–1A–MC6, –1–MC7, –1A–MC7, –7, –7A turbofan engines, installed on but not limited to Boeing 707 and 720 series aircraft and McDonnell Douglas DC–8 series aircraft.

Note: This airworthiness directive (AD) applies to each engine identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For engines that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must use the authority provided in paragraph (b) to request approval from the Federal Aviation Administration (FAA). This approval may address either no action, if the current configuration eliminates the unsafe condition, or different actions necessary to address the unsafe condition described in this AD. Such a request should include an assessment of the effect of the changed configuration on the unsafe condition addressed by this AD. In no case does the presence of any modification, alteration, or repair remove any engine from the applicability of this AD.

Compliance: Required as indicated, unless accomplished previously.

To prevent steel high pressure compressor (HPC) disk failure due to corrosion, which could result in an uncontained engine failure and damage to the aircraft, accomplish the following:

(a) Inspect steel HPC disks, stages 10–15, for corrosion, recoat or replate, or replace as necessary, in accordance with PW Alert Service Bulletin (ASB) No. A6208, Revision 2, dated July 7, 1995, and the following schedule:

(1) For disks coated with PW110 Aluminide (AL), and for disks with unknown coating or plating, as follows:

(i) Initially inspect, recoat or replate, or replace as necessary, 11 years since new or since last recoat or replate, or 24 months after the effective date of this AD, whichever occurs later.

(ii) Thereafter, inspect, recoat or replate, or replace as necessary, at intervals not to exceed 11 years since new or last coating, if AL protective coating is applied, or not to exceed 13 years since new or last plating, if Nickel Cadmium (NI–CAD) plating is applied.

(2) For disks plated with NI–CAD, as follows:

(i) Initially inspect, recoat or replate, or replace as necessary, 13 years since new or since last replate, or 24 months after the effective date of this AD, whichever occurs later.

(ii) Thereafter, inspect, recoat or replate, or replace as necessary, at intervals not to exceed 11 years since new or last coating, if AL protective coating is applied, or not to exceed 13 years since new or last plating, if NI–CAD plating is applied.

(3) For disks with unknown history and unknown coating or plating, as follows:

(i) Initially inspect, recoat or replate, or replace as necessary, 24 months after the effective date of this AD.

(ii) Thereafter, inspect, recoat or replate, or replace as necessary, at intervals not to exceed 11 years since new or last coating, if AL protective coating is applied, or not to exceed 13 years since new or last plating, if NI–CAD plating is applied.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office. The request should be forwarded through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Engine Certification Office.

Note: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the Engine Certification Office.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the aircraft to a location where the requirements of this AD can be accomplished.

Issued in Burlington, Massachusetts, on October 18, 1995.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 95–26942 Filed 10–30–95; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205–AA89

Wage and Hour Division

29 CFR Part 507

RIN 1215–AA69

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

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

ACTION: Proposed rule.

SUMMARY: This rule is being proposed to obtain comments on certain provisions of the Department's Final Rule implementing provisions of the Immigration and Nationality Act (INA) as it relates to the temporary employment in the Untied States (''U.S.'') of nonimmigrants admitted under H–1B visas.

DATES: Public comments are invited. Comments shall be received by November 30, 1995 in order to expedite the Department's ability to provide additional guidance through issuance of a final rule.

ADDRESSES: Comments may be mailed to John R. Fraser, Deputy Administrator, 200 Constitution Ave., NW., Room S3510, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: On 20 CFR part 655, subpart H, and 29 CFR part 507, subpart H, 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 I, and 29 CFR part 507, subpart I, contact Thomas Shierling, Office of Enforcement Policy, Immigration Team, Wage and Hour Division, Employment Standards Administration, Department of Labor, Room S–3510, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 219–7605 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act of 1995

As discussed above, this Proposed Rule is a republication for notice and comment of various provisions published in the Final Rule. It is also proposed that § _____.731(b)(1) be revised to require less recordkeeping than had been required in the Final Rule. Reporting and recordkeeping requirements contained in the regulations have been submitted for review to the Office of Management and Budget under Section 3507(d) of the Paperwork Reduction Act of 1995.

Title: Wage recordkeeping requirements applicable to employers of H–1B nonimmigrants.

Summary: This Proposed Rule requires that employers document an objective actual wage system to be applied to H–1B nonimmigrants and U.S. workers. it also requires that employers keep payroll records for non-FLSA exempt H–1B workers and other employees for the specific employment in question.

Need: The statute requires that the employer pay H–1B nonimmigrants the higher of the actual or prevailing wage. In order to determine whether the employer is paying the required wage, the Department requires an employer to have and document an objective wage system used to determine the wages of non-H–1B workers. The Department also believes that it is essential to require the employer to maintain payroll records for the employer's employees in the specific employment

in question at the place of employment to ensure that H–1B nonimmigrants are being paid at least the actual wage being paid to non-H–1B workers or the prevailing wage, whichever is higher.

Respondents and proposed frequency of response: The Department estimates that approximately 26,480 of the 110,000 employers who file labor condition applications actually employ H–1B nonimmigrants. The Department further estimates that the public burden is approximately 1 hour per employer per year to document the actual wage system for a total burden to the regulated community of 26,480 hours per year.

The payroll recordkeeping requirements are virtually the same as those required by the Fair Labor Standards Act and any burden required is subsumed in OMB Approval No. 1215–0017 for those regulations at 29 CFR Parts 516, except with respect to records of hours worked required to be maintained for H–1B nonimmigrants who are exempt from the FLSA. The Department estimates that the number of employers who are required to keep such hourly records is approximately 2,251. The Department estimates that each employer accounts for approximately 2.45 workers and that the burden to employers to keep hourly records is 2.5 hours per employee per year. Thus, the total burden for keeping hourly records per employer is 6.125 hours per year for a total yearly burden to the regulated community of 13,787 hours per year.

Estimated total annual burden: The Department estimates, based on the figures above, that the total annual burden on the regulated community is 40,267 hours per year.

The public is invited to provide comments on the collection of information requirements of these provisions so the Department may:

(1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) enhance the quality, utility, and clarify of the information to be collected; and

(4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Written comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20503.

II. Background

On November 29, 1990, the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) (INA or Act) was amended by the Immigration Act of 1990 (IMMACT), Public Law 101–649, 104 Stat. 4978. On December 12, 1991, the INA was further amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Public Law 102–232, 105 Stat. 1733. These amendments assign responsibility to the Department of Labor (Department of DOL) for the implementation of several provisions of the Act relating to the entry of certain categories of employment-based immigrants, and to the entry and temporary employment of certain categories of nonimmigrants. One of the provisions of the Act governs the temporary entry of foreign ''professionals'' to work in ''specialty occupations'' in the U.S. under H–1B nonimmigrant status. 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184(c).

