for Nonagricultural Immigration Programs,'' allows employers to submit their own surveys, which will be used by the SESA to determine prevailing wage if they meet the required standards.

With respect to the suggestion from the law firm that elementary and secondary educational institutions should be made exempt from the filing fee and should be included within the scope of the prevailing wage provisions, the Department notes that the fee provision has been modified by the October 2000 Amendments to exempt such organizations, but no such modification was made to the prevailing wage provisions.

The Smithsonian Institution in its comments points out that one issue not addressed in the NPRM is how the categories of employers are to make their status known when they ask the local SESA for a prevailing wage determination. These provisions have been in effect since enactment of the ACWIA and the Department has not found that any additional paperwork requirements are necessary. The Department anticipates that employers which are entitled to this provision will make themselves known. If additional guidance is necessary, the Department will provide it.

The regulatory text consistent with the above discussion is incorporated in the rules for the Permanent program, 20 CFR part 656, § 656.40(c). Conforming changes are made to cross-reference this provision in § 656.40(a) and in the H–1B regulations at § 655.731(a)(2) and (3). In addition, the related provisions concerning prevailing wages for academic institutions and certain Federal research agencies at § 656.3 (definition of ''Federal research agency'') and Subpart E, § 656.50, are deleted.

Finally, Section 415(b) of the ACWIA provides that these special prevailing wage provisions apply to computations made for applications filed on or after the date of enactment of the ACWIA, and to applications filed earlier ''to the extent that the computation is subject to an administrative or judicial determination that is not final as of such date.'' Thus, as discussed above, the amendments made to §§ 655.731(a)(2) and 656.40 are effective immediately, and apply to all cases in which the determination of the prevailing wage was not yet finally determined administratively pursuant to the regulations at Parts 655 and 656. Moreover, they are applicable to any cases pending in Federal court which were not finally decided where the prevailing wage determination was under review, as of the date of enactment.

O. What H–1B Regulatory Matters, in Addition to the ACWIA Provisions, Are Addressed in This Interim Final Rule?

In the NPRM, the Department re-published for further notice and comment some of the provisions of the Final Rule promulgated in December 1994 which had been proposed for comment on October 31, 1995, during the pendency of the *NAM* litigation. That litigation resulted in an injunction against the Department's enforcement of some of these provisions on Administrative Procedure Act procedural grounds (*National Association of Manufacturers* v. *Reich,* No. 95–0715, D.D.C. July 22, 1996).

As explained in the NPRM, some of the provisions of the Final Rule were modified in the NPRM in light of ACWIA requirements and others in light of comments received in response to the October, 1995 proposal.

This Interim Final Rule is based on the Department's consideration of all comments received, both on the 1995 proposal and the recent NPRM.

1. What Are the Standards or Restrictions for Placement of H–1B Workers at Locations Other Than Those Identified on the Original LCA? (§ 655.735)

In the NPRM, the Department dealt separately with three related matters concerning the work locations of H–1B workers and the movement of such workers to new locations. These matters, which are of significant concern to users of the H–1B program, were: the regulation concerning short-term placement of H–1B workers at worksites not covered by any LCA (NPRM Section O.1); the interpretation of the term ''place of employment''/''worksite,'' which affects many of the employer's LCA obligations (NPRM Section P.1); and the interface among the regulatory provisions affecting the ''roving'' or ''floating'' of H–1B workers away from their home base worksite(s) (NPRM Section P.2). Because the reactions of commenters indicated some confusion about the interplay among these three matters, they are addressed in the following combined discussion.

a. What Are the Opportunities and Guidelines for Short-Term Placement of H–1B Workers at Worksite(s) Outside the Location(s) Listed on the LCA? (NPRM Section O.1)

Regulations to authorize short-term placement of H–1B workers at places of employment outside the areas of intended employment listed on the employer's LCA(s) were first published by the Department in the December 20, 1994 Final Rule. The structure and application of this short-term placement option assumes that the new location to which an H–1B worker is sent is, in fact, a ''place of employment'' or ''worksite'' for that worker. However, as discussed below, not every physical location at which an H–1B worker's duties are

performed will constitute a ''worksite'' for that worker (see subsection b, below). It is important for employers to recognize that if the location is not a ''worksite'' for that H–1B worker, then the short-term placement provision will not be applicable to that worker at that location and, consequently, the placement of the worker there will not be subject to the requirements of this section of the regulation (see IV.O.1.b and c, below). The following discussion of the short-term placement option is, therefore, based on the assumption that the H–1B worker(s) will be temporarily placed at worksites which are not covered by an LCA.

Prior to promulgation of the short-term placement option, an employer was not permitted to employ a worker at a worksite in any area unless the employer had a certified LCA covering that area of employment. Section 655.735(b)(4) of the 1994 Final Rule provided the short-term placement option, whereby ''the employer's placement(s) of H–1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's labor condition application(s) shall be limited to a cumulative total of ninety (90) workdays within a three-year period, beginning on the first day on which the employer placed an H–1B nonimmigrant at any worksite within such area of employment.'' This provision was intended by the Department to allow employers greater flexibility in deploying their H–1B workers in response to business needs and opportunities in new areas. The Department recognized that an employer could, in any such situation, choose to file a new LCA covering the new worksite at which it intended to place H–1B workers. However, the Department sought to provide a mechanism by which an employer—desiring to move its H–1B worker(s) quickly, or contemplating a temporary operation in a new location—could be accommodated under the program without the delay or obligations involved in filing a new LCA. With that goal in mind, the regulation authorized an employer to use H–1B worker(s) at worksite(s) in an area of employment not covered by an existing LCA for a total of 90 workdays within a three-year period, without having to file a new LCA for that new area. Essentially, the Department created a limited exception to the rule that there must be an LCA covering every worksite at which an H–1B worker is employed. By creating this exception, the Department enabled employers wishing to use H–1B worker(s) to respond immediately to an opportunity or a problem in a non-LCA location without waiting to prepare and file an LCA for that location. If the situation requiring quick response by H–1B worker(s) was resolved within the regulation's ''short-term'' window, then a new LCA would never be required. If, on the other hand, the H–1B worker(s) would be needed at worksite(s) in the new area for a longer period of time, the employer would have ample time to prepare and file a new LCA while already using the H–1B worker(s) there. The ''short-term'' placement regulation set forth in the 1994 Final Rule specified that the ''short-term'' 90-day period would be calculated by totaling all days of work by all the employer's H–1B workers in the area of employment (covering all worksites within that area), beginning with the first workday of any H–1B worker at any worksite in that area. The 90-day period was applied separately to each new area of employment (*i.e.,* a separate 90-day period was available for each new city or commuting area).

This provision was enjoined because of lack of appropriate notice and comment, in the NAM decision. In the meantime, the provision was published for comment in the October 31, 1995, Proposed Rule. The Department received eight comments in response to the 1995 proposed rule. All eight commenters considered the proposed ''short-term'' placement option to be unworkable. Several commenters (ACIP, Intel, Microsoft, Motorola, NAM) described this option as particularly burdensome to employers with many employees in positions where movement is required as a normal incident of job duties.

ACIP, Intel, and Microsoft commented that large employers, with many employees dispersed over a number of worksites, did not have the practical ability to keep track of cumulative work days for H–1B workers for every location to which the employees travel for business. Microsoft added that the ''short-term'' placement option effectively prevented H–1B employees from participating in joint development projects with development partners. Microsoft recommended that the rule be revised to increase the number of short-term placement days from 90 to 180 and that the regulation impose the time test on a per employee basis, rather than on a location basis; apply it to a specific worksite and not any worksite within the area of employment; and require a new LCA only when the principal place of employment is changed. Intel and ACIP recommended that the Department revise its approach to the roving employee to one which differentiates between companies that are dependent on foreign workers (employee base is comprised of more than 15 percent H–1B workers) and those that are not dependent. Such a system, Intel opined, would enable the Department to better focus its enforcement activities, while not penalizing non-dependent employers with excessive paperwork. ACIP further suggested that additional paperwork requirements should apply only when travel to another location involves ''performance of services'' and the H–1B worker does not remain under the ''sole control'' of the H–1B employer. ACIP also suggested that additional H–1B workers should be able to travel to any location for which an LCA is already on file for that employer and occupation, without any additional paperwork. AILA and NAM objected to the cumulative nature of the proposed rule and its application to an entire area, rather than to a given work site. ACIP, along with Coopers & Lybrand and CBSI, recommended that the 90-day limit should apply to one employee at one specific worksite, rather than for all of the employer's H–1B workers.

Based on the comments received in response to that 1995 publication, the 1999 NPRM proposed and requested comments on a modified version of the provision—allowing the employer to utilize the ''short-term'' placement option in an area of employment without an LCA until any individual H–1B worker works for 90 days at any worksite or combination of worksites in the area of employment. Under the proposal, the 90 workdays would be counted on a per-worker basis. The proposal specified that as soon as one H–1B worker has worked more than 90 workdays within that area of employment, no more work can be performed by any H–1B worker at any worksite in that area unless, and until, the employer files and ETA certifies an LCA for the area. In other words, the entire workforce and all worksites in the area of employment would be subject to a new LCA once any one H–1B worker has worked 90 days in a three-year period in the area.

Twenty commenters addressed the NPRM revisions to the short-term placement rule, including those who commented in both 1995 and 1999.

The AFL-CIO objected to the existence of a short-term placement option. It expressed the view that the Department had given H–1B employers an unnecessary and harmful ''benefit of the doubt'' in the proposed regulation, and that employers may use short-term placement to avoid prevailing wage and notice requirements.

Several commenters considered the rule to be complex and burdensome for employers. Seven commenters (ACIP, AILA, Cowan & Miller, Rubin & Dornbaum, White Consolidated Industries, Network Appliance, FHCRC) stated that the Department's proposal unrealistically requires the human resources staff at a large company to keep track of personnel movement from multiple divisions or offices to various customer sites around the country. Three commenters (Senators Abraham and Graham, Congressional commenters, and Oracle) stated that the Department has no authority, explicit or implicit, to impose what they believe is a complex monitoring requirement under the rule.

AILA stated that the Department's proposed modification to the rule was unresponsive to employers' fundamental concerns. AILA recommended that the regulation should have no bright-line test for the amount of time constituting temporary placement versus permanent re-assignment to the new non-LCA worksite. AILA suggested that the distinction between temporary and permanent placement should be based ''on all of the facts and circumstances of the situation,'' including such facts as whether the H–1B worker's ''place of abode'' has changed, whether the worker's business card shows the new work address, and whether the worker has a phone line and work station at the new worksite. AILA also suggested that, if a time test were to be used in the regulation, it should operate as a presumption rather than a bright-line rule (*i.e.,* once the time limit had been reached, a presumption would arise that the worker's place of employment had changed, but the employer could rebut the presumption by showing that the placement was temporary in light of the facts and circumstances). Further, AILA suggested that the determination of temporary versus permanent placement should be examined in an enforcement context, rather than be subject to a bright-line rule.

Eight commenters expressed concerns regarding the proposed regulation's time test of 90 cumulative workdays for any H–1B worker over a three-year period. Four commenters (ACIP, AILA, Oracle and SBSC) stated that limiting an individual worker to an average of 30 workdays per year (90 days over a three-year period) in any one geographic area would severely limit a company's ability to do business in the area. Two commenters (ACIP, AILA) stated that 90 workdays over three years is unreasonable; they suggested that the regulation allow 90 days per year rather than 90 days over three years (*i.e.,* three times the cumulative workdays stated in the NPRM time test). Three commenters (ACIP, ITAA, and Hammond) suggested that the time test be applied to each H–1B worker for each worksite (*i.e.,* the 90-day count would restart if the worker moved to a different worksite within the same area of employment, and one worker's accumulation of 90 workdays would have no effect on the rest of the employer's H–1B workforce in that area). In this regard, two commenters (Hammond, ACIP) commended the Department's modification of the regulation to provide for a workday count on a worker-by-worker basis (rather than a cumulative count of all workdays of all of an employer's H–1B workers in the area of employment), but ACIP nevertheless asserted that the modified regulation was unworkable since large employers do not track workers in such a manner. Two commenters (University of California, ACE) stated that the limitation of 90 cumulative workdays in a three-year period may have an adverse effect on academic researchers, whose research activities would not likely exceed 90 consecutive days but may require more than 90 cumulative workdays in a three-year period. These commenters suggested an exception to the time test, for researchers working for higher education institutions, government labs and research affiliated units for activities directly related to their research where the research requires travel and work at sites that have one of a kind equipment.

The Department has carefully considered the views of the AFL–CIO, which objected to the existence of the short-term placement option because of the potential for employer avoidance of H–1B program obligations applicable to the workers' new worksites. The Department shares this concern that employers' obligations be met and that U.S. workers be protected through the prevailing wage and notice requirements. However, the Department believes that it is appropriate and important to provide H–1B employers with a regulatory mechanism to accommodate legitimate business needs while, at the same time, preserving the program's protections. Without the regulation's short-term placement option, an employer would, quite literally, be unable to place any H–1B worker at any worksite that is not already covered by an LCA; the employer would have to prepare and file an LCA and await ETA certification prior to dispatching any H–1B worker(s) to such a worksite. Considering the fast pace of business—especially in industries such as information technology—the delay involved in the LCA process could handicap an employer which needed to use its H–1B workers to respond to a business need or opportunity at a non-LCA worksite. The Department considers the short-term placement option to be a reasonable means by which the employer may meet its obligations both in its business and in the H–1B program. This option allows the employer to move its H–1B worker(s) quickly, but also requires that the employer continue to comply with H–1B standards (*e.g.,* paying ''home base'' wages plus travel expenses to H–1B worker(s) in short-term placement). By setting a limitation on short-term placements, the regulatory provision also assures that the employer which needs to use its H–1B worker(s) at the new worksite beyond such a time-frame will have to fully comply with all statutory obligations for that location (*e.g.,* provide notice, obtain local prevailing wage rate and make any pay adjustments needed to meet that rate).

The Department recognizes that some employers and interest groups view the short-term placement option as impractical and burdensome. These commenters view the regulation as requiring employers to keep detailed records of placement of H–1B worker(s) to non-LCA worksite(s) in order to ensure that the workday limit is not exceeded by any worker. The Department considers it important to emphasize that the short-term placement regulation creates an option for the employer, and that no employer is required to use this provision. Further, the regulation does not impose any recordkeeping requirements on an employer that chooses to make short-term placements; the employer may utilize any appropriate means to ensure that the workday limit is not exceeded. Obviously, an employer may avoid all the perceived ''burdens'' of the short-term placement regulation simply by withholding its H–1B worker(s) from all non-LCA worksites until after the LCA filing process is completed and the worker(s) can be sent to the new worksites pursuant to new LCAs. Or, an employer may promptly file a new LCA when the first H–1B worker is sent to a non-LCA worksite, so that the LCA is certified well before the workday limit is reached.

The Department also reminds employers that—regardless of whether they are taking advantage of the short-term placement option—they are obliged to be vigilant in maintaining their compliance with the H–1B

program's requirements, many of which are worksite-specific. The Department presumes that employers are taking appropriate steps to assure such compliance, which would logically include the employer's being aware of the locations of its H–1B worker(s). An employer which is unable to determine the whereabouts of its H–1B worker(s) would be handicapped in assuring that the worker(s) are employed in full compliance with an approved LCA (*e.g.,* worksite notice, strike/lockout prohibition, local prevailing wage rate) or in accordance with the short-term placement option (*e.g.,* workday limitation, travel costs).

The Department has carefully considered but is unable to accommodate the suggestion that the short-term placement option have no ''time test'' but, instead, allow a *post hoc* determination of temporary versus permanent placement based on ''all the facts and circumstances.'' Such an approach would, in the Department's view, be too vague to be effective from either the employer's or the worker's perspective. A bright-line test, based on workdays, affords certainty to the employer and to workers regarding applicable standards (e.g., clarity as to when a new prevailing wage or notice would be needed).

After fully considering the commenters' views, however, the Department has concluded that the NPRM's time test—90 cumulative workdays for any one H–1B worker at any worksite or combination of worksites in one area of employment over a three-year period—should be modified to provide a more reasonable accommodation for employers' business needs. In the Interim Final Rule, the Department has maintained the worker-by-worker count of workdays (which most commenters endorsed) and has made an annual allocation, rather than a three-year accumulation, of workdays (which several commenters suggested). In addition, the Interim Final Rule incorporates the concept of short-term placement being determined, in part, based on facts such as the H–1B worker's maintenance of his/her workstation at the ''home office,'' as indicated by one of the commenters. Using these concepts, the Interim Final Rule provides that an employer may make a ''short-term'' placement or assignment of an individual H–1B worker at any worksite or combination of worksites in a non-LCA area for a total of 30 workdays in a one-year period (either the calendar year or the employer's fiscal year, whichever the employer chooses). The Rule also provides that the placement may be expanded by as much as an additional 30 workdays (thus, 60 workdays in a one-year period) if the employer is prepared to show that the worker maintains a workstation at the home office, spends a substantial amount of time at the home office, and maintains his/her ''place of abode'' in the area of the home office. Thus, under this regulation, the employer would be able to place an individual H–1B worker at worksite(s) in a non-LCA area for as many as 60 workdays in a one-year period, and have that placement be considered ''short-term'' so as not to trigger the requirements for filing and complying with a new LCA for the area of employment. Once an H–1B worker exceeds the workday limitation in a one-year period, the employer would not be permitted to continue the placement of that worker or any other H–1B worker in the same occupation in that area of employment, until one year from the beginning of the next one-year period (either the beginning of the next calendar year, or the beginning of the employer's next fiscal year) or until an LCA is in place.

The Department believes that any greater presence by an employer's workforce in an area cannot be considered short-term and should require the employer both to provide notice to the local workforce and to pay local prevailing wages. Under the Interim Final Rule, the employer may choose how to use the annual available workdays in placing an H–1B worker ''temporarily'' at worksite(s) in the area of employment (*i.e.,* use them all consecutively, or at different times within one year). While some other measurement might have been preferred by some commenters, the Department believes that, as a matter of common sense and fairness, a worker's placement at a worksite for more than the equivalent of 12 normal workweeks in a calendar year (60 workdays, five-day work weeks) cannot reasonably be characterized as ''short-term,'' whether the workdays are taken in one block or spread over a period of time.

The Department recognizes that some commenters have criticized the regulation as being confusing and difficult to use. Therefore, the Interim Final Rule contains clarifying changes which make the provision more user-friendly. For example, the Rule includes a definition of the ''one-year period'' for short-term placements (*i.e.,* either the calendar year or the employer's fiscal year, whichever the employer chooses) and provides a clear description of the employer's choices of actions when the time limit for short-term placement has been reached (*i.e.,* file an LCA to continue using H–1B workers, or discontinue use of H–1B workers until the next one-year period begins). These clarifications—made in response to commenters's concerns—do not affect the substantive requirements of the regulation.

The Department has concluded that the same standards should apply to all H–1B employers. A profusion of time tests and rules for different industries or types of employers would increase the complexity of the regulation without appreciable benefit in achieving the purposes of the program. The employer's option of timely filing an LCA for the location should alleviate any ''burdens'' which might otherwise argue for special rules or exceptions for certain industries.

One commenter (ACIP) suggested that the regulation should authorize employers to use a ''national LCA'' which would permit free movement of H–1B workers to any and all worksites around the country without the need to monitor the number of workdays at any particular worksites. According to ACIP, some employers pay a wage which is greater than the prevailing wage in any part of the country, as measured by the OES survey, the source of prevailing wage determinations issued by the Employment Service, or other published, nationwide data sources, so that their placements of H–1B workers at any worksites (whether temporarily or permanently) would have no adverse impact on local wages. Since this concept of a ''national LCA'' was not set forth for notice and comment in the NPRM, the Department cannot consider the matter for purposes of the Interim Final Rule. However, the Department is of the view that the concept warrants consideration. The Department, therefore, proposes it here for comment and possible inclusion in the Final Rule. In particular, the Department seeks comments as to whether such an LCA would be feasible under the statutory scheme, and also seeks information and suggestions as to how such an LCA would address each of the statutorily-prescribed attestation elements (*e.g.*, collective bargaining notice or worksite notice; local prevailing wage rates; strike/lockout).

The Department wishes to emphasize that it considers the various components of the short-term placement rule to be non-severable. After the injunction was issued by the court in *NAM*, some confusion arose concerning the effect of the injunction—*i.e.*, whether short-term placements were permitted without any time restriction, or whether employers would be required to place H–1B workers only at worksites in areas of

employment with certified LCAs. The Department has approached this matter on a case-by-case basis, taking into account the confusion created by the *NAM* decision. However, with the issuance of this Interim Final Rule, the Department considers all such confusion to have been dispelled. Therefore, the Department cautions employers that—except in accordance with the strict requirements of the short-term placement option—the H–1B provisions of the INA and the Department's regulations require that an LCA be filed for any and all worksites where H–1B workers are employed. Violations of any of the provisions of the short-term placement option will result in its inapplicability in its entirety.

i. When Is the Short-Term Placement Option Available? (§ 655.735)

As explained in the NPRM, the short-term placement option would be available only when an employer wants to send its H–1B worker(s) who are already in the United States under an H–1B petition supported by an LCA filed by the employer to a new worksite which is in an area of employment for which the employer does not have an LCA in effect for the occupation. After the 90-workday limit is reached by any one H–1B worker, the short-term placement option would no longer be available for any H–1B worker(s) for any worksite in that area of employment; the employer would be required to have an LCA in effect for the new area and to be in full compliance with all the LCA requirements. The NPRM explained that the short-term placement option would not be available where the H–1B worker has just arrived in the United States (or has adjusted status), in which case the worker must be placed at a place of employment listed on the LCA supporting the H–1B petition for the worker. In addition, the short-term placement option would not be available where the employer is moving its H–1B worker(s) among worksites in one or more areas covered by valid LCAs; the worker(s) would be subject to the requirements of those LCAs (*e.g.*, notice, prevailing wage, non-displacement for dependent employers) that cover those worksites. For example, as the NPRM explained, the short-term placement option cannot be used where the employer has an LCA in effect for an area of employment in order to avoid ''overcrowding'' the LCA with H–1B workers. As a matter of enforcement discretion in determining whether a violation exists in an ''overcrowded'' LCA situation, the Department will look at all the facts and circumstances in order to determine whether the employer is acting in good faith to assure compliance with the program, including taking steps to file new LCA(s) and rectify the overfilling of the numerical limitation specified by the employer itself on the initial LCA(s).

The Department received three comments addressing the specifics of the availability of the short-term placement option. ACIP commended the Department for demonstrating flexibility and for clarifying that an employer may file LCAs with multiple, open slots and use those slots for roving employees. However, ACIP sought clarification that short-term placements under the 90-workday rule do not ''fill'' an open LCA slot. ACIP also sought clarification of the NPRM discussion of the temporary placement of H–1B workers ''overfilling'' a valid LCA, particularly concerning the Department's use of enforcement discretion in such situations. ACIP suggested that, due to the lengthy processing time of LCAs, the Department should permit the employer to ''overfill'' an LCA. The second commenter, ITAA, stated that, in its view, the Department's past practice was to ignore ''LCA overcrowding'' if the employer met the notice and wage requirements for each worker at the site. ITAA observed that, under the proposed regulation, the Department stated an intention to use its enforcement authority and cite violations for ''LCA overcrowding'' if the number of H–1Bs ''significantly exceeds'' the number of openings listed on the LCA. ITAA anticipated that DOL would assess penalties for ''misrepresenting a material fact'' or a ''substantial failure'' to accurately list the information on the LCA. Therefore, ITAA requested a definition of ''significant'' overcrowding of the LCA. The third commenter, Latour, suggested that the Department be flexible regarding ''overfilled'' LCAs and consider employers' explanations in those situations where the ''overfill'' is significant.

As for the concerns of the commenters regarding the potential use of the short-term placement option to deal with situations of ''overcrowded'' or ''overfilled'' LCAs, the Department points out that the statute expressly requires that the employer's LCA ''specif[y] the number of workers sought,'' and further provides that a substantial failure to comply with this requirement can result in the assessment of a $1,000 civil money penalty and one-year debarment (8 U.S.C. 212(n)(1)(D) and 212(n)(2)(C)(i)). The number of H–1B workers taking jobs in a local labor market is a matter which Congress obviously considers to be significant, and the Department cannot set aside the statutory requirement that the employer accurately attest to this specific information. The Department is not aware of serious problems concerning overcrowded LCAs since the H–1B program's inception. Thus, the Department has used, and will continue to use, a rule of reason in assessing such situations; violations will not be cited as long as the employer is showing good faith and is taking steps to come into compliance. The determination would necessarily be made on a case-by-case basis, and it is not feasible to issue bright-line rules such as some particular degree of overcrowding which would be tolerable.

With respect to the query as to whether the use of the short-term placement option would affect the ''overcrowding'' determination, the Department emphasizes that where an LCA is in effect, the short-term placement option is simply not applicable. The LCA's terms—including its specification of the number of H–1B workers to be employed in the area—are binding on the employer, except with respect to an H–1B worker who moves into and out of the area without establishing a ''worksite'' there (see IV.O.1.b, below).

ii. What Are the Standards for Payment of the H–1B Worker's Travel Expenses Under the Short-Term Placement Option? (§ 655.735(b)(3), Previously Set Forth in Appendix B, Section a)

A component of the proposed short-term placement option is the requirement that employers who wish to avail themselves of this option pay travel-related expenses at a level at least equal to the rate prescribed for Federal Government employees on travel or temporary assignment, as set out in the General Services Administration (GSA) regulations. The NPRM explained that the GSA standards were used as a benchmark because the Department believes that some basic, universally available measures are needed, and because the GSA standards (based on surveys of travel costs) are appropriate for this purpose. The NPRM proposed to modify the provisions in the current Final Rule (enjoined by *NAM*), so as to better explain the uses of the GSA standards (*e.g.*, no payment to the worker for lodging would be required where the worker actually incurs no lodging costs).

The nine commenters on this proposal (ACIP, AILA, Cowan & Miller, Hammond & Associates, Intel, ITAA, Latour, Rubin & Dornbaum, White Consolidated Industries) were

unanimous in their opposition to a regulation that would require employers to have separate travel reimbursement standards for H–1B workers than for other employees. These commenters suggested that the standard for H–1B workers, like all other workers, should be reimbursement for actual expenses incurred while on travel.

The Department has fully considered these comments, as well as its own post-*NAM* enforcement experience. During the post-*NAM* period, when the regulation has been enjoined, the Department has been enforcing actual expense reimbursement for all H–1B business travelers. In these enforcement proceedings, the Department has not encountered problems pertaining to abusive practices or difficulties in proof of actual expenses, since it has found that employers in fact keep a record of expenses as a prudent business practice. Therefore, the Department is adopting the commenters' recommendation. The regulation is modified in this Interim Final Rule to specify that employers who use the short-term placement option must reimburse H–1B workers for the actual expenses incurred during their short-term placement. In those rare instances where the employer, in an enforcement action by DOL, is unable to demonstrate the actual expenses incurred, the Department will use the GSA standards to determine whether the reimbursement was sufficient and to assess back wages if appropriate.

b. What Constitutes an H–1B Worker's ''Worksite'' or ''Place of Employment'' for Purposes of the Employer's Obligations Under the Program? (NPRM Section P.1) (§ 655.715)

The H–1B program's requirements largely focus on the H–1B worker's ''place of employment'' or ''worksite.'' That location controls the prevailing wage determination, identifies where the employer must provide notice to workers, and specifies the scope of the strike/lockout prohibition. A location which is not a worksite, on the other hand, would not trigger those requirements, even if the H–1B worker were at that location in the course of the performance of job duties. The NPRM echoed the previous rules issued under this program at § 655.715, which define ''place of employment'' as ''the worksite or physical location where the work is actually performed.'' However, the NPRM provided further interpretation of this term (as part of proposed Appendix B to Subpart H of the regulations), in an effort to better inform the users of the program and to alleviate some apparent confusion on this matter.

The proposed guidance was in response to some employers' concern that a strict or literal application of the ''place of employment''/''worksite'' definition could lead to absurd and/or burdensome compliance requirements with regard to the employer's obligation of providing required notice and adjusting the H–1B worker's wages to comply with different prevailing wages for work at various locations. Employers raised questions regarding whether the ''worksite'' definition would be applicable (thus either causing the worker's time at that location to be counted towards the 90-workday ceiling, or triggering compliance obligations under an LCA covering that location) where an H–1B worker has a business lunch at a local restaurant, or appears as a witness in a court, or attends a training seminar at an out-of-town hotel.

The NPRM, in Appendix B, proposed that the term ''place of employment'' or ''worksite'' does not include any location where either of two criteria is satisfied:

1. An H–1B worker who is stationed and regularly works at one location is temporarily at another location for a particular individual or employer-required developmental activity such as a management conference, a staff seminar, or a formal training course (other than ''on-the-job-training'' at a location where the employee is stationed and regularly works). For the H–1B worker participating in such activities, the location of the function would not be considered a ''place of employment'' or ''worksite,'' and such location—whether owned or controlled by the employer or by a third party—would not invoke H–1B program requirements with regard to that worker at that location. However, if the employer uses H–1B nonimmigrants as instructors or resource or support staff who continuously or regularly perform their duties at such locations, the locations would be ''places of employment'' or ''worksites'' for any such workers and, thus, would be subject to H–1B program requirements with regard to these workers.

2. The H–1B worker's presence at that location satisfies three requirements regarding the nature and duration of the worker's job functions there—

a. The nature and duration of the H–1B worker's presence at the location is due to the fact that either the H–1B worker's job is by nature peripatetic, in that the normal duties of the worker's occupation (rather than the nature or the employer's business) require frequent travel (local or non-local) from location to location, or the H–1B worker spends most of the time working at one location but occasionally travels for short periods to other locations; and

b. The H–1B worker's presence at the locations to which the worker travels from the ''home'' worksite is on a casual, short-term basis, which can be recurring but not excessive (*i.e.*, not exceeding five consecutive workdays for any one visit); and

c. The H–1B worker is not at the location to perform work in an occupation in which workers are on strike or lockout.

The NPRM provided examples to illustrate these criteria, and explained that for an H–1B worker who performs work at a location which is a non-worksite (under either criterion 1 or criterion 2), the ''place of employment'' or ''worksite'' for purposes of notice, prevailing wage and working conditions is the worker's home base or regular work location. Further, the NPRM stated that, in applying this interpretation of ''place of employment'' or ''worksite,'' the Department will look carefully at any situations which appear to be contrived or abusive, such as where the H–1B worker's purported ''place of employment'' is a location other than where the worker spends most of his/her time, or where the purported ''area of employment'' does not include the location(s) where the worker spends most of his/her time.

The Department received nine comments on the NPRM ''worksite''/''place of employment'' proposal.

Several commenters addressed the general matter of whether the proposed Appendix B guidance was appropriate. Senators Abraham and Graham and Oracle remarked that ''place of employment'' is a term with a plain meaning (in their view, the location where the individual is employed); they stated that, in modern commerce, workers employed in one location frequently must travel to other locations to perform their duties and that, when they do so, they are not employed there but are merely visiting. Rapidigm, a staffing firm, requested a clearer definition of ''worksite,'' and asked whether the amount of time spent at a location is the only factor, regardless of the nature of the work or who has control or supervision of the worker. AILA urged that the proposed Appendix B be dropped because, in its view, it creates an absurd result and is ''micromanagement'' by the Department.

A number of commenters (ACIP, Intel, ITAA, Latour, Godward) expressed their approval of the Department's recognition that not all activities engaged in by a worker occur at a ''worksite.'' However, some commenters

were dissatisfied with the NPRM's proposal of five consecutive workdays as the test for a ''casual, short-term'' stay for purposes of a non-worksite visit by an H–1B worker. ACIP, Intel and ITAA stated that this standard is overly restrictive and unrealistic. ACIP suggested that the Department should not be concerned with the length of stay, as long as the worker is engaged in non-worksite activities; ACIP recommended that, if a duration-of-stay standard was adopted, it should be 10 workdays at least. ITAA expressed a similar view that ''casual, short-term basis'' should be defined to include visits of up to10 consecutive work days to accommodate training courses, business seminars, and other events which may last between five and 10 days. Intel recommended that the focus should be on the purpose of the trip, rather than on the length of stay.

The Department seeks to achieve the purposes of the Act which focuses its protections for workers on the ''place of employment,'' while accommodating the legitimate needs of employers using the H–1B program. The regulation, since the inception of the program, has recognized that the identification of the ''place of employment'' cannot be merely a matter of the employer's designation, since that approach would not serve the purposes of protecting workers' prevailing wages and other rights. Instead, the regulation identifies the ''place of employment'' by looking to the activities of the H–1B worker, defining ''place of employment'' as ''the worksite or physical location where the work is actually performed'' (20 CFR 655.715). However, the Department has determined that the regulation must afford reasonable flexibility so as to take into account the common practices of employers whose workers may have more than one ''place of employment'' over a period of time or, who may perform duties at various locations which should not, for practical reasons, be characterized as ''places of employment.'' In this regard, the Department shares the view of those commenters who observed that workers may legitimately ''visit'' locations to perform job duties without in all circumstances making those locations into ''places of employment'' for purposes of the H–1B program.

After consideration of all the comments, the Department has concluded that the five cumulative workdays standard is a reasonable and appropriate measure of a casual, short-term ''visit'' where a worker's job is by its nature peripatetic. A full, ordinary workweek of five days is, in the Department's view, a practical and reasonable measurement of a business ''visit'' by a worker performing job duties. Further, the worker may make recurring, short ''visits'' to the location, in order to perform job duties. On the other hand, the Department believes that more flexibility is appropriate for a worker who spends most of his or her time at one location but occasionally travels for short periods to other locations. Under these circumstances, the Department believes that a duration of up to 10 workdays is appropriate. The Interim Final Rule is modified accordingly.

With regard to the concern of some commenters that a five-workdays time frame would be unrealistic for developmental activities such as training and business seminars, the Department points out that there is, in fact, no time frame for developmental activities. Such activities are specifically addressed under criterion 1 rather than under criterion 2, which contains the business ''visit'' concept.

Finally, based on considerations of clarity and ease of use of the regulations, the Department has determined that the criteria for distinguishing between a worksite and a non-worksite should be included in the regulatory text which defines the statutory term ''place of employment.'' Thus, in this Interim Final Rule, this material appears in the regulation at § 655.715, rather than in Appendix B as proposed.

c. Under What Circumstances May an H–1B Worker ''Rove'' or ''Float'' From His/Her ''Home Base'' Worksite? (NPRM Section P.2 and Proposed Appendix B, section b)

The statute and regulations do not permit the employment of H–1B workers as ''roving'' or ''floating'' employees for whom no particular LCA, and thus no specific set of LCA requirements, would be applicable. However, as explained in the NPRM, the Department recognizes that some employers need to move their H–1B workers from place to place in order to meet the needs of clients or to respond to business problems and opportunities. This practice of moving H–1B workers is sometimes described as having the workers ''rove'' or ''float'' from a ''home base'' worksite. To assist employers in understanding how this practice can be accommodated under the program, Appendix B of the NPRM proposed guidance concerning the three circumstances in which an H–1B worker could legitimately ''rove'' or ''float'' from his/her home base worksite to perform job duties at some other location. This guidance, like the other provisions of proposed Appendix B, was initially developed as interpretive guidance that the Department had planned to issue independently of the regulations.

The Department received two comments on its proposed guidance.

AILA urged that the Appendix B guidance be dropped, because it considered both the ''rove''/''float'' discussion and the interpretation of ''worksite'' to be attempts by the Department ''to micromanage employers' commerce'' through ''peculiar workplace rules.''

ITAA requested clarification concerning the interface between the Department and INS policies concerning when an LCA for a ''new'' area of employment may be substituted for the ''original'' LCA, and whether such a substitution would require the filing of a new petition. The Department recognizes that employers need clarity regarding this matter, and will consult with the INS with the intention of providing official, coordinated guidance.

The Department has concluded, upon further review, that incorporation of the interpretive guidance in proposed Appendix B, section b, into the regulation is not necessary or appropriate at this time. The Department plans to issue separate interpretive guidance explaining the inter-relationship between the various provisions regarding employment of H–1B nonimmigrant workers outside of their home work station.

2. What Are an Employer's Wage Obligations for an H–1B Worker's ''Nonproductive Time''? (See IV.H, Above)

3. What Are the Guidelines for Determining and Documenting the Employer's ''Actual Wage''? (Appendix A to Subpart H)

Section 212(n)(1)(A)(i)(I) of the INA as amended by the Immigration Act of 1990 (IMMACT 90) and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA) requires that an employer seeking to employ H–1B nonimmigrants agree that it will pay the nonimmigrants at least the higher of the prevailing wage or the ''actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question.''

In explaining the amendments to the H–1B program made by MTINA, Senator Reid explained Congress intended ''specific employment to mean the specific position held by the H–1B

worker at the place of employment.'' Furthermore, by ''similar experience and qualifications,'' Congress intended consideration of ''experience, qualifications, education, job responsibility and function, specialized knowledge, and other such legitimate factors'' 137 Cong. Rec. S18243 (Nov. 26, 1991).

The Department's regulations explaining the ''actual wage'' requirement, as amended in 1992 and 1994, provide at § 655.731(a)(1) that in determining the actual wage, employers may take into consideration experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. Legitimate business factors are ''those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards.'' The actual wage is the amount paid to other employees with substantially similar experience and qualifications with substantially the same duties and responsibilities, or if there are no such employees, the wage paid the H–1B nonimmigrant. In addition, the regulation requires that adjustments such as cost of living increases or other periodic adjustments, higher entry rate due to market conditions, or the employee moving into a more advanced level of the occupation, be provided to H–1B nonimmigrants where the employer's pay system or scale provides for such adjustments during the LCA.

The regulations further provide at § 655.731(b)(2) that the employer shall retain documentation specifying the basis it used to establish the actual wage, *i.e.,* showing how the wage for the H–1B worker relates to the wages paid other individuals with similar experience and qualifications for the specific employment at the place of employment. The documentation is also required to show that after any adjustments in the employer's pay system or scale, the wage paid is at least the greater of the adjusted actual wage or the prevailing wage. In addition, the regulations provide at § 655.760(a)(3) that the public access file shall contain ''[a] full, clear explanation of the system that the employer used to set the 'actual wage' * * *, including any periodic increases which the system may provide. * * *'' This explanation may be in the form of a memorandum summarizing the system, or a copy of the pay system or scale. Payroll records do not need to be in the public access file, but are required to be made available to the Department in an enforcement action.

The Department initially offered guidance on factors to be considered in making this determination, with examples, in the preamble to the Interim Final Rule of January 13, 1992 (57 FR 1319). This guidance, in modified form, was published as Appendix A to Subpart H in the Final Rule of December 20, 1994 (59 FR 65671). In addition to the examples set forth in the preamble to the 1992 Interim Final Rule, Appendix A provided that the employer may take into consideration ''objective standards,'' and must ''have and document an objective system used to determine the wages of non-H–1B workers.'' The Appendix further provided that the explanation of the wage system in the public access file ''must be sufficiently detailed to enable a third party to apply the system to arrive at the actual wage rate computed by the employer for any H–1B nonimmigrant.'' The portions of Appendix A relating to an objective wage system were enjoined by the court in NAM, for lack of prior notice and comment. In the meantime, the ''Appendix A'' guidance was republished for public comment in the Proposed Rule dated October 31, 1995 (60 FR 55339).

