DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

RIN 1215–AB09

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

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

ACTION: Notice of Proposed Rulemaking; request for comments.

SUMMARY: The Department of Labor is proposing regulations to implement recent legislation and clarify existing Departmental rules relating to the temporary employment in the United States of nonimmigrants under H–1B visas. Specifically, the Department publishes this notice of proposed rulemaking to obtain public comment on issues to be addressed in regulations to implement changes made to the Immigration and Nationality Act (INA) by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). For certain of these ACWIA issues, the Department is proposing regulatory language for comment; for other issues, the Department is identifying concerns and its proposed approach to addressing them or alternative approaches, on all of which comments are requested. In addition, the Department is providing an opportunity for additional comments on certain provisions which were previously published for comment as a Proposed Rule in 1995 (60 FR 55339).

The Department is also proposing to modify regulations to implement an ACWIA provision which modifies the methodology for the determination of the prevailing wage under the Permanent Labor Certification program (20 CFR Part 656), but is not proposing specific regulatory text at this time. This methodology is also applicable to prevailing wages for the H–1B program. The Department is working in close cooperation with the Immigration and Naturalization Service (INS) in developing these regulations, since certain definitions and terms must be consistently applied by the two agencies in their respective regulations.

After receiving public comments on this notice of proposed rulemaking, the Department plans to publish an Interim Final Rule (inviting further comment) and a Final Rule (after reviewing all the comments received).

DATES: Submit written comments by February 4, 1999. The Department encourages submission of comments as soon as possible before that date. Any comments received by the Department after that date will be part of the rulemaking record and will be considered, fully, in subsequent rulemaking, but they may not receive full consideration in the interim implementing regulations. Congress expressed its intent that the Department act swiftly to issue regulations by waiving the customary 60-day comment period.

ADDRESSES: Submit written comments concerning Part 655 to Deputy Administrator, Wage and Hour Division, ATTN: Immigration Team, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW, Washington, DC 20210. If you want to receive notification that we received your comments, you should include a self-addressed stamped post card. You may submit your comments by facsimile (''FAX'') machine to (202) 219–5122. This is not a toll free number.

Submit written comments concerning Part 656 to the Assistant Secretary for Employment and Training, ATTN: Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room N–4456, 200 Constitution Avenue, NW, Washington, DC 20210. If you want to receive notification that we received your comments, you should include a self-addressed stamped post card. You may submit your comments by facsimile (''FAX'') machine to (202) 208–5844. This is not a toll-free number.

FOR FURTHER INFORMATION CONTACT: On Part 655, contact either of the following:

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

James Norris, Chief, Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room N–4456, 200 Constitution Avenue, NW, Washington, DC 20210. Telephone: (202) 219–5263 (this is not a toll-free number).

On Part 656, contact James Norris, 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).

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

The H–1B visa program is a voluntary program that allows employers to temporarily secure and employ nonimmigrants admitted under H–1B visas to fill specialized jobs in the United States. (Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*). The statute, among other things, requires that an employer pay an H–1B worker the higher of its actual wage or the locally prevailing wage, to protect U.S. workers' wages and moderate any economic incentive or advantage in hiring temporary foreign workers. Under the Immigration and Nationality Act (INA), as amended by the Immigration Act of 1990 and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, an employer seeking to employ an alien in a specialty occupation or as a fashion model of distinguished merit and ability on an H–1B visa is required to file a labor condition application with and receive certification from the Department of Labor before the Immigration and Naturalization Service (INS) may approve an H–1B visa petition. The labor condition application (LCA) process is administered by the Employment and Training Administration (ETA); complaints and investigations regarding labor condition applications are the responsibility of the Wage and Hour Division, Employment Standards Administration (ESA).