The H–1B category of specialty occupations consists of those occupations which require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the U.S. 8 U.S.C. 1184(i)(1). In addition, a nonimmigrant in a specialty occupation must possess full State licensure to practice in the occupation (if required), completion of the required degree, or experience equivalent to the degree and recognition of expertise in the specialty. 8 U.S.C. 1184(i)(2). The category of ''fashion model'' requires that the nonimmigrant be of distinguished merit and ability. 8 U.S.C. 1101(a)(15)(H)(i)(b).

The rulemaking history, as published in the Federal Register, is as follows:

March 20, 1991, Advance Notice of Proposed Rulemaking, 56 FR 11705.

August 5, 1991, Proposed Rule, 56 FR 37175.

October 22, 1991, Interim Final Rule, 56 FR 54720.

January 13, 1992, Interim Final Rule, 57 FR 1316.

October 6, 1993, Proposed Rule, 58 FR 52152.

December 30, 1993, Interim Final Rule, 58 FR 69226.

December 20, 1994, Final Rule, 59 FR 65646.

January 19, 1995, Final Rule, 60 FR 4028.

September 26, 1995, Notice, 60 FR 49505.

III. Proposed Provisions

The Department hereby republishes and reproposes several provisions adopted in the Final Rule (59 FR 65646, December 20, 1994) to provide the regulated community and the public an opportunity to comment on these provisions which were not specifically set forth in this format in the proposed rule. The Department also proposes to make an amendment to § _____.731(b)(1) as it appeared in the Final Rule.

With the exception of the Department's limited enforcement position on the recordkeeping provision of § _____.731(b)(1) (see 60 FR 49505, September 26, 1995), all provisions remain in effect and the issuance of this notice does not affect their enforcement. The Department will carefully consider all comments and will make any appropriate revisions to these provisions.

The preamble explaining each of these provisions in the Final Rule is set forth below for the convenience of the public, with minor modifications where appropriate.

1. Labor Condition Application Filing Dates

(See § _____.730(b).)

Through administration and enforcement of the H–1B program, the Department became aware that some employers were filing labor condition applications for periods of anticipated employment which were well in the future (*e.g.*, one year after the application filing date). This practice poses dangers of abuse and frustrates Congressional intent to protect the jobs and wages of U.S. workers. The prevailing wage, strike/lockout, and notice obligations are based, in large part, upon actions taken and conditions which exist at the time the labor condition application is filed. Therefore, in the Final Rule the Department established a time limit in advance of the beginning date of the period of employment that an employer may file a labor condition application. The Final Rule required and continues to require that a labor condition application can be filed no earlier than 6 months before the beginning date of the period of

employment. Labor condition applications which are received by an ETA regional office more than 6 months prior to the beginning date of the period of employment will be returned to the employer as unacceptable for filing. This procedural change imposes few, if any, additional burdens on employers and facilitates the achievement of the statutory purposes.

2. Actual Wage

(See § _____.731(a)(1) & Appendix A)

As the H–1B program evolved, the Department became aware that inconsistent and perhaps confusing interpretations had, on occasion, been provided in response to public inquiries concerning the Department's enforcement position on the employer's responsibilities under the ''actual wage'' provisions of the statute and regulation. To rectify any misunderstanding within the regulated community, the Department provided in the Final Rule the following guidance regarding its enforcement policy concerning determination of the actual wage.

In determining the required wage rate, the employer must not only obtain the prevailing wage, but also determine the actual wage for the occupation in which the H–1B nonimmigrant is to be employed by the employer. In establishing its compensation system for workers in an occupational category, of course, an employer may take into consideration objective standards relating to experience, qualifications, education, specific job responsibilities and functions, specialized knowledge, and other legitimate business factors. The use of any or all these factors is at the discretion of the employer. The employer must have and document an objective system used to determine the wages of non-H–1B workers, and apply that system to H–1B nonimmigrants as well. It is not sufficient for the employer simply to calculate an average wage of all non-H–1B employees in an occupation; the ''actual wage'' is not an ''average wage.''

The documents explaining the wage system must be maintained in the public disclosure file. The explanation of the compensation system must be sufficiently detailed to enable a third party to apply the system to arrive at the actual wage rate computed by the employer for any H–1B nonimmigrant. The computation of the H–1B nonimmigrant's individual actual wage rate shall be documented in the H–1B nonimmigrant's personnel file.

In the event the employer has not developed and documented an objective system and/or has not calculated the actual wage rate for an H–1B nonimmigrant, the Administrator—in determining the actual wage rate for enforcement and back wage computation purposes—may need to average the wages of all non-H–1B workers who are employed in the same occupation, rather than make determinations for each individual H–1B nonimmigrant; the employer in such circumstances would be cited for failure to comply with the requirements for determination of the actual wage.

Assuming the actual wage is higher than the prevailing wage and thus is the required wage rate, if an employer gives its employees a raise at year's end, or if the employer's compensation system provides for other adjustments in wages, H–1B nonimmigrants must also receive the adjustment (consistent with legitimate employer-established criteria such as level of performance, attendance, etc.). This is consistent with Congressional intent that H–1B nonimmigrants be provided the same wages as similarly-employed U.S. workers.

Where the employer's pay system or wage scale provides adjustments during the validity period of the labor condition application—*e.g.,* cost-of-living increase or other annual adjustment, increase in the entry-level rate for the occupation due to market forces, or the employee moves into a more advanced level in the same occupation—the employer shall retain documentation explaining the changes and clearly showing that, after such adjustments, the wages paid to the H–1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation in the area of intended employment.

3. Validity Period of a SESA Prevailing Wage

(See § _____.731(a)(2)(iii)(A)(*1*).)

Through administration and enforcement of the H–1B program, the Department became aware of confusion and potential adverse effect on workers' wages in situations in which employers filing LCAs relied on SESA prevailing wage determinations which were obtained on dates considerably earlier than the time of the filing (*e.g.,* six months prior to LCA date). Employers were obtaining prevailing wage rates and holding them indefinitely before using them in conjunction with filing an LCA. The Department concluded that a practicable limit should be set on the use of prevailing wage rates, and that 90 days is a reasonable practicable limit.