The Department republished Appendix A for further notice and comment in the 1999 NPRM, as modified to include job performance among the legitimate business factors which may be taken into consideration. The underlying regulatory provisions at §§ 655.731(a)(1), 655.731(b)(2), and 655.760(a)(3) were not open for notice and comment. The preamble explained that under Appendix A as proposed, the employer would not be required to create or to document an elaborate ''step'' or ''grid'' type pay system, or any other complex, rigid system. Rather, the employer's actual wage system could take into consideration any objective, business-related factors relating to experience, qualifications, education, specific job responsibilities and functions, job performance, specialized knowledge and other business factors. The use of any or all of the factors would be at the discretion of the employer. All factors used in the employer's actual wage system would need to be applied to H–1B nonimmigrant workers in the same, nondiscriminatory manner as the factors would be applied to U.S. workers in the occupational classification. Further, the preamble explained that the explanation of the actual wage system in the public access file must be sufficiently detailed to enable a third party to understand how the wage system would apply to a particular worker and ''to derive a reasonably accurate understanding of that worker's wage.''

The Department received nine comments on proposed Appendix A in the 1995 Proposed Rule, and 15 (including two 1995 commenters) in response to the 1999 NPRM. Most 1995 and 1999 commenters viewed the Appendix guidance as inconsistent with the INA and demonstrating a lack of understanding of corporate pay systems. The comments focused on an employer's responsibilities in making the actual wage determination, what factors should be considered in making the determination, how the factors should be considered, when the factors should be considered, and the documentation required to enable a third party to apply the wage system to determine the actual wage rate.

Senators Abraham and Graham, the Congressional commenters, AILA (in 1995 and 1999 comments), FHCRC, Hammond, Network Appliance, Oracle, Rubin & Dornbaum, Sun Microsystems, the Massachusetts Institute of Technology (MIT) (1995 comment) and the National Association of Manufacturers (NAM) (1995 comment) contended that the INA does not require, nor did Congress intend, that employers be required to create and document an objective wage system for their U.S. workers to meet the requirement to pay H–1B workers no less than the greater of the actual or prevailing wage. AILA indicated further that the INA requires the actual wage to be paid only to H–1B workers, and does not dictate the wages of U.S. workers. NAM indicated that this requirement ignores the realities of how businesses establish salaries and epitomizes regulatory overreach.

Several commenters (AILA, ACIP, Kirkpatrick & Lockhart, Latour and Sun Microsystems) disagreed with the Appendix A requirement that an employer use only objective factors in determining the actual wage while others offered suggestions on factors to be considered. Kirkpatrick & Lockhart indicated that by limiting this determination to objective factors, the Department was eliminating an employer's discretion in hiring and ignoring the reality that subjective as well as objective factors are evaluated in compensating employees in the corporate world. Frost & Jacobs (1995 comment) suggested that the Department include ''performance level'' as a legitimate business factor in determining actual wage. ITAA agreed with the Department's addition of ''job performance'' as an acceptable business factor in the January 5, 1999 NPRM.

After carefully considering all the comments, the Department has concluded that Appendix A—which was created in response to employers' requests for technical guidance—has not served its intended purpose and has, instead, caused some confusion. The Department has, therefore, decided that Appendix A will not be included in the Interim Final Rule. The controlling standards for determining and documenting an employee's ''actual wage'' are contained in the current regulation, 20 CFR 655.731(a)(1), 655.731(b)(2), and 655.760(a)(3) (none of which were opened for comment in the NPRM). If the need arises in the future, the Department, as appropriate, will provide compliance advice or technical assistance further explaining the current regulation.

The commenters' reactions to the proposed Appendix A are based, in large part, on a lack of understanding of the fact that the Department's regulations (20 CFR 655.731(a)(1), 655.731(b)(2), and 655.760(a)(3))—which the proposed Appendix A was intended to explain and clarify—do not direct employers to develop a special corporate-wide wage system specifically to support the employment of H–1B nonimmigrants. The Department agrees with the commenters that section 212(n)(1)(A)((i)(I) of the INA does not require an employer seeking H–1B nonimmigrants to create an objective wage system for its U.S. and H–1B workers. The Department is imposing no obligation to create such a system.

Section 655.760(a)(3) requires that the factors used be legitimate business factors such as experience, qualifications, education, specific job responsibilities and functions, specialized knowledge, and job performance. The use of any or all of these factors is at the discretion of the employer. Whatever factors are used in the employer's actual wage system must be applied to H–1B nonimmigrant workers in the same, nondiscriminatory manner that they are applied to U.S. workers. Furthermore, the factors applied must relate to the statutory standard, *i.e.,* the workers' experience, qualifications, and job duties. Accordingly, it is the Department's position that an employer may not differentiate between the pay of H–1B and U.S. workers based on market forces, such as the lowest wage a worker is willing to accept. Similarly, it is inappropriate for an employer to consider factors which are not relevant to the job and which are not uniformly applied to H–1B and U.S. workers.

The Appendix A guidelines were drafted under the presumption that all U.S. businesses use wage systems to determine professional salaries that consider various legitimate business factors. The Department drafted Appendix A to limit the actual wage determination to objective legitimate business factors already being used by the employer because such factors could reasonably be used by the Department in its enforcement to compare H–1B nonimmigrant and U.S. workers in the specific employment in question. Although the Department remains concerned about the inherent difficulty in comparing the pay of workers based on subjective factors, it is persuaded that some subjective factors, such as an evaluation of performance levels, may be legitimate business factors used in setting the actual wage. However, pursuant to § 655.760(a)(3), the employer continues to be required to describe the wage system it used to determine the actual wage paid to H–1B nonimmigrants.

AILA and NAM (1995 comments) disagreed with the requirement that an employer establish the actual wage based on the ''occupation'' in which the H–1B nonimmigrant is employed. The commenters stated that the statute requires that H–1B workers be paid at least (the greater of the prevailing or) actual wage of those with similar qualifications and experience employed in the ''specific employment'' in question, a smaller group than dictated by the NPRM. Therefore AILA suggested that employers should be required to analyze which jobs are comparable for actual wage purposes, and pay the H–1B worker at least as much as the employees in those jobs.

The Department agrees that an employer must determine which workers are the subject of comparison with the H–1B worker in order to determine the actual wage required to be paid, at a minimum, to the H–1B worker. The Department also agrees that the appropriate actual wage determination comparison for H–1B nonimmigrants is to ''individuals with similar experience and qualifications for the specific employment in question'' and not ''occupation.'' However, in many circumstances this comparison can only be made if the Department is able to review the employer's compensation system for employees in the occupational category, since the employer's compensation system for other employees in the same occupation bears directly on determinations of the actual wage required to be paid for the specific employment in question.

Intel (1995 comments) and Microsoft (1995 comments) suggested that the Department allow blanket approval—as meeting actual wage requirements—for large employers with established ''total compensation'' wage systems which meet certain requirements such as executive bonuses and profit sharing supplements to base salary. The Department disagrees with this suggestion. The Department is charged with enforcement of the statutory requirement that the employer pay the H–1B worker(s) the higher of the actual or prevailing wage. Such enforcement includes a determination that H–1B workers have, in fact, been paid at least the actual wage paid to other workers with similar experience and qualifications for the specific employment—a determination that can only be made through an examination of the application of the employer's actual wage system. Furthermore, it would be inappropriate for the Department to make exceptions for large employers; the statute indicates no Congressional intent for differing obligations for employers depending upon the size of their workforce or the sophistication or apparent generosity of their compensation systems.

AILA (1995 comments) and NAM (1995 comments) asked how the Department can determine the actual wage in the absence of documentation by using an average (as stated in the preamble to the 1995 NPRM, 60 FR 55341), when the express language of the regulation is that the actual wage is not an average. AILA recommended that if the Department is allowed to use an average to compute the actual wage, employers should be able to use an average as well.

The Department is unable to accommodate the recommendation that employers be authorized to compute the actual wage by averaging the wages paid to employees. As stated in the preamble to the 1995 Proposed Rule, the actual wage is not an average. It reflects application of an employer's actual pay system. Use of the average by the employer would not satisfy the statutory requirement. However, the Department must have some method of determining the actual wage and calculating any back wages due H–1B workers if the employer has not documented and cannot reconstruct its actual wage system. In such circumstances, averaging the wages of non-H–1B workers may be an enforcement method of last resort. The Department would identify U.S. workers in the specific employment in question with experience and qualifications similar to the H–1B nonimmigrant and average their wages to determine the actual wage back wage assessment.

ITAA requested that an employer be permitted to set an actual wage range for a particular position, even if some H–1B workers with similar skills and education make more than others, as long as the workers are paid within the range and meet the prevailing wage requirement.

The Department agrees that an actual wage range can be used to determine compliance with the actual wage requirement, provided the employer's methodology in assigning wages within the range is based on acceptable, legitimate business factors and the methodology is applied in the same manner to H–1B nonimmigrants and U.S. workers. This should result in U.S. workers and H–1B workers with similar skills and qualifications being paid the same, where their duties and responsibilities are the same.

MIT (1995 comments), AILA (1995 comments), NAM (1995 comments), Microsoft (1995 comments), CBSI (1995 comments), Intel, and Rubin & Dornbaum objected to the requirement to update and document changes to the actual wage when the employer's pay system or scale provides for pay adjustments during the validity period of the LCA. They stated that Section 212(n)(1)(A)(i) of the INA directs that the required wage rate determination be ''based on the best information available as of the time of filing the application;'' thus an actual wage update should be required only at the time of filing the LCA. AILA further stated that to require constant reconsideration of the actual wage (like the prevailing wage) would be a massive burden on employers which Congress did not intend to impose.

The Department notes that the INA language referred to in the comments was included in the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Public Law 102–232, 105 Stat. 1733, and refers to the sources of wage information (''the best information available'') that an employer may use when reporting the appropriate wage on its LCA. 137 Cong. Rec. S18243 (Nov. 26, 1991) (Statement of Senator Simpson). As Senator Simpson stated, with the enactment of MTINA, employers were no longer required ''to use any specific methodology to determine that the alien's wage complies with the wage requirements of the Act and may utilize a State agency determination, such as SESA, an authoritative independent source, or other legitimate sources of wage information.''

The Department's interpretation of an employer's actual wage obligation as an ongoing, dynamic obligation has been the Department's position since the inception of the H–1B program, as provided by § 655.731(a)(1) of the existing regulations (which were not open for notice and comment). The regulation explains that the actual wage obligation includes adjustments in the actual wage. In response to comments on the 1993 NPRM expressing concern that infrequent prevailing wage updates would allow an employer to use ''stale'' wage data, the Department stated in the preamble to the December 20, 1994 Final Rule (59 FR 65654): ''[T]he ''actual wage rate'' has been and will continue to be a ''safety net'' for the H–1B nonimmigrant. Assuming the actual wage is higher than the prevailing wage and thus is the required wage rate, if an employer normally gives its employees a raise at year's end, or the employer's system provides for other adjustments, H–1B nonimmigrants must also be given the raise (consistent with employer-established criteria such as level of performance, attendance, etc.).'' Conversely, if no raises, bonuses, or other updates are provided U.S. workers throughout the life of the LCA, the H–1B worker is not entitled to such payments or adjustments. The Department's interpretation furthers the Congressional intent of parity in wages and benefits for U.S. workers and H–1B nonimmigrants.

Several commenters (Microsoft (1995 comment), Motorola (1995 comment), Coopers & Lybrand (1995 comment), ITAA, Intel, ACIP, and AILA expressed strong concern over the requirement that the employer's compensation system be sufficiently detailed and documented in the public access file to enable a third party to apply the system to arrive at the actual wage. The commenters contended that such a requirement is unrealistic and imposes an impossible burden on employers. Microsoft (1995 comment) recommended that the pertinent portion of Appendix A be revised to read: ''The explanation of the compensation system should be sufficiently detailed to illustrate to a third party, in the event of an enforcement action, how the employer applied the system to arrive at the actual wage for an H–1B nonimmigrant.'' MIT (1995 comment) agreed with the requirement of an equitable wage system for all employees, and recommended that the wording of the provision be changed to indicate that only a general explanation of the compensation system be provided. Similarly, Intel recommended that the employer be required to provide a general description of its compensation system sufficient to enable a third party to clearly understand how wages were determined. Intel also stated that it was unclear whether the employer had to do a detailed analysis for each LCA or an overview of the compensation system to support the third party review. ACIP and AILA indicated that it was unrealistic to expect a third party to be able to calculate a particular worker's salary based on the employer's documentation of its actual wage system. ACIP was troubled that an employer could be debarred for having inadequate documentation and urged the Department to eliminate or simplify this requirement. AILA recommended that employers should make the analysis of comparable employee, decide the appropriate documentation of the analysis, and leave the rest to enforcement.

The Department is persuaded that its proposed Appendix A requirement for a public access file with the detail sufficient to enable a third party to determine the actual wage rate for an H–1B nonimmigrant is an impractical requirement for employers. The explanation of the compensation system found in the public access file must be sufficiently detailed for a third party to understand how the employer applied its pay system to arrive at the actual wage for its H–1B nonimmigrant(s). It is the Department's view that although third parties may not have the information needed to arrive at the specific actual wage for the H–1B nonimmigrant(s), the information should be sufficient to allow them to make a judgement on the potential for an actual wage problem. At a minimum, the description of the actual wage system in the public access file should identify the business-related factors that are considered and the manner in which they are implemented (*e.g.,* stating the wage/salary range for the specific employment in the employer's workforce and identifying the pay differentials for factors such as education and job duties). Computation of U.S. and H–1B workers' particular wages need not appear in the public access file; that information must be available for review by the Department in the event of an enforcement action (such as in each worker's personnel file maintained by the employer).

4. What Records Must the Employer Keep Concerning Employees' Hours Worked? (§ 655.731(b)(1))

The Department sought further comment on proposed amendments to § 655.731(b)(1), the basic recordkeeping obligation to support an employer's

wage obligation. This provision was published for comment in the Proposed Rule dated October 31, 1995 (60 FR 55339). An earlier amendment to § 655.731(b)(1) was promulgated in the Department's Final Rule of December 20, 1994 (59 FR 65646), which was enjoined by the court in NAM, for lack of prior notice and comment.

The proposed regulation would require employers to keep specified payroll records for H–1B workers and ''for all other employees for the specific employment in question at the place of employment.'' Hours worked records would be required if (1) the employee is not paid on a salary basis, (2) the actual wage is expressed as an hourly rate, or (3) with respect to H–1B workers only, the prevailing wage is expressed as an hourly rate.

The Department has made a number of accommodations already to concerns expressed regarding the requirements of this rule, particularly in regard to the circumstances in which hours worked records must be maintained. Therefore a detailed rulemaking history is useful.

The regulations currently in effect at 20 CFR 655.731(b)(1) (1993) (i.e., the regulations which are not under injunction), require that payroll records be maintained for H–1B workers and for ''all other individuals with experience and qualifications similar to the H–1B nonimmigrant for the specific employment in question at the place of employment.'' Hours worked records are required if the employee is paid on other than a salary basis, or if the prevailing wage or actual wage is expressed as an hourly wage.

The 1994 Final Rule (set forth in the CFR, but enjoined in NAM), like the current NPRM, required that an employer maintain payroll records for H–1B workers and for ''all other employees for the specific employment in question at the place of the employment.'' Upon further consideration, the Department issued a Notice of Enforcement Position (60 FR 49505, September 26, 1995) announcing that, with respect to any additional workers for whom the Final Rule may have applied recordkeeping requirements (*i.e.,* U.S. workers in the specific employment in question who did not have similar qualifications and experience), the Department would enforce the provision to require the employer to keep only those records which are required by the Fair Labor Standards Act (FLSA), 29 CFR Part 516. The Department concluded that, in virtually all situations, the records required by the FLSA would include those listed under the H–B Final Rule.

In the October 1995 NPRM, the Department proposed to require employers to retain records of hours worked for all employees in the same specific employment as the H–B worker if (1) the employee is not paid on a salary basis, (2) the actual wage is expressed as an hourly rate, or (3) with respect to H–1B workers only, the prevailing wage is expressed as an hourly rate. Thus unlike the rule currently in effect (or the final rule enjoined in NAM), where the actual wage is expressed as a salary but the prevailing wage is expressed as an hourly wage, hourly records would not be required for U.S. workers in the specific employment question.

The January 1999 NPRM was identical to the October 1995 proposed rule, as described above.

The Department received one comment on the proposed modification of the documentation requirements in response to the 1995 NPRM and five additional comments in response to the 1999 NPRM.

A law firm (Moon) (1995 comment) commended the Department for ''revising the recordkeeping requirement to release employers from any obligation to keep records of hours worked by FLSA-exempt [U.S.] employees.'' At the same time, it criticized the proposal insofar as it requires records to be kept for FLSA-exempt H–1B workers where the prevailing wage is expressed as an hourly rate—a requirement it characterized as artificial and inconsistent with traditional FLSA principles. The firm recommended that the Department instead require SESAs to issue prevailing wage determinations on a salaried basis for exempt workers.

Intel asserted that all of its H–1B workers are paid on a salary basis (and apparently are listed as such on their LCAs); Intel noted, however, that SESAs sometimes issue rates on an hourly basis and suggested that the rule be clarified so that this alone would not trigger a recordkeeping requirement. Intel and ACIP both suggested that the provision should be modified to make plain that such records need be kept only where an employer includes an hourly rate on an LCA. ACIP stated that it should not matter if the SESA lists the rate as an hourly wage. It further argued that if recordkeeping is required in all instances where a SESA issues an hourly rate, this requirement would ''muddy up'' the FLSA-status of the workers. Another commenter (Rubin) expressed similar concerns, stating that considerable paperwork will be generated if recordkeeping is triggered simply because a SESA, without regard to the practice within a profession, issues a rate as an hourly wage.

The Department appreciates the concern expressed by commenters that SESAs sometimes issue hourly rates for certain occupations without regard to whether workers are commonly paid on a salary basis or the FLSA-exempt nature of the job. The Department notes that while SESAs ordinarily base prevailing wage determinations on the U.S. Bureau of Labor Statistics, Occupational Employment Statistics survey (OES), which are generally expressed as an hourly wage, the SESAs will issue the prevailing wage as a salary rate upon request. In addition, to alleviate the concerns of employers and to avoid confusion with regard to the nature of the prevailing wage or recordkeeping obligations, the Department is modifying § 655.731(a)(2) to expressly authorize the employer to convert the prevailing wage determination into the form which accurately reflects the wage which it will pay (*i.e.,* where the prevailing wage is expressed as an annual ''salary,'' it may be converted to an hourly rate by dividing the amount by 2080; where the prevailing wage is expressed as an hourly rate, it may be converted to a salary by multiplying the amount by 2080). The modified regulation instructs that the employer shall state the prevailing wage on the LCA in the manner in which the wage will be paid, *i.e.,* as an hourly rate or a salary. However, the prevailing wage must be expressed as an hourly wage if the worker is part-time, in order to ensure that the part-time worker is in fact paid for the proportion of the week in which he or she actually works.

In addition, after review, the Department has concluded that a further revision of the regulation is appropriate to remove the requirement that an employer keep hourly wage records for its full-time H–1B employees paid on a salary basis. (Employers are also directed to § 655.731(a)(4) (not revised in this rule), which explains payment of wages to employees paid on a salary basis.) The regulation continues to require employers to keep hours worked records for part-time employees, as well as hourly employees. It is the Department's view that there is no other way to ensure that employers comply with their obligation to pay these workers at least the prevailing wage for all hours worked. Otherwise, for example, an employer would be able to state on its H–1B petition that an employee will be paid 20 hours per week, pay the employee an annual salary based on 20 hours per week, keep no record of hours worked, and actually

work the employee 30 hours a week. In any event, the Department believes that most employers keep hours worked records for their part-time employees.

Another commenter (Latour) agreed that it was reasonable for DOL to require the retention of the records enumerated in the proposal, which it stated were records kept by typical employers. However, it expressed concern over a perceived requirement that all the documentation must be included in the public access file. Another commenter (Baumann) expressed concern over the requirement that the records be kept beginning with the date the LCA is submitted throughout the period of employment. This commenter stated that the proposal, read in the broadest sense, requires an employer to continue to update the public access file each time a new worker is hired or a current employee receives a pay increase. He requested the Department to make clear that the wage information relating to non-H–1B workers is limited to the period before the filing of the LCA.

It appears that these commenters have misunderstood the documentation requirement as it relates to the public access file. The basic payroll information required to be maintained does not need to be included in the public access file, but rather must be available to the Wage and Hour Division in the event of an investigation. As provided in § 655.760(a), the public access file is required to contain only the wage rate to be paid the H–1B workers, an explanation of the employer's actual wage system (discussed in IV.O.3, above), and the documentation used to establish the prevailing wage.

5. What Are the Requirements for Posting of ''Hard Copy'' Notices at Worksite(s) Where H–1B Workers Are Placed? (See IV.F, above)

6. What Are the Time Periods or ''Windows'' Within Which Employers May File LCAs? (§ 655.730(b) and § 655.731(a)(2)(iii)(A)(*1*))

Regulations with respect to the time periods or ''windows'' within which employers may file labor condition applications were first published by the Department as §§ 655.730(b) and 655.731(a)(2)(iii)(A)(*1*) in the December 20, 1994 Final Rule. That rule provides at § 655.730(b) that ''a labor condition application shall be submitted * * * no earlier than six months before the beginning date of the period of intended employment shown on the LCA.'' Section 655.731(a)(2)(iii)(A)(*1*) states that ''[a]n employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application not more than 90 days after the date of issuance of such SESA wage determination.''

These provisions were challenged in the *NAM* litigation as violative of the notice and comment provision of the APA, 5 U.S.C. 553(b)(3). The district court in *NAM*, however, concluded that §§ 655.730(b) and 655.731(a)(2)(iii)(A)(*1*) ''lie on the procedural side of the spectrum and are exempt from the notice and comment requirement of the APA.'' The court further found that the ''plaintiff has failed to demonstrate that the two time periods are so short that they encroach upon an employer's ability to utilize the H–1B workers, and plaintiff has failed to show that the rules alter any substantive standard by which [the Department] will evaluate LCAs.'' Therefore these rules are currently in effect.

On October 3, 1995, during the pendency of the *NAM* litigation, the Department republished these sections for comment. The 1999 NPRM republished these sections for comment without modification.

Six commenters (Intel, CBSI, Motorola, Moon, AILA, MIT) responded to the republication of these sections in the 1995 Proposed Rule. With respect to the requirement that an LCA be filed within 90 days of issuance of a SESA prevailing wage determination, all six commenters asserted that the requirement would make more work for employers and that it would slow down the LCA process. Two of these commenters (CBSI, MIT) also suggested that the validity period of a SESA determination should be 180 days, and one commenter (Moon) suggested that SESA determinations should carry no expiration date.

Three commenters (AILA, BRI, ITAA) responded to these sections as republished in the 1999 NPRM. ITAA supported the provision permitting employers to file LCAs up to six months before the beginning date of the period of intended employment as shown on the LCA, stating the proposal reflected an ''appropriate balance'' of the Department's and business interests. One commenter (BRI) sought clarification on whether an LCA already certified could be used any time during the validity of the LCA, assuming the prevailing wage was obtained from a source other than a SESA.

AILA objected to the 90-day validity period for the SESA prevailing wage as arbitrary and—because most U.S. employers make annual wage assessments—unrelated to the ''real world wage.'' Therefore, AILA asserted, requesting a prevailing wage from the SESA every 90 days places an undue burden on U.S. employers. AILA recommended that SESA prevailing wages should be valid for a period of one year, based on the observation that SESAs rely on the OES survey—an annual survey—to obtain wage information for purposes of issuing prevailing wage determinations.

The Department has considered the comments offered in response to its proposals regarding the time frames in which LCAs may be filed by employers.

Because there has been no objection to the requirement of § 655.730(b) that an LCA be filed within six months of the beginning date of intended employment, the Department will adopt that regulation as proposed.

With regard to the length of the ''validity period'' of SESA-issued wage determinations—the period during which the determination may be used by an employer to support a visa petition—the Department has concluded that the proposed rule can be modified to accommodate the views of the commenters, while maintaining the crucial principle that prevailing wage determinations should reflect rates which are current and accurate for the locality and the occupational classification. The Interim Final Rule therefore provides that the SESA's issuance of a prevailing wage determination shall include a specification of a validity period, which shall be not less than 90 days and not more than one year from the date of the issuance. The Department will provide guidance to the SESAs with regard to their assignment of validity periods. The Department notes that the Bureau of Labor Statistics' Occupational Employment Statistics (OES) survey and most employer-provided surveys are updated on a regular basis, and the update cycles for such surveys can be readily determined—unlike the update cycle for prevailing wages based on Service Contract Act and Davis-Bacon wage determinations or collective bargaining agreements. The Department anticipates that the validity period will be 90 days where the wage rate is based on SCA, Davis-Bacon, or collective bargaining agreements. The Department anticipates that where the wage rate is based on the OES survey or on a survey provided by the employer and found acceptable by the SESA, the validity period will ordinarily be until the next update, provided it is at least 90 days and no more than one year from the date of issuance. This will reduce the burden of employers and SESAs in filing and responding to wage determinations without any adverse affect on worker wages.

7. How May an Employer Challenge a SESA/ES-Issued Prevailing Wage Determination?
(§ 655.731(a)(2)(iii)(A)(*1*) and (d)(2), § 655.840(c))

H–1B regulations specifically explaining the procedures available to employers to challenge a SESA-issued prevailing wage determination were first published by the Department in the December 1994 Final Rule. That rule provides at §§ 655.731(a)(2)(iii)(A)(*1*), 655.731(d)(2) and 655.840(c) that irrespective of whether the wage determination is obtained by the employer prior to filing the LCA or by the Wage and Hour Division in an enforcement proceeding, employers must assert any challenge to the wage determination under the Employment Service (ES) complaint system at 20 CFR part 658, Subpart E, rather than in an enforcement proceeding before the Office of Administrative Law Judges pursuant to Subpart I of part 655. Furthermore, pursuant to § 655.731(a)(2)(iii)(A)(*1*), an employer which wishes to appeal a SESA-issued wage determination must file the appeal and obtain a final ruling pursuant to the ES complaint system prior to filing any LCA based on that determination. Section 655.731(d)(2) provides that where a prevailing wage determination is obtained by Wage and Hour pursuant to § 655.731(d)(1), an employer must file any appeal within 10 days of receipt of the wage determination; notwithstanding the provisions of §§ 658.420 and 658.426, the appeal is filed directly with ETA, rather than with the SESA.

These provisions of the 1994 Final Rule were challenged in the *NAM* litigation as contrary to the requirements of the APA. The court, in that matter, concluded that these provisions were procedural regulations, exempt from APA notice and comment requirements, and further found that the plaintiffs in that case had failed to demonstrate that an employer's substantive rights had been altered by these provisions. Accordingly, the regulations were not enjoined and remain in effect. During the pendency of that litigation, these provisions were republished for notice and comment in the October 1995 Proposed Rule. The identical provisions were republished for notice and comment in the January 1999 Proposed Rule.

The Department received five comments (AILA, Frost & Jacobs, Moon, Motorola, NAM) in response to the proposals republished in 1995. All commenters opposed the proposed provisions. One commenter (Moon) asserted that the ES system was inadequate because it ''handcuffs the employer by gagging the SESA from revealing information.'' The commenter was alluding to the language in § 655.731(d)(2), which states that neither ETA nor the SESA may divulge any employer wage data which was collected under the promise of confidentiality. Another commenter (Frost & Jacobs) urged that any challenge of a SESA determination be required to be resolved by the ES in a timely manner (recommended 30-day time limit). Motorola was also concerned with the ability of the ES to timely respond to SESA challenges, especially in situations of H–1B visa extensions or changes in status from an F-visa to an H–1B. In these situations, this commenter noted, an employer is forced to accept the challenged wage in order to obtain the LCA so that the application may be filed with the INS in sufficient time to prevent removing an individual from the payroll for lack of work authorization.

In their comments to the 1995 proposals, NAM and AILA contended that allowing challenges to prevailing wage determinations to be made only pursuant to the ES complaint system deprives employers of their procedural due process protections. These organizations commented that a paper appeal to an administrative agency, staffed by paid employees of the very agency which determined the prevailing wage, without any rights to discovery, an examination of the evidence in support of the wage determination, or an express written decision, does not substitute for the right to be heard by an independent ALJ where all of these rights are guaranteed.

The 1999 NPRM republication of the 1995 proposals on this issue sought further comment on these proposals. AILA, the sole commenter on this issue, stated that a poll of its members revealed that the complaint process is rarely used because of failure by either the ES or SESA Prevailing Wage Unit to publicize it. AILA further criticized the complaint system as laborious, complicated and protracted, requiring handling by several different offices of the SESA and ETA. Furthermore, the opportunity for a hearing before a DOL administrative law judge is permitted only at the discretion of the ETA Regional Administrator. AILA stated that without the opportunity for meaningful review of a SESA wage determination by an impartial judicial tribunal, such as in an ALJ hearing, employers feel that a meaningful and fair review might not be possible under the ES complaint system.

The Department continues to be of the view, as stated in the preamble to the December 1994 Final Rule, that ''permitting an employer to operate under a SESA prevailing wage determination and later contesting it in the course of an investigation or enforcement action is contrary to sound public policy; such a delayed disruptive challenge would have a harmful effect on U.S. and H–1B employees, competing employers, and other parties who may have received notice of and/or relied on the prevailing wage at issue.''

Challenges to SESA prevailing wage determinations prior to filing the LCA (as distinguished from challenges to prevailing wage determinations obtained by Wage and Hour) must be made through the ES complaint system by filing a complaint with the SESA. However, it should be clarified that complaints need not be initiated at the ES local office level. The complaint may be filed directly with the organization within the SESA responsible for alien labor certification prevailing wage determinations. This office is usually part of the central state office. Since the implementation of the OES program, SESA local offices are not involved in making or issuing prevailing wage determinations. See ETA's General Administrative Letter 2–98 (October 3, 1997).

Furthermore, although the regulations at § 658.421(h) provide that the offer of a hearing before an administrative law judge is discretionary, it is ETA's policy that where the employer is appealing a wage determination obtained by Wage-Hour pursuant to § 655.731(d), the ETA Regional Administrator will offer a hearing before an Administrative Law Judge in every H–1B case which is not resolved to the employer's satisfaction.

With regard to comments that challenges to a SESA prevailing wage determination should be resolved more expeditiously, the Department believes that allowing employers to initiate a challenge to the a SESA prevailing wage determination at the State rather than the local office level will simplify and reduce the time necessary to resolve those complaints. The regulations governing the ES complaint system provide that if the complaint has not been resolved within 30 working days the State office shall make a written determination. Furthermore, appeals to wage determinations obtained by Wage-Hour are filed directly with the ETA Regional Administrator, thus shortening the process.

As indicated above, one commenter to the 1995 Proposed Rule objected to the provision at § 655.731(d)(2) which

states, in relevant part, that neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality. This regulatory provision prohibiting release of wage information codified a longstanding ETA policy of not releasing such information because release of such information would inhibit employers responding to SESA conducted prevailing wage surveys. Furthermore, since January 1998, SESAs, pursuant to ETA's General Administrative Letter 2–98 (October 3, 1997), have based their prevailing wage determinations on the wage component of the Bureau of Labor Statistics' expanded Occupational Employment Statistics (OES) program. The occupational employment statistics questionnaire used to conduct occupational employment surveys informs potential respondent employers that ''[t]he Bureau of Labor Statistics and the State agency collecting this information will use the information you provide for statistical purposes only and will hold the information in confidence to the full extent permitted by law.'' This statement reflects longstanding BLS policies and practices, as well as longstanding ETA policies and practices, which are essential to obtain the information needed to provide timely and accurate statistics to the public. Accordingly, the Department is leaving unchanged the provision at § 655.731(d)(2) which states that in a challenge to a SESA wage determination ''neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.''

AILA has maintained that one reason that the ES complaint system has not been widely used is that it has not been widely publicized; AILA contends that despite the stated obligation at 20 CFR 658.410(d), not all State agencies have publicized the use of the ES complaint system through the prominent display of an ETA-approved ES complaint system poster in each local office. ETA operating experience indicates that a failure to display an ETA-approved ES complaint system poster in each local office is a rare occurrence. Such a failure would be a basis for a complaint about ES actions or omissions under ES regulations (20 CFR 658.401). Further, the availability of the ES complaint to challenge SESA prevailing wage determinations issued under the H–1B program is clearly set forth in the H–1B regulations.

The Department has concluded that at this time further measures to streamline the complaint process for challenging SESA prevailing wage determinations are not warranted. The basic structure of the current system appears to be adequate in view of the few complaints (about six) concerning SESA wage determinations that have been received and processed since publication of the 1994 Final Rule. On review, however, the Department has concluded that classification determinations, including specifically whether an employee is properly classified as an experienced or inexperienced worker, are properly the subject of ALJ enforcement proceedings pursuant to part 655, subpart I, since a determination of whether an employee has been appropriately classified can best be determined upon a review of the actual duties performed by the employee. Accordingly, §§ 655.731(a)(2)(iii)(A)(*1*) and (*3*), and 655.731(d)(2)(ii), are revised to remove references to determinations by the SESA or the ETA Regional Administrator regarding occupational classification.

P. What Additional Interpretative Regulations Did the Department Propose?

The Department proposed a new Appendix B to the regulations in order to explain the Department's interpretation of several provisions of the regulations which were not themselves open for notice and comment. As the Department stated in the NPRM, these interpretations concerned questions that had arisen in its administration of the program and had been discussed with interest groups. It was the Department's view that because of the interest raised over these questions, its interpretations should be included in the regulations, either as an appendix or as regulatory text. As discussed below, on a number of the issues, the provisions have been removed from Appendix B into the regulations.

1. What Constitutes an H–1B Worker's ''Worksite'' or ''Place of Employment'' for Purposes of the Employer's Obligations Under the Program? (See IV.O.1.b, Above)

2. Under What Circumstances May an H–1B Worker ''Rove'' or ''Float'' From His/Her ''Home Base'' Worksite? (See IV.O.1.c, Above)

3. What H–1B Related Fees and Costs Are Considered To Be an Employer's Business Expenses? (§ 655.731(c)(9)(ii)&(iii), Previously in Proposed Appendix B, Section c)

Section 655.731(c)(7)(iii)(C) of the current regulations excludes from deductions which are authorized to be taken from the required wage those deductions which are a recoupment of the employer's business expenses. Paragraph (c)(9) further explains that where the imposition of the employer's business expense(s) on the H–1B worker has the effect of reducing the employee's wages below the required wage (the prevailing wage or actual wage, whichever is greater), that will be considered an unauthorized deduction from wages. These provisions were not open for notice and comment.

The Department sought comment on proposed Appendix B, which explains its interpretation of the operation of these provisions in the context of the H–1B petition process. The NPRM notes that the filing of an LCA and the filing of an H–1B petition are legal obligations required to be performed by the employer alone (workers are not permitted to file an LCA or an H–1B petition). Therefore the NPRM provides that any costs incurred in the filing of the LCA and the H–1B petition (*e.g.,* prevailing wage survey preparation, attorney fees, INS fees) cannot be shifted to the employee; such costs are the sole responsibility of the employer, even if the worker proposes to pay the fees.

The NPRM further notes that *bona fide* costs incurred in connection with visa functions which are required by law to be performed by the nonimmigrant (*e.g.,* translation fees and other costs relating to visa application and processing for prospective nonimmigrant residing outside of the United States) do not constitute an employer's business expense. The Department stated, however, that it would look behind what appear to be contrived allocations of costs.

The Department received 21 comments on this issue. All of the commenters (a number of whom were attorneys commenting only on this issue) opposed the Department's position in the NPRM. As a general matter, these commenters contended that the question of how fees are allocated between the employer and the H–1B worker is a question which should be decided between the employer and the employee.

Immigration attorneys and their professional association (AILA), as well as Senators Abraham and Graham, argued that the Department is interfering with the H–1B workers' right to counsel. AILA argued that how the H–1B petition is drafted is critical to an employee, since it may affect his or her maintenance of status and ability to stay in the United States. Another attorney (Freedman) stated that attorney representation of the alien has acted as a buffer against employer abuses, that there is no reason to imply that an

attorney representing an employer is more competent or more impartial than an attorney suggested by an alien, and that employers may not be aware of the expertise necessary to file H–1B petitions. This attorney also suggested that the requirement that employers pay attorney fees would intimidate a potential whistleblower.

Many commenters (AILA, ACIP, and a number of attorneys, businesses and trade associations) argued, in effect, that since Congress, in drafting the ACWIA, specifically prohibited employers from imposing the additional petition fee on employees, the failure to prohibit the payment of other expenses by employees evidences an intention to allow their imposition by an employer.

ITAA and ACIP argued that the current law is directed toward prohibiting certain deductions from an employee's salary that will push it below the required wage rate. In other words, as long as the H–1B worker receives at least the required wage, it should not be a violation if the worker then spends that money for job-related matters such as fees. ACIP and ITAA stated that as a minimum, if the H–1B worker's wages minus the expenses equals or exceeds the required wage rate, there should be no violation. Latour agreed with the Department that if an H–1B worker's wage is below the prevailing wage, it would be a violation to deduct attorney fees from the worker's compensation, but stated that there is no basis for prohibiting the employer from having the employee handle the payment if the fees, when subtracted from the worker's pay, would not result in compensation less than the prevailing wage.

BRI pointed out that many employers provide payment of immigration expenses as a benefit to employees. Making it mandatory that all employers pay such fees will disadvantage those employers who offer payment of fees as a benefit. BRI also suggested that employer payment of fees would make H–1B workers more likely to take advantage of the system.

ACIP, AILA, and ITAA asserted that an employer should be able to collect these expenses as liquidated damages if the H–1B nonimmigrant prematurely terminates an employment contract. One attorney (Freedman) contended that by listing attorney fees as an employer business expense, the Department was establishing a regulatory basis for repayment as liquidated damages—thereby promoting the abusive actions for which the ACWIA was enacted.

Educational and research institutions (ACE, AIRI, University of California, Johns Hopkins) noted that the INS has determined that because ACWIA has allowed an exemption from the additional fee for H–1B petitions from higher education institutions, affiliated or related research institutions, and nonprofit and governmental research organizations, these institutions are also exempt from the requirement that employers pay the $110 filing fee. Thus, they stated that INS has determined that H–1B workers may pay the cost of the filing fee, as in the past. These commenters therefore urged that DOL accept this approach so there is no conflict between Federal agencies. The University of California also stated that an employer does not have an interest in a worker being in the United States prior to commencement of employment and therefore should not bear the cost of a change of status. Finally, three attorney commenters (Latour, Quan, and Stump) argued that forbidding legal fee payment by nonimmigrant workers will be especially onerous to small businesses, small private schools, and other financially-limited groups which are not familiar with the requirements of the H–1B program.

At the outset, the Department wants to clarify an apparent misconception by some commenters regarding the restrictions placed upon employers in assessing the employer's own business expenses to H–1B workers. An H–1B employer is prohibited from imposing its business expenses on the H–1B worker—including attorney fees and other expenses associated with the filing of an LCA and H–1B petition—only to the extent that the assessment would reduce the H–1B worker's pay below the required wage, *i.e.,* the higher of the prevailing wage and the actual wage.

''Actual wage'' is explained at § 655.731(a)(1) of the existing regulations as ''the wage rate paid by the employer to all other individuals with the similar experience and qualifications for the specific employment in question.'' The regulation continues by noting that ''[w]here no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H–1B nonimmigrant by the employer.''

The Department also wishes to emphasize, as provided in § 655.731(c)(9) of the existing regulations (renumbered in the Interim Final Rule as § 655.731(c)(12)), that where a worker is required to pay an expense, it is in effect a deduction in wages which is prohibited if it has the effect of reducing an employee's pay (after subtracting the amount of the expense) below the required wage (*i.e.,* the higher of the actual wage or the prevailing wage). An employer cannot avoid its wage requirements by paying an employee a check at the required wage and then accepting a prohibited payment from a worker either directly, or indirectly through the worker's payment of an expense which is the employer's responsibility.

