**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Part 655**

**RIN 1205–AB03**

**Wage and Hour Division**

**29 CFR Part 506**

**RIN 1215–AA90**

## Attestations by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports

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

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** The Employment and Training Administration (ETA) and the Employment Standards Administration (ESA) of the Department of Labor (DOL or Department) are promulgating regulations to implement amendments to existing regulations governing the filing and enforcement of attestations by employers seeking to use alien crewmembers to perform longshore work in the U.S. The amendments relate to employers' use of alien crewmembers to perform longshore work at locations in the State of Alaska. Under the Immigration and Nationality Act employers, in certain circumstances, are required to submit these attestations to DOL in order to be allowed by the Immigration and Naturalization Service (INS) to use alien crewmembers to perform specified longshore activities at locations in the State of Alaska. The attestation process is administered by ETA, while complaints and investigations regarding the attestations are handled by ESA.

**DATES:** *Effective Date:* The interim final rule promulgated in this document is effective on February 21, 1995.

*Comments:* Written comments on the interim final rule are invited from interested parties. Comments shall be submitted by March 20, 1995.

**ADDRESSES:** Submit comments to: Doug Ross, Assistant Secretary, Employment and Training Administration, Department of Labor, Room N–4456, 200 Constitution Avenue NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** On 20 CFR part 655, subpart F, and 29 CFR part 506, subpart F, contact Flora T. Richardson, Chief, Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room N–4456, 200 Constitution Avenue NW., Washington, DC 20210. Telephone: (202) 219–5263 (this is not a toll-free number).

On 20 CFR part 655, subpart G, and 29 CFR part 506, subpart G, contact Solomon Sugarman, Chief, Farm Labor Programs, Wage and Hour Division, Employment Standards Administration, Department of Labor, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210. Telephone: (202) 219–7605 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

### I. Paperwork Reduction Act

The information collection requirements of the Form ETA 9033–A under the Alaska exception and contained in this rule have been submitted to the Office of Management and Budget (OMB) for clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control No. 1205–0352. The information collection requirements of the Form ETA 9033 under the prevailing practice exception, assigned OMB Control No. 1205–0309, remain unchanged by this rulemaking. The Form ETA 9033 was published in the Federal Register with the final rule to implement the prevailing practice exception on September 8, 1992 (57 FR 40966).

The Employment and Training Administration estimates that employers will be submitting up to 350 attestations per year under the Alaska exception. The public reporting burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing information/data sources, gathering and maintaining the information/data needed, and completing and reviewing the attestation. It is likely that the burden will be considerably less in the second and subsequent years in which an employer submits an attestation.

Written comments on the collection of information requirements should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Employment and Training Administration, Washington, DC 20503.

### II. Background

The Coast Guard Authorization Act of 1993, Pub. L. 103–206, 107 Stat. 2419 (Coast Guard Act), was enacted on December 20, 1993. Among other things, the Coast Guard Act amended section 258 of the Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*) which places limitations on the performance of longshore work by alien crewmembers in U.S. ports.

The loading and unloading of vessels had traditionally been performed by U.S. longshore workers. However, until passage of the Immigration Act of 1990 (IMMACT 90), Pub. L. 101–649, 104 Stat. 4978, (November 29, 1990), alien crewmembers had also been allowed by Immigration and Naturalization Service (INS) regulation to do this kind of work in U.S. ports, because longshore work was considered to be within the scope of permitted employment for alien crewmembers. The IMMACT 90 limited this practice in order to provide greater protection to U.S. longshore workers.

Prior to the Coast Guard Act's enactment, section 258 of the INA prohibited alien crewmembers admitted with D-visas from performing longshore work except in four specific instances: (a) Where the vessel's country of registration does not prohibit U.S. crewmembers from performing longshore work in that country's ports and nationals of a country which does not prohibit U.S. crewmembers from performing longshore work in that country's ports hold a majority of the ownership interest in the vessel; (b) where there is in effect in a local port one or more collective bargaining agreement(s), each covering at least 30 percent of the longshore workers at a particular port and each permitting the activity to be performed by alien crewmembers; (c) where there is no collective bargaining agreement covering at least 30 percent of the longshore workers and an attestation has been filed with the Department which states that the use of alien crewmembers to perform longshore work is permitted under the prevailing practice of the port, that the use of alien crewmembers is not during a strike or lockout, that such use is not intended or designed to influence the election of a collective bargaining representative, and that notice has been provided to longshore workers at the port; and (d) where the activity is performed with the use of automated self-unloading conveyor belts or vacuum-actuated systems; *provided that,* the Secretary of Labor (Secretary) has not found that an attestation is required because it was not the prevailing practice to utilize alien crewmembers to perform the activity or because the activity was performed during a strike or lockout or in order to influence the election of a collective bargaining representative. For this purpose, the term ''longshore work''

does not include the loading or unloading of hazardous cargo, as determined by the Secretary of Transportation, for safety and environmental protection and no attestations were or are necessary for the loading and unloading of such cargo.

The Department published final regulations in the Federal Register on September 8, 1992, (57 FR 40966) to implement the prevailing practice exception under IMMACT 90. The fishing industry and the carriers worked together to comply with the law by filing the necessary attestations to qualify under the prevailing practice exception. The International Longshore and Warehousemen's Union responded to protect the jurisdiction of U.S. longshore workers by filing complaints pursuant to the attestations and seeking cease and desist orders to halt the performance of longshore work by the carrier's alien crewmembers.

The basic problem was that the prevailing practice exception was apparently designed for established port areas. A lack of flexibility in the remote areas of Alaska where the longshore work needed to be performed, in some cases, prevented carriers from complying with Departmental regulations. As a result, even where there were no U.S. longshore workers available for the particular employment, employers in some of these remote areas were prohibited from performing the necessary longshore work, resulting in potential adverse impacts on the Alaskan fishing industry including the loss of American jobs. In order to remedy the situation, Congress consulted with representatives of the longshoremen's unions and the carriers and enacted special provisions recognizing the unique character of Alaskan ports.

The Coast Guard Act amended the INA by establishing a new Alaska exception to the general prohibition on the performance of longshore work by alien crewmembers in U.S. ports. The Alaska exception provides that the prohibition does not apply where the longshore work is to be performed at a particular location in the State of Alaska and an attestation with accompanying documentation has been filed by the employer with the Department of Labor. The INA provides, however, that longshore work consisting of the use of an automated self-unloading conveyor belt or vacuum-actuated system on a vessel shall continue to be governed by section 258(c) of the INA (8 U.S.C. 1288(c)), even at locations in the State of Alaska. If, however, it is determined that an attestation is required for longshore work at locations in the State of Alaska consisting of the use of automated equipment, *i.e.*, because the Administrator has determined, pursuant to a complaint, that it is not the prevailing practice to use alien crewmembers to perform the longshore activity(ies) through the use of the automated equipment, or was during a strike or lockout or intended to influence an election of a bargaining representative for workers in the local port, or if the Administrator issues a cease and desist order against use of the automated equipment without such attestation, the required attestation shall be filed by the employer under the Alaska exception and not under the prevailing practice exception. The amended INA provides that the prevailing practice exception no longer applies in case of longshore work to be performed at a particular location in the State of Alaska. As a result, U.S. ports in the State of Alaska which were previously listed in Appendix A, ''U.S. Seaports,'' have been removed from the Appendix in this interim final rule.

The Alaska exception is intended to provide a preference for hiring United States longshoremen over the employer's alien crewmembers. The employer must attest that, before using alien crewmen to perform the activity specified in the attestation, the employer will make a bona fide request for and employ United States longshore workers who are qualified and available in sufficient numbers from contract stevedoring companies and private dock operators. The employer must also provide notice of filing the attestation to such contract stevedoring companies and private dock operators, and to labor organizations recognized as exclusive bargaining representatives of United States longshore workers. Finally, the employer must attest that the use of alien crewmembers to perform longshore work is not intended or designed to influence the election of a bargaining representative for workers in the State of Alaska.

The Coast Guard Act provides that the Secretary of Labor shall prescribe such regulations as may be necessary to carry out the amendments to the INA. The INA further provides that attestations previously filed pursuant to the prevailing practice exception at section 258(c) of the INA (8 U.S.C. 1288(c)) would not expire at the expiration of their respective validity periods but would remain valid until 60 days after the date of issuance of final regulations by the Secretary. Absent a final rule for attestations under this program, employers are precluded from using alien crewmembers for longshore activity at a particular location in the State of Alaska unless an employer had a valid attestation for the location on file with ETA on the date of the Act's enactment. Thus, even where there are no qualified United States longshore workers available at a particular location in the State of Alaska, such an employer is prohibited from utilizing alien crewmembers to perform the necessary longshore work. This program affects a limited class of individuals and entities in Alaska. The Department consulted with representatives of all relevant parties in the development of this interim final rule and, for good cause, has determined that issuance of a proposed rule is unnecessary. 5 U.S.C. 553(b)(B).

Further, there is ongoing longshore work being performed off the coast of Alaska in connection with the fishing industry. Since delay in the issuance of an interim final rule precludes employers from filing attestations in Alaska in order to use the ''Alaska exception'', such employers may be encouraged by economic exigencies to utilize foreign crewmembers in longshore work illegally or to reflag their vessels to qualify for the reciprocity exception for vessels under the flags of countries which permit U.S. crewmembers to perform longshore work. Either of these actions by shippers would diminish employment opportunities for Alaskan stevedores, contrary to the purposes of the Act. Indeed, DOL has received information that further delay in implementing the Alaska exception could adversely impact the employment opportunities for Alaskan workers seeking longshore work. The Department, for good cause, has determined that this potential harm makes it impracticable and contrary to the public interest to delay implementation by publishing the rule as a proposed rule. 5 U.S.C. 553(b)(B).

Nevertheless, the Department is very interested in receiving comments on the interim final rule. These comments will be considered in the development of a final rule.

## III. Attestation Process and Requirements

The regulations for the attestation program for employers using alien crewmembers for longshore work in the United States are published at 20 CFR part 655, subparts F and G, and 29 CFR part 506, subparts F and G, 57 FR 40966 (September 8, 1992).

### *A. When and Where to File*

The regulations require that, to be acceptable, any attestation under the Alaska exception must be filed with ETA at least 30 days prior to the first

performance of longshore activity by alien crewmembers, or anytime up to 24 hours before the first performance of the activity if the delay could not have been reasonably anticipated. An attestation must be filed only once per year for locations at which alien crewmembers will be used. Therefore, the 30-day filing requirement applies only to the first performance of longshore work after the attestation is filed. Subsequent arrivals to the same location in the State of Alaska in the same year do not require that an additional attestation be filed.

Under the prevailing practice exception, the regulations require that a separate attestation be filed for each port at which the employer intends to use alien crewmembers to perform longshore work. The Department has determined that, under the Alaska exception, it is appropriate to accept attestations which contain multiple locations. An attestation must be filed by each individual employer but may apply to multiple vessels and multiple locations within the State of Alaska. For other States, the prevailing practice exception is port-specific and the employer is required to attest that there is no collective bargaining agreement *in the port* covering at least 30 percent of the longshore workers, and that it is the prevailing practice *in the port* for alien crewmembers to perform longshore work. There is no such port-specific or location-specific attestation element or other provision under the Alaska exception.

The Department requires that crewmember attestations for locations in the State of Alaska be submitted to and accepted by the Employment and Training Administration (ETA) regional office in Seattle, Washington. The address of the Seattle regional office is listed in the instructions for completing the Form ETA 9033–A.

ETA shall make available for public examination in Washington, DC, a list of employers which have filed attestations, and for each such employer, a copy of the employer's attestation and accompanying documentation in a timely manner after the acceptance of the attestation.

*B. Acceptance for Filing*

In accepting an attestation for filing, the regulations require that the application be filed with ETA at least 30 days before the first performance of the longshore activity (or anytime up to 24 hours before the first performance of the activity, upon a showing that the employer could not have reasonably anticipated the need to file an attestation for that location at that time). The term ''could not have reasonably anticipated'' is intended to be a broader and more flexible standard than under the prevailing practice exception, which permits late filing only in the event of an ''unanticipated emergency.'' Depending on the particular circumstances, delays occasioned by adverse weather conditions, changes in commercial requirements, changes in fish migration patterns, or other unforeseen circumstances may be sufficient to file less than 30 days in advance.

The regulations provide that the Department review an attestation only to ensure that it is completed properly, that it is accompanied by the required documentation specified in the regulations, and that the documentation is not, on its face, inconsistent with the attestation.

Level of Federal Review of Attestations

The Department has determined that the general approach to its review of employer attestations under the prevailing practice exception shall apply to attestations filed under the Alaska exception. The Department will review an attestation to ensure that it has been filed at least 30 days prior to the first performance of the longshore activity (or anytime up to 24 hours before the first performance of the activity, upon a showing that the employer could not have reasonably anticipated the need to file an attestation for that location at that time), that it is completed properly, that it has the appropriate accompanying documentation, and that the documentation is not, on its face, inconsistent with the attestation. In addition, the Department will review attestations to determine the following: (1) Whether the Administrator, Wage and Hour Division, DOL, has advised ETA that it has issued a cease and desist order currently in effect that would affect the attesting employer and particular location; (2) whether the Administrator has advised ETA of a determination that an employer has misrepresented or failed to comply with an attestation previously submitted and accepted for filing, requiring the Attorney General to bar the employer from entry to any U.S. port for up to one year; and (3) whether the Administrator has advised ETA that the employer has failed to comply with any penalty or remedy assessed.

Appeals Process

The regulations do not include an administrative appeal process for attestations during the filing phase under the Alaska exception. When an attestation is returned because it is untimely, improperly completed, or lacking proper documentation, an employer may resubmit another attestation to the Department. Attestations which have been accepted by ETA may be objected to by an aggrieved party through the complaint process in subpart G, and procedures for investigation, hearing, and appeal are provided therein. The Department believes that this approach is consistent with the statute's intent for a streamlined attestation filing process and a complaint-driven enforcement system for the statute's requirements.

*C. Attestation Elements*

Bona-fide Request for United States Longshore Workers

An employer or its agent filing an attestation under the Alaska exception must attest that it will make a bona fide request for dispatch of United States longshore workers who, by industry standards in the State of Alaska, including safety considerations, are qualified and available in sufficient numbers to perform the longshore activity at the particular time and location. Such requests must be directed to contract stevedoring companies and operators of private docks at which the employer intends to use longshore workers. Wherever two or more contract stevedoring companies have signed a joint collective bargaining agreement with a single qualified labor organization, the employer need request longshore workers from only one of such contract stevedoring companies. Qualified labor organizations are those which have been recognized as exclusive bargaining representatives of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which make available or intend to make available longshore workers to the particular location where the longshore work is to be performed. An employer is not required to request dispatch of United States longshore workers from contract stevedoring companies or private dock operators which do not meet the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) or, in the case of contract stevedoring companies, which are not licensed to do business in the State of Alaska. Evidence of coverage is a copy of the DOL Office of Workers' Compensation Programs (OWCP) Certificate of Compliance, which is maintained by the contract stevedoring company or private dock operator. Further, a request for dispatch from a private dock operator

need only be made for longshore work to be performed at that dock.

Employers are not required to request dispatch of United States longshore workers from any party which has notified the employer in writing that it does not intend to dispatch workers to the location at which longshore work is to be performed. If a party that has provided such notice subsequently informs the employer in writing that it is prepared to provide workers, the employer's obligations to that party to request dispatch of, and employ qualified United States longshore workers made available in sufficient numbers, recommence 60 days from the employer's receipt of the notice.

Employment of United States Longshore Workers

An employer or its agent must attest that it will employ all United States longshore workers dispatched in response to a request made under the first attestation element who are qualified and available in sufficient numbers and who are needed to perform the longshore activity at the particular time and location attested to.

This attestation element also specifies that employers will not be required to hire less than full work units of United States longshore workers nor to provide overnight accommodations for the workers. The regulations provide that ''full work unit'' means the full complement of longshore workers needed to perform the longshore activity, as determined by industry standards in the State of Alaska, including safety considerations. Where the makeup of a full work unit is covered by one or more collective bargaining agreements in effect at the time and location where longshore work is to be performed, the provisions of such agreements shall be deemed to be in conformance with industry standards in the State of Alaska. This element also states the conditions under which employers will be required to provide transportation from the point of embarkation to the vessel on which longshore work is to be performed. Specifically, there is a thirty-minute travel time limit and a five-mile travel distance limit except in Klawock/Craig and Wide Bay, Alaska, where, due to the remoteness of these areas, the travel limits are extended to forty-five minutes and seven and one-half miles, respectively. Further, an employer is not required to provide transportation, even if the vessel is within the specified time and distance limitations from the point of embarkation, unless surface transportation is available and such transportation may be safely accomplished. If a vessel where longshore work is to be performed is beyond the specified time and distance limitations from the point of embarkation, the employer is still obligated to hire any qualified U.S. longshore worker who is capable of getting to the vessel where the longshore work is to be performed at his or her own expense, even though the specified time and/or distance limitations are exceeded, but is not required to provide such transportation nor reimburse the worker for expenses incurred in getting to and from the vessel.

Election

An employer filing an attestation under the Alaska exception must attest that the use of alien crewmembers to perform longshore activities will not be intended or designed to influence an election of a bargaining representative for workers in the State of Alaska.

Notice

Lastly, an employer of alien crewmembers must attest that at the time of filing the attestation, notice of the filing has been provided to: (1) Labor organizations which have been recognized as exclusive bargaining representatives of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which make available or intend to make available workers to the locations where the employer is attesting that the longshore work is to be performed; (2) contract stevedoring companies which are licensed to do business in the State of Alaska, meet the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932), and which employ or intend to employ United States longshore workers at those locations; and (3) operators of private docks at which the employer intends to use longshore workers. The operators to whom provision of notice is required shall also meet the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932).