In order to alleviate confusion and to better assure the achievement of the Congressional purposes of protecting the wages of U.S. workers, the Department clarified the regulation to set a deadline for an employer's reliance on a SESA prevailing wage determination. An employer that obtains a SESA prevailing wage determination must file the labor condition application under which that rate will be paid within 90 days from the date of the SESA's determination.

4. Challenges of Prevailing Wage Determinations Only Through Employment Service Complaint System

(See § _____ .731(a)(2)(iii)(A)(*1*), § _____ .731(d)(2) and § _____ .840(c).)

Section _____ .731(a)(2)(iii)(A) lists the State Employment Security Agency (SESA) as one source for obtaining a prevailing wage determination. Although DOL regulations provide an avenue for an employer to challenge an SESA determination through the Employment Service (ES) complaint process (under 20 CFR part 658, subpart E), the Interim Final Rule did not make it sufficiently clear that challenges to SESA prevailing wage determinations were to be made *only* through that process. In designing the program, the Department had envisioned that the ES complaint process would be used for all prevailing wage challenges. However, after substantial enforcement litigation experience, the Department found that some employers were instead attempting to contest such determinations through the hearing provided under § _____ .835. These enforcement procedures were not intended to handle such challenges.

The Final Rule provided needed clarification by directing the employer to the ES complaint process and alerting the employer that a challenge of an SESA prevailing wage determination could be made only prior to filing an LCA in which that SESA determination is used. Implicit and essential in this process is the requirement that once an employer obtains a prevailing wage determination from the SESA and files an LCA using such determination without challenging it through the ES complaint process, the employer, in effect, has accepted the determination and waived its right to challenge the determination. Permitting an employer to operate under a SESA prevailing wage determination and later contest it in the course of an investigation or enforcement action is contrary to sound public policy; such a delayed, disruptive challenge would have a harmful effect on U.S. and H–1B employees, competing employers, and other parties who may have received notice of and/or relied on the prevailing wage at issue. Section _____ .731(a)(2)(iii)(A) of the Final Rule

explicitly stated the Department's clarification of the use and consequences of the ES complaint process. Challenges to SESA prevailing wage determinations can be made only through the State agency's ES process. See 20 CFR 658.410 *et seq.*

Where the prevailing wage determination is made by the SESA prior to the filing of the LCA, the employer's avenue of appeal is through the ES complaint system, entering the system at the State level. See 20 CFR 658.410 *et seq.* However, where the prevailing wage determination is made by ETA (with or without consultation with the SESA) during the course of a Wage and Hour Division enforcement action, the employer's avenue of appeal also is through the ES complaint system, but the employer enters the system at the ETA regional office level. The employer will be notified where to file any appeal. For purposes of the H–1B program only, this is a collateral change to the ES complaint system regulations, which generally require all complaints to be filed at the SESA level (see 20 CFR 658.420 *et seq.*) and is notwithstanding the provisions of 20 CFR 658.421(a) and 658.426. Similarly, § _____ .731(d) provides that, where the employer does not have a valid prevailing wage determination, the Administrator, during the course of an investigation, may obtain a prevailing wage determination from ETA, which, in turn, may consult with the SESA and then determine the appropriate prevailing wage. Some employers also were contesting these ETA prevailing wage determinations at the Wage and Hour enforcement hearing provided under § _____ .835. The Department believes that the proper forum for *all* prevailing wage determination challenges—whether the wage determination was obtained by the employer or by the Administrator (where the employer does not have a valid prevailing wage determination)—is the ES complaint process. Once the prevailing wage determination is final, either through the lack of a timely challenge or through the completion of the ES process, the determination will be conclusive for purposes of enforcement. In such cases where the prevailing wage determination is made by ETA at the Administrator's request, any challenge must be initiated at the ETA regional office level within 10 days after the employer receives the ETA prevailing wage determination. Section _____ .731(d) was amended in the Final Rule to reflect this clarification.

Finally, § _____.840(c) provides that where the Administrator has found a wage violation based on a prevailing wage determination obtained by the Administrator from ETA, the Administrative Law Judge (ALJ) in the enforcement proceeding ''shall not determine the prevailing wage *de novo,* but shall * * * either accept the wage determination or vacate the wage determination.'' This provision had been interpreted by some employers as permitting a challenge of prevailing wage determinations obtained by the Administrator for ETA. Section _____.840(c) was not intended to function as a mechanism from such challenges. Accordingly, § _____.840(c) was clarified in the Final Rule to reflect that once the Administrator obtains a prevailing wage determination from ETA and the employer either fails to challenge such determination through the ES complaint process within the specified time of 10 days, or, after such a challenge, the determination is found to be accurate by the ES complaint process, the ALJ must accept the determination as accurate and cannot vacate it. As with other final decisions of the Department, the employer continues to have access to Federal district court if the issues are not satisfactorily resolved.

5. Documentation of the Wage Statement

(See § _____.731(b)(1).)

Section _____.731(b)(1) of the Final Rule requires that, in documenting its compliance with the wage requirements, an employer shall maintain certain documentation, not only for the H–1B nonimmigrant(s), but for ''all other employees for the specific employment in question at the place of the employment.'' In the preamble to the Final Rule, the Department stated that ''[t]his information is ordinarily maintained by the employer for purposes of showing compliance with other applicable statutes (*e.g.*, the Fair Labor Standards Act) and will permit the Department to determine whether in fact the required wage has been paid'' (59 FR 65654, December 20, 1994).

Upon further consideration, the Department issued a Notice of Enforcement Position (60 FR 49505, September 26, 1995) announcing that, with respect to any additional workers for whom the Final Rule may have applied recordkeeping requirements, the Department would enforce the provision to require the employer to keep only those records which are required by the Fair Labor Standards Act (''FLSA''), 29 CFR part 516. The Department concluded that, in virtually all situations, the records required by the FLSA would include those listed under the H–1B Final Rule.

An amendment is proposed to be made to § _____.731(b)(1)(v). This section requires employers to retain records of hours worked for all employees in the same specific employment as the H–1B nonimmigrant if employees are paid on other than a salary basis or if the actual or prevailing wages are expressed as an hourly wage. The Department finds that it is unnecessary to require employers to retain records of hours worked for FLSA-exempt, similarly employed *non–*H–1B workers when the employer expresses its actual wage as a salary, even if the prevailing wage is expressed as an hourly wage. Therefore, the Department is proposing to amend § _____.731(b)(1)(v) so that employers are not required to retain records of hours worked for FLSA-exempt, similarly employed non–H–1B workers if the actual wage is expressed as a salary but the prevailing wage is expressed as an hourly rate.