The Interim Final Rule continues to provide that any expenses directly related to the filing of the LCA and the H–1B petition are a business expense that may not be paid by the H–1B worker if such payment would reduce his or her wage below the required wage. These expenses are the responsibility of the employer regardless of whether the INS filing is to bring an H–1B nonimmigrant into the United States, or to amend, change, or extend an H–1B nonimmigrant's status. As stated in the NPRM, the LCA application and H–1B petition, by law, may only be filed by the H–1B employer. The employer is not required to seek legal representation in completing and filing an LCA or H–1B petition, but once it utilizes the services of an attorney for this purpose, it has incurred an expense associated with the preparation of documents for which it has legal responsibility.

H–1B nonimmigrants are permitted to pay the expenses of functions which by law are required to be performed by the nonimmigrant, such as translation fees and other costs related to the visa application and processing. The Department also recognizes that there may be situations where an H–1B worker receives legal advice that is personal to the worker. Thus, we did not intend to imply that an H–1B worker may never hire an attorney in connection with his or her employment in the United States. While the illustrative expenses (translation fees and other costs relating to the visa application) were not denominated in the NPRM as legal expenses, if they were provided through an attorney these costs and associated attorney fees would be personal to the worker and may be paid by the worker, rather than expenses that would have to borne by the employer. Similarly, any costs associated with the H–1B worker's receipt of legal services he or she contracts to receive relative to obtaining visas for the worker's family, and the various legal obligations of the worker under the laws of the U.S. and the country of origin that might arise in connection with residence and employment in the U.S., are not ordinarily the employer's business expenses. As such, they appropriately may be borne by the worker.

An employer, however, may not seek to pass its legal costs associated with the

LCA and H–1B petition on to the employee. With respect to the concerns regarding small employers who may not have familiarity with H–1B requirements and may not know an attorney specializing in this area of law, there is nothing to prohibit an H–1B worker from recommending to the employer an attorney familiar with the requirements of the H–1B program. In addition, if an applicant for a job hired an attorney clearly to serve the employee's interest, to negotiate the terms of the worker's employment contract, to provide information necessary for the H–1B petition or review its terms on the worker's behalf, or to provide the applicant with advice in connection with application of U.S. employment laws, including the various employee protection provisions of the H–1B program and its new whistleblower provisions, the fees for such attorney services are not the employer's business expense. In its enforcement, the Department will look behind any situation where it appears that an employee is absorbing an employer's business expenses in the guise of the employee paying his or her own legitimate fees and expenses.

Contrary to the view of many commenters, the Department does not read the ACWIA's proscription against an employer's assessment of the additional petition filing fee on the H–1B worker as evincing an intention that an employer may assess any other expenses against the worker. Neither the language of this provision, nor its place within the statute's larger context, allows a conclusion that Congress intended this provision to affect the ability of an employer to assess other costs to H–1B workers. The ACWIA prohibition against charging the H–1B worker for the filing fee is much more sweeping than the regulatory provision at issue. The ACWIA prohibits an employer from charging the fee, even where there would not be a resulting wage violation, and even as a part of the liquidated damages an employer may contract with a worker to pay for early termination.

The Department concurs with the comments that the ACWIA does not preclude the recovery of expenses in connection with the filing of the LCA and H–1B petition as liquidated damages. It is the Department's view that there is no basis for distinguishing attorney fees and other expenses in connection with these filings from other expenses which may be permitted, under state law, as liquidated damages. However, as set forth in IV.K, above, the Interim Final Rule provides that the $500/$1,000 filing fee may not be collected through liquidated damages.

As stated above, education and research groups stated that INS has taken the position that qualified education and research organizations who are exempt from paying the additional filing fee will not be required to pay the separate $110 petition filing fee themselves, but rather INS will accept payment made by the H–1B workers. The Department does not believe that this statement is inconsistent with its position, since, as discussed above, employers are not prohibited from requiring workers to make these payments where the workers are paid above the required wage. To the extent these commenters may be suggesting that the Department should create an exception for academic and research institutions, the Department sees no basis for this suggestion. The status of these institutions as exempt from the additional filing fee does not change the fact that they are employers who, as such, are required to file the LCA and the H–1B petition, and to pay the attendant costs if payment by the H–1B worker would bring the worker's wages below the required wage.

In the Interim Final Rule, the discussion of expenses of the H–1B program which the employer may not impose on H–1B workers has been removed from Appendix B and incorporated in the regulations at § 655.731(c)(9)(ii) and (iii).

4. When Is the Service Contract Act Wage Rate Required To Be Applied as the ''Prevailing Wage''? (§ 655.731(a)(2)(i)(B), Previously Set Forth in Proposed Appendix B, Section d)

Under § 655.731(a)(2)(i) and (iii)(A) of the regulations, if there is an applicable wage determination issued under the McNamara-O'Hara Service Contract Act (SCA) for the occupational classification in the area of employment, that SCA wage determination is considered by the Department to constitute the prevailing wage for that occupation in that area. This use of the SCA wage determination applies regardless of whether the employer is an SCA contractor, and regardless of whether the workers will be employed on an SCA contract. In the NPRM, the Department addressed questions that have arisen concerning application of the SCA wage rate for computer occupations where the wage rate on the wage determination is $27.63, and application of the SCA wage rate where the employer is of the view that the workers are exempt from the SCA.

The NPRM provided at Appendix B, section d, that where an SCA wage determination for an occupational classification in the computer industry states a rate of $27.63, that rate will not be issued by the SESA and may not be used by the employer as the prevailing wage. That rate does not constitute a statement of the prevailing wage; it is the highest wage that any worker in a skilled computer occupation is required to be paid under the SCA. Under that statute, workers are exempt from the Act's requirements if they earn more than $27.63 per hour, regardless of whether they are paid on a salary basis an hourly rate. (See 29 CFR 4.156; 541.3). In such a case, the SESA will use the OES survey—rather than the SCA rate—and the employer, if it chooses not to obtain a prevailing wage rate from the SESA, will need to consult the OES survey or another source for wage information.

Proposed Appendix B also provided that the question of whether the nonimmigrant worker(s) who will be employed will be exempt or non-exempt from the SCA is irrelevant to use of the SCA wage determination to access the prevailing wage. Therefore, in issuing the SCA wage rate as the prevailing wage determination, the SESA will not consider questions of employee exemption, and, in an enforcement action, the Department will consider the SCA wage rate to be the prevailing wage without regard to whether any particular H–1B employee(s) would be exempt from the SCA if employed under an SCA contract.

The Department received six comments on this issue. ACIP expressed confusion over the Department's singling out the SCA wage rate for computer operations, and urged reconsideration of this position before issuing interim final regulations. AILA stated that the Department's proposal is inconsistent because of this singling out of the SCA rate for computer operations, and contended, along with two other commenters (Rubin & Dornbaum, Cowan & Miller), that by designating the SCA wage as the prevailing wage, the Department virtually requires employers to use SESA determinations instead of the other wage sources permitted by law. Finally, AILA questioned the proposal to disregard the exempt status of the H–1B workers, contending that this is inconsistent with the practice used in the Permanent Program, as recognized in the Technical Assistance Guide at page 114. Network Appliance and FHCRC objected to application of the SCA wage rate where the employer is not subject to that Act.

The significant role in the regulations of SCA determinations of the prevailing wage is founded in the legislative history of the H–1B program in IMMACT 90, which evidences Congressional intent that prevailing wage determinations be made as in the Permanent Alien Labor Certification (immigrant worker) Program, 20 CFR 656.40. See Conf. Rep. No. 101–955, 101st Cong., 2d Sess. 122 (1990), 1990 U.S.C.C.A.N. 6787. In any event, the general provisions governing use of wage rates in SCA wage determinations set forth in the regulations at § 655.731(a)(2)(i) and (iii)(A) were not published for comment. Proposed Appendix B, section d, addressed only two specific questions: application of the SCA wage rate to skilled workers in computer occupations, and the broader question of the relevance of whether workers would be exempt from the SCA.

The Department continues to be of the view that SCA wage determinations cannot properly be used for computer occupations where the wage is stated as $27.63 per hour. As explained above, this wage rate is not in any sense a statement of the prevailing wage for the occupation. Rather, this rate is instead a ''cap'' on the SCA-required wage that results from an SCA statutory provision which has no application in the H–1B program. Allowing the use of the $27.63 rate as the prevailing wage would therefore undermine the statutory requirement that workers be paid at least the prevailing wage, and create an economic incentive to utilize H–1B workers rather than U.S. workers. Furthermore, computer occupations are treated differently than other occupations with regard to the use of SCA rates because these occupations are treated uniquely under the SCA. Only for skilled computer occupations is there a cap on the wage set under the SCA, by virtue of a Congressional enactment exempting workers who are paid more than $27.63 per hour from the Fair Labor Standards Act, and therefore from the SCA. See 41 U.S.C. 357(b); Pub. L. 101–583, § 2, Nov. 15, 1990, 104 Stat. 2871, as amended by Pub. L. 104–188, 110 Stat. 1929.

For several reasons, the Department also continues to be of the view that the potential SCA-exempt status of the nonimmigrant workers who will be employed under the LCA is irrelevant. SCA wage determinations (with the exception of computer professionals, as discussed above) are the Department's statement of the prevailing wage of the occupations listed, and are made without regard to the exempt status of workers surveyed. Furthermore, exemption status cannot be determined in advance, based on an employee's occupation. Rather, determinations are made only on examination of the actual duties performed by individual employees and on an examination of the manner in which the employees are paid. With the exception of computer professionals, doctors and attorneys, SCA-exempt employees must be paid either on a salary or fee basis. See 29 CFR part 541. The Department notes that this interpretation is not in fact inconsistent with the provisions of the Permanent Program's Technical Assistance Guide, which requires use of the SCA wage determination ''[i]f the job opportunity is in an occupation and a geographic area for which DOL has made a wage determination'' under the SCA. Page 114 of the Guide simply points out that executive, administrative, and professional employees are exempt from the SCA, but does not state that the exemption is intended to limit the application of the SCA wage determination in determining the prevailing wage under the permanent program. In any event, it is the Department's intention to conform its prevailing wage determinations under the Permanent Program to the interpretations in this Rule, as set forth in § 655.731(a)(2)(i)(B) (rather than in Appendix B, as proposed).

5. How Are the ''PMSA'' and ''CMSA'' Concepts Applied? (§ 655.715, Previously in Proposed Appendix B, Section e)

The regulations at § 655.731(a)(2) require that the prevailing wage be determined for the occupational classification in the area of intended employment. ''Area of intended employment'' in turn is defined to include ''the area within normal commuting distance'' of the place where the H–1B worker will be employed. This definition further provides that ''[i]f the place of employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of employment.''

Proposed Appendix B, section e, further explained that in computing prevailing wages for an ''area of intended employment,'' the Department will consider all locations within either an MSA or a primary metropolitan statistical area (PMSA) to constitute ''normal commuting distance.'' The NPRM further stated that ''a consolidated metropolitan statistical area (CMSA) will not be used in this manner in determining the prevailing wage rates.'' The Department sought to explain, parenthetically, that this simply meant that all locations within a CMSA will not necessarily be deemed to be within normal commuting distance. The Department determined, based on its operational experience, that CMSAs can be too geographically broad to be used in this manner. Because the Department has not adopted any rigid measure of distance as a ''normal commuting area,'' locations near the boundaries of MSAs and PMSAs, and locations within or near the boundaries of CMSAs may be within normal commuting distance, depending on the factual circumstances.

The Department received four comments (ACIP, AILA, Intel, Latour) on this issue. ACIP believes that there is no justification for eliminating the use of CMSAs for prevailing wage purposes, and that requiring the use of PMSAs and MSAs will unnecessarily inflate the prevailing wage rate for employers located in certain metropolitan areas. That organization further commented that the fact that many wage surveys use CMSAs supports their contention that workers do in fact commute within these regions and CMSAs should continue to be a valid statistical area.

AILA expressed its agreement that employers should make good faith efforts to utilize surveys which fit a geographical area, but noted that it is not always possible. Thus, it recommended that employers be able to use broader geographic surveys where no valid local surveys can be found. Intel expressed a similar view. Latour stated that it has used ''normal commuting distance'' since IMMACT 90, and the Department's proposal would only create confusion for employers.

These comments demonstrate a misunderstanding on the part of the commenters of the Department's view on the use of CMSAs. The Department did not intend to place a blanket prohibition on the use of CMSAs. Rather, the Department intended only to clarify, albeit parenthetically, that, unlike MSAs and PMSAs, locations within a CMSA are not automatically deemed to be within normal commuting distance. If an employer can show that it could not get an adequate sample at the MSA or PMSA level, a survey based upon a CMSA may, in fact, be appropriate. In such a situation, the employer should demonstrate that it was not possible to obtain a representative sample of similarly employed workers within the MSA or PMSA. Upon such a showing, the CMSA survey should be acceptable. Furthermore, if an employer is unable to obtain a representative sample at the MSA or PMSA level, GAL 2–98 (ETA's prevailing wage policy directive)

specifically directs that the geographic base of the survey should be expanded. The Department's proposals on this issue also sought to introduce the PMSA concept into the regulation, which had previously discussed only MSAs. The Department has therefore amended the definition of ''Area of intended employment'' in § 655.715, consistent with this discussion, and has removed the discussion from proposed Appendix B, section e.

6. How Does the ''Weighted Average'' Apply in the Determination of the Prevailing Wage, and What Other Issues Have Arisen Concerning the Determination of the Prevailing Wage? (§ 655.731(b)(3)(iii)(B)(*1*), Previously in Proposed Appendix B, Section f; § 655.731(a)(2)(vii); and Proposed Revisions to § 655.731(a)(2)(iii) and (d)(4))

Proposed Appendix B, section f, explained that, due to the inadvertent omission of the word ''weighted'' from one provision of the regulation, there had been a suggestion of confusion regarding whether an employer which uses an ''independent authoritative source'' to determine prevailing wages was required to use a ''weighted average'' methodology. Therefore proposed Appendix B described this methodology and how and when it is to be used.

The Department received no comments on this provision. The Department has amended § 655.731(b)(3)(iii)(B)(*1*) to expressly require a weighted average and has removed this section from Appendix B.

As discussed above in IV.O.4, the Department has concluded that an employer will not be required to keep hourly wage records for full-time H–1B workers paid on a salary basis where the prevailing wage is expressed as an hourly wage. In order to permit this change in the recordkeeping provisions, it is necessary that the regulations be amended to explain that the hourly wage may be converted to a salary. Section 655.731(a)(2)(vii) is therefore amended to provide that an hourly rate may be converted to a weekly salary by multiplying the rate by 40, and may be converted to an annual salary by multiplying by 2080, etc.

7. What is the Effect of a New LCA on the Employer's Prevailing Wage Obligation Under a Pre-Existing LCA? (§ 655.731(a)(4), Previously in Proposed Appendix B, Section g)

The Department, in the 1999 NPRM, acknowledged the possibility of confusion among employers regarding the prevailing wage obligation of an employer which has filed more than one LCA for the same occupational classification in the same area of employment. In such circumstances, the Department observed, the employer could have H–1B employees in the same occupational classification in the same area of employment brought into the United States (or accorded H–1B status) based on petitions approved pursuant to different LCAs (filed at different times) with different prevailing wage determinations. Therefore, the Department advised in proposed Appendix B to Subpart H, that the prevailing wage rate as to any particular H–1B nonimmigrant is prescribed by the LCA which supports that nonimmigrant's H–1B petition. The regulations require that the employer obtain the prevailing wage at the time that the LCA is filed (§ 655.731(a)(2)). The LCA is valid for the period certified by ETA, and the employer must satisfy all the LCA's requirements for as long as any H–1B nonimmigrants are employed pursuant to that LCA (§ 655.750). Where new nonimmigrants are employed pursuant to a new LCA, that new LCA prescribes the employer's obligations as to those new nonimmigrants. The prevailing wage determination on the later/subsequent LCA does not ''relate back'' to operate as an ''update'' of the prevailing wage for the previously-filed LCA for the same occupational classification in the same area of employment. The Department also cautioned employers that every H–1B worker is to be paid in accordance with the employer's actual wage system (regardless of any difference among prevailing wage rates under various LCAs), and thus is to receive any pay increases which that system provides (*e.g.,* merit increases; cost of living increases).

One commenter, AILA, welcomed the acknowledgment that a prevailing wage on an LCA is not changed by later prevailing wage determinations. However, AILA expressed opposition to the reminder that an employer is obligated to pay any wage increases provided by its actual wage system.

The Department has removed its discussion of this issue from Appendix B to the regulations at § 655.731(a)(4). The issue of payment of wage increases under the actual wage system is discussed above in IV.O.3 of the preamble.

Q. Miscellaneous Matters

The Department has also made minor changes to the regulations not discussed above.

Section 655.700(c)(2) has been amended to explain the effect of the ACWIA amendments upon the entry and employment of a nonimmigrant who is a citizen of Mexico pursuant to the provisions of the North American Free Trade Agreement (NAFTA). As a general matter, the H–1B requirements continue to apply. To avoid the imposition of more stringent requirements on the entry of such nonimmigrants (who are classified as ''TN''), however, neither the recruitment nor the displacement provisions apply to these nonimmigrants. The Interim Final Rule also continues the practice of applying the statutory and regulatory provisions for registered nurses (most recently the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106–95) to TNs.

In addition, several places (*e.g.,* §§ 655.700, 655.705, 655.715), have been revised to reflect the amendments made by the ACWIA and the October 2000 Amendments, and to reflect the current Departmental organizational structure.

V. Executive Order 12866

Because of its importance to the public and to the Administration's priorities, the Department is treating this rule as a ''significant regulatory action'' within the meaning of section 3(f)(4) of Executive Order (E.O.) 12866. E.O. 12866 requires a full economic impact analysis only for ''economically significant'' rules as defined in section 3(f)(1). An ''economically significant'' rule pursuant to section 3(f)(1) is one that may ''have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.''

As noted in the NPRM, the H–1B visa program is a voluntary program that allows employers to temporarily secure and employ nonimmigrants admitted under H–1B visas to fill specialized jobs not filled by U.S. workers. In order to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers, Section 212(n) of the INA imposes various requirements on employers, including the requirement that the employer pay an H–1B worker the higher of the actual wage or the prevailing wage. This Interim Final Rule implements statutory changes in the H–1B visa program enacted by the ACWIA. The ACWIA (1) temporarily increases the maximum number of H–1B visas permitted each year; (2) temporarily requires, during the increased H–1B cap period, new non-displacement (layoff) and recruitment attestations by ''H–1B-

dependent'' employers and employers found to have committed willful violations or misrepresentations; (3) requires employers of H–1B workers to offer the same fringe benefits to H–1B workers as they offer U.S. workers; (4) requires employers in certain cases to pay H–1B workers in a non-productive status; and (5) provides whistleblower protections to employees (including former employees and applicants) who disclose information about potential violations or cooperate in an investigation or proceeding. In addition, this Rule contains final rules on certain proposals previously published for comment in October 1995, and on proposals relating to the Department's interpretations of the INA and its existing regulations.

The Department, in the NPRM, concluded that this rule is not ''economically significant'' because the direct, incremental costs that an employer would incur because of this rule, above customary business expenses associated with recruiting qualified job applicants and retaining qualified employees in specialized jobs, are expected to be minimal. Collectively, the changes proposed by this rule will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, the Department concluded that this rule is not a ''significant regulatory action'' as defined by section 3(f)(1) of E.O. 12866, and no economic impact analysis is required under section 6(a)(3).

Four commenters (ACIP, AILA, Hammond and TCS) specifically responded to the Department's findings with respect to E.O. 12866. Hammond disagreed with the Department's assessment that a full economic impact analysis is not required. That commenter stated its belief that the direct, incremental costs an employer would incur because of this rule are above the customary and usual business expenses for recruiting qualified job applicants and for retaining qualified employees in specialized jobs. Hammond contended that the rule will impose significant costs that will have an annual effect on the economy of $100 million or more, and will adversely affect the computer industry and its productivity.

All four commenters stated their view that the Department has underestimated the additional burdens and costs to be attributed to the new regulatory provisions on all H–1B employers, and that the economic impact of the rule is not limited to H–1B-dependent employers. AILA urged the Department to provide a more accurate and reasonable estimate of the burden created by its regulatory provisions, using reliable data and computations, before imposing the regulations in final form. In the alternative, and in the absence of data to support a reasonable estimate of the economic impact on H–1B employers, AILA recommended the adoption of regulations that are less burdensome.

For the reasons discussed above and in the preamble of the NPRM, the Department continues to believe that the Interim Final Rule is not an ''economically significant'' regulatory action under E.O. 12866, section 3(f)(1). Furthermore, as described in detail above, the Department has made significant changes in several provisions which will lessen the perceived burden to employers. Accordingly, the Rule does not require an assessment of costs and benefits under section 6(a)(3) of that E.O. The Rule, however, was treated as a ''significant regulatory action'' under E.O. 12866, section 3(f)(4), because of its importance to the public and to the Administration's priorities and was, therefore, reviewed by the Office of Management and Budget.

VI. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis, describing the anticipated impact of the proposed rule on small entities. This initial analysis was published as part of the NPRM. The initial regulatory flexibility analysis concluded that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The Regulatory Flexibility Act also requires agencies to prepare a final regulatory analysis, assessing comments received on the initial analysis, describing any significant alternatives affecting small entities that were considered in arriving at the final rule, and the anticipated impact of the rule on small entities.

In the initial regulatory flexibility analysis, the Department noted that available data and analyses indicated that most of the businesses in the industries in which H–1B workers likely would be employed would meet SBA's definition of ''small.'' The Department, however, stated its conclusion that the economic impact of the rule would not be significant. As there explained, most of the new compliance obligations addressed in this rulemaking apply to only a small subset of the full universe of employers that participate in the H–1B program, namely, those that meet the new definition of ''H–1B dependent employer'' and those found to have committed willful violations or misrepresentations (''willful violators''), which the Department estimated to be no more than 200 employers.

Upon further analysis, including review of the comments received by the Department, we have concluded that the Department's initial assessment was correct, *i.e.,* the rules will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

The discussion which follows addresses the statutory requirements bearing on this final analysis. While much of the discussion closely tracks the language in the Department's initial analysis, we address below the comments received bearing upon the impact of the rule on small entities. The reader should review the supplementary information section of the preamble (particularly section IV) for a full discussion of the various alternatives considered by the Department in crafting the IFR. However, we discuss below some aspects of these alternatives as they relate to small entities.

1. What Are the Objectives of, and the Legal Basis for, the Interim Final Rule?

On October 21, 1998, President Clinton signed into law the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), which was enacted as Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999 (Public Law 105–277). The ACWIA amended the Immigration and Nationality Act (INA), as amended (8 U.S.C. 1101 *et seq.*), relating to the H–1B visa program. Under the H–1B visa program, employers may temporarily employ nonimmigrants admitted into the U.S. under H–1B visas in specialty occupations and as fashion models, instead of employing U.S. workers, under certain conditions. Section 412(d) of the ACWIA provides that some of the amendments made by the ACWIA do not take effect until the Department promulgates implementing regulations, which are the subject of this rulemaking.

The Interim Final Rule is issued pursuant to provisions of the INA, as amended, and the ACWIA, 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), 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 sec. 412(d) and (e), Pub. L. 105–277, 112 Stat. 2681. The objectives of the rule are to enable employers to understand and comply with applicable requirements under the amended H–1B visa program, and to advise employees and applicants of the protections afforded by the amendments to U.S. and H–1B workers.

2. What Comments Were Received Addressing the Initial Regulatory Flexibility Analysis, How Does the Department Assess the Comments, and What Changes, if Any, Were Made as a Result of the Comments?

As discussed below, the Department received only a few comments (from ACIP, AILA, Hammond and ITAA) that specifically discussed the initial regulatory flexibility analysis. The comments specifically directed at the initial regulatory flexibility analysis addressed only the commenters' disagreement with the Department's estimate of the number of U.S. employers that would be affected by the rule's requirements pertaining to H–1B–dependent employers or willful violators. Employers with such status (generally those employers with more than 15 percent of their workforce comprised of nonimmigrants or employers found to have willfully violated H–1B requirements) must follow requirements not imposed on the much larger number of employers that employ a smaller percentage of nonimmigrant workers. Since the comments received specifically relate to the Department's estimate regarding the number of small entities affected by the IFR, the comments are discussed in the next section of this analysis.

Although not raised in connection with the initial analysis, numerous commenters, as detailed in the preceding sections of the preamble to the Interim Final Rule, objected to the recordkeeping burdens imposed by the rule; a few commenters (Chamber of Commerce, IEEE, Simmons) expressed a general concern that the regulations would impose requirements that small businesses would find burdensome. (See sections IV.D.7, D.8, E.1.)

The Department has taken these comments into account, clarifying the particular requirements in several respects. While many of these comments did not differentiate among employers by size, the Department has made many adjustments in the Interim Final Rule, as discussed above, that will benefit small employers. The comments reflected some misunderstanding regarding the need to create, as distinguished from retaining or maintaining, documents relating to the H–1B employment process. The Rule requires the creation of documents in only a relatively few instances. And, in most instances, the maintenance of these documents already is required by other statutes and regulations. For example, while the regulation requires employers in some instances to maintain basic payroll and hours worked records for certain employees, employers are already required to do so by other federal statutes, such as the Fair Labor Standards Act. In a related matter, the Interim Final Rule clarifies that employers need not segregate H–1B documents in a file or system separate from other employment documents. Finally, the Rule, at § 655.760, clarifies the documents that need to be kept in a public access file and simplifies the employer's obligations in this regard. These aspects of the Rule are discussed in full in the earlier sections of the preamble. The reader's particular attention to the following points is recommended: The Paperwork Reduction Act summary in section I; non-displacement documentation (IV.D.8); recruitment practices (IV.E.2); recruitment documentation (IV.E.5); benefits documentation (IV.G.2); location of documents (IV.D.3); hours worked documentation (IV.O.4); public access rules clarified (IV.O.4 and § 655.760 of the Rule).

The Rule also contains several provisions that will particularly benefit small businesses. The Department has provided: A toll free fax number to file LCAs (see IV.B); free or nominal charge resources for determining ''master's degree equivalence'' (see IV.C.2) and determining ''specialities related to'' a master's degree (see IV.C.3). Other aspects of the Rule that may be of particular assistance to some small entities include the use of a download program that can be used with Apple Macintosh systems (see IV.B.5) and employer options regarding the payment of benefits to H–1B workers already employed abroad by the employer or its affiliate (see IV.G.1). The Department's outreach efforts to explain the requirements of the ACWIA and the Rule also benefit small entities. As part of these efforts, the Department, as discussed in the preamble above, at section IV.B, plans to make available soon its small business compliance guide and to set up a computer program that will enable individuals and employers to obtain answers to their H–1B questions.

The Department received some miscellaneous comments that concern small entities. As noted above, at section IV.N of the preamble, the Department received a comment requesting that state school districts and private schools be included in the special prevailing wage provisions. The Department has concluded that the statute does not allow for such exemption.

One commenter (Gurtu & McGoldrick) expressed the summary view that the rules would impose excessive recordkeeping requirements on small businesses. As noted here and throughout the preamble, we believe that the Interim Final Rule imposes only minimal obligations on employers, and that the ACWIA does not allow the latitude to except small entities from the requirements necessary to ensure compliance with the statute. (See section 8 below.)

Another commenter (SBSC) expressed the view that the Department's use of established definitions and regulations from areas of the law external to immigration would prove costly to small employers. We believe that we have provided ample information to allow all employers to understand and comply with all aspects of the H–1B program. No employer is required to look beyond the regulations in order to meet these obligations. At the same time, the references in the preamble to other statutes should assist employers by providing them with potentially useful guides to help them in meeting these requirements and by reminding them that other laws may bear on the employment of H–1B workers.

3. How Many Small Entities Will Be Covered by the Interim Final Rule?

A. As the Department noted in the initial regulatory flexibility analysis, the rule will have the greatest impact on ''H–1B-dependent'' employers and ''willful violators.'' Other aspects of the rule will apply all to employers which seek to temporarily employ nonimmigrants admitted into the U.S. under the H–1B visa program in specialty occupations and as fashion models. The initial analysis distinguished between ''H–1B dependent employers''/''willful violators'' and all other H–1B employers and we follow that approach here in discussing these two groups of employers.

Section 412 (a)(3) of the ACWIA defines ''H–1B-dependent employer'' as an employer that has 25 or fewer full-time equivalent employees employed in the U.S. and more than 7 H–1B nonimmigrants, at least 26 but not more than 50 full-time equivalent employees and more than 12 H–1B nonimmigrants, or at least 51 full-time equivalent employees and a workforce of H–1B nonimmigrants comprising at least 15

percent of its full-time equivalent employees. The ACWIA requires H–1B-dependent employers and employers found to have willfully violated H–1B requirements to attest that they will not displace (layoff) U.S. workers and replace them with H–1B workers in essentially equivalent jobs, that they will not place H–1B workers with other employers without first inquiring as to whether they intend to displace U.S. workers, and that they have taken good faith steps to recruit in the United States for U.S. workers to fill the jobs for which they are seeking H–1B workers. An employer filing an LCA pertaining only to ''exempt H–1B nonimmigrants'' need not comply with the non-displacement and good faith recruitment attestations, regardless of status as an H–1B-dependent or willful violator. ''Exempt H–1B nonimmigrants'' are defined as those who earn at least $60,000 annually or who have attained a master's degree or its equivalent in a specialty related to the intended employment.

B. The definition of ''small'' business varies considerably, depending on the policy issues and circumstances under review, the industry being studied, and the measures used. The size standards used by the U.S. Small Business Administration (SBA) to define small business concerns according to their Standard Industrial Classification (SIC) codes are codified at 13 CFR 121.201. SBA's small size standards are generally expressed either in maximum number of employees or annual receipts (in millions of dollars).

As explained in the initial analysis, we could apply SBA's size standards and gauge precisely how many of the affected businesses are ''small'' if we were able to construct a profile of each business that used H–1B workers, showing both the total number of workers employed and the portion that are H–1B workers, together with total annual receipts and the applicable SIC industry code. Unfortunately, the precise data required for this analysis are not available. However, we know that by far the greatest number of occupations in LCAs certified under the H–1B program have historically been for computer-related occupations, and for therapists (principally physical and occupational).[1] Looking just at these categories would present a view of 60 to 70 percent of all the certified job openings under the H–1B program.

For Major Group 73, Business Services, the SBA's small business size standards for SIC codes in which computer-related occupations would likely be employed are all at the $18 million level (annual receipts).[2] Data from the *1992 Census of Service Industries: Establishment and Firm Size* (published February 1995) indicate that 39,511 out of a total 40,242 firms (or 98.18 percent) have annual receipts less than $18 million.

The Business Services category would not include other users of H–1B workers in computer-related occupations, such as computer equipment manufacturers. For computer and other electronic equipment manufacturers, the SBA's small size threshold is 1,000 employees.[3] In 1994 (latest data on size distribution), 1.6 percent of the establishments employed 1,000 or more workers (comprising 42.1 percent of the employment in the industry).[4] There were more than 14,000 establishments in this industry in 1996.

For Major Group 80, Health Services, the SBA's small size threshold for all categories within the group are at the $5 million (annual receipts) level. Data from the *1992 Census of Service Industries: Establishment and Firm Size* (February 1995) indicate that 244,437 out of a total 249,052 firms (or 98.15 percent) have annual receipts less than $5 million.[5]

Based on the above data, we concluded in the initial analysis that the vast majority (over 98 percent) of the businesses in the industries in which H–1B workers are likely to be employed would meet SBA's definition of ''small.'' In the initial analysis, the Department estimated that approximately 50,000 employers a year file LCA's for H–1B nonimmigrants. The Department also estimated that not more than ten (10) employers a year will be found to have committed willful violations. The Department has received no comments, nor possesses any other information, that would call into question this approach or the estimate it yielded in the initial analysis. Based upon its updated review of the number of LCAs filed per year and taking into consideration the increase in petitions permitted by the October 2000 amendments to the INA, the Department currently estimates that 63,500 employers a year will file LCAs.

C. As noted in the initial analysis, there are no data available to determine how many ''H–1B-dependent'' employers will exist under the rule. We arrived at our estimate of the number of ''H–1B-dependent'' employers for purposes of the initial analysis, as follows. Although the test for H–1B dependency varies with the size of the employer, an employer must employ at least seven H–1B workers to be dependent. Therefore, we stated that if we assume that every H–1B-dependent employer had the smallest workforce threshold (25 full-time equivalent employees) and therefore subject to the ''more than seven H–1B'' workers test, we can estimate the maximum potential number of H–1B-dependent employers in computer-related fields and health services (using therapists) by determining how many of those employers submitted LCAs seeking certification of more than seven H–1B nonimmigrants on a single LCA. This approach undercounts the potential number of H–1B-dependent employers because some employers requesting fewer than seven H–1B workers on a single LCA may already employ other H–1B workers or may file more than one LCA. For purposes of the initial analysis, therefore, we calculated the number of employers for which more

[1] Our initial analysis, utilizing 1997 data, showed that 398,324 job openings were certified—44.4 percent in computer-related occupations and 25.9 percent for therapists. More recent data for FY 1999 shows 53.2 percent of 1,089,524 openings certified were in computer-related occupations and 17.7 percent were therapists (of whom 118,350 or 88.27 percent were filed by one employer). For the period October 1, 1999 through May 31, 2000, 514,263 openings were certified—61 percent in computer-related occupations and only 0.5 percent therapists.

[2] Major Group 73 includes the followng SIC industries: Computer Programming Services (7371); Prepackaged Software (7372); Computer Intergrated Systems Design (7373); Computer Processing and Data Preparation and Processing Services (7374); Information Retrieval Services (7375); Computer Facilities Management Services (7376); Computer Rental and Leasing (7377); Computer Maintenance and Repair (7378); and Computer Related Services. Not Elsewhere Classified (N.E.C.) (7379).

[3] According to BLS, the following five SICs comprise the electronic equipment manufacturing industry: 357, Computer and Office Equipment; 365; Household Audio and Video Equipment; 366, Communications Equipment; 367, Electronic Components and Accessories; and 381, Search and Navigation Equipment. These five SICs share common need for high levels of computer programmers, analysts, engineers and other computer scientists. BLS has published data on establishment size for the industry as a whole, but not its five components. See *Career Guide to Industries*, BLS Bulletin 2503, pp. 53–56, January 1998. The products of this industry include computers and computer storage devices such as disk drives; semiconductors (silicon or computer chips or integrated circuits), which are the core of computers and other advanced electronic products; computer peripheral equipment such as printers and scanners; calculating and accounting machines such as automated teller machines; and other electronic equipment using highly skilled computer and other scientists and professionals.

[4] BLS Bulletin 2503 (January 1998). Source: U.S. Department of Commerce. *County Business Patterns*, 1994.

[5] SIC industries 8021 (Offices and Clinics of Dentists), 8042 (Offices and Clinics of Optometrists), 8072 (Dental Laboratories), and 8092 (Kidney Dialysis Centers) were subtracted from the total number of health service firms in SIC 80 for purposes of this analysis, based on the assumption that such firms would not likely employ physical or occupational therapists.

than five (5) H–1B nonimmigrants were certified on a single LCA to work in computer-related fields or as therapists in FY 1997, to estimate an upper-bound limit of the maximum potential number of H–1B-dependent employers. This yielded a total of 1,425 employers (8.7 percent of the total in the sample). This approach for setting the maximum upper limit greatly overstates H–1B dependency, however, because many larger firms employing more than 25 full-time employees would automatically be included in the count of H–1B dependents. For example, we know, that many major employers of H–1B workers have workforces larger than 25 full-time equivalent employees. In addition, some employers file LCAs certifying a need for H–1B workers but for various reasons never fill all the positions.

Both ACIP and AILA asserted that the Department's premises and conclusion were not logically connected and, along with the other two commenters, contended that the Department's estimate is not supported by reliable data. AILA stated that the number of affected employers and the resultant burden ''may be significantly higher than the DOL suggests.'' ACIP and AILA asserted that the Department's estimated ''upper limit'' of 1,425 H–1B dependent employers was based on an unsupported and, in their view, incorrect assumption that employers generally file ''blanket LCAs.'' Hammond recommended that the Department work with the INS to analyze the economic information required in an H–1B petition to determine the probable number of small and H–1B dependent employers that will be affected by the proposed regulations.

As the Department explained in both the initial regulatory analysis and in other sections of the preamble to the NPRM, aside from reasonable estimates, there are no data available to determine precisely how many ''H–1B dependent'' employers will exist under the rule in any given year, nor how many employers will be found to have committed willful violations or misrepresentations. Such precision would require a profile of each business that used H–1B workers, showing both the total number of workers employed and the portion that are H–1B workers, together with total annual receipts and the applicable SIC industry code for each business. Additional data identifying the education and earnings profiles of the H–1B workers would be needed to determine whether H–1B-dependent employers would likely be filing LCAs for only exempt workers. In the course of developing the NPRM, the Department requested available information from the INS and was advised that information required in an H–1B petition would not enable us or the INS to determine the probable number of small or H–1B-dependent employers that would be affected by the proposed regulations. The Department's conclusion that no such data existed was borne out by the lack of any suggestions in the comments that such data exist. Similarly, we received no suggestions for arriving at a better estimate of the number of employers that would be affected by the rule.

After review of the comments and available data, the Department has concluded that there are no data to assist it in determining the likely number of H–1B-dependent employers and willful violators. The Department has received no information that leads it to question its estimate in the initial analysis that the number of H–1B-dependent employers and willful violators who would be subject to the new recruitment and displacement attestations would be between 100 and 200 employers. The Department does not believe that the increase in the cap for H–1B workers will have a proportionate effect on the number of dependent employers, since the Department believes that most such employers are already dependent. To take into account employers that may have been close to H–1B-dependency under the former cap who could now employ a larger number of H–1B workers, the Department now estimates the number of H–1B-dependent employers and willful violators to be 150 to 250 employers, at a midpoint of 200 employers.

4. What Are the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Interim Final Rule, Which Small Entities Will They Affect, and What Type of Professional Skills Are Needed To Meet the Requirements?

The reporting and recordkeeping requirements of the Rule are not overly complex, and in most cases simply require that a copy be kept of a record made for other purposes or that a simple arithmetic calculation be performed. There are no requirements for technical, specialized or professional skills to comply with the reporting or recordkeeping provisions of the rule. The particular reporting and recordkeeping requirements of this Rule are described above in the Supplementary Information section entitled ''Paperwork Reduction Act'' and in various places throughout the preamble. Some of these requirements are also briefly summarized below.

As noted, most new recordkeeping and compliance requirements imposed by the ACWIA and this rule apply only to employers meeting the new definition of ''H–1B-dependent employer'' or employers found to have committed willful violations or misrepresentations, which we estimate to number between 125 and 225. To determine if it meets the new definition of ''H–1B-dependent employer,'' an employer of H–1B workers must compare the number of its H–1B workers to the number of full-time equivalent employees. H–1B-dependent employers and willful violators must comply with the new ''non-displacement'' and ''good faith recruitment'' requirements of the ACWIA. In many cases, it will be readily apparent, at either end of the spectrum, whether an employer is or is not H–1B dependent and no actual computation will be necessary. Based on the comments, the Interim Final Rule provides an easy test for determining if H–1B-dependency status is readily apparent. In the few instances where actual computations will be required, the Rule also provides an easier, alternative method of determining full-time equivalent employees.