The required notices shall include a copy of the Form ETA 9033–A, shall state that the attestation with accompanying documentation has been filed and is available at the National office of ETA for review by interested parties, and shall explain where complaints can be filed with respect to employer attestations. Further, in the required notice, the employer shall request a copy of the Certificate of Compliance issued by the district director of the Office of Workers' Compensation Programs under section 37 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) from contract stevedoring companies and private dock operators. The employer's obligations to request dispatch of and employ qualified United States longshore workers from any party shall commence upon receipt of the Certificate of Compliance.

Finally, the Department periodically shall publish in the Federal Register a list of employers who have submitted attestations under the Alaska exception.

*D. Automated Vessel Exception*

The INA provides that longshore work consisting of the use of an automated self-unloading conveyor belt or vacuum-actuated system on a vessel shall continue to be governed by the prevailing practice exception and Departmental regulations thereunder at 20 CFR 655.520 and 29 CFR 506.520. If, however, it is determined that an attestation is required for longshore work consisting of the use of automated equipment, *i.e.*, because the Administrator has determined, pursuant to a complaint, that it is not the prevailing practice to use alien crewmembers to perform the longshore activity(ies) through the use of the automated equipment, or was during a strike or lockout or intended to influence an election of a bargaining representative for workers in the local port, or if the Administrator issues a cease and desist order against use of the automated equipment without such attestation, the required attestation shall be filed by the employer under the Alaska exception and not under the prevailing practice exception. The amended INA provides that the prevailing practice exception no longer applies in the case of longshore work to be performed at a particular location in the State of Alaska.

IV. Complaints, Investigations, and Dispositions

The INA provides that the Secretary shall establish complaint, investigation, and hearing procedures and authorizes the Secretary to issue cease and desist orders against employers. The Secretary's enforcement responsibilities are assigned to the Administrator, Wage and Hour Division, of the Department's Employment Standards Administration (ESA).

*A. Complaint, Investigation, and Hearing*

The INA provides that the existing process for the receipt, investigation, and disposition of complaints at section 258(c)(4) of the INA shall apply to the use of alien crewmembers to perform

longshore work at locations in the State of Alaska. Therefore, enforcement of attestations filed under the Alaska exception will be conducted in accordance with regulations currently in place for attestations filed under the prevailing practice exception.

Section 258(c)(4) of the INA requires that the Secretary establish a system to conduct investigations where a complaint presents there is reasonable cause to believe that an attesting employer failed to meet a condition attested to or misrepresented a material fact in its attestation, or that a non-attesting employer claiming the automated vessel exception was not qualified for the exception because the performance of the associated longshore activity does not prevail in the port. The regulations provide that the Wage and Hour Administrator may conduct investigations of potential violations of the law only pursuant to a complaint. The investigative process is to be completed and a determination issued in a 180-day period, or a longer period for good cause shown. Any aggrieved person may file a complaint.

The regulations provide that, in investigating an attesting employer, the Administrator shall consider the employer's statutory burden to present and retain facts and evidence to show the matters attested to. The regulations also require that the employer cooperate in the investigation and take no retaliatory action against persons who file complaints, assist in the investigation, or participate in the administrative proceedings.

*B. Administrative Law Judge Hearing and Discretionary Review by the Secretary*

Section 258(c)(4)(D) of the INA requires that the Secretary provide interested parties an opportunity for a hearing within 60 days of the date of the investigative determination. Because of this compressed timeframe, the regulations require that a request for hearing be filed directly with the Chief Administrative Law Judge no later than 15 days from the date of the Administrator's determination. Further, the regulations incorporate the statutory imposition of the burden of proof on the attesting employer to establish the truth of the attestation elements.

An opportunity for discretionary review by the Secretary is afforded by the regulations, with short deadlines in accordance with the statutory intent for expedited dispositions. Any interested party may request such review, and the Secretary shall determine what matters, if any, will be reviewed.

*C. Cease and Desist Order*

Section 258(c)(4)(C) of the INA authorizes the Secretary, at the request of a complainant, to issue a cease and desist order against an attesting employer or against a non-attesting employer claiming the automated vessel exception. The complainant's request may be made when the Secretary has determined there is reasonable cause to conduct an investigation. The INA specifies that, if a complainant requests such an order, the employer will be notified and given 14 days within which to respond. The Secretary is then required to determine whether the preponderance of the evidence submitted supports the complainant's position and, if it does, to order that the employer cease and desist the activity(ies) at issue. The order remains in effect throughout the hearing process for the attesting employer; for the non-attesting employer claiming the automated vessel exception, the order remains in effect throughout the hearing process unless ETA accepts for filing an attestation from that employer for the activity and location which the cease and desist order affects.

The regulations provide that the complainant who desires a cease and desist order must submit two complete copies of the request and the evidence to substantiate the allegations (the second copy of the request will be provided to the employer). The Administrator's notice to the employer shall include copies of the complaint, the cease and desist order request and supporting evidence, and any other pertinent evidence from an investigation of the same or a closely related matter which the Administrator incorporates into the record. The employer, thus, will be fully informed as to the allegations and evidence. The Administrator's notice also shall specify that, during the 14-day response period specified by the INA, the Administrator will provide, at the employer's request, an opportunity for a meeting with a Wage and Hour Division official to give the employer's views on the evidence and issues. This meeting shall be informal, shall not be subject to any procedural rules, and shall include the complainant if the complainant so desires.

The regulations specify that the cease and desist order will remain in effect unless and until the Administrator withdraws the order on the ground that the employer's position is determined to have been correct or a final determination is made which results in resolution of the matter under investigation, or—in the case of the automated vessel exception—an attestation relating to the longshore activity is accepted for filing by ETA.

A complainant's request for a cease and desist order under the Alaska exception shall specify the location(s) at issue. The regulations provide that the Secretary is required to determine whether the preponderance of the evidence submitted supports the complainant's position and, if it does, to order that the employer cease and desist the activity(ies) at the location(s) at issue. Since an attestation under the Alaska exception may be valid for multiple locations, a cease and desist order pertaining to a particular location or locations shall not prejudice the validity of the attestation with respect to the performance of longshore activities which are covered by the attestation, but which are not at issue under the cease and desist order.

*D. Penalties*

A violation of section 258 of the INA or the regulations thereunder by an attesting employer may result in the imposition of administrative remedy(ies), such as a civil money penalty not to exceed $5,000 per alien crewmember illegally employed. Upon notice of the violation(s), the Attorney General thereafter shall not permit the vessels owned or chartered by the employer to enter any port of the U.S. during a period of up to one year. Additionally, ETA will be notified and shall thereafter not accept any attestation from the employer for any activity(ies) at any U.S. port for one year (or for a shorter period, if such period is specified by INS).

Upon the Department's final determination that an employer improperly claimed the automated vessel exemption, the Attorney General will be notified and shall thereafter require that, before using alien crewmembers, the employer must have on file with ETA an attestation for the activity(ies) and the port at issue. For locations in the State of Alaska such an attestation shall be made under the Alaska exception on Form ETA 9033–A. For other states, the attestation shall be made under the prevailing practice exception on Form ETA 9033.

V. Enforcement Matters

*A. Clarification of Judicial Review*

To ensure that the regulation comports with recent supreme court caselaw, § _____.650 of the rule has been amended to provide that a party may not seek judicial review of an administrative law judge's decision until such party has exhausted all administrative remedies.

*B. Debarment Timing (Notice to Attorney General)*

The statute requires that the Secretary notify the Attorney General (AG) of an employer's violation(s). Pursuant to § _____.665(b) of the Interim Final rule, the Administrator is required to notify the AG and ETA of the final determination of a violation by an attesting employer or of the ineligibility of an employer for the automated vessel exception, upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an attesting employer or a finding of nonapplicability of the automated vessel exception, and no timely request for hearing is made pursuant to § _____.630 of this part;

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an attesting employer or finding inapplicable the automated vessel exception; or

(3) Where the administrative law judge finds that there was no violation by an attesting employer or that the automated vessel exception does apply, and the Secretary, upon review, issues a decision pursuant to § _____.655 of this part, holding that a violation was committed by an attesting employer or holding that the automated vessel exception does not apply.

This regulatory construct creates a situation where the Administrator notifies the AG of a violation upon a finding of a violation or upon a finding that the automated vessel exception does not apply by an ALJ, even though such finding subsequently may be appealed to the Secretary and eventually overturned. An attesting employer thus could be debarred after a finding of violation by an ALJ, serve part or all of the debarment period, and subsequently be found by the Secretary not to have committed a violation. Similarly, if the ALJ finds that the employer is ineligible for the automated vessel exception, the employer could be required not to use alien crewmembers to perform longshore activities at the specified port without first filing an attestation with ETA, and subsequently be found to be eligible for the automated vessel exception by the Secretary.

To correct this anomaly, § _____.665(b) has been amended to require notification to the AG after a finding of a violation or a finding of nonapplicability of the automated vessel exception by an ALJ only under the following circumstances: (a) where there is no appeal from the ALJ's finding to the Secretary; (b) where, upon appeal, the Secretary declines to review the ALJ's finding; and (c) where, upon review, the Secretary affirms the ALJ's finding.

VI. Summary

The Department welcomes comments on these and any other issues addressed in the regulations and on any issues not addressed that commenters believe need to be addressed.

*Regulatory Impact and Administrative Procedure*

E.O. 12866:

In accordance with Executive Order 12866, the Department of Labor has determined that this is not a significant regulatory action as defined in section 3(f) of the Order.

Regulatory Flexibility Act:

The Department of Labor has notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule does not have a significant economic impact on a substantial number of small entities.

Nevertheless, interested parties are requested to submit, as part of their comments on this rule, information on the potential economic impact of the rule.

Absent a final rule for attestations under this program, employers are precluded from using alien crewmembers for longshore activity at a particular location in the State of Alaska unless the employer had a valid attestation for the location on file with ETA on the date of the Coast Guard Act's enactment. This program affects a limited class of individuals and entities in Alaska. The Department consulted with representatives of all relevant parties in the development of this interim final rule and, for good cause, has determined that issuance of a proposed rule is unnecessary. 5 U.S.C. 553(b)(B).

Further, there is ongoing longshore work being performed off the coast of Alaska in connection with the fishing industry. Since delay in the issuance of an interim final rule precludes employers from filing attestations in Alaska in order to use the ''Alaska exception'', such employers may be encouraged by economic exigencies to utilize foreign crewmembers in longshore work illegally or to reflag their vessels to qualify for the reciprocity exception for vessels under the flags of countries which permit U.S. crewmembers to perform longshore work. Either of these actions by shippers would diminish employment opportunities for Alaskan stevedores, contrary to the purposes of the Act. Indeed, DOL has received information that further delay in implementing the Alaska exception could adversely impact the employment opportunities for Alaskan workers seeking longshore work. The Department, for good cause, has determined that this potential harm makes it impracticable and contrary to the public interest to delay implementation by publishing the rule as a proposed rule. 5 U.S.C. 553(b)(B).

Nevertheless, the Department is very interested in receiving comments on the interim final rule. These comments will be considered in the development of a final rule.

*Catalog of Federal Domestic Assistance Number*

This program is not listed in the *Catalog of Federal Domestic Assistance.*

List Of Subjects

*20 CFR Part 655*

Administrative practice and procedure, Agriculture, Aliens, Crewmembers, Employment, Enforcement, Fashion Models, Forest and Forest Products, Guam, Health professions, Immigration, Labor, Longshore work, Migrant labor, Nurse, Penalties, Registered nurse, Reporting and recordkeeping requirements, Specialty occupation, Students, Wages.

*29 CFR Part 506*

Administrative practice and procedures, Aliens, Crewmembers, Employment, Enforcement, Immigration, Labor, Longshore work, Penalties, Reporting and recordkeeping requirements.

Text of the Joint Interim Final Rule

For the reasons set forth in the common preamble, the text of the joint interim final rule as adopted by ETA and the Wage and Hour Division, ESA, and in this document appears below:

**Subpart F—Attestations by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports**

General Provisions

Sec.

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_____.510 Employer attestations.
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Alaska Exception

_____.530 Special provisions regarding the performance of longshore activities at locations in the State of Alaska.
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## Subpart F—Attestations by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports

General Provisions

*§ _____.500 Purpose, procedure and applicability of subparts F and G of this part.*

(a) *Purpose.* (1) Section 258 of the Immigration and Nationality Act (''Act'') prohibits nonimmigrant alien crewmembers admitted to the United States on D-visas from performing longshore work at U.S. ports except in five specific instances:

(i) Where the vessel's country of registration does not prohibit U.S. crewmembers from performing longshore work in that country's ports and nationals of a country (or countries) which does not prohibit U.S. crewmembers from performing longshore work in that country's ports hold a majority of the ownership interest in the vessel, as determined by the Secretary of State (henceforth referred to as the ''reciprocity exception'');

(ii) Where there is in effect in a local port one or more collective bargaining agreement(s), each covering at least thirty percent of the longshore workers, and each permitting the activity to be performed under the terms of such agreement(s);

(iii) Where there is no collective bargaining agreement covering at least thirty percent of the longshore workers at the particular port and an attestation with accompanying documentation has been filed with the Department of Labor attesting that, among other things, the use of alien crewmembers to perform a particular activity of longshore work is permitted under the prevailing practice of the particular port (henceforth referred to as the ''prevailing practice exception'');

(iv) Where the longshore work is to be performed at a particular location in the State of Alaska and an attestation with accompanying documentation has been filed with the Department of Labor attesting that, among other things, before using alien crewmembers to perform the activity specified in the attestation, the employer will make a bona fide request for and employ United States longshore workers who are qualified and available in sufficient numbers from contract stevedoring companies, labor organizations recognized as exclusive bargaining representatives of United States longshore workers, and private dock operators (henceforth referred to as the ''Alaska exception''); or

(v) Where the longshore work involves an automated self-unloading conveyor belt or vacuum-actuated system on a vessel and the Administrator has not previously determined that an attestation must be filed pursuant to this part as a basis for performing those functions (henceforth referred to as the ''automated vessel exception'').

(2) The term ''longshore work'' does not include the loading or unloading of hazardous cargo, as determined by the Secretary of Transportation, for safety and environmental protection. The Department of Justice, through the Immigration and Naturalization Service (INS), determines whether an employer may use alien crewmembers for longshore work at U.S. ports. In those cases where an employer must file an attestation in order to perform such work, the Department of Labor shall be responsible for accepting the filing of such attestations. Subpart F of this part sets forth the procedure for filing attestations with the Department of Labor for employers proposing to use alien crewmembers for longshore work at U.S. ports under the prevailing practice exception, the Alaska exception, and where it has been determined that an attestation is required under the automated vessel exception listed in paragraph (a)(1)(iv) of this section. Subpart G of this part sets forth complaint, investigation, and penalty provisions with respect to such attestations.

(b) *Procedure.* (1) Under the prevailing practice exception in sec. 258(c) of the Act, and in those cases where it has been determined that an attestation is required under the automated vessel exception for longshore work to be performed at locations other than in the State of Alaska, the procedure involves filing an attestation with the Department of Labor attesting that:

(i) The use of alien crewmembers for a particular activity of longshore work is the prevailing practice at the particular port;

(ii) The use of alien crewmembers is not during a strike or lockout nor designed to influence the election of a collective bargaining representative; and

(iii) Notice of the attestation has been provided to the bargaining representative of longshore workers in the local port, or, where there is none, notice has been provided to longshore workers employed at the local port.

(2) Under the automated vessel exception in sec. 258(c) of the Act, no attestation is required in cases where longshore activity consists of the use of an automated self-unloading conveyor belt or vacuum-actuated system on a vessel. The legislation creates a rebuttable presumption that the use of alien crewmembers for the operation of such automated systems is the prevailing practice. In order to overcome such presumption, it must be shown by the preponderance of the evidence submitted by any interested party, that the use of alien crewmembers for such activity is not the prevailing practice at the particular port, that it is during a strike or lockout, or that it is intended or designed to influence an election of a bargaining representative for workers in the local port.

(3) Under the Alaska exception in sec. 258(d) of the Act, and in those cases where it has been determined that an attestation is required under the automated vessel exception consisting of the use of such equipment for longshore work to be performed in the State of Alaska, the procedure involves filing an attestation with the Department of Labor attesting that:

(i) The employer will make a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the activity at the particular time and location from the parties to whom notice has been provided under paragraph (b)(3)(iv) (B) and (C) of this section, except that:

(A) Wherever two or more contract stevedoring companies which meet the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) have signed a joint collective bargaining agreement with a single labor organization recognized as an exclusive bargaining representative of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*), the employer may request longshore workers from only one such contract stevedoring company, and

(B) A request for longshore workers to an operator of a private dock may be made only for longshore work to be performed at that dock and only if the operator meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932);

(ii) The employer will employ all United States longshore workers made available in response to the request made pursuant to paragraph (b)(3)(i) of this section who are qualified and available in sufficient numbers and who are needed to perform the longshore activity at the particular time and location attested to;

(iii) The use of alien crewmembers for such activity is not intended or designed to influence and election of a bargaining representative for workers in the State of Alaska; and

(iv) Notice of the attestation has been provided to:

(A) Labor organizations which have been recognized as exclusive bargaining representatives of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which make available or intend to make available workers to the particular location where the longshore work is to be performed;

(B) Contract stevedoring companies which employ or intend to employ United States longshore workers at that location; and

(C) Operators of private docks at which the employer will use longshore workers.