6. Enforcement of Wage Obligation

(See § _____.731(c)(5).)

The Act requires an employer to state that it is offering and will offer the H–1B nonimmigrant, during the period of authorized employment, wages that are at least the required wage rate. The required wage rate is the actual wage rate or the prevailing wage rate, whichever is greater. Furthermore, the employer is required to indicate on the LCA whether an H–1B nonimmigrant will work full-time or part-time. Under the Secretary's statutory authority to implement the Act, the regulations do not authorize an employer to fail to pay the required wage rate. In enforcement proceedings, however, the Department has encountered confusion over an employer's obligations in circumstances where the H–1B nonimmigrant is in a nonproductive status or circumstance.

There is no statutory or regulatory authorization for a reduction in the prescribed wage rate for any H–1B nonimmigrant who is not engaged in productive work for the LCA-filing employer due to employment-related conditions such as training, lack of work, or other such reasons. The H–1B program was not intended and should not operate to provide an avenue for nonimmigrants to enter the U.S. and await work at the employer's choice or convenience, as has been found to be occurring. Compare 8 U.S.C. 1101(a)(15)(H)(iii). Instead, the H–1B program's purpose is to enable employers to temporarily employ fully-qualified workers for whom employment opportunities currently exist. The employer, having attested to the duration and scope of the intended

employment (*i.e.*, beginning and ending dates; full or part-time), controls the nonimmigrant's employment status. The Immigration and Nationality Act (8 U.S. C. 1182(n)(1)) requires that once the H–1B status has been approved for the period specified by the employer, the employer controls the status and work of the H–1B nonimmigrant, who is unable to accept employment elsewhere without a certified labor condition application and approved I–129 petition filed on the worker's behalf by another employer.

For the purpose of DOL administration and enforcement of the H–1B program pursuant to these regulations, an H–1B nonimmigrant is considered to be under the control or employ of the LCA-filing employer from the time of arrival in the United States and throughout the period of his or her employment—regardless of whether the nonimmigrant is in training or other nonproductive status, *unless* during the period employment an H–1B nonimmigrant experiences a period of nonproductive status due to conditions which are unrelated to the employment and render the nonimmigrant unable to work—e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant, caring for an ill relative. In such circumstances where a period of nonproductive status is due to conditions unrelated to employment, the employer shall not be obligated to pay the required wage rate during that period, provided that the INS permits the employee to remain in the U.S. without being paid and provided further that such period is not subject to payment under other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq*.).

It is the Department's position that an LCA-filing employer has no prereogative—other than in circumstances described above—but to pay the required wage beginning no later than the day the H–1B nonimmigrant is in the United States under the control and employ of that LCA-filing employer, and continuing throughout the nonimmigrant's period of employment. Any H–1B nonimmigrant to be employed under an LCA in a full-time capacity (the part-time block not having been checked on Item 7(b) of the LCA) shall be guaranteed full-time pay (ordinarily 40 hours' pay) each week, or the weekly equivalent if paid a monthly or annual salary. If an employer's LCA shows ''part-time employment,'' the employer will be required to pay the nonproductive employee for at least the number of hours to be worked per week indicated on the I–129 petition filed by the employer with the INS. If the employer indicates on the LCA that an employee is to work only part-time and subsequent investigation discloses that, in fact, the employee was working full-time in a majority of the weeks during the period covered by the investigation, the employer will be responsible for full-time pay including during nonproductive periods for which the worker received either no pay or less than the required wage.

7. Notification

(See § _____. 734(a)(1)(ii)(D).)

Section 212(n)(1)(C) of the INA requires that an employer seeking to hire an H–1B nonimmigrant shall notify, at the time of filing the application, the bargaining representative of its employees of the filing of the labor condition application or, if there is no bargaining representative, post notice of filing in conspicuous locations at the place of employment. 8 U.S.C. 1182(n)(1)(C). The interim final regulations at § _____. 730(h)(1) implemented this statutory requirement.

Based on program experience, the Final Rule clarified the regulations to better assure the worker protections which Congress intended the notice requirement to achieve. The Department had become aware that some employers which place H–1B nonimmigrants at new worksites within areas covered by existing LCA's failed to fulfill their LCA obligations, but, because notices were not posted at the new worksites, potentially adversely affected workers were not informed of the LCA conditions or of their own rights to examine certain documents and to file complaints. The Department recognized that it could take the position that an employer wishing to place H–1B nonimmigrants at worksites where notice had not been given could be required to both post a notice *and* file a new LCA before placing H–1B nonimmigrants at a new worksite within an area of intended employment. However, such a two-step requirement appeared to the Department to be burdensome. The protections intended by Congress can be effected by notice posted by the employer at each new worksite within an area of intended employment at the time the H–1B nonimmigrants are sent there to work, without the employer being required to file new LCA's. The Final Rule, therefore, imposed a less burdensome but equally worker-protective standard, by providing that the employer shall post worksite notices on the first day of work by an H–1B nonimmigrant at a new worksite, which will remain posted for at least ten days.

A clarification of the regulation, based upon program experience, was also made in the Final Rule with regard to the timing of an employer's notice of filing an LCA. The Department became aware of confusion and potential adverse effects in situations in which employers provided the required notice of filing the application to the bargaining representative, or to its employees by posting at the place of employment, considerably in advance of the date the application was filed (*e.g.*, six months prior to filing). In order to alleviate confusion and to better assure the achievement of Congressional intent that U.S. workers who work side-by-side with H–1B nonimmigrants be notified of the employer's intent and their ability to file complaints if they believe violations have occurred, the Final Regulation required that notice, provided by the employer under the fourth labor condition statement, was to be provided on or within 30 days prior to the date the labor condition application is filed.

8. Short-Term Placement of H–1B Nonimmigrants at Worksites Outside the Location(s) Listed on the LCA

(See § _____.735.)

Until the October 1993 NPRM, the Department had indicated that job contractors would be treated like any other employer under the H–1B program. After obtaining considerable programmatic experience regarding the operations and effects of job contractors using H–1B nonimmigrants, the Department proposed in its NPRM to clarify how LCA's should be completed by job contractors, and proposed to amend the regulations to create certain additional standards for such employers.