The ACWIA provisions on non-displacement and recruitment of U.S. workers do not apply if the LCA is used for petitioning only ''exempt H–1B nonimmigrants.'' If INS determines in the course of adjudicating an H–1B petition that an H–1B nonimmigrant is exempt, the employer must keep a copy of the determination in the public access file.

The Interim Final Rule would require an H–1B-dependent employer or willful violator that is seeking to place an H–1B nonimmigrant with another employer to secure and retain a written assurance from the second employer, a contemporaneous written record of the second employer's verbal statement, or a prohibition in the contract between the two employers, stating that the second employer has not displaced and intends not to displace a U.S. worker.

H–1B-dependent employers and willful violators must maintain documentation that they have not displaced U.S. workers for a period 90 days before and 90 days after the employer petitions for an H–1B worker. The Interim Final Rule, like the proposed rule, requires covered employers to maintain typical personnel records that would ordinarily be readily available, including name, last known mailing address, title and description of job, and any documentation kept on the employee's experience and

qualifications and principal assignments, for all U.S. workers who left employment during the 180-day window. The employer must also keep all documents concerning the departure of any such U.S. employees and the terms of any offers of similar employment made to them and their responses. In most cases no special records need to be created to meet these requirements. EEOC requires under its regulations that any such existing records be maintained by employers.

H–1B-dependent employers and willful violators must make good faith efforts to recruit U.S. workers using procedures that meet industry-wide standards before hiring H–1B workers. These employers will be required to keep documentation of the recruiting methods they used, including the places, dates, and contents of advertisements or postings, and the compensation terms (if not included in contents of advertisements and postings). These employers must also summarize in the public disclosure file the principal recruitment methods used and the time frame within which the recruitment was conducted. As discussed above at section IV.E.5 of the preamble to this Rule, the NPRM requested comments on how employers should determine industry-wide standards, and how to make this determination available to U.S. workers. (See IV.E.1, E.5.) Inasmuch as the requirements are based on industry-wide standards, meeting this statutory standard should not impose significant burdens on affected employers in most cases. To ascertain whether employers have given good faith consideration to U.S. worker/applicants, the Interim Final Rule also requires the retention of applications and related documents, rating forms, job offers, etc. Retention of such records already is required by EEOC, so no additional burden will be imposed. (See IV.D.8, above.)

All employers of H–1B workers must offer fringe benefits to H–1B workers on the same basis and terms as offered to similarly-employed U.S. workers. To document that they have done so, employers must keep copies of their fringe benefit plans and summary plan descriptions, including rules on eligibility and benefits, evidence of what benefits are actually provided to workers, and how costs are shared between employers and employees. Because regulations of the Pension and Welfare Benefits Administration and the Internal Revenue Service generally require employers to keep copies of such fringe benefit information, meeting this requirement should not impose any additional burdens on most affected employers, and in the few cases where such information is not currently retained, it is anticipated that the additional burden will be minor. (See IV.G.1, above.)

As noted in the initial analysis, the Department republished and asked for comment on several provisions of the December 20, 1994 Final Rule (59 FR 65646) that were published for notice and comment on October 31, 1995 (60 FR 55339). As explained above, H–1B workers are required to be paid at least the actual wage or the prevailing wage, whichever is higher. To ensure this requirement is met, employers are required to include in the public access file documents explaining their actual wage system, and to maintain payroll records for the specific employment in question for both their H–1B workers and their U.S. workers. The Interim Final Rule revises the proposal to require that hours worked records be retained with respect to U.S. workers only if the employee is not paid on a salary basis or the actual wage is expressed as an hourly rate, and further that hours worked records be kept for H–1B workers only if the worker is part-time or is not paid on a salary basis. In virtually all cases, these employees would be paid hourly and hourly pay records would therefore be kept. (See IV.O.4, above.)

5. Are There any Federal Rules That Duplicate, Overlap or Conflict With the Interim Final Rule?

There are no Federal rules that directly duplicate, overlap or conflict with the Interim Final Rule. Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), enforced by the EEOC, prohibits national origin discrimination by employers with 15 or more employees (see 29 CFR part 1606). The Immigration Reform and Control Act of 1986 (see 8 U.S.C. 1324b; 8 U.S.C. 1103(a)), enforced by the U.S. Department of Justice, prohibits national origin discrimination by employers with between four and fourteen employees (those not covered by Title VII), and citizenship-status discrimination by employers with at least four employees (see 28 CFR part 44). In addition, under the ACWIA, an ''H–1B dependent'' employer must attest that it has taken good faith steps to recruit in the U.S. for the position for which it is seeking the H–1B worker, and that it has offered the job to any U.S. worker/applicant who is equally or better qualified. The Department of Labor is responsible for enforcing the required recruitment, and the Department of Justice is responsible for administering an arbitration process detailed in the ACWIA if U.S. worker/applicants complain that they were not offered a job for which they were equally or better qualified, as required.

6. Are There Significant Alternatives Available Such as Differing Compliance or Reporting Requirements or Timetables for Small Entities?

The compliance and reporting requirements of the Interim Final Rule, together with those significant alternatives which have been identified, are discussed in the ''Supplementary Information'' section of the preamble above. Different timetables for implementing the statutory requirements for smaller businesses would not be consistent with the statute. The statute temporarily increases the maximum allowable number of nonimmigrants that may be admitted into the U.S. to perform specialized jobs not filled by U.S. workers, and temporarily adds corresponding provisions intended to protect the wages and working conditions of U.S. workers in similar jobs during the same period.

7. Can Compliance and Reporting Requirements Be Clarified, Consolidated, or Simplified Under the Interim Final Rule for Small Entities?

The compliance and reporting requirements of the Interim Final Rule, and each of the alternatives considered together with their expected advantages and disadvantages, are described in the preamble above. The Department has attempted to keep new recordkeeping requirements to the minimum necessary for the Department to ascertain compliance and for the public to be aware of the primary documentation relied on by the employer to satisfy the statutory requirements. (See Section 212(n)(1) of the INA.) Moreover, most of the recordkeeping requirements already are imposed by other statutes, or only require retention of documents which, in any event, would be kept as a matter of prudent business practice.

Upon further review and consideration if the comments received, the Department has clarified several aspects of the rule. Among other items clarified are the documents to be kept in the public disclosure file and other documents which, in contrast, need not be segregated within the employer's system of records. (See § 655.760.)

In this connection, the Department also considered the use of performance rather than design standards in the regulations. The proposed rules discussed such alternatives, such as establishing a presumption of good faith recruitment based on the employer's hiring a significant number of U.S.

workers and, thereby, accomplishing a significant reduction in the ratio of H–1B workers to U.S. workers in the employer's workforce. (See IV.E.1, E.2, above.) The comments received on these proposals were negative and these alternatives were not included in the Interim Final Rule.

8. Can Small Entities Be Exempted From Coverage of the Rule, or Any Part of the Rule?

Exemption from coverage under this Interim Final Rule for small entities would not be appropriate under the terms of the controlling H–1B statutory mandates. The ACWIA contains no authority for the Department to grant such an exemption except to the extent that the statute itself grants an exemption (*e.g.*, the definition of ''H–1B-dependent employer''). Further, as discussed above, the Department believes that the impact on small businesses will not require significant, additional expenditures. The direct, incremental costs associated with the customary and usual business expenses for recruiting qualified job applicants and retaining qualified employees in specialized jobs should be minimally affected by implementation of this Rule. Most employers, including the smallest entities, should already have systems in place to meet the additional requirements prescribed by the ACWIA and this Rule.

VII. Small Business Regulatory Enforcement Fairness Act

The Department, in the NPRM, concluded that the proposed rule is not a ''major rule'' within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 801 *et seq.*. The rule will not likely result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S. based enterprises to compete with foreign-based enterprises in domestic or export markets.

Five commenters (ACIP, AILA, Hammond, ITAA and SBSC) responded to the Department's conclusion that this rule is not a ''major rule'' within the meaning of SBREFA. The commenters generally focused on their belief that the Department has underestimated the costs to employers of complying with the rule. They asserted that a reasonable, reliable estimate of costs would show that the rule is a major one requiring approval by Congress. ACIP and AILA contended that the Department has underestimated the cost of this rule to employers because it has not included in its analysis the costs to employers for legal services, training materials, computers, files and other systems necessary for compliance.

The Department believes that employer compliance with the additional requirements of the ACWIA will not require significant, additional expenditures as suggested by commenters. The direct, incremental costs associated with the customary and usual business expenses for recruiting qualified job applicants and retaining qualified employees in specialized jobs should be minimally affected by implementation of this rule. Those systems needed for compliance with the few additional requirements of the ACWIA should largely already be in place. The Department has concluded that collectively, the changes set forth in this Rule will not have an economically significant impact, and therefore the Rule is not a major rule under SBREFA.

VIII. Unfunded Mandates Reform Act of 1995; Executive Order 13132

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector, ''* * * (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' The Department concluded in the NPRM that for purposes of the Unfunded Mandates Reform Act, this rule does not include any Federal mandate that may result in increased annual expenditures in excess of $100 million by State, local or tribal governments in the aggregate, or by the private sector. Moreover, the requirements of the Unfunded Mandates Reform Act do not apply to this Rule because it does not include a ''Federal mandate,'' which is defined to included either a ''Federal intergovernmental mandate'' or a ''Federal private sector mandate.'' 2 U.S.C. 658(6). Except in limited circumstances not applicable here, those terms do not include ''a duty arising from participation in a voluntary program.'' 2 U.S.C. 658(5)(A)(I)(II) and 7(A)(ii). A decision by an employer to obtain an H–1B worker is purely voluntary and the obligations arise ''from participation in a voluntary Federal program.''

AILA specifically took issue with the Department's description of the H–1B program as ''voluntary.'' AILA believes that there is very little that is ''voluntary'' about the H–1B program. Rather, that group asserts, Congress recognized an urgent need for additional qualified professionals in certain fields and responded to that need by enacting ACWIA. AILA describes the H–1B program as a ''government monopoly'' where businesses have no choice but to accept the burdensome requirements of the program if they are to obtain the highly skilled foreign workers necessary for their economic survival. While from an employer's perspective, use of the H–1B visa program may be an economic necessity, participation in the program remains voluntary since it applies only to employers who choose to participate in the program.

In addition, the 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, within the meaning of Executive Order 13132. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

IX. Catalog of Federal Domestic Assistance Number

This program is listed in the Catalog of Federal Domestic Assistance at 17.252.

List of Subjects in 20 CFR Parts 655 and 656

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

The Interim Final Rule

Parts 655 and 656 of Chapter V of Title 20, Code of Federal Regulations, are amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The table of contents for part 655, subparts H and I, is revised 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

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

655.705 What federal agencies are involved in the H–1B program, and what are the

responsibilities of those agencies and of employers?
655.710 What is the procedure for filing a complaint?
655.715 Definitions
655.720 Where are labor condition applications to be filed and processed?
655.721 What are the addresses of the ETA regional offices which handle matters other than processing LCAs?
655.730 What is the process for filing a labor condition application?
655.731 What is the first LCA requirement, regarding wages?
655.732 What is the second LCA requirement, regarding working conditions?
655.733 What is the third LCA requirement, regarding strikes and lockouts?
655.734 What is the fourth LCA requirement, regarding notice?
655.735 What are the special provisions for short-term placement of H–1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on the LCA?
655.736 What are H–1B-dependent employers and willful violators?
655.737 What are ''exempt'' H–1B nonimmigrants, and how does their employment affect the additional attestation obligations of H–1B-dependent employers and willful violator employers?
655.738 What are the ''non-displacement of U.S. workers'' obligations that apply to H–1B-dependent employers and willful violators, and how do they operate?
655.739 What is the ''recruitment of U.S. workers'' obligation that applies to H–1B-dependent employers and willful violators, and how does it operate?
655.740 What actions are taken on labor condition applications?
655.750 What is the validity period of the labor condition application?
655.760 What records are to be made available to the public, and what records are to be retained?

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

655.800 Who will enforce the LCAs and how will they be enforced?
655.801 What protection do employees have from retaliation?
655.805 What violations may the Administrator investigate?
655.806 Who may file a complaint and how is it processed?
655.807 How may someone who is not an ''aggrieved party'' allege violations, and how will those allegations be processed?
655.808 Under what circumstances may random investigations be conducted?
655.810 What remedies may be ordered if violations are found?
655.815 What are the requirements for the Administrator's determination?
655.820 How is a hearing requested?
655.825 What rules of practice apply to the hearing?
655.830 What rules apply to service of pleadings?
655.835 How will the administrative law judge conduct the proceeding?
655.840 What are the requirements for a decision and order of the administrative law judge?
655.845 What rules apply to appeal of the decision of the administrative law judge?
655.850 Who has custody of the administrative record?
655.855 What notice shall be given to the Employment and Training Administration and the Attorney General of the decision regarding violations?

2. 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) and (n), 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)(150(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), 1182(n), 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.*

3. Section 655.700 is revised to read as follows:

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

(a) *Statutory provisions.* With respect to nonimmigrant workers entering the United States (U.S.) on H–1B visas, the Immigration and Nationality Act (INA), as amended, provides as follows:

(1) Establishes an annual ceiling (exclusive of spouses and children) on the number of foreign workers who may be issued H–1B visas—

(i) 195,000 in fiscal year 2001;

(ii) 195,000 in fiscal year 2002;

(iii) 195,000 in fiscal year 2003; and

(iv) 65,000 in each succeeding fiscal year;

(2) Defines the scope of eligible occupations for which nonimmigrants may be issued H–1B visas and specifies the qualifications that are required for entry as an H–1B nonimmigrant ;

(3) Requires an employer seeking to employ H–1B nonimmigrants to file a labor condition application (LCA) agreeing to various attestation requirements and have it certified by the Department of Labor (DOL) before a nonimmigrant may be provided H–1B status by the Immigration and Naturalization Service (INS); and

(4) Establishes an enforcement system under which DOL is authorized to determine whether an employer has engaged in misrepresentation or failed to meet a condition of the LCA, and is authorized to impose fines and penalties.

(b) *Procedure for obtaining an H–1B visa classification.* Before a nonimmigrant may be admitted to work in a ''specialty occupation'' or as a fashion model of distinguished merit and ability in the United States under the H–1B visa classification, there are certain steps which must be followed:

(1) First, an employer shall submit to DOL, and obtain DOL certification of, a labor condition application (LCA). The requirements for obtaining a certified LCA are provided in this subpart. The LCA (Form ETA 9035) and cover page (Form ETA 9035CP, containing the full attestation statements that are incorporated by reference in Form ETA 9035) may be obtained from *http://ows.doleta.gov,* from DOL regional offices, and from the Employment and Training Administration (ETA) national office. Employers are encouraged to utilize the electronic filing system developed by ETA to expedite the certification process (see § 655.720).

(2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (INS Form I–129), together with the certified LCA, to INS, requesting H–1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, INS are set forth in INS regulations. The INS petition (Form I–129) may be obtained from an INS district or area office.

(3) If INS approves the H–1B classification, the nonimmigrant then may apply for an H–1B visa abroad at a consular office of the Department of State. If the nonimmigrant is already in the United States in a status other than H–1B, he/she may apply to the INS for a change of visa status.

(c) *Applicability.* (1) This subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the H–1B visa

classification in specialty occupations or as fashion models of distinguished merit and ability.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, this subpart H and subpart I of this part shall apply (except for the provisions relating to the recruitment and displacement of U.S. workers (see §§ 655.738 and 655.739)) to the entry and employment of a nonimmigrant who is a citizen of Mexico under and pursuant to the provisions of section D or Annex 1603 of NAFTA in the case of all professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA other than registered nurses. Therefore, the references in this part to ''H–1B nonimmigrant'' apply to any Mexican citizen nonimmigrant who is classified by INS as ''TN.'' In the case of a registered nurse, the following provisions shall apply: subparts D and E of this part or the Nursing Relief for Disadvantaged Areas Act of 1999 (Public Law 106–95) and the regulations issued thereunder, 20 CFR part 655, subparts L and M.

4. Section 655.705 is revised to read as follows:

§ 655.705 What federal agencies are involved in the H–IB program, and what are the responsibilities of those agencies and of employers?

Three federal agencies (Department of Labor, Department of State, and Department of Justice) are involved in the process relating to H–1B nonimmigrant classification and employment. The employer also has continuing responsibilities under the process. This section briefly describes the responsibilities of each of these entities.

(a) *Department of Labor (DOL) responsibilities.* DOL administers the labor condition application process and enforcement provisions (exclusive of complaints regarding non-selection of U.S. workers, as described in 8 U.S.C. 1182(n)(1)(G)(i)(II) and 1182(n)(5)). Two DOL agencies have responsibilities:

(1) The Employment and Training Administration (ETA) is responsible for receiving and certifying labor condition applications (LCAs) in accordance with this subpart H. ETA is also responsible for compiling and maintaining a list of LCAs and makes such list available for public examination at the Department of Labor, 200 Constitution Avenue, NW., Room C–4318, Washington, DC 20210.

(2) The Wage and Hour Division of the Employment Standards Administration (ESA) is responsible, in accordance with subpart I of this part, for investigating and determining an employer's misrepresentation in or failure to comply with LCAs in the employment of H–1B nonimmigrants.

(b) *Department of Justice (DOJ) and Department of State (DOS) responsibilities.* The Department of State, through U.S. Embassies and Consulates, is responsible for issuing H–1B visas. The Department of Justice, through the Immigration and Naturalization Service (INS), accepts the employer's petition (INS Form I–129) with the DOL-certified LCA attached. INS is responsible for approving the nonimmigrant's H–1B visa classification. In doing so, the INS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the labor condition application is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H–1B visa classification. If the petition is approved, INS will notify the U.S. Consulate where the nonimmigrant intends to apply for the visa unless the nonimmigrant is in the U.S. and eligible to adjust status without leaving this country. See 8 U.S.C. 1255(h)(2)(B)(i). The Department of Justice administers the system for the enforcement and disposition of complaints regarding an H–1B-dependent employer's or willful violator employer's failure to offer a position filled by an H–1B nonimmigrant to an equally or better qualified United States worker (8 U.S.C. 1182(n)(1)(E), 1182(n)(5)), or such employer's willful misrepresentation of material facts relating to this obligation. The Department of Justice, through the INS, is responsible for disapproving H–1B and other petitions filed by an employer found to have engaged in misrepresentation or failed to meet certain conditions of the labor condition application (8 U.S.C. 1182(n)(2)(C)(i)–(iii); 1182(n)(5)(E)).

(c) *Employer's responsibilities.* Each employer seeking an H–1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities, as described more fully in this subpart and subpart I, including—

(1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035 in the manner prescribed in § 655.720. By completing and signing the LCA, the employer agrees to several attestations regarding an employer's responsibilities, including the wages, working conditions, and benefits to be provided to the H–1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. The LCA contains additional attestations for certain H–1B-dependent employers and employers found to have willfully violated the H–1B program requirements; these attestations impose certain obligations to recruit U.S. workers, to offer positions to U. S. workers who are equally or better qualified than the H–1B nonimmigrant(s), and to avoid the displacement of U.S. workers (either in the employer's workforce or in the workforce of a second employer with whom the H–1B nonimmigrant(s) is placed with indicia of employment by that employer (8 U.S.C. 1182(n)(1)(E)–(G)). These additional attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. If the LCA is certified by ETA, a copy will be returned to the employer.

(2) The employer shall make the LCA and necessary supporting documentation (as identified under this subpart) available for public examination at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with ETA.

(3) The employer then may submit a copy of the certified LCA to INS with a completed petition (INS Form I–129) requesting H–1B classification.

(4) The employer shall not allow the nonimmigrant worker to begin work until INS grants the worker authorization to work in the United States for that employer or, in the case of a nonimmigrant who is already in H–1B status and is changing employment to another H–1B employer, until the new employer files a petition supported by a certified LCA.

(5) The employer shall develop sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its LCA and the accuracy of information provided, in the event that such statement or information is challenged. The 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. Section 655.710 is revised to read as follows:

§ 655.710 What is the procedure for filing a complaint?

(a) Except as provided in paragraph (b) of this section, complaints concerning misrepresentation in the labor condition application or failure of the employer to meet a condition specified in the application shall be filed with the Administrator, Wage and Hour Division (Administrator), ESA, according to the procedures set forth in subpart I of this part. The Administrator shall investigate where appropriate, and after an opportunity for a hearing, assess appropriate sanctions and penalties, as described in subpart I of this part.

(b) Complaints arising under section 212(n)(1)(G)(i)(II) of the INA, 8 U.S.C. 1182(n)(1)(G)(i)(II), alleging failure of the employer to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street & Constitution Avenue, NW., Washington, DC 20530. The Department of Justice shall investigate where appropriate and shall take such further action as may be appropriate under that Department's regulations and procedures.

6. Section § 655.715 is amended to revise the definition of ''Area of intended employment'', to add the definition of ''Employed, employed by the employer or employment relationship'', to revise the definition of ''Employer'', to revise the definition of ''Employment and Training Administration (ETA)'', to add the definition of ''Office of Workforce Security (OWS)'', to revise the definitions of ''Place of employment'' and ''State Employment Security Agency (SESA)'', to remove the definition of ''United States Employment Service'', and to add the definition of ''United States worker (U.S. worker)'', to read as follows:

§ 655.715 Definitions.

Area of intended employment means the area within normal commuting distance of the place (address) of employment where the H–1B nonimmigrant is or will be employed. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* normal commuting distances might be 20, 30, or 50 miles). If the place of employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of employment; however, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling with regard to the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (*e.g.,* near the border of) the MSA or PMSA (or CMSA).

* * * * *

Employed, employed by the employer, or employment relationship means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, ''no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'' *NLRB* v. *United Ins. Co. of America,* 390 U.S. 254, 258 (1968).

Employer means a person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H–1B nonimmigrants and/or U.S. worker(s). The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H–1B nonimmigrant is deemed to be the employer of that H–1B nonimmigrant.

Employment and Training Administration (ETA) means the agency within the Department which includes the Office of Workforce Security (OWS).

* * * * *

Office of Workforce Security (OWS) means the agency of the Department which is charged with administering the national system of public employment offices.

Place of employment means the worksite or physical location where the work actually is performed.

(1) The term does not include any location where either of the following criteria—paragraph (1)(i) or (ii)—is satisfied:

(i) *Employee developmental activity.* An H–1B worker who is stationed and regularly works at one location may temporarily be at another location for a particular individual or employer-required developmental activity such as a management conference, a staff seminar, or a formal training course (other than ''on-the-job-training'' at a location where the employee is stationed and regularly works). For the H–1B worker participating in such activities, the location of the activity would not be considered a ''place of employment'' or ''worksite,'' and that worker's presence at such location—whether owned or controlled by the employer or by a third party—would not invoke H–1B program requirements with regard to that employee at that location. However, if the employer uses H–1B nonimmigrants as instructors or resource or support staff who continuously or regularly perform their duties at such locations, the locations would be ''places of employment'' or ''worksites'' for any such employees and, thus, would be subject to H–1B program requirements with regard to those employees.

(ii) *Particular worker's job functions.* The nature and duration of an H–1B nonimmigrant's job functions may necessitate frequent changes of location with little time spent at any one location. For such a worker, a location would not be considered a ''place of employment'' or ''worksite'' if the following three requirements (*i.e.,* paragraphs (1)(ii)(A) through (C)) are all met—

(A) The nature and duration of the H–1B worker's job functions mandates his/her short-time presence at the location. For this purpose, either:

(*1*) The H–1B nonimmigrant's job must be peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location; or

(*2*) The H–1B worker's duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations; and

(B) The H–1B worker's presence at the locations to which he/she travels from the ''home'' worksite is on a casual, short-term basis, which can be recurring but not excessive (*i.e.,* not exceeding five consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations); and

(C) The H–1B nonimmigrant is not at the location as a ''strikebreaker'' (*i.e.,* the H–1B nonimmigrant is not performing work in an occupation in which workers are on strike or lockout).

(2) Examples of ''non-worksite'' locations based on worker's job functions: A computer engineer sent out to customer locations to ''troubleshoot'' complaints regarding software malfunctions; a sales representative

making calls on prospective customers or established customers within a ''home office'' sales territory; a manager monitoring the performance of out-stationed employees; an auditor providing advice or conducting reviews at customer facilities; a physical therapist providing services to patients in their homes within an area of employment; an individual making a court appearance; an individual lunching with a customer representative at a restaurant; or an individual conducting research at a library.

(3) Examples of ''worksite'' locations based on worker's job functions: A computer engineer who works on projects or accounts at different locations for weeks or months at a time; a sales representative assigned on a continuing basis in an area away from his/her ''home office;'' an auditor who works for extended periods at the customer's offices; a physical therapist who ''fills in'' for full-time employees of health care facilities for extended periods; or a physical therapist who works for a contractor whose business is to provide staffing on an ''as needed'' basis at hospitals, nursing homes, or clinics.

(4) Whenever an H–1B worker performs work at a location which is not a ''worksite'' (under the criterion in paragraph (1)(i) or (1)(ii) of this definition), that worker's ''place of employment'' or ''worksite'' for purposes of H–1B obligations is the worker's home station or regular work location. The employer's obligations regarding notice, prevailing wage and working conditions are focused on the home station ''place of employment'' rather than on the above-described location(s) which do not constitute worksite(s) for these purposes. However, whether or not a location is considered to be a ''worksite''/''place of employment'' for an H–1B nonimmigrant, the employer is required to provide reimbursement to the H–1B nonimmigrant for expenses incurred in traveling to that location on the employer's business, since such expenses are considered to be ordinary business expenses of employers (§§ 655.731(c)(7)(iii)(C); 655.731(c)(9)). In determining the worker's ''place of employment'' or ''worksite,'' the Department will look carefully at situations which appear to be contrived or abusive; the Department would seriously question any situation where the H–1B nonimmigrant's purported ''place of employment'' is a location other than where the worker spends most of his/her work time, or where the purported ''area of employment'' does not include the location(s) where the worker spends most of his/her work time.

* * * * *

State Employment Security Agency (SESA) means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with OWS in the operation of the national system of public employment offices.

* * * * *

United States worker (''U.S. worker'') means an employee who is either

(1) A citizen or national of the United States, or

(2) An alien who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under section 207 of the INA, is granted asylum under section 208 of the INA, or is an immigrant otherwise authorized (by the INA or by the Attorney General) to be employed in the United States.

7. Section 655.720 is revised to read as follows:

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

(a) *Facsimile transmission (FAX).* If the employer submits the LCA (Form ETA 9035) by FAX, the transmission shall be made to 1–800–397–0478 (regardless of the intended place of employment for the H–1B nonimmigrant(s)). (Note to paragraph (a): The employer submitting an LCA via FAX shall not use the FAX number assigned to an ETA regional office, but shall use only the 1–800–397–0478 number designated for this purpose.) The cover pages to Form ETA 9035 (*i.e.,* Form ETA 9035CP) should not be FAXed with the Form ETA 9035.

(b) *U.S. Mail.* If the employer submits the LCA (Form ETA 9035) by U.S. Mail, the LCA shall be sent to the ETA service center at the following address: ETA Application Processing Center, P.O. Box 13640, Philadelphia PA 19101.

(c) *All matters other than the processing of LCAs* (*e.g.,* prevailing wage challenges by employers) are within the jurisdiction of the Regional Certifying Officers in the ETA regional offices identified in § 655.721.

8. Section 655.721 is added to read as follows:

§ 655.721 What are the addresses of the ETA regional offices which handle matters other than processing LCAs?

(a) The Regional Certifying Officers in the ETA regional offices are responsible for administrative matters under this subpart other than the processing of LCAs (*e.g.,* prevailing wage challenges by employers). (Note to paragraph (a): LCAs are filed by employers and processed by ETA only in accordance with § 655.720.)

(b) The ETA regional offices with responsibility for labor certification programs are—

(1) Region I Boston (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): J.F.K. Federal Building, Room E–350, Boston, Massachusetts 02203. Telephone: 617–565–4446.

(2) Region I New York (New York, New Jersey, Puerto Rico, and the Virgin Islands): 201 Varick Street, Room 755, New York, New York 10014. Telephone: 212–337–2186.

(3) Region II (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia): Suite 825 East, The Curtis Center, 170 S. Independence Mall West, Philadelphia, Pennsylvania 19106–3315. Telephone: 215–861–5250.

(4) Region III (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee): Atlanta Federal Ctr., 100 Alabama St., NW, Suite 6M–12, Atlanta, Georgia 30303. Telephone: 404–562–2115.

(5) Region IV (Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming): 525 Griffin Street, Room 317, Dallas, Texas 75202. Telephone: 214–767–4989.

(6) Region V (Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin): 230 South Dearborn Street, Room 605, Chicago, Illinois 60604. Telephone: 312–353–1550.

(7) Region VI (Alaska, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, and Washington): P.O. Box 193767, San Francisco, California 94119–3767. Telephone: 415–975–4601.

(c) The ETA website at *http://ows.doleta.gov* will be updated to reflect any changes in the information contained in this section concerning the ETA regional offices.

9. Section 655.730 is revised to read as follows:

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

(a) *Who must submit labor condition applications?* An employer, or the employer's authorized agent or representative, which meets the definition of ''employer'' set forth in § 655.715 and intends to employ an H–1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability shall submit an LCA to the Department.

(b) *Where and when is an LCA to be submitted?* An LCA shall be submitted by the employer to ETA in accordance with the procedure prescribed in

§ 655.720 no earlier than six months before the beginning date of the period of intended employment shown on the LCA. It is the employer's responsibility to ensure that a complete and accurate LCA is received by ETA. Incomplete or obviously inaccurate LCAs will not be certified by ETA. ETA shall process all LCAs sequentially upon receipt regardless of the method used by the employer to submit the LCA (*i.e.,* either FAX or U.S. Mail as prescribed in § 655.720) and shall make a determination to certify or not certify the LCA within seven working days of the date the LCA is received and date stamped by ETA. If the LCA is submitted by FAX, the LCA containing the original signature shall be maintained by the employer as set forth at § 655.760(a)(1).

(c) *What is to be submitted?* Form ETA 9035.

(1) *General.* One completed and dated original Form ETA 9035 bearing the employer's original signature (or that of the employer's authorized agent or representative) shall be submitted by the employer to ETA in accordance with the procedure prescribed in § 655.720. The signature of the employer or its authorized agent or representative on Form ETA 9035 acknowledges the employer's agreement to the labor condition statements (attestations), which are specifically identified in Form ETA 9035 as well as set forth in the cover pages (Form ETA 9035CP) and incorporated by reference in Form ETA 9035. The labor condition statements (attestations) are described in detail in §§ 655.731 through 655.735, and 655.736 through 655.739 (if applicable). Copies of Form ETA 9035 and cover pages Form ETA 9035CP are available from ETA regional offices and on the ETA website at *http://ows.doleta.gov.* Each Form ETA 9035 shall identify the occupational classification for which the LCA is being submitted and shall state:

(i) The occupation, by Dictionary of Occupational Titles (DOT) Three-Digit Occupational Groups code and by the employer's own title for the job;

(ii) The number of H–1B nonimmigrants sought;

(iii) The gross wage rate to be paid to each H–1B nonimmigrant, expressed on an hourly, weekly, biweekly, monthly or annual basis;

(iv) The starting and ending dates of the H–1B nonimmigrants' employment;

(v) The place(s) of intended employment;

(vi) The prevailing wage for the occupation in the area of intended employment and the specific source (*e.g.,* name of published survey) relied upon by the employer to determine the wage. If the wage is obtained from a SESA, the appropriate box must be checked and the wage must be stated; the source for a wage obtained from a source other than a SESA must be identified along with the wage; and

(vii) The employer's status as to whether or not the employer is H–1B-dependent and/or a willful violator, and, if the employer is H–1B-dependent and/or a willful violator, whether the employer will use the application only in support of petitions for exempt H–1B nonimmigrants.

(2) *Multiple positions and/or places of employment.* The employer shall file a separate LCA for each occupation in which the employer intends to employ one or more H–1B nonimmigrants, but the LCA may cover more than one intended position (employment opportunity) within that occupation. All intended places of employment shall be identified on the LCA; the employer may file one or more additional LCAs to identify additional places of employment.

(3) *Full-time and part-time jobs.* The position(s) covered by the LCA may be either full-time or part-time; full-time and part-time positions cannot be combined on a single LCA.

(d) *What attestations does the LCA contain?* An employer's LCA shall contain the labor condition statements referenced in §§ 655.731 through 655.734, and § 655.736 through 655.739 (if applicable), which provide that no individual may be admitted or provided status as an H–1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary an application stating that:

(1) The employer is offering and will offer during the period of authorized employment to H–1B nonimmigrants no less than the greater of the following wages (such offer to include benefits and eligibility for benefits provided as compensation for services, which are to be offered to the nonimmigrants on the same basis and in accordance with the same criteria as the employer offers such benefits to U.S. workers):

(i) The actual wage paid to the employer's other employees at the worksite with similar experience and qualifications for the specific employment in question; or

(ii) The prevailing wage level for the occupational classification in the area of intended employment;

(2) The employer will provide working conditions for such nonimmigrants that will not adversely affect the working conditions of workers similarly employed (including benefits in the nature of working conditions, which are to be offered to the nonimmigrants on the same basis and in accordance with the same criteria as the employer offers such benefits to U.S. workers);

(3) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment;

(4) The employer has provided and will provide notice of the filing of the labor condition application to:

(i)(A) The bargaining representative of the employer's employees in the occupational classification in the area of intended employment for which the H–1B nonimmigrants are sought, in the manner described in § 655.734(a)(1)(i); or

(B) If there is no such bargaining representative, affected workers by providing electronic notice of the filing of the LCA or by posting notice in conspicuous locations at the place(s) of employment, in the manner described in § 655.734(a)(1)(ii); and

(ii) H–1B nonimmigrants by providing a copy of the LCA to each H–1B nonimmigrant at the time that such nonimmigrant actually reports to work, in the manner described in § 655.734(a)(2).

(5) The employer has determined its status concerning H–1B-dependency and/or willful violator (as described in § 655.736), has indicated such status, and if either such status is applicable to the employer, has indicated whether the LCA will be used only for exempt H–1B nonimmigrant(s), as described in § 655.737.

(6) The employer has provided the information about the occupation required in paragraph (c) of this section.

(e) *Change in employer's corporate structure or identity.* (1) Where an employer corporation changes its corporate structure as the result of an acquisition, merger, ''spin-off,'' or other such action, the new employing entity is not required to file new LCAs and H–1B petitions with respect to the H–1B nonimmigrants transferred to the employ of the new employing entity (regardless of whether there is a change in the Employer Identification Number (EIN)), *provided that* the new employing entity maintains in its records a list of the H–1B nonimmigrants transferred to the employ of the new employing entity, and maintains in the public access file(s) (see § 655.760) a document containing all of the following:

(i) Each affected LCA number and its date of certification;

(ii) A description of the new employing entity's actual wage system applicable to H–1B nonimmigrant(s)

who become employees of the new employing entity;

(iii) The employer identification number (EIN) of the new employing entity (whether or not different from that of the predecessor entity); and

(iv) A sworn statement by an authorized representative of the new employing entity expressly acknowledging such entity's assumption of all obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective LCA filed by the predecessor entity. Unless such statement is executed and made available in accordance with this paragraph, the new employing entity shall not employ any of the predecessor entity's H–1B nonimmigrants without filing new LCAs and petitions for such nonimmigrants. The new employing entity's statement shall include such entity's explicit agreement to:

(A) Abide by the DOL's H–1B regulations applicable to the LCAs;

(B) Maintain a copy of the statement in the public access file (see § 655.760); and

(C) Make the document available to any member of the public or the Department upon request.

(2) Notwithstanding the provisions of paragraph (e)(1) of this section, the new employing entity must file new LCA(s) and H–1B petition(s) when it hires any new H–1B nonimmigrant(s) or seeks extension(s) of H–1B status for existing H–1B nonimmigrant(s). In other words, the new employing entity may not utilize the predecessor entity's LCA(s) to support the hiring or extension of any H–1B nonimmigrant after the change in corporate structure.

(3) A change in an employer's H–1B-dependency status which results from the change in the corporate structure has no effect on the employer's obligations with respect to its current H–1B nonimmigrant employees. However, the new employing entity shall comply with § 655.736 concerning H–1B-dependency and/or willful-violator status and § 655.737 concerning exempt H–1B nonimmigrants, in the event that such entity seeks to hire new H–1B nonimmigrant(s) or to extend the H–1B status of existing H–1B nonimmigrants. (See § 655.736(d)(6).)

10. Section 655.731 is revised to read as follows:

§ 655.731 What is the first LCA requirement, regarding wages?

An employer seeking to employ H–1B nonimmigrants in a specialty occupation or as a fashion model of distinguished merit and ability shall state on Form ETA 9035 that it will pay the H–1B nonimmigrant the required wage rate.

(a) *Establishing the wage requirement.* The first LCA requirement shall be satisfied when the employer signs Form ETA 9035 attesting that, for the entire period of authorized employment, the required wage rate will be paid to the H–1B nonimmigrant(s); that is, that the wage shall be the greater of the actual wage rate (as specified in paragraph (a)(1) of this section) or the prevailing wage (as specified in paragraph (a)(2) of this section). The wage requirement includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for services to H–1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(1) The *actual wage* is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. ''Legitimate business factors,'' for purposes of this section, means those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards. Where there are other employees with substantially similar experience and qualifications in the specific employment in question—*i.e.,* they have substantially the same duties and responsibilities as the H–1B nonimmigrant—the actual wage shall be the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H–1B nonimmigrant by the employer. Where the employer's pay system or scale provides for adjustments during the period of the LCA—*e.g.,* cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation—such adjustments shall be provided to similarly employed H–1B nonimmigrants (unless the prevailing wage is higher than the actual wage).

(2) The *prevailing wage* for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information as of the time of filing the application. Except as provided in paragraph (a)(3) of this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a SESA, an independent authoritative source, or other legitimate sources of data. One of the following sources shall be used to establish the prevailing wage:

(i) A wage determination for the occupation and area issued under one of the following statutes (which shall be available through the SESA):

(A) The Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see also 29 CFR part 1), or

(B) The McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (SCA) (see also 29 CFR part 4). The following provisions apply to the use of the SCA wage rate as the prevailing wage:

(*1*) Where an SCA wage determination for an occupational classification in the computer industry states a rate of $27.63, that rate will not be issued by the SESA and may not be used by the employer as the prevailing wage; that rate does not represent the actual prevailing wage but, instead, is reported by the Wage and Hour Division in the SCA determination merely as an artificial ''cap'' in the SCA-required wage that results from an SCA exemption provision (see 41 U.S.C. 357(b); 29 CFR 541.3). In such circumstances, the SESA and the employer must consult another source for wage information (*e.g.,* Bureau of Labor Statistics' Occupational Employment Statistics Survey).

(*2*) Except as provided in paragraph (a)(2)(i)(B)(*1*) of this section, for purposes of the determination of the H–1B prevailing wage for an occupational classification through the use of an SCA wage determination, it is irrelevant whether a worker is employed on a contract subject to the SCA or whether the worker would be exempt from the SCA through application of the SCA/FLSA ''professional employee'' exemption test (*i.e.,* duties and compensation; see 29 CFR 4.156; 541.3). Thus, in issuing the SCA wage rate as the prevailing wage determination for the occupational classification, the SESA will not consider questions of employee exemption, and in an enforcement action, the Department will consider the SCA wage rate to be the prevailing wage without regard to whether any particular H–1B employee(s) could be exempt from that wage as SCA contract workers under the SCA/FLSA exemption. An employer who employs H–1B employee(s) to perform services under an SCA-covered contract may find that the H–1B employees are required to be paid the SCA rate as the H–1B prevailing wage even though non-H–1B employees

performing the same services may be exempt from the SCA.