(c) *Applicability.* Subparts F and G of this part apply to all employers who seek to employ alien crewmembers for longshore work at U.S. ports under the prevailing practice exception, to all employers who seek to employ alien crewmembers for longshore work at locations in the State of Alaska under the Alaska exception, to all employers claiming the automated vessel exception, and to those cases where it has been determined that an attestation is required under the automated vessel exception.

**§ _____.501 Overview of responsibilities.**

This section provides a context for the attestation process, to facilitate understanding by employers that may seek to employ alien crewmembers for longshore work under the prevailing practice exception, under the Alaska exception, and in those cases where an attestation is necessary under the automated vessel exception.

(a) *Department of Labor's responsibilities.* The United States Department of Labor (DOL) administers the attestation process. Within DOL, the Employment and Training Administration (ETA) shall have responsibility for setting up and operating the attestation process; the Employment Standards Administration's Wage and Hour Division shall be responsible for investigating and resolving any complaints filed concerning such attestations.

(b) *Employer attestation responsibilities.* (1) Each employer seeking to use alien crewmembers for longshore work at a local U.S. port pursuant to the prevailing practice exception or where an attestation is required under the automated vessel exception for longshore work to be performed at locations other than in the State of Alaska shall, as the first step, submit an attestation on Form ETA 9033, as described in § _____.510 of this part, to ETA at the address set forth at § _____.510(b) of this part. If ETA accepts the attestation for filing, pursuant to § _____.510 of this part, ETA shall return the cover form of the accepted attestation to the employer, and, at the same time, shall provide notice of the filing to the Immigration and Naturalization Service (INS) office having jurisdiction over the port where longshore work will be performed.

(2) Each employer seeking to use alien crewmembers for longshore work at a particular location in the State of Alaska pursuant to the Alaska exception or where an attestation is required under the automated vessel exception for longshore work to be performed at a particular location in Alaska shall submit, as a first step, an attestation on Form ETA 9033–A, as described in § _____.533 of this part, to ETA at the address of the Seattle regional office as set forth at § _____.532 of this part. The address appears in the instructions to Form ETA 9033–A. ETA shall return the cover form of the accepted attestation to the employer, and, at the same time, shall provide notice of the filing to the INS office having jurisdiction over the location where longshore work will be performed.

(c) *Complaints.* Complaints concerning misrepresentation in the attestation, failure of the employer to carry out the terms of the attestation, or complaints that an employer is required to file an attestation under the automated vessel exception, may be filed with the Wage and Hour Division, according to the procedures set forth in subpart G of this part. Complaints of ''misrepresentation'' may include assertions that an employer has attested to the use of alien crewmembers only for a particular activity of longshore work and has thereafter used such alien crewmembers for another activity of longshore work. If the Division determines that the complaint presents reasonable cause to warrant an investigation, the Division shall then investigate, and, where appropriate, after an opportunity for a hearing, assess sanctions and penalties. Subpart G of this part further provides that interested parties may obtain an administrative law judge hearing on the Division's determination after an investigation and may seek the Secretary's review of the

administrative law judge's decision. Subpart G of this part also provides that a complainant may request that the Wage and Hour Administrator issue a cease and desist order in the case of either alleged violation(s) of an attestation or longshore work by alien crewmember(s) employed by an employer allegedly not qualified for the claimed automated vessel exception. Upon the receipt of such a request, the Division shall notify the employer, provide an opportunity for a response and an informal meeting, and then rule on the request, which shall be granted if the preponderance of the evidence submitted supports the complainant's position.

**§ _____.502 Definitions.**

For the purposes of subparts F and G of this part:

*Accepted for filing* means that a properly completed attestation on Form ETA 9033, including accompanying documentation for each of the requirements in § _____.510 (d) through (f) of this part, or a properly completed attestation on Form ETA 9033–A, including accompanying documentation for the requirement in § _____.537 of this part in the case of an attestation under the Alaska exception, submitted by the employer or its designated agent or representative has been received and filed by the Employment and Training Administration of the Department of Labor (DOL). (Unacceptable attestations under the prevailing practice exception are described at § _____.510(g)(2) of this part. Unacceptable attestations under the Alaska exception are described at § _____.538(b) of this part.)

*Act* and *INA* mean the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

*Activity* means any activity relating to loading cargo; unloading cargo; operation of cargo-related equipment; or handling of mooring lines on the dock when a vessel is made fast or let go.

*Administrative law judge* means an official appointed pursuant to 5 U.S.C. 3105.

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, or such authorized representatives as may be designated to perform any of the functions of the Administrator under subparts F and G of this part.

*Attestation* means documents submitted by an employer attesting to and providing accompanying documentation to show that, under the prevailing practice exception, the use of alien crewmembers for a particular activity of longshore work at a particular U.S. port is the prevailing practice, and is not during a strike or lockout nor intended to influence an election of a bargaining representative for workers; and that notice of the attestation has been provided to the bargaining representative, or, where there is none, to the longshore workers at the local port. Under the Alaska exception, such documents shall show that, before using alien crewmen to perform longshore work, the employer will make bona fide requests for dispatch of United States longshore workers who are qualified and available in sufficient numbers and that the employer will employ all such United States longshore workers in response to such a request for dispatch; that the use of alien crewmembers is not intended or designed to influence an election of a bargaining representative for workers in the State of Alaska; and that notice of the attestation has been provided to labor organizations recognized as exclusive bargaining representatives of United States longshore workers, contract stevedoring companies, and operators of private docks at which the employer will use longshore workers.

*Attesting employer* means an employer who has filed an attestation.

*Attorney General* means the chief official of the U.S. Department of Justice or the Attorney General's designee.

*Automated vessel* means a vessel equipped with an automated self-unloading conveyor belt or vacuum-actuated system which is utilized for loading or unloading cargo between the vessel and the dock.

*Certifying Officer* means a Department of Labor official who makes determinations about whether or not to accept attestations:

(1) A regional Certifying Officer designated by a Regional Administrator, Employment and Training Administration (RA) makes such determinations in a regional office of the Department;

(2) A national Certifying Officer makes such determinations in the national office of the USES.

*Chief, Division of Foreign Labor Certifications, USES* means the chief official of the Division of Foreign Labor Certifications within the United States Employment Service, Employment and Training Administration, Department of Labor, or the designee of the Chief, Division of Foreign Labor Certifications, USES.

*Chief Administrative Law Judge* means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

*Contract stevedoring company* means a stevedoring company which is licensed to do business in the State of Alaska and which meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932).

*Crewmember* means any nonimmigrant alien admitted to the United States to perform services under sec. 101(a)(15)(D)(i) of the Act (8 U.S.C. 1101(a)(15)(D)(i)).

*Date of filing* means the date an attestation is *accepted for filing* by ETA.

*Department* and *DOL* mean the United States Department of Labor.

*Director* means the chief official of the United States Employment Service (USES), Employment and Training Administration, Department of Labor, or the Director's designee.

*Division* means the Wage and Hour Division of the Employment Standards Administration, DOL.

*Employer* means a person, firm, corporation, or other association or organization, which suffers or permits, or proposes to suffer or permit, alien crewmembers to perform longshore work at a port within the U.S. For purposes of §§ _____.530 through _____.541, which govern the performance of longshore activities by alien crewmembers under the Alaska exception, ''employer'' includes any agent or representative designated by the employer.

*Employment and Training Administration (ETA)* means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

*Employment Standards Administration (ESA)* means the agency within the Department of Labor (DOL) which includes the Wage and Hour Division.

*Immigration and Naturalization Service (INS)* means the component of the Department of Justice which makes the determination under the Act on whether an employer of alien crewmembers may use such crewmembers for longshore work at a U.S. port.

*Lockout* means a labor dispute involving a work stoppage, wherein an employer withholds work from its employees in order to gain a concession from them.

*Longshore work* means any activity (except safety and environmental protection work as described in sec. 258(b)(2) of the Act) relating to the loading or unloading of cargo, the operation of cargo related equipment (whether or not integral to the vessel),

or the handling of mooring lines on the dock when the vessel is made fast or let go, in the United States or the coastal waters thereof.

*Longshore worker* means a U.S. worker who performs longshore work.

*Port* means a geographic area, either on a seacoast, lake, river or any other navigable body of water, which contains one or more publicly or privately owned terminals, piers, docks, or maritime facilities, which is commonly thought of as a port by other government maritime-related agencies, such as the Maritime Administration. U.S. ports include, but are not limited to, those listed in Appendix A to this subpart.

*Qualified and available in sufficient numbers* means the full complement of qualified longshore workers needed to perform the longshore activity, as determined by industry standards in the State of Alaska, including safety considerations.

*Regional Administrator, Employment and Training Administration (RA)* means the chief official of the Employment and Training Administration (ETA) in a Department of Labor (DOL) regional office.

*Secretary* means the Secretary of Labor or the Secretary's designee.

*Strike* means a labor dispute wherein employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operations.

*Unanticipated emergency* means an unexpected and unavoidable situation, such as one involving severe weather conditions, natural disaster, or mechanical breakdown, where cargo must be immediately loaded on, or unloaded from, a vessel.

*United States* is defined at 8 U.S.C. 1101(a)(38).

*United States Employment Service (USES)* means the agency of the Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices.

*United States (U.S.) worker* means a worker who is a U.S. citizen, a U.S. national, a permanent resident alien, or any other worker legally permitted to work indefinitely in the United States.

**§ _____.510 Employer attestations.**

(a) *Who may submit attestations?* An employer (or the employer's designated U.S. agent or representative) seeking to employ alien crewmembers for a particular activity of longshore work under the prevailing practice exception shall submit an attestation, provided there is not in effect in the local port any collective bargaining agreement covering at least 30 percent of the longshore workers. An attestation is required for each port at which the employer intends to use alien crewmembers for longshore work. The attestation shall include: A completed Form ETA 9033, which shall be signed by the employer (or the employer's designated agent or representative); and facts and evidence prescribed in paragraphs (d) through (f) of this section. This § _____.510 shall not apply in the case of longshore work performed at a particular location in the State of Alaska. The procedures governing the filing of attestations under the Alaska exception are set forth at §§ _____.530 through _____.541.

*(b) Where and when should attestations be submitted?* (1) Attestations must be submitted, by U.S. mail, private carrier, or facsimile transmission to the U.S. Department of Labor ETA Regional Office(s) which are designated by the Chief, Division of Foreign Labor Certifications, USES. Attestations must be received and date-stamped by DOL at least 14 calendar days prior to the date of the first performance of the intended longshore activity, and shall be accepted for filing or returned by ETA in accordance with paragraph (g) of this section within 14 calendar days of the date received by ETA. An attestation which is accepted by ETA solely because it was not reviewed within 14 days is subject to subsequent invalidation pursuant to paragraph (i) of this section. Every employer filing an attestation shall have an agent or representative with a United States address. Such address shall be clearly indicated on the Form ETA 9033. In order to ensure that an attestation has been accepted for filing prior to the date of the performance of the longshore activity, employers are advised to take mailing time into account to make sure that ETA receives the attestation at least 14 days prior to the first performance of the longshore activity.

(2) *Unanticipated Emergencies.* ETA may accept for filing attestations received after the 14-day deadline when due to an unanticipated emergency, as defined in § _____.502 of this part. When an employer is claiming an unanticipated emergency, it shall submit documentation to support such a claim. ETA shall then make a determination on the validity of the claim, and shall accept the attestation for filing or return it in accordance with paragraph (g) of this section. ETA shall in no case accept an attestation received later than the date of the first performance of the activity.

(c) *What should be submitted?* (1) *Form ETA 9033 with accompanying documentation.* For each port, a completed and dated original Form ETA 9033, or facsimile transmission thereof, containing the required attestation elements and the original signature of the employer (or the employer's designated agent or representative) shall be submitted, along with two copies of the completed, signed, and dated Form ETA 9033. (If the attestation is submitted by facsimile transmission, the attestation containing the original signature shall be maintained at the U.S. business address of the employer's designated agent or representative). Copies of Form ETA 9033 are available at all Department of Labor ETA Regional Offices and at the National Office. In addition, the employer shall submit two sets of all facts and evidence to show compliance with each of the attestation elements as prescribed by the regulatory standards in paragraphs (d) through (f) of this section. In the case of an investigation pursuant to subpart G of this part, the employer shall have the burden of proof to establish the validity of each attestation. The employer shall maintain in its records at the office of its U.S. agent, for a period of at least 3 years from the date of filing, sufficient documentation to meet its burden of proof, which shall at a minimum include the documentation described in this § _____.510, and shall make the documents available to Department of Labor officials upon request.

Whenever any document is submitted to a Federal agency or retained in the employer's records pursuant to this part, the document either shall be in the English language or shall be accompanied by a written translation into the English language certified by the translator as to the accuracy of the translation and his/her competency to translate.

(2) *Statutory precondition regarding collective bargaining agreements.* (i) The employer may file an attestation only when there is no collective bargaining agreement in effect in the port covering 30 percent or more of the longshore workers in the port. The employer shall attest on the Form ETA 9033 that no such collective bargaining agreement exists at the port at the time that the attestation is filed.

(ii) The employer is not required to submit with the Form ETA 9033 documentation substantiating that there is no collective bargaining agreement in effect in the port covering 30 percent or more of the longshore workers. If a complaint is filed which presents reasonable cause to believe that such an agreement exists, the Department shall

conduct an investigation. In such an investigation, the employer shall have the burden of proving that no such collective bargaining agreement exists.

(3) *Ports for which attestations may be filed.* Employers may file an attestation for a port which is listed in Appendix A (U.S. Seaports) to this subpart. Employers may also file an attestation for a particular location not in Appendix A to this subpart if additional facts and evidence are submitted with the attestation to demonstrate that the location is a port, meeting all of the criteria as defined by § _____.502 of this part.

(4) *Attestation elements.* The attestation elements referenced in paragraph (c)(1) of this section are mandated by sec. 258(c)(1)(B) of the Act (8 U.S.C. 1288(c)(1)(B)). Section 258(c)(1)(B) of the Act requires employers who seek to have alien crewmembers engage in a longshore activity to attest as follows:

(i) The performance of the activity by alien crewmembers is permitted under the prevailing practice of the particular port as of the date of filing of the attestation;

(ii) The use of the alien crewmembers for such activity is not during a strike or lockout in the course of a labor dispute, and is not intended or designed to influence an election of a bargaining representative for workers in the local port; and

(iii) Notice of the attestation has been provided by the owner, agent, consignee, master, or commanding officer to the bargaining representative of longshore workers in the local port, or, where there is no such bargaining representative, notice has been provided to longshore workers employed at the local port.

(d) *The first attestation element: prevailing practice.* For an employer to be in compliance with the first attestation element, it is required to have been the prevailing practice during the 12-month period preceding the filing of the attestation, for a particular activity of longshore work at the particular port to be performed by alien crewmembers. For each port, a prevailing practice can exist for any of four different types of longshore work: loading of cargo, unloading of cargo, operation of cargo-related equipment, or handling of mooring lines. It is thus possible that at a particular port it is the prevailing practice for alien crewmembers to unload vessels but not the prevailing practice to load them. An employer shall indicate on the attestation form which of the four longshore activities it is claiming is the prevailing practice for such work to be performed by alien crewmembers.

(1) *Establishing a prevailing practice.*

(i) In establishing that a particular activity of longshore work is the prevailing practice at a particular port, an employer shall submit facts and evidence to show that in the 12-month period preceding the filing of the attestation, one of the following conditions existed:

(A) Over fifty percent of vessels docking at the port used alien crewmembers for the activity; or

(B) Alien crewmembers made up over fifty percent of the workers in the port who engaged in the activity.

(ii) *Prevailing practice after Secretary of State determination of non-reciprocity.* Section 258(d) of the Act provides a reciprocity exception (separate from the prevailing practice exception) to the prohibition on performance of longshore work by alien crewmembers in U.S. ports. However, this reciprocity exception becomes nonapplicable where the Secretary of State determines that, for a particular activity of longshore work, a particular country (by law, regulation, or practice) prohibits such activity by U.S. crewmembers in its ports. When the Secretary of State places a country on the non-reciprocity list (which means, for the purposes of this section, *Prohibitions on longshore work by U.S. nationals; listing by country* at 22 CFR 89.1), crewmembers on vessels from that country (that is, vessels that are registered in that country or vessels whose majority ownership interest is held by nationals of that country) are not permitted to perform longshore work in U.S. waters, absent applicability of some exception other than the reciprocity exception. The Secretary of State's determination has the following effects in the establishment of a prevailing practice for a particular longshore activity at a particular U.S. port for purposes of the prevailing practice exception.

(A) An employer from any country, other than the country which is placed on the non-reciprocity list, may include the longshore activities performed by alien crewmembers on all vessels in establishing the prevailing practice for a particular longshore activity in a particular port.

(B) An employer from a country which is placed on the non-reciprocity list may file an attestation for the prevailing practice exception under the standards and requirements established in this subpart F (except as provided in paragraph (d)(1)(ii)(C) of this section), provided that the attestation is filed at least 12 months after the date on which the employer's country is placed on the list.