In the NPRM, as part of the proposal to develop special procedures for job contractors, the Department defined the term ''job contractor'' and the proposed requirements to be met, including the general requirement to assure that the information provided on the LCA in Item 7 (occupational information) must pertain to the location(s) (city and State) of any and all worksites where H–1B nonimmigrants would be employed. The Department further proposed that a job contractor filing an LCA must indicate thereon the place of employment at which the H–1B nonimmigrant will actually work (and for which the prevailing wage must be determined) as opposed to the employer's headquarters or other office location, if such location is different from the place of employment. The Department also proposed that, if the

contractor wishes to relocate an H–1B nonimmigrant to work at any location not listed on a certified LCA, a corresponding LCA shall be filed and certified (and the appropriate prevailing wage determined) before any H–1B nonimmigrant may be employed at that location. The NPRM addressed other job contractor matters, such as the contractor's actual wage obligation.

Of the 264 comments received in response to the NPRM, 171 commented on these proposals and 153 (nearly 90%) opposed it—128 of those 153 coming from business commenters. The negative comments related to the concept as a whole or related to a part of it—such as the nationwide actual wage, worksite posting, and place of employment designation on the labor condition application.

Concerns were expressed about an employer's ability to find workers to fill health care needs, especially in the physical therapist occupation. Other commenters expressed concern that the proposed rule would impose special hardships on job contractors, would be onerous, and would be discriminatory. Several commenters suggested that the Department consider a time test methodology, rather than a ''job contractor'' concept, in identifying the responsibilities of an employer which places H–1B nonimmigrants at worksites owned or controlled by entities other than the employer. Suggestions for the allowable duration of temporary placement ranged from 30 days to 180 days.

Of the comments received in response to the January 13, 1992, Interim Final Rule, concerning the worksite movement of H–1B nonimmigrants, 13 commenters (11 of which were businesses) expressed the view that the initial LCA filing should be sufficient when an H–1B nonimmigrant is transferred between temporary worksites such as branch offices or customer offices. These comments advocated the position that an employer should be able to move H–1B nonimmigrant employees to worksites where the tour of duty would be of a short or temporary nature.

In promulgating the Final Rule, the Department carefully considered the comments concerning the job contractor concept as proposed, and decided based thereupon not to establish special procedures applicable only to those businesses operating as job contractors. Based on the overwhelming weight of the comments and the Department's experience in the program, the Final Rule contained a modification of the proposed rule, consistent with commentors' suggestions, to implement a ''time test'' for short-term assignments of H–1B nonimmigrants to worksite(s) outside the area(s) of employment covered by already-certified LCAs, whether the new worksite is another establishment of the employer or is the worksite of another entity (*e.g.*, a customer of a job contractor providing H–1B nonimmigrants or services provided by H–1B nonimmigrants at the customer's location.) The Final Rule is both less burdensome for employers and more protective of workers than was the provision as proposed in the NPRM.

The Department recognizes that it is common practice for employers—not only job contractors, but also other employers which operate in more than one place of employment within the United States—to move employers from one place of employment (worksite) to another for short periods of time in response to business demands. The Final Rule takes into consideration the practical and real world experience of such short-term placement of employees.

The Final Rule applying to all LCA-filing employers includes a 90 workday placement option within a three-year period, beginning with the first work day at any worksite in a new area of intended employment, for an employer who shifts H–1B nonimmigrant workers to any worksite(s) outside the location listed on the employer's already-certified LCA. The 90-day option applies separately for each area of intended employment (*e.g.*, 90 cumulative days for Los Angeles, 90 cumulative days for San Francisco). Under this option an employer may place H–1B nonimmigrant(s) at such worksite(s)—*without filing a new LCA* (and thus without meeting the notice, prevailing wage, and actual wage requirements for such area of intended employment)—provided that the employer complies with three requirements:

1. Unless an LCA has been filed and certified for the new area of intended employment, no H–1B nonimmigrant continues to work at a worksite in such area after 90 cumulative workdays by H–1B nonimmigrants at all worksites within the area (starting with the first day on which any H–1B nonimmigrant worked at any worksite in the area) and the employer makes no further placement of H–1B worker(s) in such area within the three-year period which began with the first day of placement.

2. The H–1B nonimmigrant(s) working in the area is (are) compensated at the required wage rate applicable under the employer's already-certified LCA plus expenses for the other area of employment when placed. The Department has incorporated the regulations promulgated by the General Services Administration (''GSA'') for Federal employees as the basis for such travel expenses as it is unaware of any other universally available source of this information for employers. GSA advises us that the rates are based on surveys of two-star hotels and comparable restaurants. Furthermore, under IRS guidelines, employers are not required to provide receipts for employee travel expenses if the employer has used the Federal per diem rates. (*See* IRS Rev. Proc. 94–77). Finally, some Federal District Courts have found Federal per diem rates to be a ''fair method of compensation.'' (*See PPG Industries, Inc.* v. *Celanese Polymer Specialties Co.*, 658 F.Supp. 555 (W.D.Ky. 1987), rev'd on other grounds, 840 F.2d 1565 (Fed. Cir. 1988) and *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 684 F.Supp. 953 (N.D.Ohio 1988)). Thus, GSA per diem rates are recognized as providing reasonable reimbursement for travel expenses.

3. No H–1B nonimmigrant is placed at a worksite where there is a strike or lockout in the same occupational classification.

Of course, at any time an employer may file a new LCA covering the new area of intended employment (complying with all LCA requirements, including determination of actual and prevailing wage rates as well as notice to employees). This filing can be done in advance of the placement or, if such new LCA is filed and certified after placement and the employer complies with any obligations attendant to the new LCA, the employer could cease payment of per diem and transportation rates. If, at the accumulation of 90 workdays, the employer has H–1B nonimmigrants at any worksite(s) in the new area of intended employment, the employer must have filed and received approval of a new LCA and complied with all requirements attendant to such filing.

This 90 workday placement option does *not* apply to the placement of H–1B nonimmigrants at any new worksite(s) within an area covered by an already-certified LCA filed by the employer. Such worksite(s) would be encompassed within and fully subject to the requirements of that LCA, including prevailing wage and worksite notice(s) (see § c.1.b NOTIFICATION, above, regarding notification at new worksites). The only additional action required for the employer in this circumstance is to post notice for a period of 10 days at the new worksite.

IV. Executive Order 12866

The Department has determined that this Proposed Rule is not an ''economically significant regulatory action'' within the meaning of Executive Order 12866, in that it will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

V. 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.

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 507

Administrative practice and procedures, Aliens, Employment, Enforcement, Fashion models, Immigration, Labor, Penalties, Reporting and recordkeeping requirements, Specialty occupation, Wages, Working conditions.

Adoption of the Joint Rule

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

Signed at Washington, DC, this 24th day of October, 1995.

Tim Barnicle,

Assistant Secretary for Employment and Training.