(ii) A union contract which was negotiated at arms-length between a union and the employer, which contains a wage rate applicable to the occupation; or

(iii) If the job opportunity is in an occupation which is not covered by paragraph (a)(2)(i) or (ii) of this section, the prevailing wage shall be the weighted average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wages paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within five percent of the average rate of wages. See paragraph (c) of this section, regarding payment of required wages. See also paragraph (d)(4) of this section, regarding enforcement. The prevailing wage rate under this paragraph (a)(2)(iii) shall be based on the best information available. The Department believes that the following prevailing wage sources are, in order of priority, the most accurate and reliable:

(A) *A SESA Determination.* Upon receipt of a written request for a prevailing wage determination, the SESA will determine whether the occupation is covered by a Davis-Bacon or Service Contract Act wage determination, and, if not, whether it has on file current prevailing wage information for the occupation. This information will be provided by the SESA to the employer in writing in a timely manner. Where the prevailing wage is not immediately available, the SESA will determine the prevailing wage using the methods outlined at 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The SESA shall specify the validity period of the prevailing wage, which shall in no event be for less than 90 days or more than one year from the date of the SESA's issuance of the determination.

(*1*) An employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application within the validity period of the prevailing wage as specified on the determination. Once an employer obtains a prevailing wage determination from the SESA and files an LCA supported by that prevailing wage determination, the employer is deemed to have accepted the prevailing wage determination (as to the amount of the wage) and thereafter may not contest the legitimacy of the prevailing wage determination through the Employment Service complaint system or in an investigation or enforcement action. Prior to filing the LCA, the employer may challenge a SESA prevailing wage determination through the Employment Service complaint system, by filing a complaint with the SESA. See subpart E of 20 CFR part 658. Employers which challenge a SESA prevailing wage determination must obtain a final ruling from the Employment Service complaint system prior to filing an LCA based on such determination. In any challenge, the SESA shall not divulge any employer wage data which was collected under the promise of confidentiality.

(*2*) If the employer is unable to wait for the SESA to produce the requested prevailing wage determination for the occupation in question, or for the Employment Service complaint system process to be completed, the employer may rely on other legitimate sources of available wage information in filing the LCA, as set forth in paragraph (a)(2)(iii)(B) and (C) of this section. If the employer later discovers, upon receipt of a prevailing wage determination from the SESA, that the information relied upon produced a wage that was below the prevailing wage for the occupation in the area of intended employment and the employer was paying below the SESA-determined wage, no wage violation will be found if the employer retroactively compensates the H–1B nonimmigrant(s) for the difference between the wage paid and the prevailing wage, within 30 days of the employer's receipt of the SESA determination.

(*3*) In all situations where the employer obtains the prevailing wage determination from the SESA, the Department will accept that prevailing wage determination as correct (as to the amount of the wage) and will not question its validity where the employer has maintained a copy of the SESA prevailing wage determination. A complaint alleging inaccuracy of a SESA prevailing wage determination, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of a SESA prevailing wage determination. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

(C) *Another legitimate source of wage information.* The employer may rely on other legitimate sources of wage data to obtain the prevailing wage. The other legitimate source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(C) of this section. The employer will be required to demonstrate the legitimacy of the wage in the event of an investigation.

(iv) For purposes of this section, ''similarly employed'' means ''having substantially comparable jobs in the occupational classification in the area of intended employment,'' except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, ''similarly employed'' means:

(A) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(B) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(v) A prevailing wage determination for LCA purposes made pursuant to this section shall not permit an employer to pay a wage lower than that required under any other applicable Federal, State or local law.

(vi) Where a range of wages is paid by the employer to individuals in an occupational classification or among individuals with similar experience and qualifications for the specific employment in question, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.

(vii) The employer shall enter the prevailing wage on the LCA in the form in which the employer will pay the wage (*i.e.,* either a salary or an hourly rate), except that in all cases the prevailing wage must be expressed as an hourly wage if the H–1B nonimmigrant will be employed part-time. Where an employer obtains a prevailing wage determination (from any of the sources identified in paragraph (a)(2)(i) through (iii) of this section) that is expressed as an hourly rate, the employer may convert this determination to a salary by multiplying the hourly rate by 2080. Conversely, where an employer obtains a prevailing wage (from any of these sources) that is expressed as a salary, the employer may convert this determination to an hourly rate by dividing the salary by 2080.

(viii) In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment in the case of an employee of an institution of higher education or an affiliated or related nonprofit entity , a nonprofit research

organization, or a Governmental research organization as these terms are defined in 20 CFR 656.40(c), the prevailing wage level shall only take into account employees at such institutions and organizations in the area of intended employment.

(ix) An employer may file more than one LCA for the same occupational classification in the same area of employment and, in such circumstances, the employer could have H–1B employees in the same occupational classification in the same area of employment, brought into the U.S. (or accorded H–1B status) based on petitions approved pursuant to different LCAs (filed at different times) with different prevailing wage determinations. Employers are advised that the prevailing wage rate as to any particular H–1B nonimmigrant is prescribed by the LCA which supports that nonimmigrant's H–1B petition. The employer is required to obtain the prevailing wage at the time that the LCA is filed (see paragraph (a)(2) of this section). The LCA is valid for the period certified by ETA, and the employer must satisfy all the LCA's requirements (including the required wage which encompasses both prevailing and actual wage rates) for as long as any H–1B nonimmigrants are employed pursuant to that LCA (§ 655.750). Where new nonimmigrants are employed pursuant to a new LCA, that new LCA prescribes the employer's obligations as to those new nonimmigrants. The prevailing wage determination on the later/subsequent LCA does not ''relate back'' to operate as an ''update'' of the prevailing wage for the previously-filed LCA for the same occupational classification in the same area of employment. However, employers are cautioned that the actual wage component to the required wage may, as a practical matter, eliminate any wage-payment differentiation among H–1B employees based on different prevailing wage rates stated in applicable LCAs. Every H–1B nonimmigrant is to be paid in accordance with the employer's actual wage system, and thus to receive any pay increases which that system provides.

(3) Once the prevailing wage rate is established, the H–1B employer then shall compare this wage with the actual wage rate for the specific employment in question at the place of employment and must pay the H–1B nonimmigrant at least the higher of the two wages.

(b) *Documentation of the wage statement.* (1) The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the wage statement required in paragraph (a) of this section and attested to on Form ETA 9035. The documentation shall be made available to DOL upon request. Documentation shall also be made available for public examination to the extent required by § 655.760. The employer shall also document that the wage rate(s) paid to H–1B nonimmigrant(s) is(are) no less than the required wage rate(s). The documentation shall include information about the employer's wage rate(s) for all other employees for the specific employment in question at the place of employment, beginning with the date the labor condition application was submitted and continuing throughout the period of employment. The records shall be retained for the period of time specified in § 655.760. The payroll records for each such employee shall include:

(i) Employee's full name;

(ii) Employee's home address;

(iii) Employee's occupation;

(iv) Employee's rate of pay;

(v) Hours worked each day and each week by the employee if:

(A) The employee is paid on other than a salary basis (*e.g.,* hourly, piece-rate; commission); or

(B) With respect only to H–1B nonimmigrants, the worker is a part-time employee (whether paid a salary or an hourly rate).

(vi) Total additions to or deductions from pay each pay period, by employee; and

(vii) Total wages paid each pay period, date of pay and pay period covered by the payment, by employee.

(viii) Documentation of offer of benefits and eligibility for benefits provided as compensation for services on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers (see paragraph (c)(3) of this section):

(A) A copy of any document(s) provided to employees describing the benefits that are offered to employees, the eligibility and participation rules, how costs are shared, etc. (*e.g.,* summary plan descriptions, employee handbooks, any special or employee-specific notices that might be sent);

(B) A copy of all benefit plans or other documentation describing benefit plans and any rules the employer may have for differentiating benefits among groups of workers;

(C) Evidence as to what benefits are actually provided to U.S. workers and H–1B nonimmigrants, including evidence of the benefits selected or declined by employees where employees are given a choice of benefits;

(D) For multinational employers who choose to provide H–1B nonimmigrants with ''home country'' benefits, evidence of the benefits provided to the nonimmigrant before and after he/she went to the United States. See paragraph (c)(3)(iii)(C) of this section.

(2) *Actual wage.* In addition to payroll data required by paragraph (b)(1) of this section (and also by the Fair Labor Standards Act), the employer shall retain documentation specifying the basis it used to establish the actual wage. The employer shall show how the wage set for the H–1B nonimmigrant relates to the wages paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question at the place of employment. Where adjustments are made in the employer's pay system or scale during the validity period of the LCA, the employer shall retain documentation explaining the change and clearly showing that, after such adjustments, the wages paid to the H–1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation and area of intended employment.

(3) *Prevailing wage.* The employer also shall retain documentation regarding its determination of the prevailing wage. This source documentation shall not be submitted to ETA with the labor condition application, but shall be retained at the employer's place of business for the length of time required in § 655.760(c). Such documentation shall consist of the documentation described in paragraph (b)(3)(i), (ii), or (iii) of this section and the documentation described in paragraph (b)(1) of this section.

(i) If the employer used a wage determination issued pursuant to the provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (*see* 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (*see* 29 CFR part 4), the documentation shall include a copy of the determination showing the wage rate for the occupation in the area of intended employment.

(ii) If the employer used an applicable wage rate from a union contract which was negotiated at arms-length between a union and the employer, the documentation shall include an excerpt from the union contract showing the wage rate(s) for the occupation.

(iii) If the employer did not use a wage covered by the provisions of paragraph (b)(3)(i) or (b)(3)(ii) of this section, the employer's documentation shall consist of:

(A) A copy of the prevailing wage finding from the SESA for the

occupation within the area of intended employment; or

(B) A copy of the prevailing wage survey for the occupation within the area of intended employment published by an independent authoritative source. For purposes of this paragraph (b)(3)(iii)(B), a prevailing wage survey for the occupation in the area of intended employment published by an independent authoritative source shall mean a survey of wages published in a book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's application. Such survey shall:

(*1*) Reflect the weighted average wage paid to workers similarly employed in the area of intended employment;

(*2*) Be based upon recently collected data—*e.g.,* within the 24-month period immediately preceding the date of publication of the survey; and

(*3*) Represent the latest published prevailing wage finding by the independent authoritative source for the occupation in the area of intended employment; or

(C) A copy of the prevailing wage survey or other source data acquired from another legitimate source of wage information that was used to make the prevailing wage determination. For purposes of this paragraph (b)(3)(iii)(C), a prevailing wage provided by another legitimate source of such wage information shall be one which:

(*1*) Reflects the weighted average wage paid to workers similarly employed in the area of intended employment;

(*2*) Is based on the most recent and accurate information available; and

(*3*) Is reasonable and consistent with recognized standards and principles in producing a prevailing wage.

(c) *Satisfaction of required wage obligation.* (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.

(2) ''Cash wages paid,'' for purposes of satisfying the H–1B required wage, shall consist only of those payments that meet all the following criteria:

(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;

(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, *et seq.*);

(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, *et seq.* (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid *except that* when the H–1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (*i.e.,* an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.

(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

(v) Future bonuses and similar compensation (*i.e.,* unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (*i.e.,* they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (*i.e.,* recorded and reported as ''earnings'' with appropriate taxes and FICA contributions withheld and paid).

(3) *Benefits and eligibility for benefits* provided as compensation for services (*e.g.,* cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H–1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(i) For purposes of this section, the offer of benefits ''on the same basis, and in accordance with the same criteria'' means that the employer shall offer H–1B nonimmigrants the same benefit package as it offers to U.S. workers, and may not provide more strict eligibility or participation requirements for the H–1B nonimmigrant(s) than for similarly employed U.S. workers(s) (*e.g.,* full-time workers compared to full-time workers; professional staff compared to professional staff). H–1B nonimmigrants are not to be denied benefits on the basis that they are ''temporary employees'' by virtue of their nonimmigrant status. An employer may offer greater or additional benefits to the H–1B nonimmigrant(s) than are offered to similarly employed U.S. worker(s), *provided* that such differing treatment is consistent with the requirements of all applicable nondiscrimination laws (*e.g.,* Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e–2000e17). Offers of benefits by employers shall be made in good faith and shall result in the H–1B nonimmigrant(s)'s actual receipt of the benefits that are offered by the employer and elected by the H–1B nonimmigrant(s).

(ii) The benefits received by the H–1B nonimmigrant(s) need not be identical to the benefits received by similarly employed U.S. workers(s), *provided that* the H–1B nonimmigrant is offered the same benefits package as those workers but voluntarily chooses to receive different benefits (*e.g.,* elects to receive cash payment rather than stock option, elects not to receive health insurance because of required employee contributions, or elects to receive different benefits among an array of benefits) or, in those instances where the employer is part of a multinational corporate operation, the benefits received by the H–1B nonimmigrant are provided in accordance with an employer's practice that satisfies the requirements of paragraph (c)(3)(iii)(B) or (C) of this section. In all cases, however, an employer's practice must comply with the requirements of any applicable nondiscrimination laws (*e.g.,* Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e–2000e17).

(iii) If the employer is part of a multinational corporate operation (*i.e.,* operates in affiliation with business entities in other countries, whether as subsidiaries or in some other arrangement), the following three options (*i.e.,* (A), (B) or (C)) are available to the employer with respect to H–1B nonimmigrants who remain on the ''home country'' payroll.

(A) The employer may offer the H–1B nonimmigrant(s) benefits in accordance with paragraphs (c)(3)(i) and (ii) of this section.

(B) Where an H–1B nonimmigrant is in the U.S. for no more than 90 consecutive calendar days, the employer during that period may maintain the H–

1B nonimmigrant on the benefits provided to the nonimmigrant in his/her permanent work station (ordinarily the home country), and not offer the nonimmigrant the benefits that are offered to similarly employed U.S. workers, *provided that* the employer affords reciprocal benefits treatment for any U.S. workers (*i.e.,* allows its U.S. employees, while working out of the country on a temporary basis away from their permanent work stations in the United States, or while working in the United States on a temporary basis away from their permanent work stations in another country, to continue to receive the benefits provided them at their permanent work stations). Employers are cautioned that this provision is available only if the employer's practices do not constitute an evasion of the benefit requirements, such as where the H–1B nonimmigrant remains in the United States for most of the year, but briefly returns to the ''home country'' before any 90-day period would expire.

(C) Where an H–1B nonimmigrant is in the U.S. for more than 90 consecutive calendar days (or from the point where the worker is transferred to the U.S. or it is anticipated that the worker will likely remain in the U.S. more than 90 consecutive days), the employer may maintain the H–1B nonimmigrant on the benefits provided in his/her home country (*i.e.,* ''home country benefits'') (and not offer the nonimmigrant the benefits that are offered to similarly employed U.S. workers) *provided that* all of the following criteria are satisfied:

(*1*) The H–1B nonimmigrant continues to be employed in his/her home country (either with the H–1B employer or with a corporate affiliate of the employer);

(*2*) The H–1B nonimmigrant is enrolled in benefits in his/her home country (in accordance with any applicable eligibility standards for such benefits);

(*3*) The benefits provided in his/her home country are equivalent to, or equitably comparable to, the benefits offered to similarly employed U.S. workers (*i.e.,* are no less advantageous to the nonimmigrant);

(*4*) The employer affords reciprocal benefits treatment for any U.S. workers while they are working out of the country, away from their permanent work stations (whether in the United States or abroad), on a temporary basis (*i.e.,* maintains such U.S. workers on the benefits they received at their permanent work stations);

(*5*) If the employer offers health benefits to its U.S. workers, the employer offers the same plan on the same basis to its H–1B nonimmigrants in the United States where the employer does not provide the H–1B nonimmigrant with health benefits in the home country, or the employer's home-country health plan does not provide full coverage (*i.e.,* coverage comparable to what he/she would receive at the home work station) for medical treatment in the United States; and

(*6*) *the* employer offers H–1B nonimmigrants who are in the United States more than 90 continuous days those U.S. benefits which are paid directly to the worker (*e.g.,* paid vacation, paid holidays, and bonuses).

(iv) Benefits provided as compensation for services may be credited toward the satisfaction of the employer's required wage obligation only if the requirements of paragraph (c)(2) of this section are met (*e.g.,* recorded and reported as ''earnings'' with appropriate taxes and FICA contributions withheld and paid).

(4) For *salaried employees*, wages will be due in prorated installments (*e.g.,* annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly *except that,* in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (*e.g.,* a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period. An employer that is a school or other educational institution may apply an established salary practice under which the employer pays to H–1B nonimmigrants and U.S. workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, *provided that* the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment and the application of the salary practice to the nonimmigrant does not otherwise cause him/her to violate any condition of his/her authorization under the INA to remain in the U.S.

(5) For *hourly-wage employees*, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (*e.g.,* weekly) but in no event less frequently than monthly.

(6) Subject to the standards specified in paragraph (c)(7) of this section (regarding nonproductive status), an H–1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant ''enters into employment'' with the employer.

(i) For purposes of this paragraph (c)(6), the H–1B nonimmigrant is considered to ''enter into employment'' when he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.

(ii) Even if the H–1B nonimmigrant has not yet ''entered into employment'' with the employer (as described in paragraph (c)(6)(i) of this section), the employer that has had an LCA certified and an H–1B petition approved for the H–1B nonimmigrant shall pay the nonimmigrant the required wage beginning 30 days after the date the nonimmigrant first is admitted into the U.S. pursuant to the petition, or, if the nonimmigrant is present in the United States on the date of the approval of the petition, beginning 60 days after the date the nonimmigrant becomes eligible to work for the employer. For purposes of this latter requirement, the H–1B nonimmigrant is considered to be eligible to work for the employer upon the date of need set forth on the approved H–1B petition filed by the employer, or the date of adjustment of the nonimmigrant's status by INS, whichever is later. Matters such as the worker's obtaining a State license would not be relevant to this determination.

(7) *Wage obligation(s) for H–1B nonimmigrant in nonproductive status.*

(i) *Circumstances where wages must be paid.* If the H–1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (*e.g.,* because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA. If the employer's LCA carries a

designation of ''part-time employment,'' the employer is required to pay the nonproductive employee for at least the number of hours indicated on the I–129 petition filed by the employer with the INS and incorporated by reference on the LCA. If the I–129 indicates a range of hours for part-time employment, the employer is required to pay the nonproductive employee for at least the average number of hours normally worked by the H–1B nonimmigrant, provided that such average is within the range indicated; in no event shall the employee be paid for fewer than the minimum number of hours indicated for the range of part-time employment. In all cases the H–1B nonimmigrant must be paid the required wage for all hours performing work within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

(ii) *Circumstances where wages need not be paid.* If an H–1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (*e.g.,* touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (*e.g.,* maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period, *provided that* such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*). Payment need not be made if there has been a *bona fide* termination of the employment relationship. INS regulations require the employer to notify the INS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

(8) If the employee works in an occupation other than that identified on the employer's LCA, the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working.

(9) ''Authorized deductions,'' for purposes of the employer's satisfaction of the H–1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (*i.e.,* paragraph (c)(9)(i), (ii), or (iii))—

(i) Deduction which is required by law (*e.g.,* income tax; FICA); or

(ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (*e.g.,* union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.), except that* the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H–1B program functions which are required to be performed by the employer, *e.g.,* preparation and filing of LCA and H–1B petition); the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H–1B nonimmigrants (where there are U.S. workers); or

(iii) Deduction which meets the following requirements:

(A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);

(B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this ''benefit of employee'' standard, unless the employee is in travel status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (*e.g.,* employee living at worksite in ''on call'' status));

(C) Is not a recoupment of the employer's business expense (*e.g.,* tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H–1B program functions which are required to be performed by the employer (*e.g.,* preparation and filing of LCA and H–1B petition)). (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker's home country shall not be considered a business expense.);

(D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value); and

(E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25 percent of an employee's disposable earnings for a workweek.

(10) A deduction from or reduction in the payment of the required wage is not authorized (and is therefore prohibited) for the following purposes (*i.e.,* paragraphs (c)(10) (i) and (ii)):

(i) A penalty paid by the H–1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.

(A) The employer is not permitted to require (directly or indirectly) that the nonimmigrant pay a penalty for ceasing employment with the employer prior to an agreed date. Therefore, the employer shall not make any deduction from or reduction in the payment of the required wage to collect such a penalty.

(B) The employer is permitted to receive *bona fide* liquidated damages from the H–1B nonimmigrant who ceases employment with the employer prior to an agreed date. However, the requirements of paragraph (c)(9)(iii) of this section must be fully satisfied, if such damages are to be received by the employer via deduction from or reduction in the payment of the required wage.

(C) The distinction between liquidated damages (which are permissible) and a penalty (which is prohibited) is to be made on the basis of the applicable State law. In general, the laws of the various States recognize that *liquidated damages* are amounts which are fixed or stipulated by the parties at the inception of the contract, and which are reasonable approximations or estimates of the anticipated or actual damage caused to one party by the other party's breach of the contract. On the other hand, the laws of the various States, in general, consider that penalties are amounts which (although fixed or stipulated in the contract by the parties) are not reasonable approximations or estimates of such damage. The laws of the various States, in general, require that the relation or circumstances of the parties,

and the purpose(s) of the agreement, are to be taken into account, so that, for example, an agreement to a payment would be considered to be a prohibited penalty where it is the result of fraud or where it cloaks oppression. Furthermore, as a general matter, the sum stipulated must take into account whether the contract breach is total or partial (*i.e.,* the percentage of the employment contract completed). (*See, e.g., Vanderbilt University* v. *DiNardo*, 174 F.3d 751 (6th Cir. 1999) (applying Tennessee law); *Overholt Crop Insurance Service Co.* v. *Travis,* 941 F.2d 1361 (8th Cir. 1991) (applying Minnesota and South Dakota law); *BDO Seidman* v. *Hirshberg*, 712 N.E.2d 1220 (N.Y. 1999); *Guiliano* v. *Cleo, Inc.,* 995 S.W.2d 88 (Tenn. 1999); *Wojtowicz* v. *Greeley Anesthesia Services, P.C.,* 961 P.2d 520 (Colo.Ct.App. 1998); *see generally,* Restatement (Second) Contracts § 356 (comment b); 22 Am.Jur.2d Damages §§ 683, 686, 690, 693, 703). In an enforcement proceeding under subpart I of this part, the Administrator shall determine, applying relevant State law (including consideration where appropriate to actions by the employer, if any, contributing to the early cessation, such as the employer's constructive discharge of the nonimmigrant or non-compliance with its obligations under the INA and its regulations) whether the payment in question constitutes liquidated damages or a penalty. (Note to paragraph (c)(10)(i)(C): The $500/$1,000 filing fee under section 214(c)(1) of the INA can never be included in any liquidated damages received by the employer. *See* paragraph (c)(10)(ii), which follows.)

(ii) *A rebate of the $500/$1,000 filing fee paid by the employer under Section 214(c)(1) of the INA.* The employer may not receive, and the H–1B nonimmigrant may not pay, any part of the $500 additional filing fee (for a petition filed prior to December 18, 2000) or $1,000 additional filing fee (for a petition filed on or subsequent to December 18, 2000), whether directly or indirectly, voluntarily or involuntarily. Thus, no deduction from or reduction in wages for purposes of a rebate of any part of this fee is permitted. Further, if liquidated damages are received by the employer from the H–1B nonimmigrant upon the nonimmigrant's ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer, such liquidated damages shall not include any part of the $500/$1,000 filing fee (*see* paragraph (c)(10)(i) of this section). If the filing fee is paid by a third party and the H–1B nonimmigrant reimburses all or part of the fee to such third party, the employer shall be considered to be in violation of this prohibition since the employer would in such circumstances have been spared the expense of the fee which the H–1B nonimmigrant paid.

(11) Any unauthorized deduction taken from wages is considered by the Department to be non-payment of that amount of wages, and in the event of an investigation, will result in back wage assessment (plus civil money penalties and/or disqualification from H–1B and other immigration programs, if willful).

(12) Where the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expenses(s), the Department will consider the amount to be an unauthorized deduction from wages even if the matter is not shown in the employer's payroll records as a deduction.

(13) Where the employer makes deduction(s) for repayment of loan(s) or wage advance(s) made to the employee, the Department, in the event of an investigation, will require the employer to establish the legitimacy and purpose(s) of the loan(s) or wage advance(s), with reference to the standards set out in paragraph (c)(9)(iii) of this section.

(d) *Enforcement actions.* (1) In the event of an investigation pursuant to subpart I of this part, concerning a failure to meet the ''prevailing wage'' condition or a material misrepresentation by the employer regarding the payment of the required wage, the Administrator shall determine whether the employer has the documentation required in paragraph (b)(3) of this section, and whether the documentation supports the employer's wage attestation. Where the documentation is either nonexistent or insufficient to determine the prevailing wage (e.g., does not meet the criteria specified in this section, in which case the Administrator may find a violation of paragraph (b)(1), (2), or (3), of this section); or where, based on significant evidence regarding wages paid for the occupation in the area of intended employment, the Administrator has reason to believe that the prevailing wage finding obtained from an independent authoritative source or another legitimate source varies substantially from the wage prevailing for the occupation in the area of intended employment; or where the employer has been unable to demonstrate that the prevailing wage determined by another legitimate source is in accordance with the regulatory criteria, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed. The 30-day investigatory period shall be suspended while ETA makes the prevailing wage determination and, in the event that the employer timely challenges the determination through the Employment Service complaint system (see paragraph (d)(2), which follows), shall be suspended until the Employment Service complaint system process is completed and the Administrator's investigation can be resumed.

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, the employer may challenge the ETA prevailing wage only through the Employment Service complaint system. (See 20 CFR part 658, subpart E.) Notwithstanding the provisions of 20 CFR 658.421 and 658.426, the appeal shall be initiated at the ETA regional office which services the State in which the place of employment is located (see § 655.721 for the ETA regional offices and their jurisdictions). Such challenge shall be initiated within 10 days after the employer receives ETA's prevailing wage determination from the Administrator. In any challenge to the wage determination, neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where the employer timely challenges an ETA prevailing wage determination obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling from the Employment Service complaint system. Upon such final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's prevailing wage determination serving as the conclusive determination for all purposes.

(ii) Where the employer does not challenge ETA's prevailing wage determination obtained by the Administrator, such determination shall be deemed to have been accepted by the employer as accurate and appropriate (as to the amount of the wage) and thereafter shall not be subject to challenge in a hearing pursuant to § 655.835.

(3) For purposes of this paragraph (d), ETA may consult with the appropriate SESA to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

(4) No prevailing wage violation will be found if the employer paid a wage that is equal to, or more than 95 percent of, the prevailing wage as required by paragraph (a)(2)(iii) of this section. If the employer paid a wage that is less than 95 percent of the prevailing wage, the employer will be required to pay 100 percent of the prevailing wage.

11. Section 655.732 is revised to read as follows:

§ 655.732 What is the second LCA requirement, regarding working conditions?

An employer seeking to employ H–1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability shall state on Form ETA 9035 that the employment of H–1B nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment.

(a) *Establishing the working conditions requirement.* The second LCA requirement shall be satisfied when the employer affords working conditions to its H–1B nonimmigrant employees on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees. Working conditions include matters such as hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules. The employer's obligation regarding working conditions shall extend for the longer of two periods: the validity period of the certified LCA, or the period during which the H–1B nonimmigrant(s) is(are) employed by the employer.

(b) *Documentation of the working condition statement.* In the event of an enforcement action pursuant to subpart I of this part, the employer shall produce documentation to show that it has afforded its H–1B nonimmigrant employees working conditions on the same basis and in accordance with the same criteria as it affords its U.S. worker employees who are similarly employed.

12. The title to § 655.733 is revised to read as follows:

§ 655.733 What is the third LCA requirement, regarding strikes and lockouts?

13. Section 655.734 is amended by revising the title and by revising paragraphs (a) (l) (ii) and (a) (2) and by adding paragraph (a)(3), to read as follows:

§ 655.734 What is the fourth LCA requirement, regarding notice?

* * * * *

(a) * * *

(1) * * *

(i) * * *

(ii) Where there is no collective bargaining representative, the employer shall, on or within 30 days before the date the LCA is filed with ETA, provide a notice of the filing of the LCA. The notice shall indicate that H–1B nonimmigrants are sought; the number of such nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the location(s) at which the H–1B nonimmigrants will be employed; and that the LCA is available for public inspection at the H–1B employer's principal place of business in the U.S. or at the worksite. The notice shall also include the statement: ''Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor.'' If the employer is an H–1B-dependent employer or a willful violator, and the LCA is not being used only for exempt H–1B nonimmigrants, the notice shall also set forth the nondisplacement and recruitment obligations to which the employer has attested, and shall include the following additional statement: ''Complaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street & Constitution Avenue, NW., Washington, DC 20530.'' The notice shall be provided in one of the two following manners:

(A) *Hard copy notice,* by posting a notice in at least two conspicuous locations at each place of employment where any H–1B nonimmigrant will be employed (whether such place of employment is owned or operated by the employer or by some other person or entity).

(1) The notice shall be of sufficient size and visibility, and shall be posted in two or more conspicuous places so that workers in the occupational classification at the place(s) of employment can easily see and read the posted notice(s).

(2) Appropriate locations for posting the notices include, but are not limited to, locations in the immediate proximity of wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a).

(3) The notices shall be posted on or within 30 days before the date the labor condition application is filed and shall remain posted for a total of 10 days.

(B) *Electronic notice,* by providing electronic notification to employees in the occupational classification (including both employees of the H–1B employer and employees of another person or entity which owns or operates the place of employment) for which H–1B nonimmigrants are sought, at each place of employment where any H–1B nonimmigrant will be employed. Such notification shall be given on or within 30 days before the date the labor condition application is filed, and shall be available to the affected employees for a total of 10 days, except that if employees are provided individual, direct notice (as by e-mail), notification only need be given once during the required time period. Notification shall be readily available to the affected employees. An employer may accomplish this by any means it ordinarily uses to communicate with its workers about job vacancies or promotion opportunities, including through its ''home page'' or ''electronic bulletin board'' to employees who have, as a practical matter, direct access to these resources; or through e-mail or an actively circulated electronic message such as the employer's newsletter. Where affected employees at the place of employment are not on the ''intranet'' which provides direct access to the home page or other electronic site but do have computer access readily available, the employer may provide notice to such workers by direct electronic communication such as e-mail (*i.e.,* a single, personal e-mail message to each such employee) or by arranging to have the notice appear for 10 days on an intranet which includes the affected employees (*e.g.,* contractor arranges to have notice on customer's intranet accessible to affected employees). Where employees lack practical computer access, a hard copy must be posted in accordance with paragraph (a)(1)(ii)(A) of this section, or the employer may provide employees individual copies of the notice.

(2) Where the employer places any H–1B nonimmigrant(s) at one or more worksites not contemplated at the time of filing the application, but which are within the area of intended employment listed on the LCA, the employer is required to post electronic or hard-copy notice(s) at such worksite(s), in the manner described in paragraph (a)(1) of this section, on or before the date any H–1B nonimmigrant begins work.

(3) The employer shall, no later than the date the H–1B nonimmigrant reports to work at the place of employment, provide the H–1B nonimmigrant with a copy of the LCA (Form ETA 9035) certified by the Department. Upon request, the employer shall provide the H–1B nonimmigrant with a copy of the cover pages, Form ETA 9035CP.

* * * * *

14. Section 655.735 is revised to read as follows:

§ 655.735 What are the special provisions for short-term placement of H–1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on the LCA?

(a) Subject to the conditions specified in this section, an employer may make short-term placements or assignments of H–1B nonimmigrant(s) at worksite(s) (place(s) of employment) in areas not listed on the employer's approved LCA(s) without filing new labor condition application(s) for such area(s).

(b) The following conditions must be fully satisfied by an employer during all short-term placement(s) or assignment(s) of H–1B nonimmigrant(s) at worksite(s) (place(s) of employment) in areas not listed on the employer's approved LCA(s):

(1) The employer has fully satisfied the requirements of §§ 655.730 through 655.734 with regard to worksite(s) located within the area(s) of intended employment listed on the employer's LCA(s).

(2) The employer shall not place, assign, lease, or otherwise contract out any H–1B nonimmigrant(s) to any worksite where there is a strike or lockout in the course of a labor dispute in the same occupational classification(s) as that of the H–1B nonimmigrant(s).

(3) For every day the H–1B nonimmigrant(s) is placed or assigned outside the area(s) of employment listed on the approved LCA(s) for such worker(s), the employer shall:

(i) Continue to pay such worker(s) the required wage (based on the prevailing wage at such worker's(s') permanent worksite, or the employer's actual wage, whichever is higher);

(ii) Pay such worker(s) the actual cost of lodging (for both workdays and non-workdays); and

(iii) Pay such worker(s) the actual cost of travel, meals and incidental or miscellaneous expenses (for both workdays and non-workdays).

(c) An employer's short-term placement(s) or assignment(s) of H–1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's approved LCA(s) shall not exceed a total of 30 workdays in a one-year period for any H–1B nonimmigrant at any worksite or combination of worksites in the area, *except that* such placement or assignment of an H–1B nonimmigrant may be for longer than 30 workdays but for no more than a total of 60 workdays in a one-year period where the employer is able to show the following:

(1) The H–1B nonimmigrant continues to maintain an office or work station at his/her permanent worksite (*e.g.,* the worker has a dedicated workstation and telephone line(s) at the permanent worksite);

(2) The H–1B nonimmigrant spends a substantial amount of time at the permanent worksite in a one-year period; and

(3) The H–1B nonimmigrant's U.S. residence or place of abode is located in the area of the permanent worksite and not in the area of the short-term worksite(s) (*e.g.,* the worker's personal mailing address; the worker's lease for an apartment or other home; the worker's bank accounts; the worker's automobile driver's license; the residence of the worker's dependents).

(d) For purposes of this section, the term *workday* shall mean any day on which an H–1B nonimmigrant performs any work at any worksite(s) within the area of short-term placement or assignment. For example, three workdays would be counted where a nonimmigrant works three non-consecutive days at three different worksites (whether or not the employer owns or controls such worksite(s)), within the same area of employment. Further, for purposes of this section, the term *one-year period* shall mean the calendar year (*i.e.,* January 1 through December 31) or the employer's fiscal year, whichever the employer chooses.

(e) The employer may not make short-term placement(s) or assignment(s) of H–1B nonimmigrant(s) under this section at worksite(s) in any area of employment for which the employer has a certified LCA for the occupational classification. Further, an H–1B nonimmigrant entering the U.S. is required to be placed at a worksite in accordance with the approved petition and supporting LCA; thus, the nonimmigrant's initial placement or assignment cannot be a short-term placement under this section. In addition, the employer may not continuously rotate H–1B nonimmigrants on short-term placement or assignment to an area of employment in a manner that would defeat the purpose of the short-term placement option, which is to provide the employer with flexibility in assignments to afford enough time to obtain an approved LCA for an area where it intends to have a continuing presence (*e.g.,* an employer may not rotate H–1B nonimmigrants to an area of employment for 20-day periods, with the result that nonimmigrants are continuously or virtually continuously employed in the area of employment, in order to avoid filing an LCA; such an employer would violate the short-term placement provisions).

(f) Once any H–1B nonimmigrant's short-term placement or assignment has reached the workday limit specified in paragraph (c) of this section in an area of employment, the employer shall take one of the following actions:

(1) File an LCA and obtain ETA certification, and thereafter place any H–1B nonimmigrant(s) in that occupational classification at worksite(s) in that area pursuant to the LCA (*i.e.,* the employer shall perform all actions required in connection with such LCA, including determination of the prevailing wage and notice to workers); or

(2) Immediately terminate the placement of any H–1B nonimmigrant(s) who reaches the workday limit in an area of employment. No worker may exceed the workday limit within the one-year period specified in paragraph (d) of this section, unless the employer first files an LCA for the occupational classification for the area of employment. Employers are cautioned that if any worker exceeds the workday limit within the one-year period, then the employer has violated the terms of its LCA(s) and the regulations in the subpart, and thereafter the short-term placement option cannot be used by the employer for H–1B nonimmigrants in that occupational classification in that area of employment.

(g) An employer is not required to use the short-term placement option provided by this section, but may choose to make each placement or assignment of an H–1B nonimmigrant at worksite(s) in a new area of employment pursuant to a new LCA for such area. Further, an employer which uses the short-term placement option is not required to continue to use the option. Such an employer may, at any time during the period identified in paragraphs (c) and (d) of this section, file an LCA for the new area of employment (performing all actions required in connection with such LCA); upon certification of such LCA, the employer's obligation to comply with this section concerning short-term placement shall terminate. (However, see § 655.731(c)(9)(iii)(C) regarding payment of business expenses for

employee's travel on employer's business.)

15. Section 655.736 is added to read as follows:

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

Two attestation obligations apply only to two types of employers: H–1B-dependent employers (as described in paragraphs (a) through (e) of this section) and employers found to have willfully violated their H–1B obligations within a certain five-year period (as described in paragraph (f) of this section). These obligations apply only to certain labor condition applications filed by such employers (as described in paragraph (g) of this section), and do not apply to LCAs filed by such employers solely for the employment of ''exempt'' H–1B nonimmigrants (as described in paragraph (g) of this section and § 655.737). These obligations require that such employers not displace U.S. workers from jobs (as described in § 655.738) and that such employers recruit U.S. workers before hiring H–1B nonimmigrants (as described in § 655.739).

(a) *What constitutes an ''H–1B-dependent'' employer?*

(1) ''H–1B-dependent employer,'' for purposes of THIS subpart H and subpart I of this part, means an employer that meets one of the three following standards, which are based on the ratio between the employer's total work force employed in the U.S. (including both U.S. workers and H–1B nonimmigrants, and measured according to full-time equivalent employees) and the employer's H–1B nonimmigrant employees (a ''head count'' including both full-time and part-time H–1B employees) —

(i)(A) The employer has 25 or fewer full-time equivalent employees who are employed in the U.S.; and

(B) Employs more than seven H–1B nonimmigrants;

(ii)(A) The employer has at least 26 but not more than 50 full-time equivalent employees who are employed in the U.S.; and

(B) Employs more than 12 H–1B nonimmigrant; or

(iii)(A) The employer has at least 51 full-time equivalent employees who are employed in the U.S.; and

(B) Employs H–1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

(2) *''Full-time equivalent employees'' (FTEs)*, for purposes of paragraph (a) of this section are to be determined according to the following standards:

(i) The determination of FTEs is to include only persons employed by the employer (as defined in § 655.715), and does not include *bona fide* consultants and independent contractors. For purposes of this section, the Department will accept the employer's designation of persons as ''employees,'' provided that such persons are consistently treated as ''employees'' for all purposes including FICA, FLSA, etc.

(ii) The determination of FTEs is to be based on the following records:

(A) To determine the number of employees, the employer's quarterly tax statement (or similar document) is to be used (assuming there is no issue as to whether all employees are listed on the tax statement); and

(B) To determine the number of hours of work by part-time employees, for purposes of aggregating such employees to FTEs, the last payroll (or the payrolls over the previous quarter, if the last payroll is not representative) is to be used, or where hours of work records are not maintained, other available information is to be used to make a reasonable approximation of hours of work (such as a standard work schedule). (But see paragraph (a)(2)(iii)(B)(*1*) of this section regarding the determination of FTEs for part-time employees without a computation of the hours worked by such employees.)

