

(2) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the use of alien crewmembers is permitted by the prevailing practice for the longshore activity(ies) in the U.S. port at issue, the judge's decision shall no longer have the conclusive effect specified in paragraph (b) of this section. Upon notice from the Administrator, the DHS and ETA shall cease the actions specified in § 655.665.

§ 655.675 Non-applicability of the Equal Access to Justice Act.

A proceeding under subpart G of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

Subpart H—Labor Condition Applications and Requirements for Employers Seeking To Employ Nonimmigrants on H-1b Visas in Specialty Occupations and as Fashion Models, and Requirements for Employers Seeking To Employ Nonimmigrants on H-1b1 and E-3 Visas in Specialty Occupations

SOURCE: 59 FR 65659, 65676, Dec. 20, 1994, unless otherwise noted.

§ 655.700 What statutory provisions govern the employment of H-1B, H-1B1, and E-3 nonimmigrants and how do employers apply for H-1B, H-1B1, and E-3 visas?

Under the E-3 visa program, the Immigration and Nationality Act (INA), as amended, permits certain nonimmigrant treaty aliens to be admitted to the United States solely to perform services in a specialty occupation (INA section 101(a)(15)(E)(iii)). Under the H-1B1 visa program, the INA permits nonimmigrant professionals in specialty occupations from countries with which the United States has entered into certain agreements that are identified in section 214(g)(8)(A) of the INA to tem-

porarily enter the United States for employment in a specialty occupation. Employers seeking to employ nonimmigrant workers in specialty occupations under H-1B, H-1B1, or E-3 visas must file a labor condition application with the Department of Labor as described in §655.730(c) and (d). Certain procedures described in this subpart H for obtaining a visa and entering the U.S. after the Department of Labor attestation process, including procedures in §655.705, apply only to H-1B nonimmigrants. The procedures for receiving an E-3 or H-1B1 visa and entering the U.S. on an E-3 or H-1B1 visa after the attestation process is certified by the Department of Labor are identified in the regulations and procedures of the Department of State and the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security. Consult the Department of State (<http://www.state.gov/>) and USCIS (<http://www.uscis.gov/>) Web sites and regulations for specific instructions regarding the E-3 and H-1B1 visas.

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

(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 United States Citizenship

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

(2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (DHS Form I-129), together with the certified LCA, to DHS, requesting H-1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, DHS are set forth in DHS regulations. The DHS petition (Form I-129) may be obtained from an DHS district or area office.

(3) If DHS 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 DHS 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 DHS 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.

(3) *E-3 visas:* Except as provided in paragraph (d) of this section, this subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the E-3 visa classification in specialty occupations under INA section 101(a)(15)(E)(iii) (8 U.S.C. 1101(a)(15)(E)(iii)). This paragraph (c)(3) applies to labor condition applications filed on or after April 11, 2008. E-3 labor condition applications filed prior to that date but on or after May 11, 2005 (*i.e.*, the effective date of the statute), will be processed according to the E-3 statutory terms and the E-3 processing procedures published on July 19, 2005 in the FEDERAL REGISTER at 74 FR 41434.

(4) *H-1B1 visas:* Except as provided in paragraph (d) of this section, subparts H and I of this part apply to all employers seeking to employ foreign workers under the H-1B1 visa classification in specialty occupations described in INA section 101(a)(15)(H)(i)(b1) (8 U.S.C. 1101(a)(15)(H)(i)(b1)), under the U.S.-Chile and U.S.-Singapore Free Trade Agreements as long as the Agreements are in effect. (INA section 214(g)(8)(A)

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(8 U.S.C. 1184(g)(8)(A)). This paragraph (c)(4) applies to H-1B labor condition applications filed on or after November 23, 2004. Further, H-1B labor condition applications filed prior to that date but on or after January 1, 2004, the effective date of the H-1B program, will be handled according to the H-1B statutory terms and the H-1B processing procedures as described in paragraph (d)(3) of this section.