This proposed rule would implement statutory changes in the H–1B visa program made to the INA by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) (Title IV of Pub. L. 105–277, Oct. 21, 1998; 112 Stat. 2681). The ACWIA, among other things, temporarily increases the maximum number of H–1B visas permitted each year; temporarily requires new non-displacement (layoff) and recruitment attestations by ''H–1B dependent'' employers (as defined by ACWIA) and by employers found to have committed willful violations or misrepresentations; and requires all employers of H–1B workers to offer the same fringe benefits

to H–1B workers as it offers to U.S. workers.

A. Labor Condition Application (LCA)

Summary: The process of protecting U.S. workers begins with a requirement that employers file a labor condition application (Form ETA 9035) with the Department. In this application the employer is required to attest: (1) that it will pay H–1B aliens prevailing wages or actual wages, whichever are greater; (2) that it will provide working conditions that will not adversely affect the working conditions of U.S. workers similarly employed; (3) that there is no strike or lockout at the place of employment; and (4) that it has publicly notified its employees of its intent to employ H–1B workers. In addition, the employer must provide the information required in the application about the number of aliens sought, occupational classification, wage rate, the prevailing wage rate and the source of such wage data, the date of need and period of employment.

Need: Pursuant to ACWIA, new attestation requirements become applicable to H–1B dependent employers or willful violators after promulgation of implementing regulations. The LCA, currently approved by OMB under OMB No. 1205–0310, is being revised to identify H–1B dependent employers and willful violators and provide for their attestation to the new requirements, and to accommodate electronic processing.

Respondents and frequency of response: ACWIA increased the number of available H–1B nonimmigrant visas from 65,000 to 115,000 in fiscal years 1999 and 2000 and to 107,500 in fiscal year 2002. Besides the increase in LCAs filed for these additional workers, the proposed regulation provides that H–1B dependent employers could be required to file new LCAs. It is estimated that 249,500 LCA's will be filed annually by 50,000 H–1B employers (dependent and nondependent). This estimate is based on the assumption that the alternative LCA format preferred by the Department is selected.

Estimated total annual burden: The only added LCA burden is for employers to determine if they are dependent. In most cases employers will be able to immediately answer this question, without review of their payroll records. Where dependent or non-dependent status is not readily apparent, employers would be required to make a mathematical calculation to determine if they must make the additional attestations required of an H–1B employer. (See C. below for further explanation.) The time required to review records and make the determination is estimated to take an average of 30 minutes per employer. Since it is estimated that only 50 H–1B employers will find it necessary to make this calculation, out of a total of 50,000 H–1B employers, the estimate of the average time necessary to complete the form remains at 1 hour. Total annual burden is 249,500 hours.

B. Documentation of Corporate Identity

Summary: Currently, the regulatory requirement is that a new labor condition application (LCA) must be filed when an employer's corporate identity changes and a new Employer Identification Number (EIN) is obtained. Under the proposed rule, an employer who merely changes corporate identity through acquisition or spin-off need merely document the change in the public file (including an express acknowledgement of all LCA obligations on the part of the successor entity), provided it satisfies the Internal Revenue Code definition of a single employer, found at 26 U.S.C. 414 (see 8 U.S.C. 1182(n)(3)(C)(ii)).

Need: The regulation is designed to eliminate a burden on businesses to file a new LCA, while at the same time ensuring that the public is aware of the changes and that the employer will continue to follow its LCA obligations.

Respondents and Proposed Frequency of Response: It is estimated that 500 H–1B employers will be required to file the subject documentation annually.

Estimated total annual burden: It is estimated that the recording and filing of each such document will take 15 minutes for a total annual burden of 125 hours.

C. Determination of H–1B Dependency

Summary: An H–1B employer must calculate the ratio between the number of H–1B workers it employs and the number of full-time equivalent employees (FTEs) to determine whether it meets the statutory definition of an H–1B dependent employer . (8 U.S.C. 1182 (n)(3)(A)). When it is a close question, this determination would ordinarily be made by examination of an employer's quarterly tax statement and last payroll or other evidence as to average hours worked by part-time employees to aggregate their hours into FTEs, together with a count of the number of workers employed under H–1B petitions. Documentation of this determination must be made where non-dependent status is not readily apparent and a mathematical determination must be made. A copy of this determination must be placed in the public disclosure file. In addition, if an employer changes from dependent to non-dependent status, or vice versa, a simple statement of the change in status must be placed in the public disclosure file. An employer must retain hours worked records or other evidence of the average work schedules of part-time employees only, and copies of H–1B petitions for its H–1B workers.