(iii) *The FTEs employed by the employer* means the total of the two numbers yielded by paragraphs (a)(2)(iii)(A) and (B), which follow:

(A) The number of full-time employees. A full-time employee is one who works 40 or more hours per week, unless the employer can show that less than 40 hours per week is full-time employment in its regular course of business (however, in no event would less than 35 hours per week be considered to be full-time employment). Each full-time employee equals one FTE (*e.g.*, 50 full-time employees would yield 50 FTEs). (Note to paragraph (a)(2)(iii)(A): An employee who commonly works more than the number of hours constituting full-time employment cannot be counted as more than one FTE.); plus

(B) The part-time employees aggregated to a number of full-time equivalents, if the employer has part-time employees. For purposes of this determination, a part-time employee is one who regularly works fewer than the number of hours per week which constitutes full-time employment (*e.g.*, employee regularly works 20 hours, where full-time employment is 35 hours per week). The aggregation of part-time employees to FTEs may be performed by either of the following methods (*i.e.*, paragraphs (a)(2)(iii)(B)(*1*) or (*2*)):

(*1*) Each employee working fewer than full-time hours counted as one-half of an FTE, with the total rounded to the next higher whole number (*e.g.*, three employees working fewer than 35 hours per week, where full-time employment is 35 hours, would yield two FTEs (*i.e.*, 1.5 rounded to 2)); or

(*2*) The total number of hours worked by all part-time employees in the representative pay period, divided by the number of hours per week that constitute full-time employment, with the quotient rounded to the nearest whole number (*e.g.*, 72 total hours of work by three part-time employees, divided by 40 (hours per week constituting full-time employment), would yield two FTEs (*i.e.*, 1.8 rounded to 2)).

(iv) *Examples of determinations of FTEs:* Employer A has 100 employees, 70 of whom are full-time (with full-time employment shown to be 44 hours of work per week) and 30 of whom are part-time (with a total of 1004 hours of work by all 30 part-time employees during the representative pay period). Utilizing the method in paragraph (a)(2)(iii)(B)(*1*) of this section, this employer would have 85 FTEs: 70 FTEs for full-time employees, plus 15 FTEs for part-time employees (*i.e.*, each of the 30 part-time employees counted as one-half of a full-time employee, as described in paragraph (a)(2)(iii)(B)(*1*) of this section). (This employer would have 23 FTEs for part-time employees, if these FTEs were computed as described in paragraph (a)(2)(iii)(B)(*2*) of this section: 1004 total hours of work by part-time employees, divided by 44 (full-time employment), yielding 22.8, rounded to 23)). Employer B has 100 employees, 80 of whom are full-time (with full-time employment shown to be 40 hours of work per week) and 20 of whom are part-time (with a total of 630 hours of work by all 30 part-time employees during the representative pay period). This employer would have 90 FTEs: 80 FTEs for full-time employees, plus 10 FTEs for part-time employees (*i.e.*, each of the 20 part-time employees counted as one-half of a full-time employee, as described in paragraph (a)(2)(iii)(B)(*1*) of this section) (This employer would have 16 FTEs for part-time employees, if these FTEs were computed as described in paragraph (a)(2)(iii)(B)(*2*) of this section: 630 total hours of work by part-time employees, divided by 40 (full-time employment), yielding 15.7, rounded to 16)).

(b) *What constitutes an ''employer'' for purposes of determining H–1B-dependency status?* Any group treated

as a single employer under the Internal Revenue Code (IRC) at 26 U.S.C. 414(b), (c), (m) or (o) shall be treated as a single employer for purposes of the determination of H–1B-dependency. Therefore, if an employer satisfies the requirements of the IRC and relevant regulations with respect to the following groups of employees, those employees will be treated as employees of a single employer for purposes of determining whether that employer is an H–1B-dependent employer.

(1) Pursuant to section 414(b) of the IRC and related regulations, all employees ''within a controlled group of corporations'' (within the meaning of section 1563(a) of the IRC, determined without regard to section 1563(a)(4) and (e)(3)(C)), will be treated as employees of a single employer. A *controlled group of corporations* is a parent-subsidiary-controlled group, a brother-sister-controlled group, or a combined group. 26 U.S.C. 1563(a), 26 CFR 1.414(b)–1(a).

(i) A *parent-subsidiary-controlled group* is one or more chains of corporations connected through stock ownership with a common parent corporation where at least 80 percent of the stock (by voting rights or value) of each subsidiary corporation is owned by one or more of the other corporations (either another subsidiary or the parent corporation), and the common parent corporation owns at least 80 percent of the stock of at least one subsidiary.

(ii) A *brother-sister-controlled group* is a group of corporations in which five or fewer persons (individuals, estates, or trusts) own 80 percent or more of the stock of the corporations and certain other ownership criteria are satisfied.

(iii) A *combined group* is a group of three or more corporations, each of which is a member of a parent-subsidiary controlled group or a brother-sister-controlled group and one of which is a common parent corporation of a parent-subsidiary-controlled group and is also included in a brother-sister-controlled group.

(2) Pursuant to section 414(c) of the IRC and related regulations, all employees of trades or businesses (whether or not incorporated) that are under common control are treated as employees of a single employer. 26 U.S.C. 414(c), 26 CFR 1.414(c)–2.

(i) Trades or businesses are under common control if they are included in:

(A) A parent-subsidiary group of trades or businesses;

(B) A brother-sister group of trades or businesses; or

(C) A combined group of trades or businesses.

(ii) Trades or businesses include sole proprietorships, partnerships, estates, trusts or corporations.

(ii) The standards for determining whether trades or businesses are under common control are similar to standards that apply to controlled groups of corporations. However, pursuant to 26 CFR 1.414(c)–2(b)(2), ownership of at least an 80 percent interest in the profits or capital interest of a partnership or the actuarial value of a trust or estate constitutes a controlling interest in a trade or business.

(3) Pursuant to section 414(m) of the IRC and related regulations, all employees of the members of an affiliated service group are treated as employees of a single employer. 26 U.S.C. 414(m).

(i) An *affiliated service group* is, generally, a group consisting of a service organization (the ''first organization''), such as a health care organization, a law firm or an accounting firm, and one or more of the following:

(A) A second service organization that is a shareholder or partner in the first organization and that regularly performs services for the first organization (or is regularly associated with the first organization in performing services for third persons); or

(B) Any other organization if :

(*1*) A significant portion of the second organization's business is the performance of services for the first organization (or an organization described in paragraph (b)(3)(i) of this section or for both) of a type historically performed in such service field by employees, and

(*2*) Ten percent or more of the interest in the second organization is held by persons who are highly compensated employees of the first organization (or an organization described in paragraph (b)(3)(i) of this section).

(ii) [Reserved]

(4) Section 414(o) of the IRC provides that the Department of the Treasury may issue regulations addressing other business arrangements, including employee leasing, in which a group of employees are treated as employed by the same employer. However, the Department of the Treasury has not issued any regulations under this provision. Therefore, that section of the IRC will not be taken into account in determining what groups of employees are considered employees of a single employer for purposes of H–1B dependency determinations, unless regulations are issued by the Treasury Department during the period the dependency provisions of the ACWIA are effective.

(5) The definitions of ''single employer'' set forth in paragraphs (b)(1) through (b)(3) of this section are established by the Internal Revenue Service (IRS) in regulations located at 26 CFR 1.414(b)–1(a), (c)–2 and (m)–5. Guidance on these definitions should be sought from those regulations or from the IRS.

(c) *Which employers are required to make determinations of H–1B-dependency status?* Every employer that intends to file an LCA or to file H–1B petition(s) or request(s) for extension(s) of H–1B status between January 19, 2001 and October 1, 2003 is required to determine whether it is an H–1B-dependent employer or a willful violator which, except as provided in § 655.737, will be subject to the additional obligations for H–1B-dependent employers (see paragraph (g) of this section). During this time period, no H–1B-dependent employer or willful violator may use an LCA filed before January 19, 2001 to support a new H–1B petition or request for an extension of status. Furthermore, on all LCAs filed during this period an employer will be required to attest as to whether it is an H–1B-dependent employer or willful violator. An employer that attests that it is non-H–1B-dependent but does not meet the ''snap shot'' test set forth in paragraph (c)(2) of this section shall make and document a full calculation of its status. However, as explained in paragraphs (c)(1) and (2), which follow, most employers would not be required to make any calculations or to create any documentation as to the determination of H–1B status.

(1) *Employers with readily apparent status concerning H–1B-dependency need not calculate that status.* For most employers, regardless of their size, H–1B-dependency status (*i.e.*, H–1B-dependent or non-H–1B-dependent) is readily apparent and would require no calculations, in that the ratio of H–1B employees to the total workforce is obvious and can easily be compared to the definition of ''H–1B-dependency'' (see definition set out in paragraph (a)(1) of this section).

For example: Employer A with 20 employees, only one of whom is an H–1B non-immigrant, would obviously not be H–1B-dependent and would not need to make calculations to confirm that status. Employer B with 45 employees, 30 of whom are H–1B nonimmigrants, would obviously be H–1B-dependent and would not need to make calculations. Employer C with 500 employees, only 30 of whom are H–1B nonimmigrants, would obviously not be H–1B-dependent and would not need to make calculations. Employer D with

1,000 employees, 850 of whom are H–1B nonimmigrants, would obviously be H–1B-dependent and would not have to make calculations.

(2) *Employers with borderline H–1B-dependency status may use a ''snap-shot'' test to determine whether calculation of that status is necessary.* Where an employer's H–1B-dependency status (*i.e.*, H–1B-dependent or non-H–1B-dependent) is not readily apparent, the employer may use one of the following tests to determine whether a full calculation of the status is needed:

(i) *Small employer* (50 or fewer employees). If the employer has 50 or fewer employees (both full-time and part-time, including H–1B nonimmigrants and U.S. workers), then the employer may compare the number of its H–1B nonimmigrant employees (both full-time and part-time) to the numbers specified in the definition set out in paragraph (a)(1) of this section, and shall fully calculate its H–1B-dependency status (*i.e.*, calculate FTEs) where the number of its H–1B nonimmigrant employees is above the number specified in the definition. In other words, if the employer has 25 or fewer employees, and more than seven of them are H–1B nonimmigrants, then the employer shall fully calculate its status; if the employer has at least 26 but no more than 50 employees, and more than 12 of them are H–1B nonimmigrants, then the employer shall fully calculate its status.

(ii) *Large employer* (51 or more employees). If the number of H–1B nonimmigrant employees (both full-time and part-time), divided by the number of full-time employees (including H–1B nonimmigrants and U.S. workers), is 0.15 or more, then an employer which believes itself to be non-H–1B-dependent shall fully calculate its H–1B-dependency status (including the calculation of FTEs). In other words, if the number of full-time employees (including H–1B nonimmigrants and U.S. workers) multiplied by 0.15 yields a number that is equal to or less than the number of H–1B nonimmigrant employees (both full-time and part-time), then the employer shall attest that it is H–1B-dependent or shall fully calculate its H–1B dependency status (including the calculation of FTEs).

(d) *What documentation is the employer required to make or maintain, concerning its determination of H–1B-dependency status?* All employers are required to retain copies of H–1B petitions and requests for extensions of H–1B status filed with the INS, as well as the payroll records described in § 655.731(b)(1). The nature of any additional documentation would depend upon the general characteristics of the employer's workforce, as described in paragraphs (d)(1) through (4), which follow.

(1) *Employer with readily apparent status concerning H–1B-dependency.* If an employer's H–1B-dependency status (*i.e.*, H–1B-dependent or non-H–1B-dependent) is readily apparent (as described in paragraph (c)(1) of this section), then that status must be reflected on the employer's LCA but the employer is not required to make or maintain any particular documentation. The public access file maintained in accordance with § 655.760 would show the H–1B-dependency status, by means of copy(ies) of the LCA(s). In the event of an enforcement action pursuant to subpart I of this part, the employer's readily apparent status could be verified through records to be made available to the Administrator (*e.g.*, copies of H–1B petitions; payroll records described in § 655.731(b)(1)).

(2) *Employer with borderline H–1B-dependency status.* An employer which uses a ''snap-shot'' test to determine whether it should undertake a calculation of its H–1B-dependency status (as described in paragraph (c)(2) of this section) is not required to make or maintain any documentation of that ''snap-shot'' test. The employer's status must be reflected on the LCA(s), which would be available in the public access file. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the ''snap-shot'' test (*e.g.*, copies of H–1B petitions; payroll records described in § 655.731(b)(1)) .

(3) *Employer with H–1B-dependent status.* An employer which attests that it is H–1B-dependent—whether that status is readily apparent or is determined through calculations—is not required to make or maintain any documentation of the calculation. The employer's status must be reflected on the LCA(s), which would be available in the public access file. In the event of an enforcement action pursuant to subpart I of this part, the employer's designation of H–1B-dependent status on the LCA(s) would be conclusive and sufficient documentation of that status (except where the employer's status had altered to non-H–1B-dependent and had been appropriately documented, as described in paragraph (d)(5)(ii) of this section).

(4) *Employer with non-H–1B-dependent status who is required to perform full calculation.* An employer which attests that it is non-H–1B-dependent and does not meet the ''snap shot'' test set forth in paragraph (c)(2) of this section shall retain in its records a dated copy of its calculation that it is not H–1B-dependent. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (*e.g.,* copies of H–1B petitions; payroll records described in § 655.731(b)(1)).

(5) *Employer which changes its H–1B-dependency status due to changes in workforce.* An employer may experience a change in its H–1B-dependency status, due to changes in the ratio of H–1B nonimmigrant to U.S. workers in its workforce. Thus it is important that employers who wish to file a new LCA or a new H–1B petition or request for extension of status remain cognizant of their dependency status and do a recheck of such status if the make-up of their workforce changes sufficiently that their dependency status might possibly change. In the event of such a change of status, the following standards will apply:

(i) Change from non-H–1B-dependent to H–1B-dependent. An employer which experiences this change in its workforce is not required to make or maintain any record of its determination of the change of its H–1B-dependency status. The employer is not required to file new LCA(s) (which would accurately state its H–1B-dependent status), unless it seeks to hire new H–1B nonimmigrants or extend the status of existing H–1B nonimmigrants (see paragraph (g) of this section).

(ii) Change from H–1B-dependent to non-H–1B-dependent. An employer which experiences this change in its workforce is required to perform a full calculation of its status (as described in paragraph (c) of this section) and to retain a copy of such calculation in its records. If the employer seeks to hire new H–1B nonimmigrants or extend the status of existing H–1B nonimmigrants (see paragraph (g) of this section), the employer shall either file new LCAs reflecting its non-H–1B-dependent status or use its existing certified LCAs reflecting an H–1B-dependency status, in which case it shall continue to be bound by the dependent-employer attestations on such LCAs. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (*e.g.*, copies of H–1B petitions; payroll records described in § 655.731(b)(1)).

(6) *Change in corporate structure or identity of employer.* If an employer which experiences a change in its corporate structure as the result of an acquisition, merger, ''spin-off,'' or other such action wishes to file a new LCA or a new H–1B petition or request for extension of status, the new employing entity shall redetermine its H–1B-dependency status in accordance with paragraphs (a) and (c) of this section (see paragraph (g) of this section). (See § 655.730(e), regarding change in corporate structure or identity of employer.) In the event of an enforcement action pursuant to subpart I of this part, the employer's calculations where required under paragraph (c) of this section and its records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (*e.g.,* copies of H–1B petitions; payroll records described in § 655.731(b)(1)).

(7) *''Single employer'' under IRC test.* If an employer utilizes the IRC single-employer definition and concludes that it is non-H–1B-dependent, the employer shall perform the ''snap-shot'' test set forth in paragraph (c)(2) of this section, and if it fails to meet that test, shall attest that it is H–1B-dependent or shall perform the full calculation of dependency status in accordance with paragraph (a) of this section. The employer shall place a list of the entities included as a ''single employer'' in the public access file maintained in accordance with § 766.760. In addition, the employer shall retain in its records the ''snap-shot'' or full calculation of its status, as appropriate (showing the number of employees of each entity who are included in the numerator and denominator of the equation, whether the employer utilizes the ''snap shot'' test or a complete calculation as described in paragraph (c) of this section). In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (*e.g.,* copies of H–1B petitions; payroll records described in § 655.731(b)(1)).

(e) *How is an employer's H–1B-dependency status to be shown on the LCA?* The employer is required to designate its status by marking the appropriate box on the Form ETA–9035 (*i.e.,* either H–1B-dependent or non-H–1B-dependent). An employer which marks the designation of ''H–1B-dependent'' may also mark the designation of its intention to seek only ''exempt'' H–1B nonimmigrants on the LCA (see paragraph (g) of this section, and § 655.737). In the event that an employer has filed an LCA designating its H–1B-dependency status (either H–1B-dependent or non-H–1B-dependent) and thereafter experiences a change of status, the employer cannot use that LCA to support H–1B petitions for new nonimmigrants or requests for extension of H–1B status for existing nonimmigrants. Similarly, an employer that is or becomes H–1B-dependent cannot continue to use an LCA filed before January 19, 2001 to support new H–1B petitions or requests for extension of status. In such circumstances, the employer shall file a new LCA accurately designating its status and shall use that new LCA to support new petitions or requests for extensions of status.

(f) *What constitutes a ''willful violator''* employer and what are its special obligations?

(1) *''Willful violator''* or *''willful violator employer,''* for purposes of this subpart H and subpart I of this part means an employer that meets all of the following standards (*i.e.,* paragraphs (f)(1)(i) through (iii))—

(i) A finding of violation by the employer (as described in paragraph (f)(1) (ii)) is entered in either of the following two types of enforcement proceeding:

(A) A Department of Labor proceeding under section 212(n)(2) of the Act (8 U.S.C. 1182(n)(2)(C) and subpart I of this part; or

(B) A Department of Justice proceeding under section 212(n)(5) of the Act (8 U.S.C. 1182(n)(5).

(ii) The agency finds that the employer has committed either a willful failure or a misrepresentation of a material fact during the five-year period preceding the filing of the LCA; and

(iii) The agency's finding is entered on or after October 21, 1998.

(2) For purposes of this paragraph, ''willful failure'' means a violation which is a ''willful failure'' as defined in § 655.805(c).

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

(1) An employer that is ''H–1B-dependent'' (under the standards described in paragraphs (a) through (e) of this section) or is a ''willful violator'' (under the standards described in paragraph (f) of this section) is subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers (under the standards described in §§ 655.738 and 655.739, respectively) for all LCAs that are filed during the time period specified in paragraph (2)(g) of this section, to be used to support any petitions for new H–1B nonimmigrants or any requests for extensions of status for existing H–1B nonimmigrants. An LCA which does not accurately indicate the employer's H–1B-dependency status or willful violator status shall not be used to support H–1B petitions or requests for extensions. Further, an employer which falsely attests to non-H–1B-dependency status, or which experiences a change of status to H–1B-dependency but continues to use the LCA to support new H–1B petitions or requests for extension of status shall—despite the LCA designation of non-H–1B-dependency—be held to its obligations to comply with the attestation requirements concerning nondisplacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively), as explicitly acknowledged and agreed on the LCA.

(2) During the period between January 19, 2001 and October 1, 2003, any employer that is ''H–1B-dependent'' (under the standards described in paragraphs (a) through (e) of this section) or is a ''willful violator'' (under the standards described in paragraph (f) of this section) shall file a new LCA accurately indicating that status in order to be able to file petition(s) for new H–1B nonimmigrant(s) or request(s) for extension(s) of status for existing H–1B nonimmigrant(s). An LCA filed prior to January 19, 2001 may not be used to support petition(s) for new H–1B nonimmigrant(s) or request(s) for extension(s) of status for existing H–1B nonimmigrants.

(3) An employer that files an LCA indicating ''H–1B-dependent'' and/or ''willful violator'' status may also indicate on the LCA that all the H–1B nonimmigrants to be employed pursuant to that LCA will be ''exempt H–1B nonimmigrants'' as described in § 655.737. Such an LCA is not subject to the additional LCA attestation obligations, *provided that* all H–1B nonimmigrants employed under it are, in fact, exempt. An LCA which indicates that it will be used only for exempt H–1B nonimmigrants shall not be used to support H–1B petitions or requests for extensions of status for H–1B nonimmigrants who are not, in fact, exempt. Further, an employer which attests that the LCA will be used only for exempt H–1B nonimmigrants but uses the LCA to employ non-exempt H–1B nonimmigrants (through petitions and/or extensions of status) shall—despite the LCA designation of exempt H–1B nonimmigrants—be held to its obligations to comply with the attestation requirements concerning

nondisplacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively), as explicitly acknowledged and agreed on the LCA.

(4) The special provisions for H–1B-dependent employers and willful violator employers do not apply to LCAs filed after October 1, 2003 (see 8 U.S.C. 1182(n)(1)(E)(ii)). However, all LCAs filed prior to that date, and containing the additional attestation obligations described in this section and §§ 655.737 through 655.739, will remain in effect with regard to those obligations, for so long as any H–1B nonimmigrant(s) employed pursuant to the LCA(s) remain employed by the employer.

16. Section 655.737 is added to read as follows:

§ 655.737 What are ''exempt'' H–1B nonimmigrants, and how does their employment affect the additional attestation obligations of H–1B-dependent employers and willful violator employers?

(a) An employer that is H–1B-dependent or a willful violator of the H-1B program requirements (as described in § 655.736) is subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively) for all LCAs that are filed during the time period specified in § 655.736(g). However, these additional obligations do not apply to an LCA filed by such an employer if the LCA is used only for the employment of ''exempt'' H–1B nonimmigrants (through petitions and/or extensions of status) as described in this section.

(b) *What is the test or standard for determining an H–1B nonimmigrant's ''exempt'' status?* An H–1B nonimmigrant is ''exempt'' for purposes of this section if the nonimmigrant meets either of the two following criteria:

(1) Receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000; or

(2) Has attained a master's or higher degree (or its equivalent) in a specialty related to the intended employment.

(c) *How is the $60,000 annual wage to be determined?* The H–1B nonimmigrant can be considered to be an ''exempt'' worker, for purposes of this section, if the nonimmigrant actually receives hourly wages or annual salary totaling at least $60,000 in the calendar year. The standards applicable to the employer's satisfaction of the required wage obligation are applicable to the determination of whether the $60,000 wages or salary are received (see § 655.731(c)(2) and (3)). Thus, employer contributions or costs for benefits such as health insurance, life insurance, and pension plans cannot be counted toward this $60,000. The compensation to be counted or credited for these purposes could include cash bonuses and similar payments, *provided that* such compensation is paid to the worker ''cash in hand, free and clear, when due'' (§ 655.731(c)(1)), meaning that the compensation has readily determinable market value, is readily convertible to cash tender, and is actually received by the employee when due (which must be within the year for which the employer seeks to count or credit the compensation toward the employee's $60,000 earnings to qualify for exempt status). Cash bonuses and similar compensation can be counted or credited toward the $60,000 for ''exempt'' status only if payment is assured (*i.e.,* if the payment is contingent or conditional on some event such as the employer's annual profits, the employer must guarantee payment even if the contingency is not met). The full $60,000 annual wages or salary must be received by the employee in order for the employee to have ''exempt'' status. The wages or salary required for ''exempt'' status cannot be decreased or *pro rated* based on the employee's part-time work schedule; an H–1B nonimmigrant working part-time, whose actual annual compensation is less than $60,000, would not qualify as exempt on the basis of wages, even if the worker's earnings, if projected to a full-time work schedule, would theoretically exceed $60,000 in a year. Where an employee works for less than a full year, the employee must receive at least the appropriate *pro rata* share of the $60,000 in order to be ''exempt'' (*e.g.,* an employee who resigns after three months must be paid at least $15,000). In the event of an investigation pursuant to subpart I of this part, the Administrator will determine whether the employee has received the required $60,000 per year, using the employee's anniversary date to determine the one-year period; for an employee who had worked for less than a full year (either at the beginning of employment, or after his/her last anniversary date), the determination as to the $60,000 annual wages will be on a *pro rata* basis (*i.e.,* whether the employee had been paid at a rate of $60,000 per year (or $5,000 per month) including any unpaid, guaranteed bonuses or similar compensation).

(d) *How is the ''master's or higher degree (or its equivalent) in a specialty related to the intended employment'' to be determined?*

(1) ''Master's or higher degree (or its equivalent),'' for purposes of this section means a foreign academic degree from an institution which is accredited or recognized under the law of the country where the degree was obtained, and which is equivalent to a master's or higher degree issued by a U.S. academic institution. The equivalence to a U.S. academic degree cannot be established through experience or through demonstration of expertise in the academic specialty (*i.e.,* no ''time equivalency'' or ''performance equivalency'' will be recognized as substituting for a degree issued by an academic institution). The INS and the Department will consult appropriate sources of expertise in making the determination of equivalency between foreign and U.S. academic degrees. Upon the request of the INS or the Department, the employer shall provide evidence to establish that the H–1B nonimmigrant has received the degree, that the degree was earned in the asserted field of study, including an academic transcript of courses, and that the institution from which the degree was obtained was accredited or recognized.

(2) ''Specialty related to the intended employment,'' for purposes of this section, means that the academic degree is in a specialty which is generally accepted in the industry or occupation as an appropriate or necessary credential or skill for the person who undertakes the employment in question. A ''specialty'' which is not generally accepted as appropriate or necessary to the employment would not be considered to be sufficiently ''related' to afford the H–1B nonimmigrant status as an ''exempt H–1B nonimmigrant.''

(e) *When and how is the determination of the H–1B nonimmigrant's ''exempt'' status to be made?* An employer that is H–1B-dependent or a willful violator (as described in § 655.736) may designate on the LCA that the LCA will be used only to support H–1B petition(s) and/or request(s) for extension of status for ''exempt'' H–1B nonimmigrants.

(1) If the employer makes the designation of ''exempt'' H–1B nonimmigrant(s) on the LCA, then the INS—as part of the adjudication of the H–1B petition or request for extension of status—will determine the worker's ''exempt'' status, since an H–1B petition must be supported by an LCA consistent with the petition (*i.e.,* occupation, area of intended employment, exempt status). The employer shall maintain, in the public access file maintained in

accordance with § 755.760, a list of the H–1B nonimmigrant(s) whose petition(s) and/or request(s) are supported by LCA(s) which the employer has attested will be used only for exempt H–1B nonimmigrants. In the event of an investigation under subpart I of this part, the Administrator will give conclusive effect to an INS determination of ''exempt'' status based on the nonimmigrant's educational attainments (*i.e.,* master's or higher degree (or its equivalent) in a specialty related to the intended employment) unless the determination was based on false information. If the INS determination of ''exempt'' status was based on the assertion that the nonimmigrant would receive wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000, the employer shall provide evidence to show that such wages actually were received by the nonimmigrant (consistent with paragraph (c) of this section and the regulatory standards for satisfaction or payment of the required wages as described in § 655.731(c)(3)).

(2) If the employer makes the designation of ''exempt'' H–1B nonimmigrants on the LCA, but is found in an enforcement action under subpart I of this part to have used the LCA to employ nonimmigrants who are, in fact, not exempt, then the employer will be subject to a finding that it failed to comply with the nondisplacement and recruitment obligations (as described in §§ 655.738 and 655.739, respectively) and may be assessed appropriate penalties and remedies.

(3) If the employer does not make the designation of ''exempt'' H–1B nonimmigrants on the LCA, then the employer has waived the option of not being subject to the additional LCA attestation obligations on the basis of employing only exempt H–1B nonimmigrants under the LCA. In the event of an investigation under subpart I of this part, the Administrator will not consider the question of the nonimmigrant(s)'s ''exempt'' status in determining whether an H–1B-dependent employer or willful violator employer has complied with such additional LCA attestation obligations.

17. Section 655.738 is added to read as follows:

§ 655.738 What are the ''non-displacement of U.S. workers'' obligations that apply to H–1B-dependent employers and willful violators, and how do they operate?

An employer that is subject to these additional attestation obligations (under the standards described in § 655.736) is prohibited from displacement of any U.S. worker(s)—whether directly (in its own workforce) or secondarily (at a worksite of a second employer)—under the standards set out in this section.

(a) *''United States worker''* (''U.S. worker'') is defined in § 655.715.

(b) *''Displacement,''* for purposes of this section, has two components: ''lay off'' of U.S. worker(s), and ''essentially equivalent jobs'' held by U.S. worker(s) and H–1B nonimmigrant(s).

(1) *''Lay off''* of a U.S. worker means that the employer has caused the worker's loss of employment, other than through—

(i) Discharge of a U.S. worker for inadequate performance, violation of workplace rules, or other cause related to the worker's performance or behavior on the job;

(ii) A U.S. worker's voluntary departure or voluntary retirement (to be assessed in light of the totality of the circumstances, under established principles concerning ''constructive discharge'' of workers who are pressured to leave employment);

(iii) Expiration of a grant or contract under which a U.S. worker is employed, other than a temporary employment contract entered into in order to evade the employer's non-displacement obligation. The question is whether the loss of the contract or grant has caused the worker's loss of employment. It would not be a layoff where the job loss results from the expiration of a grant or contract without which there is no alternative funding or need for the U.S. worker's position on that or any other grant or contract (*e.g.,* the expiration of a research grant that funded a project on which the worker was employed at an academic or research institution; the expiration of a staffing firm's contract with a customer where the U.S. worker was hired expressly to work pursuant to that contract and the employer has no practice of moving workers to other customers or projects upon the expiration of contract(s)). On the other hand, it would be a layoff where the employer's normal practice is to move the U.S. worker from one contract to another when a contract expires, and work on another contract for which the worker is qualified is available (*e.g.,* staffing firm's contract with one customer ends and another contract with a different customer begins); or

(iv) A U.S. worker who loses employment is offered, as an alternative to such loss, a similar employment opportunity with the same employer (or, in the case of secondary displacement at a worksite of a second employer, as described in paragraph (d) of this section, a similar employment opportunity with either employer) at equivalent or higher compensation and benefits than the position from which the U.S. worker was discharged, regardless of whether or not the U.S. worker accepts the offer. The validity of the offer of a similar employment opportunity will be assessed in light of the following factors:

(A) The offer is a *bona fide* offer, rather than an offer designed to induce the U.S. worker to refuse or an offer made with the expectation that the worker will refuse;

(B) The offered job provides the U.S. worker an opportunity similar to that provided in the job from which he/she is discharged, in terms such as a similar level of authority, discretion, and responsibility, a similar opportunity for advancement within the organization, and similar tenure and work scheduling;

(C) The offered job provides the U.S. worker equivalent or higher compensation and benefits to those provided in the job from which he/she is discharged. The comparison of compensation and benefits includes all forms of remuneration for employment, whether or not called wages and irrespective of the time of payment (*e.g.,* salary or hourly wage rate; profit sharing; retirement plan; expense account; use of company car). The comparison also includes such matters as cost of living differentials and relocation expenses (*e.g.,* a New York City ''opportunity'' at equivalent or higher compensation and benefits offered to a worker discharged from a job in Kansas City would provide a wage adjustment from the Kansas City pay scale and would include relocation costs).

(2) *Essentially equivalent jobs.* For purposes of the displacement prohibition, the job from which the U.S. worker is laid off must be essentially equivalent to the job for which an H–1B nonimmigrant is sought. To determine whether the jobs of the laid off U.S. worker(s) and the H–1B nonimmigrant(s) are essentially equivalent, the comparison(s) shall be on a one-to-one basis where appropriate (*i.e.,* one U.S. worker left employment and one H–1B nonimmigrant joined the workforce) but shall be broader in focus where appropriate (*e.g.,* an employer, through reorganization, eliminates an entire department with several U.S. workers and then staffs this department's function(s) with H–1B nonimmigrants). The following comparisons are to be made:

(i) Job responsibilities. The job of the H–1B nonimmigrant must involve essentially the same duties and responsibilities as the job from which the U.S. worker was laid off. The

comparison focuses on the core elements of and competencies for the job, such as supervisory duties, or design and engineering functions, or budget and financial accountability. Peripheral, non-essential duties that could be tailored to the particular abilities of the individual workers would not be determinative in this comparison. The job responsibilities must be similar and both workers capable of performing those duties.

(ii) Qualifications and experience of the workers. The qualifications of the laid off U.S. worker must be substantially equivalent to the qualifications of the H–1B nonimmigrant. The comparison is to be confined to the experience and qualifications (*e.g.,* training, education, ability) of the workers which are directly relevant to the actual performance requirements of the job, including the experience and qualifications that would materially affect a worker's relative ability to perform the job better or more efficiently. While it would be appropriate to compare whether the workers in question have ''substantially equivalent'' qualifications and experience, the workers need not have identical qualifications and experience (*e.g.,* a bachelor's degree from one accredited university would be considered to be substantially equivalent to a bachelor's degree from another accredited university; 15 years experience in an occupation would be substantially equivalent to 10 years experience in that occupation). It would not be appropriate to compare the workers' relative ages, their sexes, or their ethnic or religious identities.

(iii) Area of employment. The job of the H–1B nonimmigrant must be located in the same area of employment as the job from which the U.S. worker was laid off. The comparison of the locations of the jobs is confined to the area within normal commuting distance of the worksite or physical location where the work of the H–1B nonimmigrant is or will be performed. For purposes of this comparison, if both such worksites or locations are within a Metropolitan Statistical Area or a Primary Metropolitan Statistical Area, they will be deemed to be within the same area of employment.

(3) The worker's rights under a collective bargaining agreement or other employment contract are not affected by the employer's LCA obligations as to non-displacement of such worker.

(c) *Direct displacement.* An H–1B-dependent or willful-violator employer (as described in § 655.736) is prohibited from displacing a U.S. worker in its own workforce (*i.e.,* a U.S. worker ''employed by the employer'') within the period beginning 90 days before and ending 90 days after the filing date of an H–1B petition supported by an LCA described in § 655.736(g). The following standards and guidance apply under the direct displacement prohibition:

(1) *Which U.S. workers are protected against ''direct displacement''?* This prohibition covers the H–1B employer's own workforce—U.S. workers ''employed by the employer''—who are employed in jobs that are essentially equivalent to the jobs for which the H–1B nonimmigrant(s) are sought (as described in paragraph (b)(2) of this section). The term ''employed by the employer'' is defined in § 655.715.

(2) *When does the ''direct displacement'' prohibition apply?* The H–1B employer is prohibited from displacing a U.S. worker during a specific period of time before and after the date on which the employer files any H-1B petition supported by the LCA which is subject to the non-displacement obligation (as described in § 655.736(g)). This protected period is from 90 days before until 90 days after the petition filing date.

(3) *What constitutes displacement of a U.S. worker?* The H–1B employer is prohibited from laying off a U.S. worker from a job that is essentially the equivalent of the job for which an H–1B nonimmigrant is sought (as described in paragraph (b)(1) of this section).

(d) *Secondary displacement.* An H–1B-dependent or willful-violator employer (as described in § 655.736) is prohibited from placing certain H–1B nonimmigrant(s) with another employer where there are indicia of an employment relationship between the nonimmigrant and that other employer (thus possibly affecting the jobs of U.S. workers employed by that other employer), unless and until the H–1B employer makes certain inquiries and/or has certain information concerning that other employer's displacement of similarly employed U.S. workers in its workforce. Employers are cautioned that even if the required inquiry of the secondary employer is made, the H–1B-dependent or willful violator employer shall be subject to a finding of a violation of the secondary displacement prohibition if the secondary employer, in fact, displaces any U.S. worker(s) during the applicable time period (see § 655.810(d)). The following standards and guidance apply under the secondary displacement prohibition:

(1) *Which U.S. workers are protected against ''secondary displacement''?* This provision applies to U.S. workers employed by the other or ''secondary'' employer (not those employed by the H–1B employer) in jobs that are essentially equivalent to the jobs for which certain H–1B nonimmigrants are placed with the other/secondary employer (as described in paragraph (b)(2) of this section). The term ''employed by the employer'' is defined in § 655.715.

(2) *Which H–1B nonimmigrants activate the secondary displacement prohibition?* Not every placement of an H–1B nonimmigrant with another employer will activate the prohibition and—depending upon the particular facts—an H–1B employer (such as a service provider) may be able to place H–1B nonimmigrant(s) at a client or customer's worksite without being subject to the prohibition. The prohibition applies to the placement of an H–1B nonimmigrant whose H–1B petition is supported by an LCA described in § 655.736(g) and whose placement with the other/secondary employer meets both of the following criteria:

(i) The nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by the other/secondary employer; and

(ii) There are indicia of an employment relationship between the nonimmigrant and the other/secondary employer. The relationship between the H–1B-nonimmigrant and the other/secondary need not constitute an ''employment'' relationship (as defined in § 655.715), and the applicability of the secondary displacement provision does not establish such a relationship. Relevant indicia of an employment relationship include:

(A) The other/secondary employer has the right to control when, where, and how the nonimmigrant performs the job (the presence of this indicia would suggest that the relationship between the nonimmigrant and the other/secondary employer approaches the relationship which triggers the secondary displacement provision);

(B) The other/secondary employer furnishes the tools, materials, and equipment;

(C) The work is performed on the premises of the other/secondary employer (this indicia alone would not trigger the secondary displacement provision);

(D) There is a continuing relationship between the nonimmigrant and the other/secondary employer;

(E) The other/secondary employer has the right to assign additional projects to the nonimmigrant;

(F) The other/secondary employer sets the hours of work and the duration of the job;

(G) The work performed by the nonimmigrant is part of the regular business (including governmental, educational, and non-profit operations) of the other/secondary employer;

(H) The other/secondary employer is itself in business; and

(I) The other/secondary employer can discharge the nonimmigrant from providing services.

(3) *What other/secondary employers are included in the prohibition on secondary displacement of U.S. workers by the H–1B employer?* The other/secondary employer who accepts the placement and/or services of the H–1B employer's nonimmigrant employee(s) need not be an H–1B employer. The other/secondary employer would often be (but is not limited to) the client or customer of an H–1B employer that is a staffing firm or a service provider which offers the services of H–1B nonimmigrants under a contract (*e.g.,* a medical staffing firm under contract with a nursing home provides H–1B nonimmigrant physical therapists; an information technology staffing firm under contract with a bank provides H–1B nonimmigrant computer engineers). Only the H–1B employer placing the nonimmigrant with the secondary employer is subject to the non-displacement obligation on the LCA, and only that employer is liable in an enforcement action pursuant to subpart I of this part if the other/secondary employer, in fact, displaces any of its U.S. worker(s) during the applicable time period. The other/secondary employer will not be subject to sanctions in an enforcement action pursuant to subpart I of this part (except in circumstances where such other/secondary employer is, in fact, an H–1B employer and is found to have failed to comply with its own obligations). (Note to paragraph (d)(3): Where the other/secondary employer's relationship to the H–1B nonimmigrant constitutes ''employment'' for purposes of a statute other than the H–1B provision of the INA, such as the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*), the other/secondary employer would be subject to all obligations of an employer of the nonimmigrant under such other statute.)

(4) *When does the ''secondary displacement'' prohibition apply?* The H–1B employer's obligation of inquiry concerns the actions of the other/secondary employer during the specific period beginning 90 days before and ending 90 days after the date of the placement of the H–1B nonimmigrant(s) with such other/secondary employer.