(d) *Nonimmigrants on E-3 or H-1B visas*—(1) *Exclusions*. The following sections in this subpart and in subpart I of this part do not apply to E-3 and H-1B nonimmigrants, but apply only to H-1B nonimmigrants: §§ 655.700(a), (b), (c)(1) and (2); 655.710(b); 655.730(d)(5) and (e); 655.735; 655.736; 655.737; 655.738; 655.739; 655.760(a)(7), (8), (9), and (10); and 655.805(a)(7), (8), and (9). Further, the following references in subparts H or I of this part, whether in the excluded sections listed above or elsewhere, do not apply to E-3 and H-1B nonimmigrants, but apply only to H-1B nonimmigrants: references to fashion models of distinguished merit and ability (H-1B visas, but not H-1B and E-3 visas, are available to such fashion models); references to a petition process before USCIS (the petition process applies only to H-1B, but not to initial H-1B and E-3 visas unless it is a petition to accord a change of status); references to additional attestation obligations of H-1B-dependent employers and employers found to have willfully violated the H-1B program requirements (these provisions do not apply to the H-1B and E-3 programs); and references in § 655.750(a) or elsewhere in this part to the provision in INA section 214(n) (formerly INA section 214(m)) (8 U.S.C. 1184(n)) regarding increased portability of H-1B status (by the statutory terms, the portability provision is inapplicable to H-1B and E-3 nonimmigrants).

(2) *Terminology*. For purposes of subparts H and I of this part, except in those sections identified in paragraph (d)(1) of this section as inapplicable to E-3 and H-1B nonimmigrants and as otherwise excluded:

(i) The term “H-1B” includes “E-3” and “H-1B1” (INA section 101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1)) (8

U.S.C. 1101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1)); and

(ii) The term “labor condition application” or “LCA” includes a labor attestation made under section 212(t)(1) of the INA for an E-3 or H-1B nonimmigrant professional classified under INA section 101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1) (8 U.S.C. 1101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1)).

(3) *Filing procedures for E-3 and H-1B labor attestations*. Employers seeking to employ an E-3 or H-1B nonimmigrant must submit a completed ETA Form 9035 or ETA Form 9035E (electronic) to DOL in the manner prescribed in §§ 655.720 and 655.730. Employers must indicate on the form whether the labor condition application is for an “E-3 Australia,” “H-1B Chile,” or “H-1B Singapore” nonimmigrant. Any changes in the procedures and instructions for submitting labor condition applications will be provided in a notice published in the FEDERAL REGISTER and posted on the ETA Web site at <http://www.foreignlaborcert.doleta.gov/>.

(4) *Employer’s responsibilities regarding E-3 and H-1B labor attestation*. Each employer seeking an E-3 or H-1B nonimmigrant in a specialty occupation has several responsibilities, as described more fully in subparts H and I of this part, including the following:

(i) By submitting a signed and completed LCA, the employer makes certain representations and agrees to several attestations regarding the employer’s responsibilities, including the wages, working conditions, and benefits to be provided to the E-3 or H-1B nonimmigrant. These attestations are specifically identified and incorporated in the LCA, and are fully described on Form ETA 9035CP (cover pages).

(ii) The employer reaffirms its acceptance of all of the attestation obligations by transmitting the certified labor attestation to the nonimmigrant, the Department of State, and/or the USCIS according to the procedures of those agencies.

(iii) The employer shall maintain the original signed and certified LCA in its files, and shall make a copy of the filed LCA, as well as necessary supporting documentation (as identified under this

subpart), available for public examination in a public access file at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with ETA.

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

(5) *Application to Chile.* During the period that the provisions of Chapter 14 and Section D of Annex 14.3 of the United States-Chile Free Trade Agreement (Chile FTA) are in effect, this subpart H and subpart I of this part shall apply (except for the provisions excluded under paragraph (d)(1) of this section) to the temporary entry and employment of a nonimmigrant who is a national of Chile under the provisions of Article 14.9 and Annex 2.1 of the Chile FTA and who is a professional under the provisions of Annex 14.3(D) of the Chile FTA.

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

[65 FR 80209, Dec. 20, 2000, as amended at 66 FR 63300, Dec. 5, 2001; 69 FR 68226, Nov. 23, 2004; 70 FR 72560, Dec. 5, 2005; 71 FR 35520, 35521, June 21, 2006; 71 FR 37804, June 30, 2006; 73 FR 19947, Apr. 11, 2008]

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

Four federal agencies (Department of Labor, Department of State, Department of Justice, and Department of Homeland Security) 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-4312, 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), Department of Homeland Security (DHS) and Department of State (DOS) responsibilities.* The Department of State, through U.S. Embassies and Consulates, is responsible for issuing H-1B, H-1B1, and E-3 visas. For H-1B visas, the following agencies are involved: DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. In doing so, the DHS 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