Bernard E. Anderson,

Assistant Secretary for Employment Standards.

Accordingly, certain amendments to part 655 of chapter V of title 20, and part 507 of chapter V of title 29 of the Code of Federal Regulations, as published earlier in the Federal Register, are republished for comment, and other amendments are proposed, as follows:

TITLE 20—EMPLOYEES' BENEFITS

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

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

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c); 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); and 8 CFR 214.2(h)(4)(i).

Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

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

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

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

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

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 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).

TITLE 29—LABOR

CHAPTER V—WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

Part 507—Enforcement of H–1B Labor Condition Applications

Subparts A, B, C, D, E, F, and G—(Reserved)

2. The authority citation for part 507 continues to read as follows:

Authority: 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184, and 29 U.S.C. 49 *et seq.*; and Pub. L. 102–232, 105 stat. 1733, 1748 (8 U.S.C. 1182 note).

3. In § _____.730, in paragraph (b), the first sentence is republished as follows:

§ _____.730 Labor condition application.

* * * * *

(b) *Where and when should a labor condition application be submitted?* A labor condition application shall be submitted, by U.S. mail, private carrier, or facsimile transmission, to the ETA regional office shown in § _____.720 of this part in whose geographic area of jurisdiction the H–1B nonimmigrant will be employed no earlier than six months before the beginning date of the period of intended employment shown on the LCA. * * *

* * * * *

4. In § _____.731, paragraph (a)(2)(iii)(A)(*1*) is republished as follows:

§ _____.731 The first labor condition statement: wages.

(a) * * *

(2) * * *

(iii) * * *

(A) * * *

(*1*) An employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application not more than 90 days after the date of issuance of such SESA wage determination. Once an employer obtains a prevailing wage determination from the SESA and files an LCA supported by that prevailing wage determination, the employer is deemed to have accepted the prevailing wage determination (both as to the occupational classification and wage) and thereafter may not contest the legitimacy of the prevailing wage determination through the Employment Service complaint system or in an investigation or enforcement action. Prior to filing the LCA, the employer may challenge an SESA prevailing wage determination through the Employment Service complaint system, by filing a complaint with the SESA. See 20 CFR 658.410 through 658.426. Employers which challenge an SESA prevailing wage determination must obtain a final ruling from the Employment Service complaint system prior to filing an LCA based on such determination. In any challenge, the SESA shall not divulge any employer wage data which was collected under the promise of confidentiality.

* * * * *

5. In § _____.731, paragraph (b)(1) is revised to read as follows:

§ _____.731 The first labor condition statement: wages.

* * * * *

(b) *Documentation of the wage statement.* (1) The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the wage statement required in paragraph (a) of this section and attested to on Form ETA 9035. The documentation shall be made available to DOL upon request. Documentation shall also be made available for public examination to the extent required by § _____.760(a) of this part. The employer shall also document that the

wage rate(s) paid to H–1B nonimmigrant(s) is (are) no less than the required wage rate(s). The documentation shall include information about the employer's wage rate for all other employees for the specific employment in question at the place of employment, beginning with the date the labor condition application was submitted and continuing throughout the period of employment. The records shall be retained for the period of time specified in § _____.760 of this part. The payroll records for each such employee shall include:

(i) Employee's full name;

(ii) Employee's home address;

(iii) Employee's occupation;

(iv) Employee's rate of pay;

(v) Hours worked each day and each week by the employee if:

(A) The employee is paid on other than a salary basis; or

(B) The actual wage is expressed as an hourly rate; or

(C) With respect only to H–1B nonimmigrants, the prevailing wage is expressed as an hourly rate.

(vi) Total additions to or deductions from pay each pay period by employees; and

(vii) Total wages paid each pay period, date of pay and pay period covered by the payment by employee.

* * * * *

6. In § _____.731, paragraph (c)(5) is republished as follows:

§ _____.731 The first labor condition statement: wages.

* * * * *

(c) * * *

(5)(i) For the purpose of DOL administration and enforcement of the H–1B program, an H–1B nonimmigrant is considered to be under the control or employ of the LCA-filing employer, and therefore shall receive the full wage which the LCA-filing employer is required to pay beginning no later than the first day the H–1B nonimmigrant is in the United States and continuing throughout the nonimmigrant's period of employment. Therefore if the H–1B nonimmigrant is in a nonproductive status for reasons such as training, lack of license, lack of assigned work or any other reason, the employer will be required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other numbers of hours as the employer can demonstrate to be full-time employment for the occupation and area involved) at the required wage for the occupation listed on the LCA. If the employer's LCA carries a designation of ''part-time employment,'' the employer will be required to pay the nonproductive employee for at least the number of hours indicated on the I–129 petition filed by the employer with the INS. If during a subsequent enforcement action by the Administrator it is determined that an employee designated in the LCA as part-time was in fact working full-time or regularly working more hours than reflected on the I–129 petition, the employer will be held to the factual standard disclosed by the enforcement action.

(ii) If, however, during the period of employment, an H–1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which render the nonimmigrant unable to work—*e.g.*, maternity leave, automobile accident which temporarily incapacitates the nonimmigrant, caring for an ill relative—then the employer shall not be obligated to pay the required wage rate during that period *provided that* the INS permits the employee to remain in the U.S. without being paid and provided further that such period is not subject to payment under other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*).

* * * * *

7. In § _____.731, paragraph (d)(2) is republished as follows:

§ _____.731 The first labor condition statement: wages.

* * * * *

(d) * * *

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, the employer may challenge the ETA prevailing wage only through the Employment Service complaint system. See 20 CFR part 658, subpart E. Notwithstanding the provisions of 20 CFR 658.421 and 658.426, the appeal shall be initiated at the ETA regional office level. Such challenge shall be initiated within 10 days after the employer receives ETA's prevailing wage determination from the Administrator. In any challenge to the wage determination, neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where the employer timely challenges an ETA prevailing wage determination obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling from the Employment Service complaint system. Upon such final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's prevailing wage determination serving as the conclusive determination for all purposes.

(ii) Where the employer does not challenge ETA's prevailing wage determination obtained by the Administrator, such determination shall be deemed to have been accepted by the employer as accurate and appropriate (both as to the occupational classification and wage) and thereafter shall not be subject to challenge in a hearing pursuant to § _____.835 of this part.

* * * * *

8. In § _____.734, paragraphs (a)(1)(ii)(C) and (D) are republished as follows:

§ _____.734 The fourth labor condition statement: notice.