(5) *What are the H–1B employer's obligations concerning inquiry and/or information as to the other/secondary employer's displacement of U.S. workers?* The H–1B employer is prohibited from placing the H–1B nonimmigrant with another employer, unless the H–1B employer has inquired of the other/secondary employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of such placement, the other/secondary employer has displaced or intends to displace a similarly-employed U.S. worker employed by such other/secondary employer. The following standards and guidance apply to the H–1B employer's obligation:

(i) The H–1B employer is required to exercise due diligence and to make a reasonable effort to enquire about potential secondary displacement, through methods which may include (but are not limited to)—

(A) Securing and retaining a written assurance from the other/secondary employer that it has not and does not intend to displace a similarly-employed U.S. worker within the prescribed period;

(B) Preparing and retaining a memorandum to the file, prepared at the same time or promptly after receiving the other/secondary employer's oral statement that it has not and does not intend to displace a similarly-employed U.S. worker within the prescribed period (such memorandum shall include the substance of the conversation, the date of the communication, and the names of the individuals who participated in the conversation, including the person(s) who made the inquiry on behalf of the H–1B employer and made the statement on behalf of the other/secondary employer); or

(C) including a secondary displacement clause in the contract between the H–1B employer and the other/secondary employer, whereby the other/secondary employer would agree that it has not and will not displace similarly-employed U.S. workers within the prescribed period.

(ii) The employer's exercise of due diligence may require further, more particularized inquiry of the other/secondary employer in circumstances where there is information which indicates that U.S. worker(s) have been or will be displaced (*e.g.,* where the H–1B nonimmigrants will be performing functions that the other/secondary employer performed with its own workforce in the past). The employer is not permitted to disregard information which would provide knowledge about potential secondary displacement (*e.g.,* newspaper reports of relevant lay-offs by the other/secondary employer) if such information becomes available before the H–1B employer's placement of H–1B nonimmigrants with such employer. Under such circumstances, the H–1B employer would be expected to recontact the other/secondary employer and receive credible assurances that no lay-offs of similarly-employed U.S. workers are planned or have occurred within the prescribed period.

(e) *What documentation is required of H–1B employers concerning the non-displacement obligation?* The H–1B employer is responsible for demonstrating its compliance with the non-displacement obligation (whether direct or indirect), if applicable.

(1) Concerning *direct displacement* (as described in paragraph (c) of this section), the employer is required to retain all records the employer creates or receives concerning the circumstances under which each U.S. worker, in the same locality and same occupation as any H–1B nonimmigrant(s) hired, left its employ in the period from 90 days before to 90 days after the filing date of the employer's petition for the H–1B nonimmigrant(s), and for any such U.S. worker(s) for whom the employer has taken any action during the period from 90 days before to 90 days after the filing date of the H–1B petition to cause the U.S. worker's termination (*e.g.,* a notice of future termination of the employee's job). For all such employees, the H–1B employer shall retain at least the following documents: the employee's name, last-known mailing address, occupational title and job description; any documentation concerning the employee's experience and qualifications, and principal assignments; all documents concerning the departure of such employees, such as notification by the employer of termination of employment prepared by the employer or the employee and any responses thereto, and evaluations of the employee's job performance. Finally, the employer is required to maintain a record of the terms of any offers of similar employment to such U.S. workers and the employee's response thereto.

(2) Concerning *secondary displacement* (as described in paragraph (d) of this section), the H–1B employer is required to maintain documentation to show the manner in which it satisfied its obligation to make inquiries as to the displacement of U.S. workers by the other/secondary employer with which the H–1B employer places any H–1B

nonimmigrants (as described in paragraph (d)(5) of this section).

18. Section 655.739 is added to read as follows:

§ 655.739 What is the ''recruitment of U.S. workers'' obligation that applies to H–1B-dependent employers and willful violators, and how does it operate?

An employer that is subject to this additional attestation obligation (under the standards described in § 655.736) is required—prior to filing the LCA or any petition or request for extension of status supported by the LCA—to take good faith steps to recruit U. S. workers in the United States for the job(s) in the United States for which the H–1B nonimmigrant(s) is/are sought. The recruitment shall use procedures that meet industry-wide standards and offer compensation that is at least as great as the required wage to be paid to H–1B nonimmigrants pursuant to § 655.731(a) (*i.e.,* the higher of the local prevailing wage or the employer's actual wage). The employer may use legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner. This section provides guidance for the employer's compliance with the recruitment obligation.

(a) ''*United States worker*'' (''U.S. worker'') is defined in § 655.715.

(b) ''*Industry,*'' for purposes of this section, means the set of employers which primarily compete for the same types of workers as those who are the subjects of the H–1B petitions to be filed pursuant to the LCA. Thus, a hospital, university, or computer software development firm is to use the recruitment standards utilized by the health care, academic, or information technology industries, respectively, in hiring workers in the occupations in question. Similarly, a staffing firm, which places its workers at job sites of other employers, is to use the recruitment standards of the industry which primarily employs such workers (*e.g.,* the health care industry, if the staffing firm is placing physical therapists (whether in hospitals, nursing homes, or private homes); the information technology industry, if the staffing firm is placing computer programmers, software engineers, or other such workers).

(c) ''*Recruitment,*'' for purposes of this section, means the process by which an employer seeks to contact or to attract the attention of person(s) who may apply for employment, solicits applications from person(s) for employment, receives applications, and reviews and considers applications so as to present the appropriate candidates to the official(s) who make(s) the hiring decision(s) (*i.e.,* pre-selection treatment of applications and applicants).

(d) ''*Solicitation methods,*'' for purposes of this section, means the techniques by which an employer seeks to contact or to attract the attention of potential applicants for employment, and to solicit applications from person(s) for employment.

(1) Solicitation methods may be either external or internal to the employer's workforce (with internal solicitation to include current and former employees).

(2) Solicitation methods may be either active (where an employer takes positive, proactive steps to identify potential applicants and to get information about its job openings into the hands of such person(s)) or passive (where potential applicants find their way to an employer's job announcements).

(i) Active solicitation methods include direct communication to incumbent workers in the employer's operation and to workers previously employed in the employer's operation and elsewhere in the industry; providing training to incumbent workers in the employer's organization; contact and outreach through collective bargaining organizations, trade associations and professional associations; participation in job fairs (including at minority-serving institutions, community/junior colleges, and vocational/technical colleges); use of placement services of colleges, universities, community/junior colleges, and business/trade schools; use of public and/or private employment agencies, referral agencies, or recruitment agencies (''headhunters'').

(ii) Passive solicitation methods include advertising in general distribution publications, trade or professional journals, or special interest publications (*e.g.,* student-oriented; targeted to underrepresented groups, including minorities, persons with disabilities, and residents of rural areas); America's Job Bank or other Internet sites advertising job vacancies; notices at the employer's worksite(s) and/or on the employer's Internet ''home page.''

(e) *How are ''industry-wide standards for recruitment'' to be identified?* An employer is not required to utilize any particular number or type of recruitment methods, and may make a determination of the standards for the industry through methods such as trade organization surveys, studies by consultative groups, or reports/statements from trade organizations. An employer which makes such a determination should be prepared to demonstrate the industry-wide standards in the event of an enforcement action pursuant to subpart I of this part. An employer's recruitment shall be at a level and through methods and media which are normal, common or prevailing in the industry, including those strategies that have been shown to be successfully used by employers in the industry to recruit U.S. workers. An employer may not utilize only the lowest common denominator of recruitment methods used in the industry, or only methods which could reasonably be expected to be likely to yield few or no U.S. worker applicants, even if such unsuccessful recruitment methods are commonly used by employers in the industry. An employer's recruitment methods shall include, at a minimum, the following:

(1) Both internal and external recruitment (*i.e.,* both within the employer's workforce (former as well as current workers) and among U.S. workers elsewhere in the economy); and

(2) At least some active recruitment, whether internal (*e.g.,* training the employer's U.S. worker(s) for the position(s)) or external (*e.g.,* use of recruitment agencies or college placement services).

(f) *How are ''legitimate selection criteria relevant to the job that are normal or customary to the type of job involved'' to be identified?* In conducting recruitment of U.S. workers (*i.e.,* in soliciting applications and in pre-selection screening or considering of applicants), an employer shall apply selection criteria which satisfy all of the following three standards (*i.e.,* paragraph (b) (1) through (3)). Under these standards, an employer would not apply spurious criteria that discriminate against U.S. worker applicants in favor of H–1B nonimmigrants. An employer that uses criteria which fail to meet these standards would be considered to have failed to conduct its recruitment of U.S. workers in good faith.

(1) *Legitimate criteria,* meaning criteria which are legally cognizable and not violative of any applicable laws (*e.g.,* employer may not use age, sex, race or national origin as selection criteria);.

(2) *Relevant to the job,* meaning criteria which have a nexus to the job's duties and responsibilities; and

(3) *Normal and customary to the type of job involved,* meaning criteria which would be necessary or appropriate based on the practices and expectations of the industry, rather than on the preferences of the particular employer.

(g) *What actions would constitute a prohibited ''discriminatory manner'' of recruitment?* The employer shall not

apply otherwise-legitimate screening criteria in a manner which would skew the recruitment process in favor of H–1B nonimmigrants. In other words, the employer's application of its screening criteria shall provide full and fair solicitation and consideration of U.S. applicants. The recruitment would be considered to be conducted in a discriminatory manner if the employer applied its screening criteria in a disparate manner (whether between H–1B and U.S. workers, or between jobs where H–1B nonimmigrants are involved and jobs where such workers are not involved). The employer would also be considered to be recruiting in a discriminatory manner if it used screening criteria that are prohibited by any applicable discrimination law (*e.g.,* sex, race, age, national origin). The employer that conducts recruitment in a discriminatory manner would be considered to have failed to conduct its recruitment of U.S. workers in good faith.

(h) *What constitute ''good faith steps'' in recruitment of U.S. workers?* The employer shall perform its recruitment, as described in paragraphs (d) through (g) of this section, so as to offer fair opportunities for employment to U.S. workers, without skewing the recruitment process against U.S. workers or in favor of H–1B nonimmigrants. No specific regimen is required for solicitation methods seeking applicants or for pre-selection treatment screening applicants. The employer's recruitment process, including pre-selection treatment, must assure that U.S. workers are given a fair chance for consideration for a job, rather than being ignored or rejected through a process that serves the employer's preferences with respect to the make up of its workforce (*e.g.,* the Department would look with disfavor on a practice of interviewing H–1B applicants but not U.S. applicants, or a practice of screening the applications of H–1B nonimmigrants differently from the applications of U.S. workers). The employer shall not exercise a preference for its incumbent nonimmigrant workers who do not yet have H–1B status (*e.g.,* workers on student visas). The employer shall recruit in the United States, seeking U.S. worker(s), for the job(s) in the United States for which H–1B nonimmigrant(s) are or will be sought.

(i) What documentation is the employer required to make or maintain, concerning its recruitment of U.S. workers?

(1) The employer shall maintain documentation of the recruiting methods used, including the places and dates of the advertisements and postings or other recruitment methods used, the content of the advertisements and postings, and the compensation terms (if such are not included in the content of the advertisements and postings). The documentation may be in any form, including copies of advertisements or proofs from the publisher, the order or confirmation from the publisher, an electronic or printed copy of the Internet posting, or a memorandum to the file.

(2) The employer shall retain any documentation it has received or prepared concerning the treatment of applicants, such as copies of applications and/or related documents, test papers, rating forms, records regarding interviews, and records of job offers and applicants' responses. To comply with this requirement, the employer is not required to create any documentation it would not otherwise create.

(3) The documentation maintained by the employer shall be made available to the Administrator in the event of an enforcement action pursuant to subpart I of this part. The documentation shall be maintained for the period of time specified in § 655.760.

(4) The employer's public access file maintained in accordance with § 655.760 shall contain information summarizing the principal recruitment methods used and the time frame(s) in which such recruitment methods were used. This may be accomplished either through a memorandum or through copies of pertinent documents.

(j) In addition to conducting good faith recruitment of U.S. workers (as described in paragraphs (a) through (h) of this section), the employer is required to have offered the job to any U.S. worker who applies and is equally or better qualified for the job than the H–1B nonimmigrant (see 8 U.S.C. 1182(n)(1)(G)(i)(II)); this requirement is enforced by the Department of Justice (see 8 U.S.C. 1182(n)(5); 20 CFR 655.705(c)).

19. Section 655.740 is amended by revising the title and paragraph (a)(2)(ii) to read as follows:

§ 655.740 What actions are taken on labor condition applications?

(a) * * *

(2) * * *

(ii) When the Form ETA 9035 contains obvious inaccuracies. An obvious inaccuracy will be found if the employer files an application in error—*e.g.,* where the Administrator, Wage and Hour Division, after notice and opportunity for a hearing pursuant to subpart I of this part, has notified ETA in writing that the employer has been disqualified from employing H–1B nonimmigrants under section 212(n)(2) of the INA. Examples of other obvious inaccuracies include stating a wage rate below the FLSA minimum wage, submitting an LCA earlier than six months before the beginning date of the period of intended employment, identifying multiple occupations on a single LCA, identifying a wage which is below the prevailing wage listed on the LCA, or identifying a wage range where the bottom of such wage range is lower than the prevailing wage listed on the LCA.

* * * * *

20. Section 655.750 is amended by revising the title and paragraph (b)(2) to read as follows:

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

* * * * *

(b) * * *

(2) Requests for withdrawals shall be in writing and shall be directed to the ETA service center at the following address: ETA Application Processing Center, P.O. Box 13640, Philadelphia PA 19101.

* * * * *

21. Section 655.760 is amended by revising the title and paragraph (a)(1), adding paragraphs (a)(6), (a)(7), (a)(8), (a)(9) and (a)(10), and revising the first sentence of paragraph (c), to read as follows:

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

(a) * * *

(1) A copy of the completed labor condition application, Form ETA 9035, and cover pages, Form ETA 9035CP. If the application is submitted by facsimile transmission, the application containing the original signature shall be maintained by the employer.

* * * * *

(6) A summary of the benefits offered to U.S. workers in the same occupational classifications as H–1B nonimmigrants, a statement as to how any differentiation in benefits is made where not all employees are offered or receive the same benefits (such summary need not include proprietary information such as the costs of the benefits to the employer, or the details of stock options or incentive distributions), and/or, where applicable, a statement that some/all H–1B nonimmigrants are receiving ''home country'' benefits (*see* § 655.731(c)(3));

(7) Where the employer undergoes a change in corporate structure, a sworn statement by a responsible official of the

new employing entity that it accepts all obligations, liabilities and undertakings under the LCAs filed by the predecessor employing entity, together with a list of each affected LCA and its date of certification, and a description of the actual wage system and EIN of the new employing entity (*see* § 655.730(e)(1)).

(8) Where the employer utilizes the definition of ''single employer''in the IRC, a list of any entities included as part of the single employer in making the determination as to its H–1B-dependency status (*see* § 655.736(d)(7));

(9) Where the employer is H–1B-dependent and/or a willful violator, and indicates on the LCA(s) that only ''exempt'' H–1B nonimmigrants will be employed, a list of such ''exempt'' H–1B nonimmigrants (*see* § 655.737(e)(1));

(10) Where the employer is H–1B-dependent or a willful violator, a summary of the recruitment methods used and the time frames of recruitment of U.S. workers (or copies of pertinent documents showing this information) (*see* § 655.739(i)(4).

* * * * *

(c) *Retention of records*. Either at the employer's principal place of business in the U.S. or at the place of employment, the employer shall retain copies of the records required by this subpart for a period of one year beyond the last date on which any H–1B nonimmigrant is employed under the labor condition application or, if no nonimmigrants were employed under the labor condition application, one year from the date the labor condition application expired or was withdrawn.* * *

* * * * *

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

22. Section 655.800 is revised to read as follows:

§ 655.800 Who will enforce the LCAs and how will they be enforced?

(a) *Authority of Administrator*. Except as provided in § 655.807, the Administrator shall perform all the Secretary's investigative and enforcement functions under section 212(n) of the INA (8 U.S.C. 1182(n)) and this subpart I and subpart H of this part.

(b) *Conduct of investigations*. The Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters which are the subject of the investigation.

(c) *Employer cooperation/availability of records*. An employer shall at all times cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of section 212(n) of the INA and/or this subpart I or subpart H of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1182(n) or this subpart I or subpart H of this part. Any such interference shall be a violation of the labor condition application and this subpart I and subpart H of this part, and the Administrator may take such further actions as the Administrator considers appropriate. (Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) *Confidentiality*. The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under this subpart I or subpart H of this part.

23. Section 655.801 is added to read as follows:

§ 655.801 What protection do employees have from retaliation?

(a) No employer subject to this subpart I or subpart H of this part shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee has—

(1) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of section 212(n) of the INA or any regulation relating to section 212(n), including this subpart I and subpart H of this part and any pertinent regulations of INS or the Department of Justice; or

(2) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of section 212(n) of the INA or any regulation relating to section 212(n).

(b) It shall be a violation of this section for any employer to engage in the conduct described in paragraph (a) of this section. Such conduct shall be subject to the penalties prescribed by section 212(n)(2)(C)(ii) of the INA and § 655.810(b)(2), *i.e.*, a fine of up to $5,000, disqualification from filing petitions under section 204 or section 214(c) of the INA for at least two years, and such further administrative remedies as the Administrator considers appropriate.

(c) Pursuant to section 212(n)(2)(v) of the INA, an H–1B nonimmigrant who has filed a complaint alleging that an employer has discriminated against the employee in violation of paragraph (d)(1) of this section (or § 655.501(a)) may be allowed to seek other appropriate employment in the United States, provided the employee is otherwise eligible to remain and work in the United States. Such employment may not exceed the maximum period of stay authorized for a nonimmigrant classified under section 212(n) of the INA. Further information concerning this provision should be sought from the Immigration and Naturalization Service.

24. Section 655.805 is revised to read as follows:

§ 655.805 What violations may the Administrator investigate?

(a) The Administrator, through investigation, shall determine whether an H–1B employer has—

(1) Filed a labor condition application with ETA which misrepresents a material fact (Note to paragraph (a)(1): Federal criminal statutes provide penalties of up to $10,000 and/or imprisonment of up to five years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546);

(2) Failed to pay wages (including benefits provided as compensation for services), as required under § 655.731 (including payment of wages for certain nonproductive time);

(3) Failed to provide working conditions as required under § 655.732;

(4) Filed a labor condition application for H–1B nonimmigrants during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment, as prohibited by § 655.733;

(5) Failed to provide notice of the filing of the labor condition application, as required in § 655.734;

(6) Failed to specify accurately on the labor condition application the number of workers sought, the occupational classification in which the H–1B nonimmigrant(s) will be employed, or the wage rate and conditions under

which the H–1B nonimmigrant(s) will be employed;

(7) Displaced a U.S. worker (including displacement of a U.S. worker employed by a secondary employer at the worksite where an H–1B worker is placed), as prohibited by § 655.738 (if applicable);

(8) Failed to make the required displacement inquiry of another employer at a worksite where H–1B nonimmigrant(s) were placed, as set forth in § 655.738 (if applicable);

(9) Failed to recruit in good faith, as required by § 655.739 (if applicable);

(10) Displaced a U.S. worker in the course of committing a willful violation of any of the conditions in paragraphs (a)(2) through (9) of this section, or willful misrepresentation of a material fact on a labor condition application;

(11) Required or accepted from an H–1B nonimmigrant payment or remittance of the additional $500/$1,000 fee incurred in filing an H–1B petition with the INS, as prohibited by § 655.731(c)(10)(ii);

(12) Required or attempted to require an H–1B nonimmigrant to pay a penalty for ceasing employment prior to an agreed upon date, as prohibited by § 655.731(c)(10)(i);

(13) Discriminated against an employee for protected conduct, as prohibited by § 655.801;

(14) Failed to make available for public examination the application and necessary document(s) at the employer's principal place of business or worksite, as required by § 655.760(a);

(15) Failed to maintain documentation, as required by this part; and

(16) Failed otherwise to comply in any other manner with the provisions of this subpart I or subpart H of this part.

(b) The determination letter setting forth the investigation findings (see § 655.815) shall specify if the violations were found to be substantial or willful. Penalties may be assessed and disqualification ordered for violation of the provisions in paragraphs (a)(5), (6), or (9) of this section only if the violation was found to be substantial or willful. The penalties may be assessed and disqualification ordered for violation of the provisions in paragraphs (a)(2) or (3) of this section only if the violation was found to be willful, but the Secretary may order payment of back wages (including benefits) due for such violation whether or not the violation was willful.

(c) For purposes of this part, *''willful failure''* means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to section 212(n)(1)(A)(i) or (ii) of the INA, or §§ 655.731 or 655.732. See *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985).

(d) The provisions of this part become applicable upon the date that the employer's LCA is certified, pursuant to §§ 655.740(a)(1) and 655.750, whether or not the employer hires any H–1B nonimmigrants in the occupation for the period of employment covered in the labor condition application. If the period of employment specified in the labor condition application expires or the employer withdraws the application in accordance with § 655.750(b), the provisions of this part will no longer apply with respect to such application, except as provided in § 655.750(b)(3) and (4).

25. Section 655.806 is added to read as follows:

§ 655.806 Who may file a complaint and how is it processed?

(a) Any aggrieved party, as defined in § 655.715, may file a complaint alleging a violation described in § 655.805(a). The procedures for filing a complaint by an aggrieved party and its processing by the Administrator are set forth in this section. The procedures for filing and processing information alleging violations from persons or organizations that are not aggrieved parties are set forth in § 655.807. With regard to complaints filed by any aggrieved person or organization—

(1) No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint.

(2) The complaint shall set forth sufficient facts for the Administrator to determine whether there is reasonable cause to believe that a violation as described in § 655.805 has been committed, and therefore that an investigation is warranted. This determination shall be made within 10 days of the date that the complaint is received by a Wage and Hour Division official. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary. No hearing or appeal pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted.

(3) If the Administrator determines that an investigation on a complaint is warranted, the complaint shall be accepted for filing; an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing. The time for the investigation may be increased with the consent of the employer and the complainant, or if, for reasons outside of the control of the Administrator, the Administrator needs additional time to obtain information needed from the employer or other sources to determine whether a violation has occurred. No hearing or appeal pursuant to this subpart shall be available regarding the Administrator's determination that an investigation on a complaint is warranted.

(4) In the event that the Administrator seeks a prevailing wage determination from ETA pursuant to § 655.731(d), or advice as to prevailing working conditions from ETA pursuant to § 655.732(c)(2), the 30-day investigation period shall be suspended from the date of the Administrator's request to the date of the Administrator's receipt of the wage determination (or, in the event that the employer challenges the wage determination through the Employment Service complaint system, to the date of the completion of such complaint process).

(5) A complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA. This jurisdictional bar does not affect the scope of the remedies which may be assessed by the Administrator. Where, for example, a complaint is timely filed, back wages may be assessed for a period prior to one year before the filing of a complaint.

(6) A complaint may be submitted to any local Wage and Hour Division office. The addresses of such offices are found in local telephone directories, and on the Department's informational site on the Internet at *http://www.dol.gov/dol/esa/public/contacts/whd/america2.htm*. The office or person receiving such a complaint shall refer it to the office of the Wage and Hour Division administering the area in which the reported violation is alleged to have occurred.

(b) When an investigation has been conducted, the Administrator shall, pursuant to § 655.815, issue a written determination as described in § 655.805(a).

26. Section 655.807 is added to read as follows:

§ 655.807 How may someone who is not an ''aggrieved party'' allege violations, and how will those allegations be processed?

(a) Persons who are not aggrieved parties may submit information concerning possible violations of the provisions described in § 655.805(a)(1) through (4) and (a)(7) through (9). No particular form is required to submit the information, except that the information shall be submitted in writing or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the information. An optional form shall be available to be used in setting forth the information. The information provided shall include:

(1) The identity of the person submitting the information and the person's relationship, if any, to the employer or other information concerning the person's basis for having knowledge of the employer's employment practices or its compliance with the requirements of this subpart I and subpart H of this part; and

(2) A description of the possible violation, including a description of the facts known to the person submitting the information, in sufficient detail for the Secretary to determine if there is reasonable cause to believe that the employer has committed a willful violation of the provisions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9).

(b) The Administrator may interview the person submitting the information as appropriate to obtain further information to determine whether the requirements of this section are met. In addition, the person submitting information under this section shall be informed that his or her identity will not be disclosed to the employer without his or her permission.

(c) Information concerning possible violations must be submitted not later than 12 months after the latest date on which the alleged violation(s) were committed. The 12-month period shall be applied in the manner described in § 655.806(a)(5).

(d) Upon receipt of the information, the Administrator shall promptly review the information submitted and determine:

(1) Does the source likely possess knowledge of the employer's practices or employment conditions or the employer's compliance with the requirements of subpart H of this part?

(2) Has the source provided specific credible information alleging a violation of the requirements of the conditions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9)?

(3) Does the information in support of the allegations appear to provide reasonable cause to believe that the employer has committed a violation of the provisions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9), and that

(i) The alleged violation is willful?

(ii) The employer has engaged in a pattern or practice of violations? or

(iii) The employer has committed substantial violations, affecting multiple employees?

(e) ''Information'' within the meaning of this section does not include information from an officer or employee of the Department of Labor unless it was obtained in the course of a lawful investigation, and does not include information submitted by the employer to the Attorney General or the Secretary in securing the employment of an H–1B nonimmigrant.

(f)(1) Except as provided in paragraph (f)(2) of this section, where the Administrator has received information from a source other than an aggrieved party which satisfies all of the requirements of paragraphs (a) through (d) of this section, or where the Administrator or another agency of the Department obtains such information in a lawful investigation under this or any other section of the INA or any other Act, the Administrator (by mail or facsimile transmission) shall promptly notify the employer that the information has been received, describe the nature of the allegation in sufficient detail to permit the employer to respond, and request that the employer respond to the allegation within 10 days of its receipt of the notification. The Administrator shall not identify the source or information which would reveal the identity of the source without his or her permission.

(2) The Administrator may dispense with notification to the employer of the alleged violations if the Administrator determines that such notification might interfere with an effort to secure the employer's compliance. This determination shall not be subject to review in any administrative proceeding and shall not be subject to judicial review.

(g) After receipt of any response to the allegations provided by the employer, the Administrator will promptly review all of the information received and determine whether the allegations should be referred to the Secretary for a determination whether an investigation should be commenced by the Administrator.

(h) If the Administrator refers the allegations to the Secretary, the Secretary shall make a determination as to whether to authorize an investigation under this section.

(1) No investigation shall be commenced unless the Secretary (or the Deputy Secretary or other Acting Secretary in the absence or disability) personally authorizes the investigation and certifies—

(i) That the information provided under paragraph (a) of this section or obtained pursuant to a lawful investigation by the Department of Labor provides reasonable cause to believe that the employer has committed a violation of the provisions described in § 655.805(a)(1), (2), (3), (4), (7), (8), or (9);

(ii) That there is reasonable cause to believe the alleged violations are willful, that the employer has engaged in a pattern or practice of such violations, or that the employer has committed substantial violations, affecting multiple employees; and

(iii) That the other requirements of paragraphs (a) through (d) of this section have been met.

(2) No hearing shall be available from a decision by the Administrator declining to refer allegations addressed by this section to the Secretary, and none shall be available from a decision by the Secretary certifying or declining to certify that an investigation is warranted.

(i) If the Secretary issues a certification, an investigation shall be conducted and a determination issued within 30 days after the certification is received by the local Wage and Hour office undertaking the investigation. The time for the investigation may be increased upon the agreement of the employer and the Administrator or, if for reasons outside of the control of the Administrator, additional time is necessary to obtain information needed from the employer or other sources to determine whether a violation has occurred.

(j) In the event that the Administrator seeks a prevailing wage determination from ETA pursuant to § 655.731(d), or advice as to prevailing working conditions from ETA pursuant to § 655.732(c)(2), the 30-day investigation period shall be suspended from the date of the Administrator's request to the date of the Administrator's receipt of the wage determination (or, in the event that the employer challenges the wage determination through the Employment Service complaint system, to the date of the completion of such complaint process).

(k) Following the investigation, the Administrator shall issue a determination in accordance with to § 655.815.

(l) This section shall expire on September 30, 2003 unless section

212(n)(2)(G) of the INA is extended by future legislative action. Absent such extension, no investigation shall be certified by the Secretary under this section after that date; however, any investigation certified on or before September 30, 2003 may be completed.

27. Section 655.808 is added to read as follows:

§ 655.808 Under what circumstances may random investigations be conducted?

(a) The Administrator may conduct random investigations of an employer during a five-year period beginning with the date of any of the following findings, provided such date is on or after October 21, 1998:

(1) A finding by the Secretary that the employer willfully violated

any of the provisions described in § 655.805(a)(1) through (9);

(2) A finding by the Secretary that the employer willfully misrepresented material fact(s) in a labor condition application filed pursuant to § 655.730; or

(3) A finding by the Attorney General that the employer willfully failed to meet the condition of section 212(n)(1)(G)(i)(II) of the INA (pertaining to an offer of employment to an equally or better qualified U.S. worker).

(b) A finding within the meaning of this section is a final, unappealed decision of the agency. See §§ 655.520(a), 655.845(c), and 655.855(b).

(c) An investigation pursuant to this section may be made at any time the Administrator, in the exercise of discretion, considers appropriate, without regard to whether the Administrator has reason to believe a violation of the provisions of this subpart I and subpart H of this part has been committed. Following an investigation, the Administrator shall issue a determination in accordance with § 655.815.

28. Section 655.810 is revised to read as follows:

§ 655.810 What remedies may be ordered if violations are found?

(a) Upon determining that an employer has failed to pay wages or provide fringe benefits as required by § 655.731 and § 655.732, the Administrator shall assess and oversee the payment of back wages or fringe benefits to any H–1B nonimmigrant who has not been paid or provided fringe benefits as required. The back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to (or with respect to) such nonimmigrant(s).

(b) *Civil money penalties.* The Administrator may assess civil money penalties for violations as follows:

(1) An amount not to exceed $1,000 per violation for:

(i) A violation pertaining to strike/lockout (§ 655.733) or displacement of U.S. workers (§ 655.738);

(ii) A substantial violation pertaining to notification (§ 655.734), labor condition application specificity (§ 655.730), or recruitment of U.S. workers (§ 655.739);

(iii) A misrepresentation of material fact on the labor condition application;

(iv) An early-termination penalty paid by the employee (§ 655.731(c)(10)(i));

(v) Payment by the employee of the additional $500/$1,000 filing fee (§ 655.731(c)(10)(ii)); or

(vi) Violation of the requirements of the regulations in this subpart I and subpart H of this part or the provisions regarding public access (§ 655.760) where the violation impedes the ability of the Administrator to determine whether a violation of section 212(n) of the INA has occurred or the ability of members of the public to have information needed to file a complaint or information regarding alleged violations of section 212(n) of the INA;

(2) An amount not to exceed $5,000 per violation for:

(i) A willful failure pertaining to wages/working conditions (§§ 655.731, 655.732), strike/lockout, notification, labor condition application specificity, displacement (including placement of an H–1B nonimmigrant at a worksite where the other/secondary employer displaces a U.S. worker), or recruitment;

(ii) A willful misrepresentation of a material fact on the labor condition application; or

(iii) Discrimination against an employee (§ 655.801(a)); or

(3) An amount not to exceed $35,000 per violation where an employer (whether or not the employer is an H–1B-dependent employer or willful violator) displaced a U.S. worker employed by the employer in the period beginning 90 days before and ending 90 days after the filing of an H–1B petition in conjunction with any of the following violations:

(i) A willful violation of any of the provisions described in § 655.805(a)(2) through (9) pertaining to wages/working condition, strike/lockout, notification, labor condition application specificity, displacement, or recruitment; or

(ii) A willful misrepresentation of a material fact on the labor condition application (§ 655.805(a)(1)).

(c) In determining the amount of the civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors. The factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the INA and this subpart I or subpart H of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the employer in good faith to comply with the provisions of 8 U.S.C. 1182(n) and this subparts H and I of this part;

(5) The employer's explanation of the violation or violations;

(6) The employer's commitment to future compliance; and

(7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

(d) *Disqualification from approval of petitions.* The Administrator shall notify the Attorney General pursuant to § 655.855 that the employer shall be disqualified from approval of any petitions filed by, or on behalf of, the employer pursuant to section 204 or section 214(c) of the INA for the following periods:

(1) At least one year for violation(s) of any of the provisions specified in paragraph (b)(1)(i) through (iii) of this section;

(2) At least two years for violation(s) of any of the provisions specified in paragraph (b)(2) of this section; or

(3) At least three years, for violation(s) specified in paragraph (b)(3) of this section.

(e) *Other administrative remedies.* (1) If the Administrator finds a violation of the provisions specified in paragraph (b)(1)(iv) or (v) of this section, the Administrator may issue an order requiring the employer to return to the employee (or pay to the U.S. Treasury if the employee cannot be located) any money paid by the employee in violation of those provisions.

(2) If the Administrator finds a violation of the provisions specified in paragraph (b)(1)(i) through (iii), (b)(2), or (b)(3) of this section, the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including but not limited to reinstatement of workers who were discriminated against in violation of § 655.805(a), reinstatement of displaced U.S. workers, back wages to workers who have been displaced or whose employment has been terminated in violation of these

provisions, or other appropriate legal or equitable remedies.

(f) The civil money penalties, back wages, and/or any other remedy(ies) determined by the Administrator to be appropriate are immediately due for payment or performance upon the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or upon the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of ''Wage and Hour Division, Labor.'' The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The payment or performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. Distribution of back wages shall be administered in accordance with existing procedures established by the Administrator.

(g) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), requires that inflationary adjustments to civil money penalties in accordance with a specified cost-of-living formula be made, by regulation, at least every four years. The adjustments are to be based on changes in the Consumer Price Index for all Urban Consumers (CPI–U) for the U.S. City Average for All Items. The adjusted amounts will be published in the **Federal Register**. The amount of the penalty in a particular case will be based on the amount of the penalty in effect at the time the violation occurs.

29. Section 655.815 is amended by revising the title and paragraphs (a) and (c)(5) to read as follows:

§ 655.815 What are the requirements for the Administrator's determination?

(a) The Administrator's determination, issued pursuant to § 655.806, 655.807, or 655.808, shall be served on the complainant, the employer, and other known interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

* * * * *

(c) * * *

(5) Where appropriate, inform the parties that, pursuant to § 655.855, the Administrator shall notify ETA and the Attorney General of the occurrence of a violation by the employer.

30. Section 655.820 is amended by revising the title and paragraph (a) to read as follows:

§ 655.820 How is a hearing requested?

(a) Any interested party desiring review of a determination issued under §§ 655.805 and 655.815, including judicial review, shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. If such a request for an administrative hearing is timely filed, the Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

* * * * *

31. The title of § 655.825 is revised to read as follows:

§ 655.825 What rules of practice apply to the hearing?

* * * * *

32. The title of § 655.830 is revised to read as follows:

§ 655.830 What rules apply to service of pleadings?

* * * * *

33. The title of § 655.835 is revised to read as follows:

§ 655.835 How will the administrative law judge conduct the proceeding?

* * * * *

34. Section 655.840 is amended by revising the title and paragraph (c) to read as follows:

§ 655.840 What are the requirements for a decision and order of the administrative law judge?

* * * * *

(c) In the event that the Administrator's determination of wage violation(s) and computation of back wages are based upon a wage determination obtained by the Administrator from ETA during the investigation (pursuant to § 655.731(d)) and the administrative law judge determines that the Administrator's request was not warranted (under the standards in § 655.731(d)), the administrative law judge shall remand the matter to the Administrator for further proceedings on the existence of wage violations and/or the amount(s) of back wages owed. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept as final and accurate the wage determination obtained from ETA or, in the event either the employer or another interested party filed a timely complaint through the Employment Service complaint system, the final wage determination resulting from that process. See § 655.731; see also 20 CFR 658.420 through 658.426. Under no circumstances shall the administrative law judge determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the prevailing wage determination.

* * * * *

35. Section 655.845 is revised to read as follows:

§ 655.845 What rules apply to appeal of the decision of the administrative law judge?

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for the Board's review permitted by this subpart. However, any such petition shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

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

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

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

(7) Attach copies of the administrative law judge's's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

(c) Whenever the Board determines to review the decision and order of an administrative law judge, a notice of the Board's determination shall be served upon the administrative law judge, upon the Office of Administrative Law Judges, and upon all parties to the proceeding within 30 calendar days after the Board's receipt of the petition for review. If the Board determines that

it will review the decision and order, the order shall be inoperative unless and until the Board issues an order affirming the decision and order.

(d) Upon receipt of the Board's notice, the Office of Administrative Law Judges shall within 15 calendar days forward the complete hearing record to the Board.

(e) The Board's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (*e.g.,* briefs);

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Board shall be filed with the Administrative Review Board, Room S–4309, U.S. Department of Labor, Washington, DC 20210. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Board until actually received by the Board. All documents, including documents filed by mail, shall be received by the Board either on or before the due date.

(g) Copies of all documents filed with the Board shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § 655.830(b).

(h) The Board's final decision shall be issued within 180 calendar days from the date of the notice of intent to review. The Board's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Board's decision, the Board shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.850.

36. The title of § 655.850 is revised to read as follows:

§ 655.850 Who has custody of the administrative record?

* * * * *

37. Section 655.855 is revised to read as follows:

§ 655.855 What notice shall be given to the Employment and Training Administration and the Attorney General of the decision regarding violations?

(a) The Administrator shall notify the Attorney General and ETA of the final determination of any violation requiring that the Attorney General not approve petitions filed by an employer. The Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions. Violations requiring notification to the Attorney General are identified in § 655.810(f).

(b) The Administrator shall notify the Attorney General and ETA upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made pursuant to § 655.820; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review is filed with the Department's Administrative Review Board (Board) pursuant to § 655.845; or

(3) Where a timely petition for review is filed from an administrative law judge's decision finding a violation and the Board either declines within 30 days to entertain the appeal, pursuant to § 655.845(c), or the Board reviews and affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an employer, and the Board, upon review, issues a decision pursuant to § 655.845, holding that a violation was committed by an employer.

(c) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (a) of this section, shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for nonimmigrants to be employed by the employer, for the period of time provided by the Act and described in § 655.810(f).

(d) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall invalidate the employer's labor condition application(s) under this subpart I and subpart H of this part, and shall not accept for filing any application or attestation submitted by the employer under 20 CFR part 656 or subparts A, B, C, D, E, H, or I of this part, for the same calendar period as specified by the Attorney General.

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The authority citation for Part 656 is revised to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A), 1182(p)(1); 29 U.S.C. 49 *et seq.*; section 122, Pub.L. 101–649, 109 Stat. 4978.

2. Section 656.3 is amended by removing the definition of *Federal research agency.*

3. Section 656.40 is amended by revising paragraphs (a)(1) and (c), and the introductory text to paragraph (b), by redesignating paragraph (d) as (e), and by adding a new paragraph (d) as follows:

§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) * * *

(1) Except as provided in paragraphs (c) and (d) of this section, if the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*, 29 CFR part 4, the prevailing wage shall be at the rate required under the statutory determination. Certifying Officers shall request the assistance of the DOL Employment Standards Administration wage specialists if they need assistance in making this determination.

* * * * *

(b) For purposes of this section, except as provided in paragraphs (c) and (d), ''similarly employed'' shall mean ''having substantially comparable jobs in the occupational category in the area of intended employment,'' except that, if no such workers are employed by employers other than the employer applicant in the area of intended employment, ''similarly employed'' shall mean:

* * * * *

(c) In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment in the case of an employee of an institution of higher education, or a related or affiliated nonprofit entity; a nonprofit research organization; or a Governmental research organization, the prevailing wage level shall only take into account employees at such institutions and organizations in the area of intended employment.