Need: Documentation of a determination of an H–1B dependency where it is a close question is necessary to determine employer compliance with H–1B requirements, and to advise the public of an employer's status. The underlying documentation must be retained to allow the Department to check this determination.

Respondents and proposed frequency of response: All employers will be required to keep the underlying documentation. It is estimated that approximately 50 H–B employers will be required to review their records in order to make the determination, with 25 employers who are found not to be dependent employers required to document this determination annually.

Estimated annual burden: The making and documentation of each such determination will take approximately 15 minutes, and occur at least twice annually, for a total annual burden of 12.5 hours.

D. Filing of Copy of INS Documentation for Exempt H–1B Employees in Public Access File

Summary: The ACWIA provisions regarding non-displacement and recruitment of U.S. workers do not apply where the LCA is used only for petitions for exempt H–1B workers. (8 U.S.C. 1182(n)(1)(E)(ii)) Where the Immigration and Naturalization Service (INS) determines a worker is exempt, employers are required to maintain a copy of such documentation in the public access file.

Need: Determinations as to whether or not H–1B workers meet the requirements to be classified as exempt H–1B nonimmigrants will be made initially by the INS in the course of adjudicating the petitions filed on behalf of H–1B nonimmigrants by dependent employers. In the event of an investigation, it is anticipated that considerable weight will be given to the INS determination that H–1B nonimmigrants were exempt based on the educational attainments of the workers, since INS has considerable experience in evaluating the educational qualifications of aliens. Retention of copies of such determinations will aid DOL in determining compliance with the H–1B requirements.

Respondents and frequency of response: It is estimated that 28,125 such documents will need to be filed annually.

Estimated total annual burden: Each such filing will take approximately one minute for an annual burden of approximately 468.8 hours.

E. Record of Assurance of Non-displacement of U.S. Workers at Second Employer's Worksite

Summary: 8 U.S.C. 1182(n)(1)(F)(ii) generally requires an H–1B dependent employer not to place H–1B nonimmigrant with another employer unless it has first inquired as to whether the other employer will displace a U.S. worker. The proposed regulation would require an employer seeking to place an H–1B nonimmigrant with another employer to secure and retain either a written assurance from the second employer, a contemporaneous written record of the second employer's oral statements regarding non-displacement, or a prohibition in the contract between the H–1B employer and the second employer.

Need: Pursuant to ACWIA, 8 U.S.C. 1182(n)(2)(E), an H–1B employer may be debarred for a secondary displacement ''only if the Secretary of Labor found that such placing employer * * * knew or had reason to know of such displacement at the time of the placement of the nonimmigrant with the other employer.'' Congress clearly intended that the employer make a reasonable inquiry and give due regard to available information. In order to assure that the purposes of the statute are achieved, the Department is developing a regulatory provision to require that the H–1B employer make a reasonable effort to inquire about potential secondary displacement and to document those inquiries.

Respondents and proposed frequency of response: It is estimated that approximately 150 employers will place H–1B nonimmigrants with secondary employers where assurances are required.

Estimated total annual burden: It is estimated each such assurance will take approximately 5 minutes and each such employer will obtain such assurances 5 times annually for an annual burden of 62.5 hours.