(C) An employer from a country which is placed on the non-reciprocity list may file an attestation pursuant to the prevailing practice exception earlier than 12 months from the date on which the employer's country is placed on the list, except that the following restrictions shall apply to such attestation:

(*1*) The employer shall submit facts and evidence to show that, for the 12-month period preceding the date of the attestation, the use of alien crewmembers to perform a particular activity of longshore work was permitted by the prevailing practice in the port (as defined in paragraph (d)(1)(i) of this section) without considering or including such activity by crewmembers on vessels from the employer's country; or

(*2*) The employer shall submit facts and evidence (including data on activities performed by crewmembers on vessels from the employer's country) to show that the use of alien crewmembers to perform a particular activity of longshore work was permitted by the prevailing practice in the port (as defined in paragraph (d)(1)(i) of this section) for one of two periods—

(*i*) For the employer whose country has not previously been on the non-reciprocity list, the period is the continuous 12-month period prior to May 28, 1991 (the effective date of section 258 of the Act); or

(*ii*) For the employer whose country was at some time on the non-reciprocity list, but was subsequently removed from the non-reciprocity list and then restored to the non-reciprocity list (on one or more occasions), the period is the last continuous 12-month period during which the employer's country was not under the reciprocity exception (that is, was listed on the non-reciprocity list).

(*iii*) For purposes of this paragraph (d)(1):

(A) ''Workers in the port engaged in the activity'' means any person who performed the activity in any calendar day;

(B) Vessels shall be counted each time they dock at the particular port):

(C) Vessels exempt from section 258 of the INA for safety and environmental protection shall not be included in counting the number of vessels which dock at the port (see Department of Transportation Regulations); and

(D) Automated vessels shall not be included in counting the number of vessels which dock at the port. For establishing a prevailing practice under

the automated vessel exception see § _____.520 of this part.

(2) *Documentation.* In assembling the facts and evidence required by paragraph (d)(1) of this section, the employer may consult with the port authority which has jurisdiction over the local port, the collective bargaining representative(s) of longshore workers at the local port, other employers, or any other entity which is familiar with the practices at the port. Such documentation shall include a written summary of a survey of the experience of shipmasters who entered the local port in the previous year; or a letter, affidavit, or other written statement from an appropriate local port authority regarding the use of alien crewmembers to perform the longshore activity at the port in the previous year; or other documentation of comparable weight. Written statements from collective bargaining representatives and/or shipping agents with direct knowledge of practices regarding the use of alien crewmembers in the local port may also be pertinent. Such documentation shall accompany the Form ETA 9033, and any underlying documentation which supports the employer's burden of proof shall be maintained in the employer's records at the office of the U.S. agent as required by paragraph (c)(1) of this section.

(e) *The second attestation element: no strike or lockout; no intention or design to influence bargaining representative election.* (1) The employer shall attest that, at the time of submitting the attestation, there is not a strike or lockout in the course of a labor dispute covering the employer's activity, and that it will not use alien crewmembers during a strike or lockout after filing the attestation. The employer shall also attest that the employment of such aliens is not intended or designed to influence an election for a bargaining representative for workers in the local port. Labor disputes for purposes of this attestation element relate only to those involving longshore workers at the port of intended employment. This attestation element applies to strikes and lockouts and elections of bargaining representatives at the local port where the use of alien crewmembers for longshore work is intended.

(2) *Documentation.* As documentation to substantiate the requirement in paragraph (e)(1) of this section, an employer may submit a statement of the good faith efforts made to determine whether there is a strike or lockout at the particular port, as, for example, by contacting the port authority or the collective bargaining representative for longshore workers at the particular port.

(f) *The third attestation element: notice of filing.* The employer of alien crewmembers shall attest that at the time of filing the attestation, notice of filing has been provided to the bargaining representative of the longshore workers in the local port, or, where there is no such bargaining representative, notice of the filing has been provided to longshore workers employed at the local port through posting in conspicuous locations and through other appropriate means.

(1) *Notification of bargaining representative.* No later than the date the attestation is received by DOL to be considered for filing, the employer of alien crewmembers shall notify the bargaining representative (if any) of longshore workers at the local port that the attestation is being submitted to DOL. The notice shall include a copy of the Form ETA 9033, shall state the activity(ies) for which the attestation is submitted, and shall state in that notice that the attestation and accompanying documentation are available at the national office of ETA for review by interested parties. The employer may have its owner, agent, consignee, master, or commanding officer provide such notice. Notices under this paragraph (f)(1) shall include the following statement: ''Complaints alleging misrepresentation of material facts in the attestation and/or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor.''

(2) *Posting notice where there is no bargaining representative.* If there is no bargaining representative of longshore workers at the local port when the employer submits an attestation to ETA, the employer shall provide written notice to the port authority for distribution to the public on request. In addition, the employer shall post one or more written notices at the local port, stating that the attestation with accompanying documentation has been submitted, the activity(ies) for which the attestation has been submitted, and that the attestation and accompanying documentation are available at the national office of ETA for review by interested parties. Such posted notice shall be clearly visible and unobstructed, and shall be posted in conspicuous places where the longshore workers readily can read the posted notice on the way to or from their duties. Appropriate locations for posting such notices include locations in the immediate proximity of mandatory Fair Labor Standards Act wage and hour notices and Occupational Safety and Health Act occupational safety and health notices. The notice shall include a copy of the Form ETA 9033 filed with DOL, shall provide information concerning the availability of supporting documents for examination at the national office of ETA, and shall include the following statement: ''Complaints alleging misrepresentation of material facts in the attestation and/or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor.''

(3) *Documentation.* The employer shall provide a statement setting forth the name and address of the person to whom the notice was provided and where and when the notice was posted and shall attach a copy of the notice.

(g) *Actions on attestations submitted for filing.* Once an attestation has been received from an employer, a determination shall be made by the regional Certifying Officer whether to accept the attestation for filing or return it. The regional Certifying Officer may request additional explanation and/or documentation from the employer in making this determination. An attestation which is properly filled out and which includes accompanying documentation for each of the requirements set forth at § _____.510(d) through (f) shall be accepted for filing by ETA on the date it is signed by the regional Certifying Officer unless it falls within one of the categories set forth in paragraph (g)(2) of this section. Once an attestation is accepted for filing, ETA shall then follow the procedures set forth in paragraph (g)(1) of this section. Upon acceptance of the employer's attestation by ETA, the attestation and accompanying documentation will be forwarded and shall be available in a timely manner for public examination at the ETA national office. ETA shall not consider information contesting an attestation received by ETA prior to the determination to accept or return the attestation for filing. Such information shall not be made part of ETA's administrative record on the attestation, but shall be referred to ESA to be processed as a complaint pursuant to subpart G of this part if the attestation is accepted by ETA for filing.

(1) *Acceptance.* (i) If the attestation is properly filled out and includes accompanying documentation for each of the requirements at § _____.510(d) through (f), and does not fall within one of the categories set forth at paragraph (g)(2) of this section, ETA shall accept the attestation for filing, provide notification to the INS office having jurisdiction over the port where longshore work will be performed, and

return to the employer, or the employer's agent or representative at a U.S. address, one copy of the attestation form submitted by the employer, with ETA's acceptance indicated thereon. The employer may then use alien crewmembers for the particular activity of longshore work at the U.S. port cited in the attestation in accordance with INS regulations.

(ii) DOL is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing.

(2) *Unacceptable attestations.* ETA shall not accept an attestation for filing and shall return such attestation to the employer, or the employer's agent or representative at a U.S. address, when one of the following conditions exists:

(i) When the Form ETA 9033 is not properly filled out. Examples of improperly filled out Form ETA 9033's include instances where the employer has neglected to check all the necessary boxes, or where the employer has failed to include the name of the port where it intends to use the alien crewmembers for longshore work, or where the employer has named a port that is not listed in Appendix A and has failed to submit facts and evidence to support a showing that the location is a port as defined by § _____.502, or when the employer has failed to sign the attestation or to designate an agent in the United States;

(ii) When the Form ETA 9033 with accompanying documentation is not received by ETA at least 14 days prior to the date of performance of the first activity indicated on the Form ETA 9033; unless the employer is claiming an unanticipated emergency, has included documentation which supports such claim, and ETA has found the claim to be valid;

(iii) When the Form ETA 9033 does not include accompanying documentation for each of the requirements set forth at § _____.510 (d) through (f);

(iv) When the accompanying documentation required by paragraph (c) of this section submitted by the employer, on its face, is inconsistent with the requirements set forth at § _____.510 (d) through (f). Examples of such a situation include instances where the Form ETA 9033 pertains to one port and the accompanying documentation to another; where the Form ETA 9033 pertains to one activity of longshore work and the accompanying documentation obviously refers to another; or where the documentation clearly indicates that only thirty percent, instead of the required fifty percent, of the activity attested to is performed by alien crewmembers;

(v) When the Administrator, Wage and Hour Division, has notified ETA, in writing, after an investigation pursuant to subpart G of this part, that the particular activity of longshore work which the employer has attested is the prevailing practice at a particular port, is not, in fact, the prevailing practice at the particular port;

(vi) When the Administrator, Wage and Hour Division, has notified ETA, in writing, that a cease and desist order has been issued pursuant to subpart G of this part, with respect to the attesting employer's performance of the particular activity and port, in violation of a previously accepted attestation;

(vii) When the Administrator, Wage and Hour Division, has notified ETA, in writing, after an investigation pursuant to subpart G of this part, that the particular employer has misrepresented or failed to comply with an attestation previously submitted and accepted for filing, but in no case for a period of more than one year after the date of the Administrator's notice and provided that INS has not advised ETA that the prohibition is in effect for a lesser period; or

(viii) When the Administrator, Wage and Hour Division, has notified ETA, in writing, that the employer has failed to comply with any penalty, sanction, or other remedy assessed in a final agency action following an investigation by the Wage and Hour Division pursuant to subpart G of this part.

(3) *Resubmission.* If the attestation is not accepted for filing pursuant to the categories set forth in paragraph (g)(2) of this section, ETA shall return to the employer, or the employer's agent or representative, at a U.S. address, the attestation form and accompanying documentation submitted by the employer. ETA shall notify the employer, in writing, of the reason(s) that the attestation is unacceptable. When an attestation is found to be unacceptable pursuant to paragraphs (g)(2) (i) through (iv) of this section, the employer may resubmit the attestation with the proper documentation. When an attestation is found to be unacceptable pursuant to paragraphs (g)(2) (v) through (viii) of this section and returned, such action shall be the final decision of the Secretary of Labor.

(h) *Effective date and validity of filed attestations.* An attestation is filed and effective as of the date it is accepted and signed by the regional Certifying Officer. Such attestation is valid for the 12-month period beginning on the date of acceptance for filing, unless suspended or invalidated pursuant to subpart G of this part or paragraph (i) of this section. The filed attestation expires at the end of the 12-month period of validity.

(i) *Suspension or invalidation of filed attestations.* Suspension or invalidation of an attestation may result from enforcement action(s) under subpart G of this part (*i.e.*, investigation(s) conducted by the Administrator or cease and desist order(s) issued by the Administrator regarding the employer's misrepresentation in or failure to carry out its attestation); or from a discovery by ETA that it made an error in accepting the attestation because such attestation falls within one of the categories set forth in paragraph (g)(2) of this section.

(1) *Result of Wage and Hour Division action.* Upon the determination of a violation under subpart G of this part, the Administrator shall, pursuant to § _____.660(b), notify the Attorney General of the violation and of the Administrator's notice to ETA.

(2) *Result of ETA action.* If, after accepting an attestation for filing, ETA finds that the attestation is unacceptable because it falls within one of the categories set forth at paragraph (g)(2) of this section, and as a result, ETA suspends or invalidates the attestation, ETA shall notify the Attorney General of such suspension or invalidation and shall return a copy of the attestation form to the employer, or the employer's agent or representative, at a U.S. address. ETA shall notify the employer, in writing, of the reason(s) that the attestation is suspended or invalidated. When an attestation is found to be suspended or invalidated pursuant to paragraphs (g)(2) (i) through (iv) of this section, the employer may resubmit the attestation with the proper documentation. When an attestation is suspended or invalidated because it falls within one of the categories in paragraphs (g)(2) (v) through (viii) of this section, such action shall be the final decision of the Secretary of Labor, except as set forth in subpart G of this part.

(j) *Withdrawal of accepted attestations.* (1) An employer who has submitted an attestation which has been accepted for filing may withdraw such attestation at any time before the 12-month period of its validity terminates, unless the Administrator has found reasonable cause under subpart G to commence an investigation of the particular attestation. Such withdrawal may be advisable, for example, when the employer learns that the particular activity(ies) of longshore work which it has attested is the prevailing practice to perform with alien crewmembers may not, in fact, have been the prevailing

practice at the particular port at the time of filing. Requests for such withdrawals shall be in writing and shall be directed to the regional Certifying Officer.

(2) Withdrawal of an attestation shall not affect an employer's liability with respect to any failure to meet the conditions attested to which took place before the withdrawal, or for misrepresentations in an attestation. However, if an employer has not yet performed the particular longshore activity(ies) at the port in question, the Administrator will not find reasonable cause to investigate unless it is alleged, and there is reasonable cause to believe, that the employer has made misrepresentations in the attestation or documentation thereof, or that the employer has not in fact given the notice attested to.

(Approved by the Office of Management and Budget under Control No. 1205–0309)

**§ _____.520 Special provisions regarding automated vessels.**

In general, an attestation is not required in the case of a particular activity of longshore work consisting of the use of automated self-unloading conveyor belt or vacuum-actuated systems on a vessel. The legislation creates a rebuttable presumption that the use of alien crewmembers for the operation of such automated systems is the prevailing practice. In order to overcome such presumption, it must be shown by the preponderance of the evidence submitted by any interested party, that the use of alien crewmembers for such activity is not the prevailing practice. Longshore work involving the use of such equipment shall be exempt from the attestation requirement only if the activity consists of using that equipment. If the automated equipment is not used in the particular activity of longshore work, an attestation is required as described under § _____.510 of this part if it is the prevailing practice in the port to use alien crewmembers for this work, except that in all cases, where an attestation is required for longshore work to be performed at a particular location in the State of Alaska, an employer shall file such attestation under the Alaska exception pursuant to §§ _____.530 through _____.541 on Form ETA 9033–A. When automated equipment is used in the particular activity of longshore work, an attestation is required only if the Administrator finds, based on a preponderance of the evidence which may be submitted by any interested party, that the performance of the particular activity of longshore work is not the prevailing practice at the port, or was during a strike or lockout or intended to influence an election of a bargaining representative for workers in the local port, or if the Administrator issues a cease and desist order against use of the automated equipment without such attestation.

(a) *Procedure when attestation is required.* If it is determined pursuant to subpart G of this part that an attestation is required for longshore work consisting of the use of automated equipment at a location other than in the State of Alaska, the employer shall comply with all the requirements set forth at § _____.510 of this part except paragraph (d) of § _____.510. In lieu of complying with § _____.510(d) of this part, the employer shall comply with paragraph (b) of this section. If it is determined pursuant to subpart G of this part that an attestation is required for longshore work consisting of the use of automated equipment at a particular location in the State of Alaska, the employer shall comply with all the requirements set forth at §§ _____.530 through _____.541 of this part.

(b) *The first attestation element: prevailing practice for automated vessels.* For an employer to be in compliance with the first attestation element, it is required to have been the prevailing practice that over fifty percent (as described in paragraph (b)(1) of this section) of a particular activity of longshore work which was performed through the use of automated self-unloading conveyor belt or vacuum-actuated equipment at the particular port during the 12-month period preceding the filing of the attestation, was performed by alien crewmembers. For purposes of this paragraph (b), only automated vessels shall be included in counting the number of vessels which dock at the port.

(1) *Establishing a prevailing practice.*

(i) In establishing that the use of alien crewmembers to perform a particular activity of longshore work consisting of the use of self-unloading conveyor belt or vacuum-actuated systems on a vessel is the prevailing practice at a particular port, an employer shall submit facts and evidence to show that in the 12-month period preceding the filing of the attestation, one of the following conditions existed:

(A) Over fifty percent of the automated vessels docking at the port used alien crewmembers for the activity (for purposes of this paragraph (b)(1), a vessel shall be counted each time it docks at the particular port); or

(B) Alien crewmembers made up over fifty percent of the workers who performed the activity with respect to such automated vessels.

(ii) *Prevailing practice after Secretary of State determination of non-reciprocity.* Section 258(d) of the Act provides a reciprocity exception (separate from the prevailing practice exception) to the prohibition on performance of longshore work by alien crewmembers in U.S. ports. However, this reciprocity exception becomes nonapplicable where the Secretary of State determines that, for a particular activity of longshore work, a particular country (by law, regulation, or practice) prohibits such activity by U.S. crewmembers in its ports. When the Secretary of State places a country on the non-reciprocity list (which means, for the purposes of this section, *Prohibitions on longshore work by U.S. nationals; listing by country* at 22 CFR 89.1), crewmembers on vessels from that country (that is, vessels that are registered in that country or vessels whose majority ownership interest is held by nationals of that country) are not permitted to perform longshore work in U.S. waters, absent applicability of some exception other than the reciprocity exception. The Secretary of State's determination has the following effects in the establishment of a prevailing practice for a particular longshore activity at a particular U.S. port for purposes of the prevailing practice exception.

(A) An employer from any country, other than the country which is placed on the non-reciprocity list, may include the longshore activities performed by alien crewmembers on all vessels in establishing the prevailing practice for a particular longshore activity in a particular port.

(B) An employer from a country which is placed on the non-reciprocity list may file an attestation for the prevailing practice exception under the standards and requirements established in this subpart F (except as provided in paragraph (b)(1)(ii)(C) of this section), provided that the attestation is filed at least 12 months after the date on which the employer's country is placed on the list.