(a) * * *

(1) * * *

(ii) * * *

(C) The notices shall be posted on or within 30 days before the date the labor condition application is filed and shall remain posted for a total of 10 days.

(D) Where the employer places any H–1B nonimmigrant(s) at one or more worksites not contemplated at the time of filing the application, but which are within the area of intended employment listed on the LCA, the employer is required to post notice(s) at such worksite(s) on or before the date any H–1B nonimmigrant begins work, which notice shall remain posted for a total of ten days.

* * * * *

9. § _____.735 is republished as follows:

§ _____.735 Special provisions for short-term placement of H–1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on labor condition application.

(a) Subject to the conditions specified in paragraph (b) of this section, an employer may place H–1B nonimmigrant(s) at worksite(s) (place(s) of employment) within areas of employment not listed on the employer's labor condition application(s)—whether or not the employer owns or controls such worksite(s)—without filing new labor condition application(s) for the area(s) of intended employment which would encompass such worksite(s).

(b) The following restrictions shall be fully satisfied by an employer which places H–1B nonimmigrant(s) at worksite(s) (place(s) of employment) within areas of employment not listed on the employer's labor condition application(s):

(1) The employer has fully satisfied the requirements of §§ _____.730

through _____.734 of this part with regard to worksite(s) located *within* the area(s) of intended employment listed on the employer's labor condition application(s).

(2) The employer shall not place, assign, lease, or otherwise contract out any H–1B nonimmigrant(s) to any worksite where there is a strike or lockout in the course of a labor dispute in the same occupational classification(s) as the H–1B nonimmigrant(s).

(3) For every day of the H–1B nonimmigrant's(s') placement outside the LCA-listed area of employment, the employer shall pay such worker(s) the required wage (based on the prevailing wage at such worker's(s') permanent work site, or the employer's actual wage, whichever is higher) *plus* per diem and transportation expenses (for both workdays and non-workdays) at rate(s) no lower than the rate(s) prescribed for Federal Government employees on travel or temporary assignment, as set out in 41 CFR Part 301–7 and Ch. 301, App. A.

(4) The employer's placement(s) of H–1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's labor condition application(s) shall be limited to a cumulative total of ninety workdays within a three-year period, beginning on the first day on which the employer placed an H–1B nonimmigrant at any worksite within such area of employment. For purposes of this section, ''workday'' shall mean any day on which one or more H–1B nonimmigrants perform any work at any worksite(s) within the area of employment. For example, one ''workday'' would be counted for a day on which seven H–1B nonimmigrants worked at three worksites within one city, and one ''workday'' would be counted for a day on which one H–1B nonimmigrant worked at one worksite within a city. The employer may rotate such workers into worksites within such area of employment or may maintain a constant work force. *However,* on the first day after the accumulation of 90 workdays, the employer shall not have any such H–1B nonimmigrant(s) at any worksite(s) within such area of employment not included on a certified LCA.

(c) At the accumulation of the 90 workdays described in paragraph (b)(4) of this section, the employer shall have ended its placement of all H–1B nonimmigrant(s) at any worksite(s) within the area of employment not listed on the labor condition application, *or* shall have filed and received a certified labor condition application for the area(s) of intended employment encompassing such worksite(s) and performed all actions required in connection with such filing(s) (*e.g.,* determination of the prevailing wage; notice to collective bargaining representative or on-site notice to workers).

(d) At any time during the 90-day period described in paragraph (b)(4) of this section, the employer may file a labor condition application for the area of intended employment encompassing such worksite(s), performing all actions required in connection with such labor condition application. Upon certification of such LCA, the employer's obligation to pay Federal per diem rates to the H–1B nonimmigrant(s) shall terminate. (However, *see* § _____.731(c)(7)(iii)(C) regarding payment of business expenses for employee's travel on employer's business.)

10. Appendix A to Subpart H—Guidance for Determination of the ''Actual Wage'' is republished as follows:

Appendix A to Subpart H—Guidance for Determination of the ''Actual Wage''

In determining the required wage rate, in addition to obtaining the prevailing wage, the employer must establish the actual wage for the occupation in which the H–1B nonimmigrant is employed by the employer. For purposes of establishing its compensation system for workers in an occupational category, an employer may take into consideration objective standards relating to experience, qualifications, education, specific job responsibility and function, specialized knowledge, and other legitimate business factors. The use of any or all these factors is at the discretion of the employer. The employer must have and document an objective system used to determine the wages of non-H–1B workers, and apply that system to H–1B nonimmigrants as well. It is not sufficient for the employer simply to calculate an average wage of all non–H–1B employees in an occupation; the actual wage is not an ''average wage''.

The documents explaining the system must be maintained in the public disclosure file. The explanation of the compensation system must be sufficiently detailed to enable a third party to apply the system to arrive at the actual wage rate computed by the employer for any H–1B nonimmigrant. The computation of the H–1B nonimmigrant's individual actual wage rate must be documented in the H–1B nonimmigrant's personnel file.

Assuming the actual wage is higher than the prevailing wage and thus is the required wage rate, if an employer gives its employees a raise at year's end or if the system provides for other adjustments in wages, H–1B nonimmigrants must also be given the raise (consistent with legitimate employer-established criteria such as level of performance, attendance, *etc.).* This is consistent with Congressional intent that H–1B nonimmigrants and similarly employed U.S. workers be provided the same wages.

Where the employer's pay system or scale provides adjustments during the validity period of the LCA—*e.g.,* cost-of-living increase or other annual adjustments, increase in the entry-level rate for the occupation due to market forces, or the employee moves into a more advanced level in the same occupation—the employer shall retain documentation explaining the changes and clearly showing that, after such adjustments, the wages paid to the H–1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation in the area of intended employment.

The following examples illustrate these principles:

(2) Worker A is paid $10.00 per hour and supervises two employees. Worker B, who is similarly qualified and performs substantially the same job duties except for supervising other employees, is paid $8.00 per hour because he/she has no supervisory responsibility.

The compensation differential is acceptable because it is based upon a relevant distinction in job duties, responsibilities, and functions: the difference in the supervisory responsibilities of the two employees. The actual wage in this occupation at the worksite for workers with supervisory responsibility is $10.00 per hour; the actual wage in this occupation at the worksite for workers without supervisory responsibility is $8.00 per hour.

(2) Systems Analyst A has experience with a particular software which the employer is interested in purchasing, of which none of the employer's current employees have knowledge. The employer buys the software and hires Systems Analyst A on an H–1B visa to train the other employees in its application. The employer pays Systems Analyst A more than its other Systems Analysts who are otherwise similarly qualified.