(1) The organizations listed in this paragraph (c) are defined as follows:

(i) *Institution of higher education* is defined in section 101(a) of the Higher Education Act of 1965. Section 101(a), 20 U.S.C. 1001(a) (1999), provides that an ''institution of higher education'' is an educational institution in any State that—

(A) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;

(B) Is legally authorized within such State to provide a program of education beyond secondary education;

(C) Provides an educational program for which the institution awards a

bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;

(D) Is a public or other nonprofit institution; and

(E) Is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(ii) *Affiliated or related nonprofit entity.* A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation, operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary;

(iii) *Nonprofit research organization or Governmental research organization.* A research organization that is either a nonprofit organization or entity that is primarily engaged in basic research and/or applied research, or a U.S. Government entity whose primary mission is the performance or promotion of basic and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

(2) *A nonprofit organization or entity* within the meaning of this paragraph is one that is qualified as a tax exempt organization under Section 501(c)(3), (c)(4) or (c)(6) of the Internal Revenue Code of 1986, 26 U.S.C. 510(c)(3), (c)(4) or (c)(6), and has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

(d) With respect to a *professional athlete* as defined in section 212(a)(5)(A)(iii)(II) of the Immigration and Nationality Act, when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations shall be considered the prevailing wage. Section 212(a)(5)(A)(iii)(II), 8 U.S.C. 1182(a)(5)(A)(iii)(II) (1999), defines a professional athlete as an individual who is employed as an athlete by—

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

* * * * *

Signed at Washington, DC, this 11th day of December, 2000.

Raymond Bramucci,

Assistant Secretary, Employment and Training Administration.

T. Michael Kerr,

Administrator, Wage and Hour Division, Employment Standards Administration.

[The following three forms will not appear in the Code of Federal Regulations.]

BILLING CODE 4510–27–P

Labor Condition Application Cover Pages

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035CP
OMB Approval:
Expiration Date:

IMPORTANT: Please read these cover pages carefully before completing Form ETA 9035 - Labor Condition Application for H-1B nonimmigrants. These cover pages and instructions contain full explanations of attestations that you are required to make and are incorporated by reference into the form pages that you are required to complete and submit to ETA. A copy of these cover pages must be included in the public disclosure file and given to the H-1B nonimmigrant upon request.

Employers seeking to hire H-1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability must submit the completed and dated original Form ETA 9035 to the designated certifying officer in the Department of Labor (Department or DOL), Employment and Training Administration (ETA) Application Processing Center. ***Labor condition applications should be submitted to an ETA Application Processing Center via facsimile transmission (FAX to 1-800-397-0478) or via mail to P.O. Box 13640 * Philadelphia, PA * 19101.*** If the application is submitted by FAX, the application containing the original signature shall be maintained by the employer. An application which is complete and has no obvious inaccuracies will be certified by the Department and returned to the employer, who may then file it in support of its petition for an H-1B nonimmigrant with the Immigration and Naturalization Service (INS).

The completed form will be electronically scanned. To ensure the accuracy of readability and avoid rejections, it is preferred that the form be completed using the ETA 9035 program available from the U.S. Department of Labor's web site at http://ows.doleta.gov. If you hand write the form, print legibly in ink using a medium to thick pen. Print only in CAPITAL LETTERS and avoid contact with the edge of the boxes. If you use a typewriter to complete the form, use a font equivalent to 12-14 pt. Center each letter in the box and use only CAPITAL LETTERS. Be sure to sign and date the form. The regulatory citations below refer to 20 CFR part 655, subparts H and I.

To knowingly and willingly furnish any false information in the preparation of the Form ETA 9035 and any supporting documentation, or to aid, abet, or counsel another to do so is a federal offense, punishable by fine or imprisonment up to five years, or both (18 U.S.C. 1001). Other penalties apply as well to fraud or misuse of this immigration document and to perjury with respect to this form (18 U.S.C. 1546 and 1621).

OMB Notice Paperwork Reduction Project 1205-0310

Persons are not required to respond to this collection of information unless it displays a current, valid OMB control number. Respondent's obligation to reply to these reporting requirements is mandatory (INA, Section 212 (n)). Public reporting burden for this collection of information is estimated to average 1 hour per response, which includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Employment and Training Administration at U.S. Department of Labor * Room C-4318 * 200 Constitution Avenue, NW * Washington, DC * 20210

Examples of how best to fill out Form ETA 9035

A. For optimum accuracy, please print in capital letters and avoid contact with the edge of the box.
The following will serve as an example:

A	B	C	D	E	F	G	H	I	J	K	L	M
N	O	P	Q	R	S	T	U	V	W	X	Y	Z

B. For optimum accuracy, please print carefully and avoid contact with the edges of the box. The following will serve as an example:

1	2	3	4	5	6	7	8	9	0

C. Shade Circles Like This--> ●
Not Like This-->

! Do Not Fax these cover pages (Form ETA 9035CP). Fax ONLY the completed Labor Condition Application for H-1B nonimmigrants - Form ETA 9035.

Draft

Labor Condition Application Cover Pages

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035CP
OMB Approval:
Expiration Date:

Instructions for Section A
Employers Information

1. Return Fax Number: If you want the application to be returned via facsimile transmission, enter the fax number, area code first, to which you want the Department to send the final determination on the application. This may be the fax number of a person or entity other than the employer (e.g., an attorney or agent). **If you want the application mailed, leave the Return Fax Number blank.**

2. Employer's Full Legal Name: Enter the full legal name of the business, firm, or organization, or, if an individual, enter the name used on legal documents. Some abbreviation may be required for long names.

3. Employer's Address: Enter the address of the employer's principal place of business.

4. Employer's City, State, and Zip/Postal Code: Self - Explanatory

5. Employer's EIN Number: Enter the employer's Federal Employer Identification Number (EIN) (assigned by the Internal Revenue Service) (9 digits).

6. Employer's Phone Number and Extension: Enter the phone number, area code first, and extension, as appropriate, of the hiring or other designated official listed in Section H.

Instructions for Section B
Rate of Pay

1. Wage Rate (or Rate From) (Required): Enter the wage rate to be paid to H-1B nonimmigrants. If the wage offer is expressed as a range, enter the bottom of the wage range to be paid.

2. Rate Up To (Optional): Enter the top of the wage range to be paid to H-1B nonimmigrants.

3. Rate is Per: Enter whether the rate of pay is in terms of per year, month, two weeks, week, or hour.

4. Is this position part-time? Mark "Yes" or "No". If the position is part-time, the employer attests that the H-1B nonimmigrant(s) supported by the LCA will not regularly work more than the number of hours indicated (which may be a range of hours) on the INS Form(s) I-129 filed for the nonimmigrant(s). **Note: All H-1B nonimmigrants under the LCA must be part-time if question 4 is marked "Yes"; all H-1B nonimmigrants must be full-time if question 4 is marked "No".**

Instructions for Section C
Period of Employment and Occupation Information

1. Begin Date: Enter the beginning date (month, date, and 4 digit year) on which the H-1B nonimmigrant(s) will be employed under this application. For example, June 5, 2000 would be entered as 06-05-2000.

2. End Date: Enter the end date (month, date, and 4 digit year) on which the H-1B nonimmigrants will be employed. For example, June 5, 2000 would be entered as 06-05-2000.

3. Occupational Code: Enter the 3 digit code from Appendix 1 which most clearly describes the occupation to be performed.

4. Number of H-1B nonimmigrants: Enter the number of H-1B nonimmigrants that will be employed under this application. Use only numerals. Do NOT spell out the number: e.g., enter "001," not "ONE".

5. Job Title: Self - Explanatory

! Do Not Fax these cover pages (Form ETA 9035CP). Fax ONLY the completed Labor Condition Application for H-1B nonimmigrants - Form ETA 9035.

Draft

Instructions for Section D
Information relating to Work Location for the H-1B nonimmigrant

1. City and State: Enter the city and state of the physical location where the work will actually be performed. See definition of "place of employment" in 20 CFR 655.175 and regulation concerning short-term placement in 20 CFR 655.735.

2. Prevailing Wage: Enter the prevailing wage rate. If the position is part-time, enter the prevailing wage on an hourly basis.

3. Wage is Per: Enter whether the prevailing wage is expressed in terms of per year, month, two weeks, week, or hour.

4. Wage Source: If the employer is relying on a wage determination obtained from a State Employment Security Agency, mark the SESA box. If the employer is using a collective bargaining agreement, mark that box. If the employer is using another source, mark the "Other" box and specify such other source in the space provided (question 6). This other source must be an appropriate survey. It may NOT be an established pay scale which has not been negotiated.

5. Year: Enter the 4 digit year in which the "other source" wage survey was published.

6. Other Wage Source: Enter the name of the published wage survey or other source used to determine the prevailing wage: e.g., "BLS Occupational Compensation Survey, Denver," "employer-conducted survey," etc. Any "other source" survey must meet all the criteria set forth in 20 CFR 655.731 (b) (3) (iii) (B) or (C), as appropriate.

Instructions for Section D - Subsection A
Information for Additional or Subsequent Work Location
Subsection A of Section D is only necessary if filing for more than one location

If H-1B nonimmigrants are to be employed concurrently or sequentially in more than one location, fill out Subsection A using the instructions listed above for Section D.

Instructions for Section E
Employer Labor Condition Statements

The employer must read and agree to statements (1) through (4) below and demonstrate that agreement by marking "Yes" in Section E of Form ETA 9035 and by signing the application form. The employer agrees to develop and maintain documentation supporting labor condition statements (1) and (4) as specified in 20 CFR 655.731 and 655.734, and to make this documentation available to DOL officials upon request. The employer also agrees to make available for public examination a copy of the labor condition application and necessary supporting documentation as specified in 20 CFR 655.760 within one (1) working day after the date on which the application has been filed with DOL. This documentation must be retained for public examination at the place of employment or the employer's principal place of business, as specified in Item G.

1. Wages: The employer attests that H-1B nonimmigrants will be paid wages which are at least the higher of the actual wage level paid by the employer to all other individuals 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. By marking "Yes" in section E of the Labor Condition Application for H-1B nonimmigrants (Form ETA 9035), the employer also attests that it will pay H-1B nonimmigrants the required wage for time in nonproductive status due to a decision of the employer or due to the H-1B nonimmigrant's lack of a permit or license. The employer further attests that H-1B nonimmigrants will be offered benefits and eligibility for benefits on the same basis, and in accordance with the same criteria, as offered to U.S. workers. See 20 CFR 655.731.

Instructions for Section E are continued on page 4

! Do Not Fax these cover pages (Form ETA 9035CP). Fax ONLY the completed Labor Condition Application for H-1B nonimmigrants - Form ETA 9035.

Continued Instructions for Section E
Employer Labor Condition Statements

2. Working Conditions: The employer attests that the employment of H-1B nonimmigrants in the named occupation will not adversely affect the working conditions of workers similarly employed. The employer further attests that H-1B nonimmigrants will be afforded working conditions on the same basis, and in accordance with the same criteria, as offered to similarly employed U.S. workers. See 20 CFR 655.732.

3. Strike, Lockout, or Work Stoppage: The employer attests that on the date the application is signed and submitted, there is not a strike, lockout, or work stoppage in the course of a labor dispute in the named occupation at the place of employment and that, if such a strike, lockout, or work stoppage occurs after the application is submitted, the employer will notify ETA within three (3) days of such occurrence and the application will not be used in support of a petition filing with INS for H-1B nonimmigrants to work in the same occupation at the place of employment until ETA determines the strike, lockout, or work stoppage has ceased. See 20 CFR 655.733.

4. Notice: The employer attests that as of the date of filing, notice of the labor condition application has been or will be provided to workers employed in the named occupation. Notice of the application shall be provided to workers through the bargaining representative, or where there is no such bargaining representative, notice of the filing shall be provided either through physical posting in conspicuous locations where H-1B nonimmigrants will be employed, or through electronic notification to employees in the occupational classification for which H-1B nonimmigrants are sought. The employer also attests that each H-1B nonimmigrant employed pursuant to the application will be provided with a copy of the certified Form ETA 9035, and provided with a copy of ETA 9035CP if requested. This notification shall be provided no later than the date the H-1B nonimmigrant reports to work at the place of employment. See 20 CFR 655.734.

! Please note that you have read and agree to these conditions by marking "Yes" in Section E of the Labor Condition Application for H-1B nonimmigrants (Form ETA 9035).

Instructions for Section F - Subsection 1
Additional Employer Labor Condition Statements

Notice To Employers: If an employer is or becomes H-1B dependent or is found to have committed a willful violation or a misrepresentation of a material fact, any labor condition application for H-1B nonimmigrants that was certified by the Department of Labor prior to January 19, 2001 will be deemed invalid and may not be used in support of a new petition or an extension of a petition for an H-1B nonimmigrant.

Please Note: The determination as to whether an employer is H-1B dependent is a function of the number of H-1B nonimmigrants employed as a proportion of the total number of full-time equivalent employees employed in the U.S. The following table can be used to determine whether the employer is or is not H-1B dependent:

An employer is H-1B dependent if it employs in the U.S.:	
Number of Full-Time Equivalent Employees (U.S. and H-1B workers):	**Number of H-1B Nonimmigrant Employees:**
1 to 25	8 or more
26 to 50	13 or more
51 or more	15% or more of workforce (U.S. and H-1B workers).

See 20 CFR 655.736 for more detailed guidance as to what constitutes an "H-1B dependent employer" or a "willful violator".

Instructions for Section F - Subsection 1 are continued on page 5

! Do Not Fax these cover pages (Form ETA 9035CP). Fax ONLY the completed Labor Condition Application for H-1B nonimmigrants - Form ETA 9035.

Continued Instructions for Section F - Subsection 1
Additional Employer Labor Condition Statements

! **All employers are required to choose one of the following alternatives. Please note the alternative chosen by marking A, B, or C in section F - Subsection 1 of the Labor Condition Application for H-1B nonimmigrants (Form ETA 9035).**

Alternative A - The employer is not H-1B dependent (as defined above) and has not been found to have committed a willful violation or a misrepresentation of a material fact during the five (5) year period preceding the date of this application (and after October 20, 1998). The employer agrees to maintain the documentation required by 20 CFR 655.736 where applicable.

If an employer chooses Alternative A and is or becomes H-1B dependent or was found, prior to the date of filing, to have committed a willful violation or a misrepresentation, the submitted labor application shall be deemed invalid and may not be used in support of a new petition or extension of a petition for an H-1B nonimmigrant. By choosing Alternative A, the employer also acknowledges that if it uses this application despite its invalidity, it is required to comply with the Additional Employer Labor Condition Statements in Section F - Subsection 2.

Alternative B - The employer is an H-1B dependent employer and/or the employer has been found during the five (5) year period preceding the date of this application (and after October 20, 1998) to have committed a willful violation or a misrepresentation of a material fact.

! **If Alternative B is chosen, Section F - Subsection 2 of Form ETA 9035 MUST be filled out.**

Alternative C - The employer is an H-1B dependent employer and/or the employer has been found during the five (5) year period preceding the submittal date of this application (and after October 20, 1998) to have committed a willful violation or a misrepresentation of a material fact, BUT the employer will use this labor condition application ONLY in support of petitions or extensions of status for exempt H-1B nonimmigrants who will receive wages at a rate equal to at least $60,000 per year, or have attained a master's degree (or equivalent or higher degree) in a specialty related to the employment. The employer also agrees to maintain documentation required by 20 CFR 655.737.

By Choosing Alternative C, the employer acknowledges that if it uses this application in support of a petition or extension of a petition of an H-1B nonimmigrant who is not exempt, it is required to comply with the Additional Employer Labor Condition Statements in Section F - Subsection 2 with respect to all H-1B nonimmigrants supported by this application.

Instruction for Section F - Subsection 2
Additional Employer Labor Condition Statements

All employers (1) that are H-1B dependent (as defined above) and/or (2) that have been found to have committed a willful violation or a misrepresentation of a material fact during the five (5) year period preceding the date of this application (and after October 20, 1998), **must read and agree to statements (A) through (C) below and demonstrate that agreement by marking "Yes" in Section F - Subsection 2 of Form ETA 9035 and by signing the application form.** The employer agrees to develop and maintain documentation supporting labor condition statements (A), (B), and (C) as specified in 20 CFR 655.738 and 655.739 and to make this documentation available to DOL officials upon request. The employer also agrees to make available for public examination a copy of the labor condition application and necessary supporting documentation as specified in 20 CFR 655.760 within one (1) working day after the date on which the application has been filed with DOL. This documentation must be retained for public examination at the place of employment or the employer's principal place of business as identified in Item A. In addition, the employer agrees to maintain documentation supporting compliance with requirements on:

Instructions for Section F - Subsection 2 are continued on page 6

! **Do Not Fax these cover pages (Form ETA 9035CP). Fax ONLY the completed Labor Condition Application for H-1B nonimmigrants - Form ETA 9035.**

Instruction for Section F - Subsection 2
Additional Employer Labor Condition Statements

(A) Displacement: The employer will not displace any similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the date of filing a petition for an H-1B nonimmigrant supported by the application. See 20 CFR 655.738.

(B) Secondary Displacement: The employer will not place any H-1B nonimmigrant employed pursuant to this application with any other employer or at another employer's worksite UNLESS the employer applicant first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the placement, and the employer applicant has no contrary knowledge.

If the other employer displaces a similarly employed U.S. worker during such period, the displacement will constitute a failure to comply with the terms of the labor condition application and the employer applicant may be subject to civil money penalties and debarment. See 20 CFR 655.738.

(C) Recruitment and Hiring: Prior to filing any petition for an H-1B nonimmigrant pursuant to this application, the employer took or will take good faith steps meeting industry-wide standards to recruit U.S. workers for the job for which the nonimmigrant is sought, offering compensation at least as great as required to be offered to the H-1B nonimmigrant. The employer will (has) offer(ed) the job to any U.S. worker who (has) applied and is equally or better qualified than the H-1B nonimmigrant. See 20 CFR 655.739.

This labor condition statement "C" does not apply to the employment of an H-1B nonimmigrant who is a "priority worker" (defined as a person with extraordinary ability, or outstanding professors or researchers, or certain multi-national executives or managers) within the meaning of Section 203 (b)(1)(A), (B), or (C) of the Immigration and Nationality Act, 8 U.S.C. 1153.

Instructions for Section G
Public Disclosure Information

Mark the appropriate circle identifying where documentation concerning this application will be maintained.

Instructions for Section H
Declaration of Employer

! **The application must be signed by an official designated by the employer and authorized by the employer to agree to the statements herein on the employer's behalf.**

False statements are subject to Federal criminal penalties, as stated above. Failure to meet a condition of the application or misrepresentation of a material fact may result in civil money penalties, debarment, and other appropriate relief.

Instructions for Section I
Contact Information

Enter information in this section only if the person to whom questions regarding this application should be directed is different from the hiring or other designated official signing the application on behalf of the employer.

1. Contact First Name and Middle Initial (MI): Self-Explanatory

2. Contact Last Name: Self-Explanatory

3. Contact Phone Number and Extension: Self-Explanatory

! **Do Not Fax these cover pages (Form ETA 9035CP). Fax ONLY the completed Labor Condition Application for H-1B nonimmigrants - Form ETA 9035.**

Labor Condition Application Cover Pages

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035CP
OMB Approval:
Expiration Date:

Appendix 1
Three - Digit Occupational Groups
Professional, Technical, and Managerial Occupations and Fashion Models

Occupations in Architecture, Engineering, and Surveying

001 ARCHITECTURAL OCCUPATIONS
002 AERONAUTICAL ENGINEERING OCCUPATIONS
003 ELECTRICAL/ELECTRONICS ENGINEERING OCCUPATIONS
005 CIVIL ENGINEERING OCCUPATIONS
006 CERAMIC ENGINEERING OCCUPATIONS
007 MECHANICAL ENGINEERING OCCUPATIONS
008 CHEMICAL ENGINEERING OCCUPATIONS
010 MINING AND PETROLEUM ENGINEERING OCCUPATIONS
011 METALLURGY AND METALLURGICAL ENGINEERING OCCUPATIONS
012 INDUSTRIAL ENGINEERING OCCUPATIONS
013 AGRICULTURAL ENGINEERING OCCUPATIONS
014 MARINE ENGINEERING OCCUPATIONS
015 NUCLEAR ENGINEERING OCCUPATIONS
017 DRAFTERS
018 SURVEYING/CARTOGRAPHIC OCCUPATIONS
019 OTHER OCCUPATIONS IN ARCHITECTURE, ENGINEERING, AND SURVEYING

Occupations in Mathematics and Physical Sciences

020 OCCUPATIONS IN MATHEMATICS
021 OCCUPATIONS IN ASTRONOMY
022 OCCUPATIONS IN CHEMISTRY
023 OCCUPATIONS IN PHYSICS
024 OCCUPATIONS IN GEOLOGY
025 OCCUPATIONS IN METEOROLOGY
029 OTHER OCCUPATIONS IN MATHEMATICS AND PHYSICAL SCIENCES

Computer - Related Occupations

030 OCCUPATIONS IN SYSTEMS ANALYSIS AND PROGRAMMING
031 OCCUPATIONS IN DATA COMMUNICATIONS AND NETWORKS
032 OCCUPATIONS IN COMPUTER SYSTEM USER SUPPORT
033 OCCUPATIONS IN COMPUTER SYSTEM TECHNICAL SUPPORT
039 OTHER COMPUTER-RELATED OCCUPATIONS

Occupations in Life Sciences

040 OCCUPATIONS IN AGRICULTURAL SCIENCES
041 OCCUPATIONS IN BIOLOGICAL SCIENCES
045 OCCUPATIONS IN PSYCHOLOGY
049 OTHER OCCUPATIONS IN LIFE SCIENCES

Occupations in Social Sciences

050 OCCUPATIONS IN ECONOMICS
051 OCCUPATIONS IN POLITICAL SCIENCE
052 OCCUPATIONS IN HISTORY
054 OCCUPATIONS IN SOCIOLOGY
055 OCCUPATIONS IN ANTHROPOLOGY
059 OTHER OCCUPATIONS IN SOCIAL SCIENCES

! Do Not Fax these cover pages (Form ETA 9035CP). Fax ONLY the completed Labor Condition Application for H-1B nonimmigrants - Form ETA 9035.

Draft

Appendix 1 Continued
Three - Digit Occupational Groups
Professional, Technical, and Managerial Occupations and Fashion Models

Occupations in Medicine and Health

070 PHYSICIANS AND SURGEONS
071 OSTEOPATHS
072 DENTISTS
073 VETERINARIANS
074 PHARMACISTS
075 REGISTERED NURSES
076 THERAPISTS
077 DIETICIANS
078 OCCUPATIONS IN MEDICAL AND DENTAL TECHNOLOGY
079 OTHER OCCUPATIONS IN MEDICINE AND HEALTH

Occupations in Education

090 OCCUPATIONS IN COLLEGE AND UNIVERSITY EDUCATION
091 OCCUPATIONS IN SECONDARY SCHOOL EDUCATION
092 OCCUPATIONS IN PRESCHOOL, PRIMARY SCHOOL, AND KINDERGARTEN EDUCATION
094 OCCUPATIONS IN EDUCATION OF PERSONS WITH DISABILITIES
096 HOME ECONOMISTS AND FARM ADVISERS
097 OCCUPATIONS IN VOCATIONAL EDUCATION
099 OTHER OCCUPATIONS IN EDUCATION

Occupations in Museum, Library, and Archival Sciences

100 LIBRARIANS
101 ARCHIVISTS
102 MUSEUM CURATORS AND RELATED OCCUPATIONS
109 OTHER OCCUPATIONS IN MUSEUM, LIBRARY, AND ARCHIVAL SCIENCES

Occupations in Law and Jurisprudence

110 LAWYERS
111 JUDGES
119 OTHER OCCUPATIONS IN LAW AND JURISPRUDENCE

Occupations in Religion and Theology

120 CLERGY
129 OTHER OCCUPATIONS IN RELIGION AND THEOLOGY

Occupations in Writing

131 WRITERS
132 EDITORS: PUBLICATION, BROADCAST, AND SCRIPT
139 OTHER OCCUPATIONS IN WRITING

Occupations in Art

141 COMMERCIAL ARTISTS: DESIGNERS AND ILLUSTRATORS, GRAPHIC ARTS
142 ENVIRONMENTAL, PRODUCT, AND RELATED DESIGNERS
149 OTHER OCCUPATIONS IN ART

! Do Not Fax these cover pages (Form ETA 9035CP). Fax ONLY the completed Labor Condition Application for H-1B nonimmigrants - Form ETA 9035.

Labor Condition Application Cover Pages

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035CP
OMB Approval:
Expiration Date:

Appendix 1 Continued
Three - Digit Occupational Groups
Professional, Technical, and Managerial Occupations and Fashion Models

Occupations in Entertainment and Recreation

152 OCCUPATIONS IN MUSIC
159 OTHER OCCUPATIONS IN ENTERTAINMENT AND RECREATION

Occupations in Administrative Specializations

160 ACCOUNTANTS, AUDITORS, AND RELATED OCCUPATIONS
161 BUDGET AND MANAGEMENT SYSTEMS ANALYSIS OCCUPATIONS
162 PURCHASING MANAGEMENT OCCUPATIONS
163 SALES AND DISTRIBUTION MANAGEMENT OCCUPATIONS
164 ADVERTISING MANAGEMENT OCCUPATIONS
165 PUBLIC RELATIONS MANAGEMENT OCCUPATIONS
166 PERSONNEL ADMINISTRATION OCCUPATIONS
168 INSPECTORS AND INVESTIGATORS, MANAGERIAL AND PUBLIC SERVICE
169 OTHER OCCUPATIONS IN ADMINISTRATIVE OCCUPATIONS

Managers and Officials

180 AGRICULTURE, FORESTRY AND FISHING INDUSTRY MANAGERS AND OFFICIALS
181 MINING INDUSTRY MANAGERS AND OFFICIALS
182 CONSTRUCTION INDUSTRY MANAGERS AND OFFICIALS
183 MANUFACTURING INDUSTRY MANAGERS AND OFFICIALS
184 TRANSPORTATION, COMMUNICATION, AND UTILITIES INDUSTRY MANAGERS AND OFFICIALS
185 WHOLESALE AND RETAIL TRADE MANAGERS AND OFFICIALS
186 FINANCE, INSURANCE, AND REAL ESTATE MANAGERS AND OFFICIALS
187 SERVICE INDUSTRY MANAGERS AND OFFICIALS
188 PUBLIC ADMINISTRATION MANAGERS AND OFFICIALS
189 MISCELLANEOUS MANAGERS AND OFFICIALS

Miscellaneous Professional, Technical, and Managerial Occupations

195 OCCUPATIONS IN SOCIAL AND WELFARE WORK
199 MISCELLANEOUS PROFESSIONAL, TECHNICAL, AND MANAGERIAL OCCUPATIONS

Sales Promotion Occupations

297 FASHION MODELS

Miscellaneous

137 INTERPRETERS AND TRANSLATORS
143 OCCUPATIONS IN PHOTOGRAGPHY
144 FINE ARTISTS
150 OCCUPATIONS IN DRAMATICS
151 OCCUPATIONS IN DANCING
153 OCCUPATIONS IN ATHLETICS AND SPORTS
191 AGENTS AND APPRAISERS
193 RADIO OPERATORS
194 SOUND, FILM
196 AIRPLANE PILOTS
197 SHIP CAPTAINS
198 RAILROAD CONDUCTORS

Do Not Fax these cover pages (Form ETA 9035CP). Fax ONLY the completed Labor Condition Application for H-1B nonimmigrants - Form ETA 9035.

Draft

Labor Condition Application for H-1B Nonimmigrants

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035
OMB Approval:
Expiration Date:

A. Employer's Information

! **If you want the application returned by mail, leave the Return Fax Number blank.**

1. Return Fax Number ( ) -

2. Employer's Full Legal Name

3. Employer's Address (Number and Street)

4. Employer's City , State Zip/Postal Code

5. Employer's EIN Number -

6. Employer's Phone Number ( ) - Extension

B. Rate of Pay

1. Wage Rate (or Rate From) (Required): $.

2. Rate Up To (Optional): $.

3. Rate is Per:
- ◯ Year
- ◯ Week
- ◯ Month
- ◯ Hour
- ◯ 2 Weeks

4. Is this position part-time?
- ◯ Yes
- ◯ No

! **Please Note: Part-time hours worked by nonimmigrant(s) will be in the range of hours stated on the INS Form(s) I-129.**

C. Period Of Employment and Occupation Information

! **Please Note: The Date Information MUST be in MM/DD/YYYY format**

1. Begin Date / /

2. End Date / /

3. Occupational Code

4. Number of H-1B Nonimmigrants

5. Job Title

D. Information relating to Work Location for the H-1B Nonimmigrants

! **This section is REQUIRED**

! **Do NOT write "Same As Above". This section MUST be filled out.**

1. City , State

2. Prevailing Wage $.

3. Wage is Per:
- ◯ Year
- ◯ Week
- ◯ Month
- ◯ Hour
- ◯ 2 Weeks

4. Wage Source
- ◯ SESA
- ◯ Collective Bargaining Agreement
- ◯ Other

! **If OTHER is chosen as the Wage Source, Numbers 5 and 6 in this section MUST be filled out.**

5. Year

6. Other Wage Source

Page Link

! **If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 6 digit number that is repeated on all 3 pages.**

Draft

Labor Condition Application for H-1B Nonimmigrants

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035
OMB Approval:
Expiration Date:

D. Subsection A Information For Additional or Subsequent Work Location

! This Section should be completed only if filing for more than 1 work location.

1. City _____ , State _____

2. Prevailing Wage $ _____ . _____

3. Wage is Per:
- ◯ Year
- ◯ Week
- ◯ Month
- ◯ Hour
- ◯ 2 Weeks

4. Wage Source
- ◯ SESA
- ◯ Collective Bargaining Agreement
- ◯ Other

! **If OTHER is chosen as the Wage Source, Numbers 5 and 6 in this section MUST be filled out.**

5. Year _____

6. Other Wage Source _____

E. Employer Labor Condition Statements

! **Please Note: In order for your application to be processed, you MUST read section E of the Labor Condition Application cover pages under the heading "Employer Labor Condition Statements" and agree to all 4 labor condition statements summarized below:**

(1) Wages: Pay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time. Offer nonimmigrants benefits on the same basis as U.S. workers.

(2) Working Conditions: Provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed.

(3) Strike, Lockout, or Work Stoppage: No strike or lockout in the occupational classification at the place of employment.

(4) Notice: Notice to union or to workers at the place of employment. A copy of this form to H-1B workers.

I have read and agree to Employer Labor Condition Statements 1, 2, 3, and 4 as set forth in Section E of the Labor Condition Application Cover Pages. ◯ Yes ◯ No

F. Additional Employer Labor Condition Statments

! **Please Note: In order for your application to be processed, you MUST read Section F - Subsections 1 and 2 of the Labor Conditio n Application cover pages under the heading "Additional Employer Labor Condition Statements" and choose one of the 3 alternatives (A, B, or C) listed below in Subsection 1. If you mark Alternative B, you MUST read Section F - Subsection 2 of the cover pages under the heading "Additional Employer Labor Condition Statements" and indicate your agreement to all 4 additional statements summarized below in Subsection 2.**

1. Subsection 1
Choose ONE of the following 3 alternatives:

A ◯ **Employer is not H-1B dependent and is not a willful violator.**

B ◯ **Employer is H-1B dependent and/or a willful violator.**

C ◯ **Employer is H-1B dependent and/or a willful violator BUT will use this application ONLY to support H-1B petitions for exempt nonimmigrants.**

2. Subsection 2
If Alternative B in Subsection 1 is marked, the following Additional Labor Condition Statements are applicable:

A. **Displacement: Non-displacement of the U.S. workers in employer's work force;**

B. **Secondary Displacement: Non-displacement of U.S. workers in another employer's work force; and**

C. **Recruitment and Hiring: Recruitment of U.S. workers and hiring of U.S. worker applicant(s) who are equally or better qualified than the H-1B nonimmigrant(s).**

I have read and agree to Additional Labor Conditional Statements 2 A, B, and C. ◯ Yes ◯ No

Page Link _____

! **If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 6 digit number that is repeated on all 3 pages.**

Draft

Labor Condition Application for H-1B Nonimmigrants

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035
OMB Approval:
Expiration Date:

G. Public Disclosure Information

Public disclosure information will be kept at:

! You must choose one of the two options listed in this Section.

◯ Employer's principal place of business

◯ Place of employment

H. Declaration of Employer

! **By signing this form, I, on behalf of the employer, attest that the information and labor condition statements provided are tru e and accurate; that I have read the sections E and F of the cover pages (Form ETA 9035CP), and that I agree to comply with the Labor Condition Statements as set forth in the cover pages and with the Department of Labor regulations (20 CFR part 655, Subparts H and I). I agree to make this applicaton, supporting documentation, and other records, available to officials of the Department of Labor upon request during any investigation under the Immigration and Nationality Act.**

1. First Name of Hiring or Other Designated Official ____ , MI ____

2. Last Name of Hiring or Other Designated Official ____

3. Hiring or Other Designated Official Title ____

4. Signature - Do NOT let signature extend beyond the box

5. Date __ / __ / ____

I. Contact Information

1. Contact First Name ____ , MI ____

2. Contact Last Name ____

3. Contact Phone Number (___) ___ - ____ Extension ____

J. U.S. Government Agency Use Only

By virtue of my signature below, I hereby acknowledge this application certified for

Date Starting _____ and Date Ending _____

Signature and Title of Authorized DOL Official _____ ETA Case Number _____ Date _____

The Department of Labor is not the guarantor of the accuracy, truthfulness, or adequacy of a certified labor condition applicat ion.

K. Complaints

Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the te rms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor. Com plaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regardin g such offer(s) of employment, may be filed with: U.S Department of Justice * 10th Street and Constitution Avenue, NW * Washington, DC * 20530.

Page Link ____

! **If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 6 digit number that is repeated on all 3 pages.**

Draft

H-1B Nonimmigrant Information Form	U.S. Department of Labor Employment Standards Administration	ESA Form WH-4 OMB Approval: Expiration Date:

This report is authorized by 8 U.S.C. 1182(n)(2)(G)(ii) of the American Competitiveness and Workforce Improvement Act (ACWIA) of 1998. The information provided on this form will assist the Department of Labor in determining whether the named employer of H-1B nonimmigrants has committed a violation of provisions of the H-1B program. Your identity will be kept confidential to the fullest extent provided by law. Please provide as much of the requested information as possible. Attach additional sheets if you need additional space to respond to a question. If you do not understand a term, or need assistance in the completion of this form, please contact the local Wage and Hour office of the U.S. Department of Labor. After you submit the form, a representative from the Department of Labor may contact you if further information is necessary to initiate an investigation.

1. **Person Submitting Information** (*please print*)

Mr., Miss, Mrs., Ms. _____
First Name Middle Initial Last Name

Current Address: _____
Number, Street, Apt. or P.O. Box No.

_____
City, State, ZIP Code

Telephone Number: (*including area code*) _____

Days/Times When You Can be Reached at that Number: _____

E-Mail Address (optional): _____

2. **Nature of Source's Relationship to Employer**: (*Please check all that apply*)

(a) ☐ H-1B Nonimmigrant Employee
☐ Former or ☐Current Employee (*dates of employment*): _____

(b) ☐ U.S. Worker
☐ Former or ☐ Current Employee (*dates of employment*):
(c) ☐ Job Applicant (*date of application*): _____
(d) ☐ Competitor Business (*please specify*): _____
(e) ☐ Federal Government Agency (*please specify*): _____
(f) ☐ State or Local Government Agency (*please specify*): _____
(g) ☐ Community or Service Organization (*please specify*): _____
(h) ☐ Other (*please specify*): _____

3. **Information on H-1B Employer Committing Alleged Violation**

Name of Employer/Company: _____

Address: _____
Number, Street City State ZIP Code

Employer Representative to be Contacted: _____

Telephone Number (*including area code*): _____

4. **Description of Alleged H-1B Violations**

Please check the appropriate box(es), (a) through (q), which best describe the violation of the H-1B provisions of the Immigration and Nationality Act which you believe have occurred. In section 8, identify each item checked and describe, in as much detail as possible, the facts and circumstances which cause you to believe that violations have occurred.

(a) ☐ Employer supplied incorrect or false information on the Labor Certification Application (LCA).

(b) ☐ Employer failed to pay H-1B worker(s) the higher of the prevailing or actual wage.

(c) ☐ Employer failed to pay H-1B worker(s) for time off due to a decision by the employer (e.g., for lack of work) or for time needed by the H-1B worker(s) to acquire a license or permit.

(d) ☐ Employer made illegal deductions from H-1B worker's wages (e.g., for H-1B petition processing; for food and housing expenses while the worker is traveling on employer's business; for tools and equipment necessary to perform employer's work).

(e) ☐ Employer failed to provide fringe benefits to H-1B worker(s) equivalent to those provided to U.S. worker(s) (e.g., cash bonuses, stock options, paid vacations and holidays, health benefits, insurance, retirement and savings plans).

(f) ☐ Employer does not afford H-1B worker(s) working conditions (hours, shifts, vacation periods) on the same basis as it does U.S. worker(s), or the employment of H-1B worker(s) adversely affects the working conditions of U.S. worker(s).

(g) ☐ Employer failed to comply with "no strike/lockout" requirement by: 1) placing or contracting out H-1B worker(s) during the validity period of the LCA to any place of employment where there is a labor dispute; 2) failing to notify the DOL, within 3 working days of the occurrence, of such a labor dispute; or 3) using an LCA for H-1B worker(s) to work at a site before the DOL has determined that a labor dispute has ended.

(h) ☐ Employer failed to provide employees or their collective bargaining representative, either by hard copy posting or electronically, notice of its intentions to hire H-1B worker(s); **or** has failed to provide H-1B worker(s) with a copy of the LCA.

(i) ☐ Employer required H-1B worker(s) to pay all or any part of $500/$1000 filing fee.

(j) ☐ Employer imposed an illegal penalty on H-1B worker(s) for ceasing employment with the employer prior to a date agreed upon by the worker and employer.

(k) ☐ Employer retaliated or discriminated against an employee, former employee, or job applicant for disclosing information, filing a complaint, or cooperating in an investigation or proceeding about a violation of the H-1B laws and regulations (i.e., whistleblower).

(l) ☐ Employer failed to maintain and make available for public examination the LCA and necessary documents at the employer's principal place of business or worksite.

(m) ☐ Employer laid off U.S. worker(s) and has replaced or seeks to replace U.S. worker(s) with H-1B worker(s) within 90 days before or after filing H-1B visa petitions.

(n) ☐ Employer placed H-1B worker(s) at another employer's worksite where U.S. workers have been laid off; and/or has failed to inquire of the second employer whether it has or intends to lay-off U.S. worker(s) and replace them with H-1B worker(s).

(o) ☐ Employer failed to recruit U.S. worker(s) for jobs for which H-1B worker(s) are sought.

(p) ☐ Employer failed to hire a U.S. worker who applied and was equally or better qualified for the job for which the H-1B worker was sought. Complaints regarding this violation should be filed with the U.S. Department of Justice, 10th and Constitution Ave., N.W., Washington, D.C., 20530.

(q) ☐ Other _____

_____

__5. Date(s) of Alleged Violation(s):

_____

6. Location of Worksite(s) where Alleged Violation(s) occurred: _____

__

_____

7. Basis of Knowledge of Alleged Violation(s): _____

8. Description of facts and circumstances which support allegations in items 4 (a) through (q). Use additional sheets of paper, if necessary.

FOR DOL USE ONLY

Complaint Received/Taken by: _____ Date: _____

Source of Complaint is: ☐ Aggrieved Party ☐ Credible information source

Public Burden Statement: We estimate that it will take an average of 20 minutes to complete this form, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the U.S. Department of Labor, Wage and Hour Division, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

[FR Doc. 00–32088 Filed 12–19–00; 8:45 am]

BILLING CODE 4510–27–C