(C) An employer from a country which is placed on the non-reciprocity list may file an attestation pursuant to the prevailing practice exception earlier than 12 months from the date on which the employer's country is placed on the list, except that the following restrictions shall apply to such attestation:

(*1*) The employer shall submit facts and evidence to show that, for the 12-month period preceding the date of the attestation, the use of alien

crewmembers to perform a particular activity of longshore work was permitted by the prevailing practice in the port (as defined in paragraph (d)(1)(i) of this section) without considering or including such activity by crewmembers on vessels from the employer's country; or

(*2*) The employer shall submit facts and evidence (including data on activities performed by crewmembers on vessels from the employer's country) to show that the use of alien crewmembers to perform a particular activity of longshore work was permitted by the prevailing practice in the port (as defined in paragraph (b)(1)(i) of this section) for one of two periods—

(*i*) For the employer whose country has not previously been on the non-reciprocity list, the period is the continuous 12-month period prior to May 28, 1991 (the effective date of section 258 of the Act); or

(*ii*) For the employer whose country was at some time on the non-reciprocity list, but was subsequently removed from the non-reciprocity list and then restored to the non-reciprocity list (on one or more occasions), the period is the last continuous 12-month period during which the employer's country was not under the reciprocity exception (that is, was listed on the non-reciprocity list).

(2) *Documentation.* In assembling the documentation described in paragraph (b)(1) of this section, the employer may consult with the port authority which has jurisdiction over the local port, the collective bargaining representative(s) of longshore workers at the local port, other employers, or any other entity which is familiar with the practices at the port. The documentation shall include a written summary of a survey of the experience of shipmasters who entered the local port in the previous year; or a letter, affidavit, or other written statement from an appropriate local port authority regarding the use of alien crewmembers to perform the longshore activity at the port in the previous year; or other documentation of comparable weight. Written statements from collective bargaining representatives and/or shipping agents with direct knowledge of practices regarding the use of alien crewmembers may also be pertinent. Such documentation shall accompany the Form ETA 9033, and any underlying documentation which supports the employer's burden of proof shall be maintained in the employer's records at the office of the U.S. agent as required under § _____.510(c)(1) of this part.

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Alaska Exception

**§ _____.530 Special provisions regarding the performance of longshore activities at locations in the State of Alaska.**

*Applicability.* Section § _____.510 of this part shall not apply to longshore work performed at locations in the State of Alaska. The performance of longshore work by alien crewmembers at locations in the State of Alaska shall instead be governed by §§ _____.530 through _____.541. The use of alien crewmembers to perform longshore work in Alaska consisting of the use of an automated self-unloading conveyor belt or vacuum-actuated system on a vessel shall continue to be governed by the provisions of § _____.520 of this part, except that, if the Administrator finds, based on a preponderance of the evidence which may be submitted by any interested party, that an attestation is required because the performance of the particular activity of longshore work is not the prevailing practice at the location in the State of Alaska, or was during a strike or lockout or intended to influence an election of a bargaining representative for workers at that location, or if the Administrator issues a cease and desist order against use of the automated equipment without such an attestation, the required attestation shall be filed pursuant to the Alaska exception at §§ _____.530 through _____.541 and not the prevailing practice exception at § _____.510.

**§ _____.531 Who may submit attestations for locations in Alaska?**

In order to use alien crewmembers to perform longshore activities at a particular location in the State of Alaska an employer shall submit an attestation on Form ETA 9033–A. As noted at § _____.502, ''Definitions,'' for purposes of §§ _____.530 through _____.541, which govern the performance of longshore activities by alien crewmembers under the Alaska exception, ''employer'' includes any agent or representative designated by the employer. An employer may file a single attestation for multiple locations in the State of Alaska.

**§ _____.532 Where and when should attestations be submitted for locations in Alaska?**

(a) Attestations shall be submitted, by U.S. mail, private carrier, or facsimile transmission to the U.S. Department of Labor regional office of the Employment and Training Administration in Seattle, Washington. Except as provided in paragraph (b) of this section, attestations shall be received and date-stamped by the Department at least 30 calendar days prior to the date of the first performance of the longshore activity. The attestation shall be accepted for filing or returned by ETA in accordance with § _____.538 within 14 calendar days of the date received by ETA. An attestation which is accepted by ETA solely because it was not reviewed within 14 days is subject to subsequent invalidation pursuant to § _____.540 of this part. An employer filing an attestation shall have an agent or representative with a United States address. Such address shall be clearly indicated on the Form ETA 9033–A. In order to ensure that an attestation has been accepted for filing prior to the date of the first performance of the longshore activity, employers are advised to take mailing time into account to make sure that ETA receives the attestation at least 30 days prior to the first performance of the longshore activity.

(b) *Late filings.* ETA may accept for filing attestations received after the 30-day deadline where the employer could not have reasonably anticipated the need to file an attestation for the particular location at that time. When an employer states that it could not have reasonably anticipated the need to file the attestation at that time, it shall submit documentation to ETA to support such a claim. ETA shall then make a determination on the validity of the claim and shall accept the attestation for filing or return it in accordance with § _____.538 of this part. ETA in no case shall accept an attestation received less than 24 hours prior to the first performance of the activity.

**§ _____.533 What should be submitted for locations in Alaska?**

(a) *Form ETA 9033–A with accompanying documentation.* A completed and dated original Form ETA 9033–A, or facsimile transmission thereof, containing the required attestation elements and the original signature of the employer or the employer's agent or designated representative, along with two copies of the completed, signed, and dated Form ETA 9033–A shall be submitted to ETA. (If the attestation is submitted by facsimile transmission, the attestation containing the original signature shall be maintained at the U.S. business address of the employer's designated agent or representative). Copies of Form ETA 9033–A are available at all Department of Labor Regional offices and at the National office. In addition, the employer shall submit two sets of facts and evidence to show compliance

with the fourth attestation element at § _____.537 of this part. In the case of an investigation pursuant to subpart G of this part, the employer has the burden of proof to establish the validity of each attestation. The employer shall maintain in its records at the office of its U.S. agent, for a period of at least 3 years from the date of filing, sufficient documentation to meet its burden of proof, which shall at a minimum include the documentation described in §§ _____.530 through ————.541, and shall make the documents available to Department of Labor officials upon request. Whenever any document is submitted to a Federal agency or retained in the employer's records pursuant to this part, the document shall either be in the English language or shall be accompanied by a written translation into the English language certified by the translator as to the accuracy of the translation and his/her competency to translate.

(b) *Attestation elements.* The attestation elements referenced in §§ _____.534 through _____.537 of this part are mandated by Sec. 258(d)(1) of the Act (8 U.S.C. 1288(d)(1)). Section 258(d)(1) of the Act requires employers who seek to have alien crewmembers engage in longshore activity at locations in the State of Alaska to attest as follows:

(1) The employer will make a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the activity at the particular time and location from the parties to whom notice has been provided under § _____.537(a)(1) (ii) and (iii), except that:

(i) Wherever two or more contract stevedoring companies have signed a joint collective bargaining agreement with a single labor organization recognized as an exclusive bargaining representative of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*), the employer may request longshore workers from only one such contract stevedoring company, and

(ii) A request for longshore workers to an operator of a private dock may be made only for longshore work to be performed at that dock and only if the operator meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932);

(2) The employer will employ all United States longshore workers made available in response to the request made pursuant to § _____.534(a)(1) who are qualified and available in sufficient numbers and who are needed to perform the longshore activity at the particular time and location to which the employer has attested;

(3) The use of alien crewmembers for such activity is not intended or designed to influence an election of a bargaining representative for workers in the State of Alaska; and

(4) Notice of the attestation has been provided to:

(i) Labor organizations which have been recognized as exclusive bargaining representatives of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which make available or intend to make available workers to the particular location where the longshore work is to be performed;

(ii) Contract stevedoring companies which employ or intend to employ United States longshore workers at that location; and

(iii) Operators of private docks at which the employer will use longshore workers.

**§ _____.534 The first attestation element for locations in Alaska: Bona fide request for dispatch of United States longshore workers.**

(a) The first attestation element shall be satisfied when the employer signs Form ETA 9033–A, attesting that, before using alien crewmembers to perform longshore work during the validity period of the attestation, the employer will make a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the specified longshore activity from the parties to whom notice is provided under § _____.537(a)(1) (ii) and (iii). Although an employer is required to provide notification of filing to labor organizations recognized as exclusive bargaining representatives of United States longshore workers pursuant to § _____.537(a)(1)(i) of this part, an employer need not request dispatch of United States longshore workers directly from such parties. The requests for dispatch of United States longshore workers pursuant to this section shall be directed to contract stevedoring companies which employ or intend to employ United States longshore workers at that location, and to operators of private docks at which the employer will use longshore workers. An employer is not required to request dispatch of United States longshore workers from private dock operators or contract stevedoring companies which do not meet the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) or, in the case of contract stevedoring companies, which are not licensed to do business in the State of Alaska.

(1) Wherever two or more contract stevedoring companies have signed a joint collective bargaining agreement with a single qualified labor organization, the employer may request longshore workers from only one of such contract stevedoring companies. A qualified labor organization is one which has been recognized as an exclusive bargaining representative of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which makes available or intends to make available workers to the particular location where the longshore work is to be performed.

(2) A request for longshore workers to an operator of a private dock may be made only for longshore work to be performed at that dock.

(3) An employer shall not be required to request longshore workers from a party if that party has notified the employer in writing that it does not intend to make available United States longshore workers who are qualified and available in sufficient numbers to the time and location at which the longshore work is to be performed.

(4) A party that has provided such written notice to the employer under paragraph (a)(3) of this section may subsequently notify the employer in writing that it is prepared to make available United States longshore workers who are qualified and available in sufficient numbers to perform the longshore activity at the time and location where the longshore work is to be performed. In that event, the employer's obligations to that party under §§ _____.534 and _____.535 of this part shall recommence 60 days after its receipt of such notice.

(5) When a party has provided written notice to the employer under paragraph (a)(3) of this section that it does not intend to dispatch United States longshore workers to perform the longshore work attested to by the employer, such notice shall expire upon the earliest of the following events:

(i) When the terms of such notice specify an expiration date at which time the employer's obligation to that party under §§ _____.534 and _____.535 of this part shall recommence;

(ii) When retracted pursuant to paragraph (a)(4) of this section; or

(iii) Upon the expiration of the validity of the attestation.

(b) *Documentation.* To substantiate the requirement in paragraph (a) of this section, an employer shall develop and

maintain documentation to meet the employer's burden of proof under the first attestation element. The employer shall retain records of all requests for dispatch of United States longshore workers to perform the longshore work attested to. Such documentation shall consist of letters, telephone logs, facsimiles or other memoranda to show that, before using alien crewmembers to perform longshore work, the employer made a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the longshore activity. At a minimum, such documentation shall include the date the request was made, the name and telephone number of the particular individual(s) to whom the request for dispatch was directed, and the number and composition of full work units requested. Further, whenever any party has provided written notice to the employer under paragraph (a)(3) of this section, the employer shall retain the notice for the period of time specified in § _____.533 of this part, and, if appropriate, any subsequent notice by that party that it is prepared to make available United States longshore workers at the times and locations attested to.

**§ _____.535 The second attestation element for locations in Alaska: Employment of United States longshore workers.**

(a) The second attestation element shall be satisfied when the employer signs Form ETA 9033–A, attesting that during the validity period of the attestation, the employer will employ all United States longshore workers made available in response to the request for dispatch who, in compliance with applicable industry standards in the State of Alaska, including safety considerations, are qualified and available in sufficient numbers and are needed to perform the longshore activity at the particular time and location attested to.

(1) In no case shall an employer filing an attestation be required to hire less than a full work unit of United States longshore workers needed to perform the longshore activity nor be required to provide overnight accommodations for the longshore workers while employed. For purposes of this section, ''full work unit'' means the full complement of longshore workers needed to perform the longshore activity, as determined by industry standards in the State of Alaska, including safety considerations. Where the makeup of a full work unit is covered by one or more collective bargaining agreements in effect at the time and location where longshore work is to be performed, the provisions of such agreement(s) shall be deemed to be in conformance with industry standards in the State of Alaska.

(2) In no case shall an employer be required to provide transportation to the vessel where the longshore work is to be performed, except where:

(i) Surface transportation is available; for purposes of this section, ''surface transportation'' means a tugboat or other vessel which is appropriately insured, operated by licensed personnel, and capable of safely transporting U.S. longshore workers from shore to a vessel on which longshore work is to be performed;

(ii) Such transportation may be safely accomplished; and

(iii) (A) Travel time to the vessel does not exceed one-half hour each way; and

(B) Travel distance to the vessel from the point of embarkation does not exceed 5 miles; for purposes of this section, ''point of embarkation'' means a dock or landing at which U.S. longshore workers may be safely boarded for transport from shore to a vessel on which longshore work is to be performed; or

(C) In the cases of Wide Bay, Alaska, and Klawock/Craig, Alaska, travel time does not exceed 45 minutes each way and travel distance to the vessel from the point of embarkation does not exceed 7.5 miles, unless the party responding to the request for dispatch agrees to lesser time and distance specifications.

(3) If a United States longshore worker is capable of getting to and from the vessel where longshore work is to be performed when the vessel is beyond the time and distance limitations specified in paragraph (a)(2)(iii) of this section, and where all of the other criteria governing the employment of United States longshore workers under this subpart are met (*e.g.*, ''qualified and available in sufficient numbers''), the employer is still obligated to employ the worker to perform the longshore activity. In such instance, however, the employer shall not be required to provide such transportation nor to reimburse the longshore worker for the cost incurred in transport to and from the vessel.

(4) Where an employer is required to provide transportation to the vessel because it is within the time and distance limitations specified in (a)(2)(iii) of this section, the employer also shall be required to provide return transportation to the point of embarkation.

(b) *Documentation.* To substantiate the requirement in paragraph (a) of this section, an employer shall develop and maintain documentation to meet the employer's burden of proof. Such documentation shall include records of payments to contract stevedoring companies or private dock operators, payroll records for United States longshore workers employed, or other documentation to show clearly that the employer has met its obligation to employ all United States longshore workers made available in response to a request for dispatch who are qualified and available in sufficient numbers. The documentation shall specify the number of full work units employed pursuant to this section, the composition of such full work units (i.e., number of workers by job title), and the date(s) and location(s) where the longshore work was performed. The employer also shall develop and maintain documentation concerning the provision of transportation from the point of embarkation to the vessel on which longshore work is to be performed. Each time one or more United States longshore workers are dispatched in response to the request under § _____.534, the employer shall retain a written record of whether transportation to the vessel was provided and the time and distance from the point of embarkation to the vessel.

**§ _____.536 The third attestation element for locations in Alaska: No intention or design to influence bargaining representative election.**

(a) The employer shall attest that use of alien crewmembers to perform the longshore activity specified on the Form ETA 9033–A is not intended or designed to influence an election of a bargaining representative for workers in the State of Alaska.

(b) *Documentation.* The employer need not develop nor maintain documentation to substantiate the statement referenced in paragraph (a) of this section. In the case of an investigation, however, the employer has the burden of proof to show that the use of alien crewmembers to perform the longshore activity specified on the Form ETA 9033–A was not intended nor designed to influence an election of a bargaining representative for workers in the State of Alaska.

**§ _____.537 The fourth attestation element for locations in Alaska: Notice of filing.**

(a)(1) The employer shall attest that at the time of filing the attestation, notice of filing has been provided to:

(i) Labor organizations which have been recognized as exclusive bargaining representatives of United States

longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which make available or intend to make available workers to the particular location where the longshore work is to be performed;

(ii) Contract stevedoring companies which employ or intend to employ United States longshore workers at the location where the longshore work is to be performed; and

(iii) Operators of private docks at which the employer will use longshore workers.

(2) The notices provided under paragraph (a)(1) of this section shall include a copy of the Form ETA 9033–A to be submitted to ETA, shall provide information concerning the availability of supporting documents for public examination at the national office of ETA, and shall include the following statement: ''Complaints alleging a misrepresentation of material facts in the attestation and/or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor.''

(b) The employer shall request a copy of the Certificate of Compliance issued by the district director of the Office of Workers' Compensation Programs under section 37 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) from the parties to whom notice is provided pursuant to paragraphs (a)(1)(ii) and (iii) of this section. An employer's obligation to make a bona fide request for dispatch of U.S. longshore workers under § _____.534 of this part before using alien crewmembers to perform the longshore work attested to shall commence upon receipt of the copy of the Certificate of Compliance.

(c) *Documentation.* The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the statement referenced in paragraphs (a) and (b) of this section and attested to on the Form ETA 9033–A. Such documentation shall include a copy of the notices provided, as required by paragraph (a)(1) of this section, and shall be submitted to ETA along with the Form ETA 9033–A.

**§ _____.538 Actions on attestations submitted for filing for locations in Alaska.**

Once an attestation has been received from an employer, a determination shall be made by the regional certifying officer whether to accept the attestation for filing or return it. The regional certifying officer may request additional explanation and/or documentation from the employer in making this determination. An attestation which is properly filled out and which includes accompanying documentation for the requirement set forth at § _____.537 of this part shall be accepted for filing by ETA on the date it is signed by the regional certifying officer unless it falls within one of the categories set forth in paragraph (b) of this section. Once an attestation is accepted for filing, ETA shall then follow the procedures set forth in paragraph (a)(1) of this section. Upon acceptance of the employer's attestation by ETA, the attestation and accompanying documentation shall be forwarded to and be available for public examination at the ETA national office in a timely manner. ETA shall not consider information contesting an attestation received by ETA prior to the determination to accept or return the attestation for filing. Such information shall not be made a part of ETA's administrative record on the attestation, but shall be referred to ESA to be processed as a complaint pursuant to subpart G of this part if the attestation is accepted by ETA for filing.