The compensation differential is acceptable because of the distinction in the specialized knowledge and the job duties of the employees. Systems Analyst A, in addition to the qualifications and duties normally associated with this occupation at the employer's worksite, is also specially knowledgeable and responsible for training the employer's other Systems Analysts in a new software package. As a result, Systems Analyst A commands a higher actual wage. However, if the employer employs other similarly qualified systems analysts who also have unique knowledge and perform similar duties in training other analysts in their area of expertise, the actual wage for Systems Analyst A would have to be at least equivalent to the actual wage paid to such similarly employed analysts.

(3) An employer seeks a scientist to conduct AIDS research in the employer's laboratory. Research Assistants A (a U.S. worker) and B (an H–1B nonimmigrant) both hold Ph.D's in the requisite field(s) of study and have the same number of years of experience in AIDS research. However,

Research Assistant A's experience is on the cutting edge of a breakthrough in the field and his/her work history is distinguished by frequent praise and recognition in writing and through awards. Research Assistant B (the nonimmigrant) has a respectable work history but has not conducted research which has been internationally recognized. Employer pays Research Assistant A $10,000 per year more than Research Assistant B in recognition of his/her unparalleled expertise and accomplishments. The employer now wants to hire a third Research Assistant on an H–1B visa to participate in the work.

The differential between the salary paid Research Assistant A (the U.S. worker) and Research Assistant B (an H–1B nonimmigrant) is acceptable because it is based upon the specialized knowledge, expertise and experience of Research Assistant A, demonstrated in writing. The employer is not required to pay Research Assistant B the same wage rate as that paid Research Assistant A, even though they may have the same job titles. The actual wage required for the third Research Assistant, to be hired on an H–1B visa, would be the wage paid to Research Assistant B unless he/she has internationally recognized expertise similar to that of Research Assistant A. As set out in § _____.731(1)(A) the employer must have and document the system used in determining the actual wage of H–1B nonimmigrants. The explanation of the system must be such that a third party may use the system to arrive at the actual wage paid the H–1B nonimmigrant.

(4) Employer located in City X seeks experienced mechanical engineers. In City X, the prevailing wage for such engineers is $49,500 annually. In setting the salaries of U.S. workers, employer pays its nonsupervisory mechanical engineers with 5 to 10 years of experience between $50,000 and $75,000 per year, using defined pay scale ''steps'' tied to experience. Employer hires engineers A, B, and C, who each have five years of experience and similar qualifications and will perform substantially the same nonsupervisory job duties. Engineer A is from Japan, where he/she earns the equivalent of $80,000 per year. Engineer B is from France and had been earning the equivalent of $50,000 per year. Engineer C is from India and had been earning the equivalent of $20,000 per year. Employer pays Engineer A $80,000 per year, Engineer B $50,000, and Engineer C $20,000 as the employer has had a long-established system of maintaining the home-country pay levels of temporary foreign workers.

The INA requires that the employer pay the H–1B nonimmigrant at least the actual wage or the prevailing wage, whichever is greater, but there is no prohibition against paying an H–1B nonimmigrant a greater wage. Therefore, Engineer A may lawfully be paid the $80,000 per year. Engineer B's salary of $50,000 is acceptable, since this is the employer's actual wage for an engineer with Engineer B's experience and duties. Engineer C's salary, however, at a rate of $20,000 per year, is unacceptable under the law, even given the employer's ''long-established 'home country' system,'' since $20,000 would be below both the actual wage and the prevailing wage. The latter situation is an example of an illegitimate business factor, *i.e.,* a system to maintain salary parity with peers in the country of origin, which yields a wage below the required wage levels.

11. In § _____.840, paragraph (c) is republished as follows:

§ _____.840 Decision and order of administrative law judge.

* * * * *

(c) In the event that the Administrator's determination(s) of wage violation(s) and computation of back wages are based upon a wage determination obtained by the Administrator from ETA during the investigation (pursuant to § _____.731(d) of this part), and the administrative law judge determines that the Administrator's request was not warranted (under the standards in § _____.731(d) of this part), the administrative law judge shall remand the matter to the Administrator for further proceedings on the issue(s) of the existence of wage violation(s) and/or the amount(s) of back waged owed. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept such wage determination as accurate. Such wage determination is one made by ETA, from which the employer did not file a timely complaint through the Employment Service complaint system or from which the employer has appealed through the ES complaint system and a final decision therein has been issued. See § _____.731 of this part; see also 20 CFR 658.420 through 658.426. Under no circumstances shall the administrative law judge determine the validity of the wage determination or require source data obtained in confidence by ETA or the SESA, or the names of establishments contacted by ETA or the SESA, to be submitted into evidence or otherwise disclosed.

* * * * *

[FR Doc. 95–26921 Filed 10–30–95; 8:45 am]

BILLING CODE 4510–27–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1309, 1310, and 1313

[DEA–138P]

RIN 1117–AA32

Removal of Exemption for Certain Pseudoephedrine Products Marketed Under the Food, Drug, and Cosmetic Act (FD&C Act)

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Proposed rule.

SUMMARY: This proposed rule is issued by the Deputy Administrator of the Drug Enforcement Administration (DEA) to remove the exemption for certain products containing pseudoephedrine (which are lawfully marketed under the Federal Food, Drug, and Cosmetic Act) from the chemical control provisions of the Controlled Substances Act (CSA) and the Controlled Substances Import and Export Act. Due to the large scale utilization of over-the-counter (OTC) pseudoephedrine products for the clandestine manufacture of controlled substances, the DEA has determined that certain products should be subject to recordkeeping, reporting, registration and notification requirements of the CSA to prevent their diversion. Such products include OTC tablets, capsules and powder packets containing pseudoephedrine alone or in combination with antihistamines, quaifenesin or dextromethorphan. This action also proposes that the threshold for pseudoephedrine be reduced to 24.0 grams pseudoephedrine base. Such a threshold is sufficient to permit the purchase of up to a 120 day supply of pseudoephedrine without the application of regulatory requirements.

To further ensure the availability of pseudoephedrine products to legitimate consumers at the retail level, this action also proposes to waive the registration requirement for retail distributors of regulated pseudoephedrine products.

DATES: Written comments and objections must be received by January 2, 1996.

FOR FURTHER INFORMATION CONTACT: Howard McClain Jr., Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, Washington, D.C. 20537. Telephone (202) 307–7183.

SUPPLEMENTARY INFORMATION:

Background

The Chemical Diversion and Trafficking Act (PL 100–690) (CDTA)