(a) *Acceptance.* (1) If the attestation is properly filled out and includes accompanying documentation for the requirement set forth at § _____.537, and does not fall within one of the categories set forth at paragraph (b) of this section, ETA shall accept the attestation for filing, provide notification to the INS office having jurisdiction over the location where longshore work will be performed, and return to the employer, or the employer's agent or representative at a U.S. address, one copy of the attestation form submitted by the employer, with ETA's acceptance indicated thereon. Before using alien crewmembers to perform the longshore work attested to on Form ETA 9033–A, the employer shall make a bona fide request for and employ United States longshore workers who are qualified and available in sufficient numbers pursuant to §§ _____.534 and _____.535. Where such a request for dispatch of United States longshore workers is unsuccessful, either in whole or in part, any use of alien crewmembers to perform longshore activity shall be in accordance with INS regulations.

(2) DOL is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing.

(b) *Unacceptable attestations.* ETA shall not accept an attestation for filing and shall return such attestation to the employer, or the employer's agent or representative at a U.S. address, when any one of the following conditions exists:

(1) When the Form ETA 9033–A is not properly filled out. Examples of improperly filled out Form ETA 9033–A's include instances where the employer has neglected to check all the necessary boxes, where the employer has failed to include the name of any port, city, or other geographical reference point where longshore work is to be performed, or where the employer has failed to sign the attestation or to designate an agent in the United States.

(2) When the Form ETA 9033–A with accompanying documentation is not received by ETA at least 30 days prior to the first performance of the longshore activity, unless the employer is claiming that it could not have reasonably anticipated the need to file the attestation for that location at that time, and has included documentation which supports this contention, and ETA has found the claim to be valid.

(3) When the Form ETA 9033–A does not include accompanying documentation for the requirement set forth at § _____.537.

(4) When the accompanying documentation submitted by the employer and required by § _____.537, on its face, is inconsistent with that section. Examples of such a situation include an instance where the Form ETA 9033–A indicates that the longshore work will be performed at a particular private dock and the documentation required under the notice attestation element indicates that notice was provided to an operator of a different private dock, or where the longshore work is to be performed at a particular time and location in the State of Alaska and the notice of filing provided to qualified labor organizations and contract stevedoring companies indicates that the longshore work is to be performed at a different time and/or location.

(5) When the Administrator, Wage and Hour Division, has notified ETA, in writing, after an investigation pursuant to subpart G of this part, that a cease and desist order has been issued pursuant to subpart G of this part, with respect to the attesting employer's performance of longshore work at a particular location in the State of Alaska, in violation of a previously accepted attestation.

(6) When the Administrator, Wage and Hour Division, has notified ETA, in writing, after an investigation pursuant to subpart G of this part, that the particular employer has misrepresented or failed to comply with an attestation previously submitted and accepted for filing, but in no case for a period of more than one year after the date of the Administrator's notice and provided that INS has not advised ETA that the

prohibition is in effect for a lesser period.

(7) When the Administrator, Wage and Hour Division, has notified ETA, in writing, that the employer has failed to comply with any penalty, sanction, or other remedy assessed in a final agency action following an investigation by the Wage and Hour Division pursuant to subpart G of this part.

(c) *Resubmission.* If the attestation is not accepted for filing pursuant to paragraph (b) of this section, ETA shall return to the employer, or the employer's agent or representative, at a U.S. address, the attestation form and accompanying documentation submitted by the employer. ETA shall notify the employer, in writing, of the reason(s) that the attestation is unacceptable. When an attestation is found to be unacceptable pursuant to paragraph (b) (1), (2), (3), or (4) of this section, the employer may resubmit the corrected attestation with the proper documentation. When an attestation is found to be unacceptable pursuant to paragraph (b) (5), (6), or (7) of this section and returned, such action shall be the final decision of the Secretary of Labor.

**§ _____.539 Effective date and validity of filed attestations for locations in Alaska.**

An attestation is filed and effective as of the date it is accepted and signed by the regional certifying officer. Such attestation is valid for the 12-month period beginning on the date of acceptance for filing, unless suspended or invalidated pursuant to § _____.540 of this part. The filed attestation expires at the end of the 12-month period of validity.

**§ _____.540 Suspension or invalidation of filed attestations for locations in Alaska.**

Suspension or invalidation of an attestation may result from enforcement action(s) under subpart G of this part (*i.e.*, investigation(s) conducted by the Administrator or cease and desist order(s) issued by the Administrator regarding the employer's misrepresentation in or failure to carry out its attestation); or from a discovery by ETA that it made an error in accepting the attestation because such attestation falls within one of the categories set forth in § _____.538(b).

(a) *Result of Wage and Hour Division action.* Upon the determination of a violation under subpart G of this part, the Administrator shall, pursuant to § _____.665(b), notify the Attorney General of the violation and of the Administrator's notice to ETA.

(b) *Result of ETA action.* If, after accepting an attestation for filing, ETA finds that the attestation is unacceptable because it falls within one of the categories set forth at § _____.538(b) and, as a result, ETA suspends or invalidates the attestation, ETA shall notify the Attorney General of such suspension or invalidation and shall return a copy of the attestation form to the employer, or the employer's agent or representative at a U.S. address. ETA shall notify the employer, in writing, of the reason(s) that the attestation is suspended or invalidated.

**§ _____.541 Withdrawal of accepted attestations for locations in Alaska.**

(a) An employer who has submitted an attestation which has been accepted for filing may withdraw such attestation at any time before the 12-month period of its validity terminates, unless the Administrator has found reasonable cause under subpart G to commence an investigation of the particular attestation. Such withdrawal may be advisable, for example, when the employer learns that the country in which the vessel is registered and of which nationals of such country hold a majority of the ownership interest in the vessel has been removed from the non-reciprocity list (which means, for purposes of this section, *Prohibitions on longshore work by U.S. nationals; listing by country* at 22 CFR 89.1). In that event, an attestation would no longer be required under subpart F of this part, since upon being removed from the non-reciprocity list the performance of longshore work by alien crewmembers would be permitted under the reciprocity exception at sec. 258(e) of the Act (8 U.S.C. 1288(e)). Requests for withdrawals shall be in writing and shall be directed to the regional certifying officer.

(b) Withdrawal of an attestation shall not affect an employer's liability with respect to any failure to meet the conditions attested to which took place before the withdrawal, or for misrepresentations in an attestation. However, if an employer has not yet performed the longshore activities at the location(s) in question, the Administrator shall not find reasonable cause to investigate unless it is alleged, and there is reasonable cause to believe, that the employer has made misrepresentations in the attestation or documentation thereof, or that the employer has not in fact given the notice attested to.

Public Access

**§ _____.550 Public access.**

(a) *Public examination at ETA.* ETA shall make available for public examination in Washington, DC, a list of employers which have filed attestations under this subpart, and for each such employer, a copy of the employer's attestation and accompanying documentation it has received.

(b) *Notice to public.* ETA periodically shall publish a list in the Federal Register identifying under this subpart employers which have submitted attestations; employers which have attestations on file; and employers which have submitted attestations which have been found unacceptable for filing.

(Approved by the Office of Management and Budget under Control No. 1205–0309)

## Appendix A to Subpart F—U.S. Seaports

The list of 224 seaports includes all major and most smaller ports serving ocean and Great Lakes commerce.

North Atlantic Range

Bucksport, ME
Eastport, ME
Portland, ME
Searsport, ME
Portsmouth, NH
Boston, MA
Fall River, MA
New Bedford, MA
Providence, RI
Bridgeport, CT
New Haven, CT
New London, CT
Albany, NY
New York, NY/NJ
Camden, NJ
Gloucester City, NJ
Paulsboro, NJ
Chester, PA
Marcus Hook, PA
Philadelphia, PA
Delaware City, DE
Wilmington, DE
Baltimore, MD
Cambridge, MD
Alexandria, VA
Chesapeake, VA
Hopewell, VA
Newport News, VA
Norfolk, VA
Portsmouth, VA
Richmond, VA

South Atlantic Range

Morehead City, NC
Southport, NC
Wilmington, NC
Charleston, SC
Georgetown, SC
Port Royal, SC
Brunswick, GA
Savannah, GA
St. Mary, GA
Cocoa, FL
Fernandina Beach, FL
Fort Lauderdale, FL
Fort Pierce, FL
Jacksonville, FL
Miami, FL
Palm Beach, FL
Port Canaveral, FL

Port Everglades, FL
Riviera, FL
Aguadilla, PR
Ceiba, PR
Guanica, PR
Guayanilla, PR
Humacao, PR
Jobos, PR
Mayaguez, PR
Ponce, PR
San Juan, PR
Vieques, PR
Yabucoa, PR
Alucroix, VI
Charlotte Amalie, VI
Christiansted, VI
Frederiksted, VI
Limetree Bay, VI

North Pacific Range

Astoria, OR
Bandon, OR
Columbia City, OR
Coos Bay, OR
Mapleton, OR
Newport, OR
Portland, OR
Rainier, OR
Reedsport, OR
St. Helens, OR
Toledo, OR
Anacortes, WA
Bellingham, WA
Edmonds (Edwards Point), WA
Everett, WA
Ferndale, WA
Friday Harbor, WA
Grays Harbor, WA
Kalama, WA
Longview, WA
Olympia, WA
Point Wells, WA
Portage, WA
Port Angeles, WA
Port Gamble, WA
Port Townsend, WA
Raymond, WA
Seattle, WA
Tacoma, WA
Vancouver, WA
Willapa Harbor, WA
Winslow, WA

Great Lakes Range

Duluth, MN
Silver Bay, MN
Green Bay, WI
Kenosha, WI
Manitowoc, WI
Milwaukee, WI
Sheboygan, WI
Superior, WI
Alpena, MI
Bay City, MI
Detroit, MI
De Tour Village, MI
Essexville, MI
Ferrysburg, MI
Grand Haven, MI
Marine City, MI
Muskegon, MI
Port Huron, MI
Presque Isle, MI
Rogers City, MI
Saginaw, MI
Sault Ste Marie, MI
Chicago, IL
Ashtabula, OH
Cincinnati, OH
Cleveland, OH
Conneaut, OH
Fairport, OH
Huron, OH
Lorain, OH
Sandusky, OH
Toledo, OH
Erie, PA
Buffalo, NY
Odgensburg, NY
Oswego, NY
Rochester, NY
Burns Harbor, IN
E. Chicago, IN
Gary, IN

Gulf Coast Range

Panama City, FL
Pensacola, FL
Port Manatee, FL
Port St. Joe, FL
Tampa, FL
Mobile, AL
Gulfport, MS
Pascagoula, MS
Baton Rouge, LA
Gretna, LA
Lake Charles, LA
Louisiana Offshore Oil Port, LA
New Orleans, LA
Beaumont, TX
Brownsville, TX
Corpus Christi, TX
Freeport, TX
Galveston, TX
Harbor Island, TX
Houston, TX
Orange, TX
Port Arthur, TX
Port Isabel, TX
Port Lavaca, TX
Port Neches, TX
Sabine, TX
Texas City, TX

South Pacific Range

Alameda, CA
Antioch, CA
Benicia, CA
Carlsbad, CA
Carpinteria, CA
Crockett, CA
El Segundo, CA
Eureka, CA
Estero Bay, CA
Gaviota, CA
Huntington Beach, CA
Long Beach, CA
Los Angeles, CA
Mandalay Beach, CA
Martinez, CA
Moss Landing, CA
Oakland, CA
Pittsburg, CA
Port Costa, CA
Port Hueneme, CA
Port San Luis, CA
Redwood City, CA
Richmond, CA
Sacramento, CA
San Diego, CA
San Francisco, CA
Selby, CA
Stockton, CA
Vallejo, CA
Ventura, CA
Barbers Point, HI
Hilo, HI
Honolulu, HI
Kahului, HI
Kaunakakai, HI
Kawaihae, HI
Nawiliwili, HI
Port Allen, HI

## Subpart G—Enforcement of the Limitations Imposed on Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports

### § _____.600 Enforcement Authority of Administrator, Wage and Hour Division.

(a) The Administrator shall perform all the Secretary's investigative and enforcement functions under section 258 of the INA (8 U.S.C. 1288) and subparts F and G of this part.

(b) The Administrator, pursuant to a complaint, 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) 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 258 of the INA (8 U.S.C. 1288) and subparts F and G 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. 1288 or subpart F or G of this part. Any such interference shall be a violation of the attestation and subparts F and G of this part, and the Administrator may take such further actions as the Administrator considers appropriate. (Note: 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)( 1) An employer subject to subparts F and G of this part shall at all times cooperate in administrative and enforcement proceedings. No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, retaliate, or in any manner discriminate against any person because such person has:

(i) Filed a complaint or appeal under or related to section 258 of the INA (8

U.S.C. 1288) or subpart F or G of this part;

(ii) Testified or is about to testify in any proceeding under or related to section 258 of the INA (8 U.S.C. 1288) or subpart F or G of this part;

(iii) Exercised or asserted on behalf of himself or herself or others any right or protection afforded by section 258 of the INA (8 U.S.C. 1288) or subpart F or G of this part.

(iv) Consulted with an employee of a legal assistance program or an attorney on matters related to section 258 of the Act or to subpart F or G of this part or any other DOL regulation promulgated pursuant to 8 U.S.C. 1288.

(2) In the event of such intimidation or restraint as are described in paragraph (d)(1) of this section, the conduct shall be a violation of the attestation and subparts F and G of this part, and the Administrator may take such further actions as the Administrator considers appropriate.

(e) 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 subpart F or G of this part. However, confidentiality will not be afforded to the complainant or to information provided by the complainant.

**§ _____.605 Complaints and investigative procedures.**

(a) The Administrator, through an investigation, shall determine whether a basis exists to make a finding that:

(1) An attesting employer has—

(i) Failed to meet conditions attested to; or

(ii) Misrepresented a material fact in an attestation.

(Note: Federal criminal statutes provide penalties of up to $10,000 and/or imprisonment of up to 5 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.); or

(2) In the case of an employer operating under the automated vessel exception to the prohibition on utilizing alien crewmembers to perform longshore activity(ies) at a U.S. port, the employer—

(i) Is utilizing alien crewmember(s) to perform longshore activity(ies) at a port where the prevailing practice has not been to use such workers for such activity(ies); or

(ii) Is utilizing alien crewmember(s) to perform longshore activities:

(A) During a strike or lockout in the course of a labor dispute at the U.S. port; and/or

(B) With intent or design to influence an election of a bargaining representative for workers at the U.S. port; or

(3) An employer failed to comply in any other manner with the provisions of subpart F or G of this part.

(b) Any aggrieved person or organization may file a complaint of a violation of the provisions of subpart F or G of this part.

(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—

(i) Whether, in the case of an attesting employer, there is reasonable cause to believe that particular part or parts of the attestation or regulations have been violated; or

(ii) Whether, in the case of an employer claiming the automated vessel exception, the preponderance of the evidence submitted by any interested party shows that conditions exist that would require the employer to file an attestation.

(3) The complaint may be submitted to any local Wage and Hour Division office; the addresses of such offices are found in local telephone directories. 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.

(c) The Administrator shall determine whether there is reasonable cause to believe that the complaint warrants investigation. 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. There shall be no hearing pursuant to § _____.625 for the Administrator's determination not to conduct an investigation. If the Administrator determines that an investigation on the complaint is warranted, the investigation shall be conducted and a determination issued within 180 calendar days of the Administrator's receipt of the complaint, or later for good cause shown.

(d) In conducting an investigation, the Administrator may consider and make part of the investigation file any evidence or materials that have been compiled in any previous investigation regarding the same or a closely related matter.

(e) In conducting an investigation under an attestation, the Administrator shall take into consideration the employer's burden to provide facts and evidence to establish the matters asserted. In conducting an investigation regarding an employer's eligibility for the automated vessel exception, the Administrator shall not impose the burden of proof on the employer, but shall consider all evidence from any interested party in determining whether the employer is not eligible for the exception.

(f) In an investigation regarding the use of alien crewmembers to perform longshore activity(ies) in a U.S. port (whether by an attesting employer or by an employer claiming the automated vessel exception), the Administrator shall accept as conclusive proof a previous Departmental determination, published in the Federal Register pursuant to § _____.670, establishing that such use of alien crewmembers is not the prevailing practice for the activity(ies) and U.S. port at issue. The Administrator shall give appropriate weight to a previous Departmental determination published in the Federal Register pursuant to § _____.670, establishing that at the time of such determination, such use of alien crewmembers was the prevailing practice for the activity(ies) and U.S. port at issue.

(g) When an investigation has been conducted, the Administrator shall, within the time period specified in paragraph (c) of this section, issue a written determination as to whether a basis exists to make a finding stated in paragraph (a) of this section. The determination shall be issued and an opportunity for a hearing shall be afforded in accordance with the procedures specified in § _____.625(d) of this part.

**§ _____.610 Automated vessel exception to prohibition on utilization of alien crewmember(s) to perform longshore activity(ies) at a U.S. port.**

(a) The Act establishes a rebuttable presumption that the prevailing practice in U.S. ports is for automated vessels (*i.e.,* vessels equipped with automated self- unloading conveyor belts or vacuum-actuated systems) to use alien crewmembers to perform longshore activity(ies) through the use of the self-unloading equipment. An employer claiming the automated vessel exception does not have the burden of establishing eligibility for the exception.

(b) In the event of a complaint asserting that an employer claiming the automated vessel exception is not eligible for such exception, the

Administrator shall determine whether the preponderance of the evidence submitted by any interested party shows that:

(1) It is not the prevailing practice at the U.S. port to use alien crewmember(s) to perform the longshore activity(ies) through the use of the self-unloading equipment; or

(2) The employer is using alien crewmembers to perform longshore activity(ies)—

(i) During a strike or lockout in the course of a labor dispute at the U.S. port; and/or

(ii) With intent or design to influence an election of a bargaining representative for workers at the U.S. port.

(c) In making the prevailing practice determination required by paragraph (b)(1) of this section, the Administrator shall determine whether, in the 12-month period preceding the date of the Administrator's receipt of the complaint, one of the following conditions existed:

(1) Over fifty percent of the automated vessels docking at the port used alien crewmembers for the activity (for purposes of this paragraph (c)(1) of this section, a vessel shall be counted each time it docks at the particular port); or

(2) Alien crewmembers made up over fifty percent of the workers who performed the activity with respect to such automated vessels.

(d) An interested party, complaining that the automated vessel exception is not applicable to a particular employer, shall provide to the Administrator evidence such as:

(1) A written summary of a survey of the experience of masters of automated vessels which entered the local port in the previous year, describing the practice in the port as to the use of alien crewmembers;

(2) A letter, affidavit, or other written statement from an appropriate local port authority regarding the use of alien crewmembers to perform the longshore activity at the port in the previous year;

(3) Written statements from collective bargaining representatives and/or shipping agents with direct knowledge of practices regarding the use of alien crewmembers at the port in the previous year.

**§ _____.615 Cease and desist order.**

(a) If the Administrator determines that reasonable cause exists to conduct an investigation with respect to an attestation, the complainant may request that the Administrator enter a cease and desist order against the employer against whom the complaint is lodged.

(1) The request for a cease and desist order may be filed along with the complaint, or may be filed subsequently. The request, including all accompanying documents, shall be filed in duplicate with the same Wage and Hour Division office that received the complaint.

(2) No particular form is prescribed for a request for a cease and desist order pursuant to this paragraph (a). However, any such request shall:

(i) Be dated;

(ii) Be typewritten or legibly written;

(iii) Specify the attestation provision(s) with respect to which the employer allegedly failed to comply and/or submitted misrepresentation(s) of material fact(s);

(iv) Be accompanied by evidence to substantiate the allegation(s) of noncompliance and/or misrepresentation;

(v) Be signed by the complaining party making the request or by the authorized representative of such party;

(vi) Include the address at which such complaining party or authorized representative desires to receive further communications relating thereto.

(3) Upon receipt of a request for a cease and desist order, the Administrator shall promptly notify the employer of the request. The Administrator's notice shall:

(i) Inform the employer that it may respond to the request and meet with a Wage and Hour Division official within 14 calendar days of the date of the notice;

(ii) Be served upon the employer by facsimile transmission, in person, or by certified or regular mail, at the address of the U.S. agent stated on the employer's attestation;

(iii) Be accompanied by copies of the complaint, the request for a cease and desist order, the evidence submitted by the complainant, and any evidence from other investigation(s) of the same or a closely related matter which the Administrator may incorporate into the record. (Any such evidence from other investigation(s) shall also be made available for examination by the complaining party at the Wage and Hour Division office which issued the notice.)

(4) No particular form is prescribed for the employer's response to the complaining party's request for a cease and desist order under this paragraph (a), however, any such response shall:

(i) Be dated;

(ii) Be submitted by facsimile transmission, in person, by certified or regular mail, or by courier service to the Wage and Hour Division office which issued the notice of the request;

(iii) Be received by the appropriate Wage and Hour Division office no later than 14 calendar days from the date of the notice of the request;

(iv) Be typewritten or legibly written;

(v) Explain, in any detail desired by the employer, the employer's grounds or reasons as to why the Administrator should deny the requested cease and desist order;

(vi) Be accompanied by evidence to substantiate the employer's grounds or reasons as to why the Administrator should deny the requested cease and desist order;

(vii) Specify whether the employer desires an informal meeting with a Wage and Hour Division official;

(viii) Be signed by the employer or its authorized representative; and

(ix) Include the address at which the employer or its authorized representative desires to receive further communications relating thereto, if such address is different from the address of the U.S. agent stated on the attestation.

(5) In the event the employer requests a meeting with a Wage and Hour Division official, the Administrator shall provide the employer and the complaining party, or their authorized representatives, an opportunity for such a meeting to present their views regarding the evidence and arguments submitted by the parties. This shall be an informal meeting, not subject to any procedural rules. The meeting shall be held within the 14 calendar days permitted for the employer's response to the request for the cease and desist order, and shall be held at a time and place set by the Wage and Hour Division official, who shall notify the parties.

(6) After receipt of the employer's timely response and after any informal meeting which may have been held with the parties, the Administrator shall promptly issue a written determination, either denying the request or issuing a cease and desist order. In making the determination, the Administrator shall consider all the evidence submitted, including any evidence from the same or a closely related matter which the Administrator has incorporated into the record and provided to the employer. If the Administrator determines that the complaining party's position is supported by a preponderance of the evidence submitted, the Administrator shall order that the employer cease the activities specified in the determination, until the completion of the Administrator's investigation and any subsequent proceedings pursuant to § _____.625 of this part, unless the prohibition is lifted by subsequent order of the Administrator because it is later determined that the employer's position was correct. While the cease and desist order is in effect, ETA shall suspend the

subject attestation, either in whole or in part, and shall not accept any subsequent attestation from the employer for the activity(ies) and U.S. port or location in the State of Alaska at issue.

(7) The Administrator's cease and desist order shall be served on the employer at the address of its designated U.S. based representative or at the address specified in the employer's response, by facsimile transmission, personal service, or certified mail.

(b) If the Administrator determines that reasonable cause exists to conduct an investigation with respect to a complaint that a non-attesting employer is not entitled to the automated vessel exception to the requirement for the filing of an attestation, a complaining party may request that the Administrator enter a cease and desist order against the employer against whom the complaint is lodged.

(1) The request for a cease and desist order may be filed along with the complaint, or may be filed subsequently. The request, including all accompanying documents, shall be filed in duplicate with the same Wage and Hour Division office that received the complaint.

(2) No particular form is prescribed for a request for a cease and desist order pursuant to this paragraph. However, any such request shall:

(i) Be dated;

(ii) Be typewritten or legibly written;

(iii) Specify the circumstances which allegedly require that the employer be denied the use of the automated vessel exception;

(iv) Be accompanied by evidence to substantiate the allegation(s);

(v) Be signed by the complaining party making the request or by the authorized representative of such party; and

(vi) Include the address at which such complaining party or authorized representative desires to receive further communications relating thereto.

(3) Upon receipt of a request for a cease and desist order, the Administrator shall notify the employer of the request. The Administrator's notice shall:

(i) Inform the employer that it may respond to the request and meet with a Wage and Hour Division official within 14 calendar days of the date of the notice;

(ii) Be served upon the employer by facsimile transmission, in person, or by certified or regular mail, at the employer's last known address; and

(iii) Be accompanied by copies of the complaint, the request for a cease and desist order, the evidence submitted by the complainant, and any evidence from other investigation(s) of the same or a closely related matter which the Administrator may incorporate into the record. (Any such evidence from other investigation(s) shall also be made available for examination by the complaining party at the Wage and Hour Division office which issued the notice.)

(4) No particular form is prescribed for the employer's response to the complaining party's request for a cease and desist order under this paragraph (b). However, any such response shall:

(i) Be dated;

(ii) Be submitted by facsimile transmission, in person, by certified or regular mail, or by courier service to the Wage and Hour Division office which issued the notice of the request;

(iii) Be received by the appropriate Wage and Hour Division office no later than 14 calendar days from the date of the notice of the request;

(iv) Be typewritten or legibly written;

(v) Explain, in any detail desired by the employer, the employer's grounds or reasons as to why the Administrator should deny the requested cease and desist order;

(vi) Be accompanied by evidence to substantiate the employer's grounds or reasons as to why the Administrator should deny the requested cease and desist order;

(vii) Specify whether the employer desires an informal meeting with a Wage and Hour Division official;

(viii) Be signed by the employer or its authorized representative; and

(ix) Include the address at which the employer or its authorized representative desires to receive further communications relating thereto.

(5) In the event the employer requests a meeting with a Wage and Hour Division official, the Administrator shall provide the employer and the complaining party, or their authorized representatives, an opportunity for such a meeting to present their views regarding the evidence and arguments submitted by the parties. This shall be an informal meeting, not subject to any procedural rules. The meeting shall be held within the 14 calendar days permitted for the employer's response to the request for the cease and desist order, and shall be held at a time and place set by the Wage and Hour Division official, who shall notify the parties.

(6) After receipt of the employer's timely response and after any informal meeting which may have been held with the parties, the Administrator shall promptly issue a written determination, either denying the request or issuing a cease and desist order. If the Administrator determines that the complaining party's position is supported by a preponderance of the evidence submitted, the Administrator shall order that the employer cease the use of alien crewmembers to perform the longshore activity(ies) specified in the order. In making the determination, the Administrator shall consider all the evidence submitted, including any evidence from the same or a closely related matter which the Administrator has incorporated into the record and provided to the employer. The order shall remain in effect until the completion of the investigation and any subsequent hearing proceedings pursuant to § _____.625 of this part, unless the employer files and maintains on file with ETA an attestation pursuant to § _____.520 of this part or unless the prohibition is lifted by subsequent order of the Administrator because it is later determined that the employer's position was correct.

(7) The Administrator's cease and desist order shall be served on the employer or its designated representative by facsimile transmission, personal service, or by certified mail at the address specified in the employer's response or, if no such address was specified, at the employer's last known address.

**§ _____.620. Civil money penalties and other remedies.**

(a) The Administrator may assess a civil money penalty not to exceed $5,000 for each alien crewmember with respect to whom there has been a violation of the attestation or subpart F or G of this part. The Administrator may also impose appropriate remedy(ies).

(b) In determining the amount of 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 Act and subpart F or G 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 violator in good faith to comply with the provisions of 8 U.S.C. 1288(c) and subparts F and G of this part;

(5) The violator's explanation of the violation or violations;

(6) The violator's commitment to future compliance; and/or

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss,

potential injury or adverse effect with respect to other parties.

(c) The civil money penalty, and any other remedy determined by the Administrator to be appropriate, are immediately due for payment or performance upon the assessment by the Administrator, or the decision by an administrative law judge where a hearing is requested, or 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 for the area in which the violations occurred. The performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. The employer's failure to pay the civil money penalty, or to perform any other remedy prescribed by the Administrator, shall result in the rejection by ETA of any future attestation submitted by the employer, until such payment or performance is accomplished.

**§ _____.625 Written notice, service and Federal Register publication of Administrator's determination.**

(a) The Administrator's determination, issued pursuant to § _____.605 of this part, 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.

(b) Where the Administrator determines the prevailing practice regarding the use of alien crewmember(s) to perform longshore activity(ies) in a U.S. port (whether the Administrator's investigation involves an employer operating under an attestation, or under the automated vessel exception), the Administrator shall, simultaneously with issuance of the determination, publish in the Federal Register a notice of the determination. The notice shall identify the activity(ies), the U.S. port, and the prevailing practice regarding the use of alien crewmembers. The notice shall also inform interested parties that they may request a hearing pursuant to § _____.630 of this part, within 15 days of the date of the determination.

(c) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and the Administrator's determination.

(d) The Administrator's written determination required by § _____.605 of this part shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor, and in the case of a finding of violation(s) by an attesting employer, prescribe any remedies, including the amount of any civil money penalties assessed and the reason therefor, and/or any other remedies required for compliance with the employer's attestation.

(2) Inform the interested parties that they may request a hearing pursuant to § _____.625 of this part.

(3) Inform the interested parties that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, and give the address of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of Labor (upon whom copies of the request must be served).

(5) Inform the parties that, pursuant to § _____.665, the Administrator shall notify ETA and the Attorney General of the occurrence of a violation by the attesting employer or of the non-attesting employer's ineligibility for the automated vessel exception.

**§ _____.630 Request for hearing.**

(a) Any interested party desiring to request an administrative hearing on a determination issued pursuant to §§ _____.605 and _____.625 of this part shall make such request in writing to the Chief Administrative Law Judge at the address stated in the notice of determination.

(b) Interested parties may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an attesting employer has committed violation(s) or that the employer is eligible for the automated vessel exception. In such a proceeding, the requesting party and the employer shall be parties; the Administrator may intervene as a party or appear as *amicus curiae* at any time in the proceeding, at the Administrator's discretion.

(2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that there is a basis for a finding that an attesting employer has committed violation(s) or that a non- attesting employer is not eligible for the automated vessel exception. In such a proceeding, the Administrator and the employer shall be parties.

(c) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the party requesting the hearing believes such determination is in error;

(5) Be signed by the party making the request or by an authorized representative of such party; and

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing must be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An interested party that fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party pursuant to 29 CFR 18.10 (b) through (d) or through participation as an amicus curiae pursuant to 18 CFR 18.12.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is filed by mail, it should be by certified mail. If the request is filed by facsimile transmission, the original of the request, signed by the requestor or authorized representative, shall be filed within ten days.

(f) Copies of the request for a hearing shall be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

**§ _____.635 Rules of practice for administrative law judge proceedings.**

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the ''Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges'' established by the Secretary at 29 CFR part 18 shall apply to

administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

**§ _____.640 Service and computation of time.**

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address or, in the case of the attesting employer, to the employer's designated representative in the U.S. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, and one copy on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

**§ _____.645 Administrative law judge proceedings.**

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § _____.630 of this part, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) Within seven calendar days following the assignment of the case, the administrative law judge shall notify all interested parties of the date, time and place of the hearing. All parties shall be given at least fourteen calendar days' notice of such hearing.

(c) The date of the hearing shall be not more than 60 calendar days from the date of the Administrator's determination. Because of the time constraints imposed by the Act, no requests for postponement shall be granted except for compelling reasons. Even if such reasons are shown, no extension of the hearing date beyond 60 days from the date of the Administrator's determination shall be granted except by consent of all the parties to the proceeding.

(d) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § _____.640 of this part. Posthearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party in accordance with § _____.640 of this part.

(e) In reaching a decision, the administrative law judge shall, in accordance with the Act, impose the following burden of proof—

(1) The attesting employer shall have the burden of producing facts and evidence to establish the matters required by the attestation at issue;

(2) The burden of proof as to the applicability of the automated vessel exception shall be on the party to the hearing who is asserting that the employer is not eligible for the exception.

(f) The administrative law judge proceeding shall not be an appeal or review of the Administrator's ruling on a request for a cease and desist order pursuant to § _____.615.

**§ _____.650 Decision and order of administrative law judge.**

(a) Within 90 calendar days after receipt of the transcript of the hearing, the administrative law judge shall issue a decision. If any party desires review of the decision, including judicial review, a petition for Secretary's review thereof shall be filed as provided in § _____.655 of this subpart. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Secretary issues an order affirming the decision, or, unless and until 30 calendar days have passed after the Secretary's receipt of the petition for review and the Secretary has not issued notice to the parties that the Secretary will review the administrative law judge's decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision. The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision shall be served on all parties in person or by certified or regular mail.

**§ _____.655 Secretary's review of administrative law judge's decision.**

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge shall petition the Secretary to review the decision and order. To be effective, such petition shall be received by the Secretary 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 Secretary'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 decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(c) Whenever the Secretary determines to review the decision and order of an administrative law judge, a notice of the Secretary's determination shall be served upon the administrative law judge and upon all parties to the

proceeding within 30 calendar days after the Secretary's receipt of the petition for review.

(d) Upon receipt of the Secretary's notice, the Office of Administrative Law Judges shall within fifteen calendar days forward the complete hearing record to the Secretary.

(e) The Secretary's notice may specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (*e.g.,* briefs); and

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, room S–4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, shall be received by the Secretary either on or before the due date.

(g) Copies of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § _____.640(b) of this part.

(h) The Secretary's final decision shall be issued within 180 calendar days from the date of the notice of intent to review. The Secretary's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Secretary's decision, the Secretary shall transmit the entire record to the Chief Administrative Law Judge for custody pursuant to § _____.660 of this part.

**§ _____.660 Administrative record.**

The official record of every completed administrative hearing procedure provided by subparts F and G of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

**§ _____.665 Notice to the Attorney General and the Employment and Training Administration.**

(a) The Administrator shall promptly notify the Attorney General and ETA of the entry of a cease and desist order pursuant to § _____.615 of this part. The order shall remain in effect until the completion of the Administrator's investigation and any subsequent proceedings pursuant to § _____.630 of this part, unless the Administrator notifies the Attorney General and ETA of the entry of a subsequent order lifting the prohibition.

(1) The Attorney General, upon receipt of notification from the Administrator that a cease and desist order has been entered against an employer:

(i) Shall not permit the vessels owned or chartered by the attesting employer to use alien crewmembers to perform the longshore activity(ies) at the port or location in the State of Alaska specified in the cease and desist order; and

(ii) Shall, in the case of an employer seeking to utilize the automated vessel exception, require that such employer not use alien crewmembers to perform the longshore activity(ies) at the port or location in the State of Alaska specified in the cease and desist order, without having on file with ETA an attestation pursuant to § _____.520 of this part.

(2) ETA, upon receipt of the Administrator's notice shall, in the case of an attesting employer, suspend the employer's attestation, either in whole or in part, for the activity(ies) and port or location in the State of Alaska specified in the cease and desist order.

(b) The Administrator shall notify the Attorney General and ETA of the final determination of a violation by an attesting employer or of the ineligibility of an employer for the automated vessel exception, upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an attesting employer or a finding of nonapplicability of the automated vessel exception, and no timely request for hearing is made pursuant to § _____.630 of this part;

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an attesting employer or finding inapplicable the automated vessel exception, and no timely petition for review to the Secretary is made pursuant to § _____.655 of this part; or

(3) Where a petition for review is taken from an administrative law judge's decision finding a violation or finding inapplicable the automated vessel exception, and the Secretary either declines within thirty days to entertain the appeal, pursuant to § _____.655(c) of this part, or the Secretary affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an attesting employer or that the automated vessel exception does apply, and the Secretary, upon review, issues a decision pursuant to § _____.655 of this part, holding that a violation was committed by an attesting employer or holding that the automated vessel exception does not apply.

(c) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (b) of this section:

(1) Shall not permit the vessels owned or chartered by the attesting employer to enter any port of the U.S. for a period of up to one year;

(2) Shall, in the case of an employer determined to be ineligible for the automated vessel exception, thereafter require that such employer not use alien crewmembers(s) to perform the longshore activity(ies) at the specified port or location in the State of Alaska without having on file with ETA an attestation pursuant to § _____.520 of this part; and

(3) Shall, in the event that the Administrator's notice constitutes a conclusive determination (pursuant to § _____.670) that the prevailing practice at a particular U.S. port does not permit the use of nonimmigrant alien crewmembers for particular longshore activity(ies), thereafter permit no employer to use alien crewmembers for the particular longshore activity(ies) at that port.

(d) ETA, upon receipt of the Administrator's notice pursuant to paragraph (b) of this section:

(1) Shall, in the case of an attesting employer, suspend the employer's attestation, either in whole or in part, for the port or location at issue and for any other U.S. port, and shall not accept for filing any attestation submitted by the employer for a period of 12 months or for a shorter period if such is specified for that employer by the Attorney General; and

(2) Shall, if the Administrator's notice constitutes a conclusive determination (pursuant to § _____.670) that the prevailing practice at a particular U.S. port does not permit the use of alien crewmembers for the longshore activity(ies), thereafter accept no attestation under the prevailing practice exception on Form ETA 9033 from any employer for the performance of the activity(ies) at that port, and shall invalidate any current attestation under the prevailing practice exception on Form ETA 9033 for any employer for the performance of the activity(ies) at that port.

**§ _____.670 Federal Register notice of determination of prevailing practice.**

(a) Pursuant to § _____.625(b), the Administrator shall publish in the Federal Register a notice of the Administrator's determination of any investigation regarding the prevailing practice for the use of alien crewmembers for particular longshore activity(ies) in a particular U.S. port (whether under an attestation or under the automated vessel exception). Where the Administrator has determined that the prevailing practice in that U.S. port does not permit such use of alien crewmembers, and no timely request for a hearing is filed pursuant to § _____.630, the Administrator's determination shall be the conclusive determination for purposes of the Act and subparts F and G of this part; the Attorney General and ETA shall, upon notice from the Administrator, take the actions specified in § _____.665. Where the Administrator has determined that the prevailing practice in that U.S. port at the time of the investigation permits such use of alien crewmembers, the Administrator shall, in any subsequent investigation, give that determination appropriate weight, unless the determination is reversed in proceedings under § _____.630 or § _____.655.

(b) Where an interested party, pursuant to § _____.630, requests a hearing on the Administrator's determination, the Administrator shall, upon the issuance of the decision of the administrative law judge, publish in the Federal Register a notice of the judge's decision as to the prevailing practice for the longshore activity(ies) and U.S. port at issue, if the administrative law judge:

(1) Reversed the determination of the Administrator published in the Federal Register pursuant to paragraph (a) of this section; or

(2) Determines that the prevailing practice for the particular activity in the port does not permit the use of alien crewmembers.

(c) If the administrative law judge determines that the prevailing practice in that port does not permit such use of alien crewmembers, the judge's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part (unless and until reversed by the Secretary on discretionary review pursuant to § _____.655). The Attorney General and ETA shall upon notice from the Administrator, take the actions specified in § _____.665.

(d) In the event that the Secretary, upon discretionary review pursuant to § _____.655, issues a decision that reverses the administrative law judge on a matter on which the Administrator has published notices in the Federal Register pursuant to paragraphs (a) and (b) of this section, the Administrator shall publish in the Federal Register a notice of the Secretary's decision and shall notify the Attorney General and ETA.

(1) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the prevailing practice for the longshore activity(ies) in the U.S. port at issue does not permit the use of alien crewmembers, the Secretary's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part. Upon notice from the Administrator, the Attorney General and ETA shall take the actions specified in § _____.665.

(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 Attorney General and ETA shall cease the actions specified in § _____.665.

**§ _____.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.

Adoption of the Joint Interim Final Rule

The agency specific adoption of the joint interim final rule, which appears at the end of the common preamble, appears below:

**TITLE 20—EMPLOYEES' BENEFITS**

**CHAPTER V—EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR**

Accordingly, for the reasons set forth in the preamble, Chapter V of Title 20, Code of Federal Regulations, is amended as follows:

## PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The Authority citation for part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H) (i) and (ii), 1182 (m) 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, 2103 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); Pub. L. 103–206, 107 Stat 2419; and 8 CFR 214.2(h)(4)(i).

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

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

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.;* and sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288 (c) and (d); 29 U.S.C. 49 *et seq.*; and Pub. L. 103–206, 107 Stat 2419.

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.;* and sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note).

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).

2. Part 655 is amended by revising subparts F and G to read as set forth in the joint interim final rule at the end of the common preamble.

**Subpart F—Attestations by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports**

General Provisions

Sec.



Alaska Exception

Signed at Washington, DC, this 6th day of January, 1995.

Robert B. Reich,

*Secretary of Labor.*

**TITLE 29—LABOR**

**CHAPTER V—WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR**

For the reasons set forth in the preamble, part 506 of Title 29, Code of Federal Regulations, is amended as follows:

## PART 506—ATTESTATIONS BY EMPLOYERS USING ALIEN CREWMEMBERS FOR LONGSHORE ACTIVITIES IN U.S. PORTS

1. The authority citation for part 506 is revised to read as follows:

Authority: 8 U.S.C. 1288 (c) and (d).

2. Part 506 is amended by revising subparts F and G to read as set forth in the joint interim final rule at the end of the common preamble.

**Subpart F—Attestations by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports**

General Provisions

Sec.
506.500 Purpose, procedure and applicability of subparts F and G of this part.
506.501 Overview of responsibilities.
506.502 Definitions.
506.510 Employer attestations.
506.520 Special provisions regarding automated vessels.

Alaska Exception

506.530 Special provisions regarding the performance of longshore activities at locations in the State of Alaska.
506.531 Who may submit attestations for locations in Alaska?
506.532 Where and when should attestations be submitted for locations in Alaska?
506.533 What should be submitted for locations in Alaska?
506.534 The first attestation element for locations in Alaska: Bona fide request for dispatch of United States longshore workers.
506.535 The second attestation element for locations in Alaska: Employment of United States longshore workers.
506.536 The third attestation element for locations in Alaska: No intention or design to influence bargaining representative election.
506.537 The fourth attestation element for locations in Alaska: Notice of filing.
506.538 Actions on attestations submitted for filing for locations in Alaska.
506.539 Effective date and validity of filed attestations for locations in Alaska.
506.540 Suspension or invalidation of filed attestations for locations in Alaska.
506.541 Withdrawal of accepted attestations for locations in Alaska.

Public Access

506.550 Public access.

Appendix A to Subpart F—U.S. Seaports

**Subpart G—Enforcement of the Limitations Imposed on Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports**

Sec.
506.600 Enforcement authority of Administrator, Wage and Hour Division.
506.605 Complaints and investigative procedures.
506.610 Automated vessel exception to prohibition on utilization of alien crewmembers to perform longshore activity(ies) at a U.S. port.
506.615 Cease and desist order.
506.620 Civil money penalties and other remedies.
506.625 Written notice, service and Federal Register publication of Administrator's determination.
506.630 Request for hearing.
506.635 Rules of practice for administrative law judge proceedings.
506.640 Service and computation of time.
506.645 Administrative law judge proceedings.
506.650 Decision and order of administrative law judge.
506.655 Secretary's review of administrative law judge's decision.
506.660 Administrative record.
506.665 Notice to the Attorney General and the Employment and Training Administration.
506.670 Federal Register notice of determination of prevailing practice.
506.675 Non-applicability of the Equal Access to Justice Act.

Signed at Washington, DC, this 6th day of January, 1995.

Robert B. Reich,

*Secretary of Labor.*

Appendix B (Not To Be Codified in the CFR): Form ETA 9033–A

Printed below is a copy of Form ETA 9033–A.

BILLING CODES 4510–30–P, 4510–27–P

## Attestation by Employers Using Alien Crewmembers for Longshore Activities at Locations in the State of Alaska

**U.S. Department of Labor**
Employment and Training Administration
U.S. Employment Service

| | | |
|---|---|---|
| 1. Full Legal Name of Company | 5. Name of U.S. Agent | OMB Approval No. 1205-0352<br>Expires: 09/30/97 |
| 2. Headquarters Address<br>(No., St., City, Town, State, ZIP Code, Country) | 6. U.S. Business Address of Agent<br>(No., St., City, State, ZIP Code) | |
| 3. Telephone (Area Code and Number) | 7. Telephone (Area Code and Number) | |
| 4. Name of Chief Executive Officer | Fax (Area Code and Number) | |

8. EMPLOYER ATTESTATION (Use attachment if additional space is needed or multiple locations are covered.)

(a) It is anticipated that longshore activities will be performed at the following times and locations in the State of Alaska (Check appropriate box(es) below for each activity of longshore work to be performed):

First Performance of Activity (Month/Day/Year) _____ Location (name of port, city, or other geographical reference point) _____

☐ (i) Loading cargo ☐ (ii) Unloading cargo
☐ (iii) Operation of cargo-related equipment ☐ (iv) Handling of mooring lines

☐ (b) Before using alien crewmen to perform any longshore activity, a bona fide request will be made to the parties to whom notice has been provided under item 8(e)(ii) and (iii) below, for United States longshore workers who are qualified and available in sufficient numbers to perform the longshore activity at the particular time and location, except that:

(i) wherever two or more contract stevedoring companies have signed a joint collective bargaining agreement with a labor organization described in 8(e)(i) below, the request for longshore workers may be made to only one such contract stevedoring company, and

(ii) a request for longshore workers to an operator of a private dock may be made only for longshore work to be performed at that dock and only if the operator meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act.

☐ (c) All United States longshore workers who are made available in response to the request for dispatch as attested at item 8(b) above and who are qualified, available in sufficient numbers, and needed to perform the longshore activity at the particular time and location, will be employed to perform such activity.

☐ (d) The use of alien crewmembers in my employ to perform any longshore activity is not intended or designed to influence an election of a bargaining representative for workers in the State of Alaska.

☐ (e) As of this date, notice of this attestation has been provided to (include copies of actual notices):

(i) Labor organizations which have been recognized as exclusive bargaining representatives of United States longshore workers and which make available or intend to make available longshore workers to the particular location(s) where the longshore work is be performed;

(ii) Contract stevedoring companies which employ or intend to employ United States longshore workers at the particular location(s) where the longshore work is to be performed; and

(iii) Operators of private docks at which workers in my employ will perform any longshore activity.

9. DECLARATION OF EMPLOYER: Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the information provided on this form and accompanying documentation is true and correct. In addition, I declare that I will comply with the Department of Labor regulations governing this program and, in particular, that I will make this attestation, supporting documentation, and other records, files and documents available to officials of the Department, upon such official's request, during any investigation under this attestation or the immigration and Nationality Act.

_____ _____
Signature of Chief Executive Officer (or U.S. Agent or Representative) Date

**FOR U.S. GOVERNMENT AGENCY USE ONLY:** By virtue of my signature below, I acknowledge that this attestation is accepted for filing on _____ (date) and will be valid for the longshore activities at locations in the State of Alaska herein attested to from _____ (beginning date) through _____ (date twelve months from beginning date).

_____ _____
Signature of Authorized DOL Official ETA Case No.

Subsequent DOL action: Suspended _____ Invalidated _____ Withdrawn _____

The Department of Labor is not the guarantor of the accuracy, truthfulness or adequacy of an attestation accepted for filing.



**DO NOT SEND THE COMPLETED FORM TO EITHER OF THESE OFFICES**

ETA 9033-A (Dec. 1994)

**ATTESTATION BY EMPLOYERS USING ALIEN CREWMEMBERS FOR LONGSHORE ACTIVITIES AT LOCATIONS IN THE STATE OF ALASKA**

IMPORTANT: READ CAREFULLY BEFORE COMPLETING FORM

Submit the completed original Form ETA 9033-A with accompanying documentation along with two copies of the form and accompanying documentation. Attestations must be received by the Department of Labor no later than 30 days prior to the first performance of the longshore activity (or anytime up to 24 hours before the first performance of the activity, upon a showing that the employer could not have reasonably anticipated the need to file an attestation for that location at the time). Attestations which are filed less than 30 days prior to the first performance of the longshore activity must include supporting documentation to show that the employer could not have reasonably anticipated the need to file an attestation for that location at that time. Attestations must be submitted to the ETA regional office at 1111 3rd Ave., Suite 900, Seattle, WA 98101.

**To knowingly furnish any false information in the preparation of this form and any supporting documentation thereto, or to aid, abet or counsel another to do so is a felony, punishable by $10,000 fine or five years in the penitentiary, or both (18 U.S.C. 1001). Other penalties apply as well to fraud and misuse of this immigration document (18 U.S.C. 1546) and to perjury with respect to this form (18 U.S.C. 1546 and 1621).**

Print legibly in ink or use a typewriter. Sign and date one form in original signature. Citations below to "regulations" are citations to the identical provisions at 20 CFR Part 655, Subparts F and G, and at 29 CFR Part 506, Subparts F and G.

**Item 1.** Full Legal Name of Company. Enter full legal name of business, firm or organization, or, if an individual, enter name used for legal purposes on documents.

**Item 2.** Headquarters Address. Self Explanatory.

**Item 3.** Telephone Number. Include area code or international calling code.

**Item 4.** Name of Chief Executive Officer. Self explanatory.

**Item 5.** Name of U.S. Agent. Self explanatory.

**Item 6.** U.S. Business Address of Agent. This address must be in the U.S.

**Item 7.** Telephone Number. Include fax number, if available.

**Item 8.** Employer Attestations. An employer must attest to the conditions listed in elements (b) through (e). The attestation will only be accepted for filing if the required documentation supporting element 8(e) is attached to the Form ETA 9033-A. See § ____ .537 of the regulations for guidance on the documentation that must be attached to the Form ETA 9033-A to support element 8(e). The employer must check the appropriate box(es) 8(a)(i) through (iv) for each of the particular activities of longshore work to be performed.

**Item 8(b).** Bona Fide Request for Dispatch of U.S. Longshore Workers. The employer must attest that, before using alien crewmen to perform longshore work, he will make a bona fide request for U.S. longshore workers who are qualified and available in sufficient numbers to perform the activity at the particular times and locations specified. The request for dispatch must be directed to the parties to whom notice of filing is provided under attestation element 8(e)(ii) and (iii). Wherever two or more contract stevedoring companies have signed a joint collective bargaining agreement with a labor organization described in attestation element 8(e)(i), the employer may request longshore workers from only one of such contract stevedoring company. A request for longshore workers to an operator of a private dock may be made only for longshore work to be performed at that dock and only if the operator meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932). See § ____ .534 of the regulations for a detailed explanation of this attestation element.

**Item 8(c).** Employment of all Qualified U.S. Longshore Workers Made Available in Sufficient Numbers. The employer must attest that all U.S. longshore workers made available in response to the request for dispatch under the first attestation element, item 8(b), who are qualified and available in sufficient numbers and who are needed to perform the longshore activity at the particular times and locations specified will be employed to perform such activity. See § ____ .535 of the regulations for a detailed explanation of this attestation element.

**Item 8(d).** No Intention or Design to Influence Bargaining Representative Election. The employer must attest the use of alien crewmembers to perform longshore activities is not intended or designed to influence an election for a bargaining representative for longshore workers in the State of Alaska. See § ____ .536 of the regulations for a detailed explanation of this attestation element.

**Item 8(e).** Notice of Filing. The employer must attest that at the time of filing the attestation, notice of filing has been provided to labor organization which have been recognized as exclusive bargaining representatives of U.S. longshore workers and which make available or intend to make available workers to the particular locations where the longshore work is to be performed. Notice must also be provided to contract stevedoring companies which employ or intend to employ U.S. longshore workers at those locations, and to operators of private docks at which the employer will use longshore workers. See § ____ .537 of the regulations for a detailed explanation of this attestation element.

**Item 9.** Declaration of Employer. One copy of this form must bear the original signature of the chief executive officer (or the chief executive officer's U.S. agent or designated representative) unless filing by facsimile transmission. See § ____ .533(2) of the regulations if filing by facsimile transmission. By signing this form, the chief executive officer is attesting to the conditions listed in items 8(b) through (e) and to the accuracy of the information provided elsewhere on the form and in the supporting documentation. False statements are subject to Federal criminal penalties, as stated above.

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If the attestation bears the necessary entries of information and documentation, the Department of Labor may accept the attestation for filing and shall document such acceptance on each of the three Form ETA 9033-A's submitted. A copy of the attestation form indicating the Department's acceptance, or notification of nonacceptance, will be returned to the employer. A copy of this attestation, along with accompanying documentation, will be available for public inspection at the Division of Foreign Labor Certifications, United States Employment Service, Room N-4456, 200 Constitution Avenue, N.W., Washington, D.C. 20210.



[FR Doc. 95–964 Filed 1–18–95; 8:45 am]
BILLING CODES 4510–30–C, 4510–27–C