F. Documentation of Non-Displacement of U.S. Workers

Summary: ACWIA (8 U.S.C. 1182(n)(1)(E) prohibits H–1B dependent employers and willful violators from hiring an H–1B nonimmigrant if their doing so would displace a U.S. worker from an essentially equivalent job in the same area of employment. The regulations will require H–1B dependent employers to keep certain documentation with respect to each former worker in the same locality and same occupation as any H–1B worker, who left its employ 90 days before or after an employer's petition for an H–1B worker. For all such employees, the Department proposes that covered H–1B employers maintain the name, last-known mailing address, occupational title and job description, and any documentation concerning the employee's experience and qualifications, and principal assignments. Further, the employer is required to keep all documents concerning the departure of such employees and the terms of any offers of similar employment to such U.S. workers and responses to those offers.

Need: These records are necessary for the Department to determine whether the H–1B employer has displaced similar U.S. workers with H–1B nonimmigrants.

Respondents and proposed frequency of response: It is estimated that 200 H–1B-dependent and willfully violating employers will need to maintain documentation for any workers who leave their employment during the prescribed period.

Estimated total annual burden: No records need be created to comply with these requirements, since the Equal Employment Opportunity Commission (EEOC) already requires under its regulations that the records described above be maintained.

G. Documentation of U.S. Worker Recruitment

Summary: Pursuant to ACWIA (8 U.S.C. 1182(n)(1)(G)), H–1B dependent employers are required to make good faith efforts to recruit U.S. workers before hiring H–1B workers. Under the regulations, H–1B employers will be required to retain documentation of the recruiting methods used, including the places and dates of the advertisements and postings or other recruitment method used, the content of the advertisements or postings, and the compensation terms. In addition, the employer must retain any documentation concerning consideration of applications of U.S. workers, such as copies of applications and related documents, rating forms, job offers, etc. The Department has also requested comments regarding how employers should determine industry-wide standards, and how to make this determination available for public disclosure to U.S. workers and others.

Need: The documentation noted above is necessary for the Department of Labor to determine whether the employer has made a good faith effort to recruit U.S. workers and for the public to be aware of the recruiting methods used and the industry standard. Retention of the records regarding consideration of applications is required to ensure employers have given good faith consideration of applications from U.S. workers.

Respondents and proposed frequency of response: It is estimated that annually 200 H–1B dependent employers will need to document their good faith efforts to recruit U.S. workers.

Estimated total annual burden: The filing of such records will take approximately twenty minutes per employer for an annual burden of approximately 66.7 hours. The retention of documents relating to applications by U.S. workers is already required by EEOC regulations, and therefore no additional burden is created.

H. Documentation of Fringe Benefits

Summary: Pursuant to ACWIA (8 U.S.C. 1182(n)(2)(C)(viii)), all employers of H–1B employees are required to offer benefits to H–1B workers on the same basis and under the same terms as offered to similarly employed U.S. workers. The regulations require employers to retain copies of all fringe benefit plans and any summary plan descriptions, including all rules regarding eligibility and benefits, evidence of what benefits are actually provided to individual workers and how costs are shared between employers and employees.

Need: These records are necessary for the Department to determine whether the H–1B nonimmigrants are offered the same fringe benefits as similarly employed U.S. workers.

Respondents and proposed frequency of response: Records are required to be retained for all H–1B employers, estimated to total 50,000. Because copies of fringe benefit plans and records are generally required to be maintained by the Pension and Welfare Benefits Administration (PWBA) and Internal Revenue Service (IRS) regulations, there should be no additional recordkeeping burden from these requirements. It is also believed that a prudent businessman would keep these records, in the order course of business, in any event. However, because some plans such as unfunded vacation plans and cash bonuses may not be documented, it is estimated that approximately 5%, or 2,500 employers, will need to record and retain some

documentation which would not otherwise be kept.

Estimated annual burden: It is estimated that 2,500 employers will spend approximately 15 minutes each documenting unwritten plans for an annual burden of 625 hours.

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

Summary: The Department has also republished and asked for comment on several provisions of the December 20, 1994 Final Rule (59 FR 65646), which were published for notice and comment on October 31, 1995 (60 FR 55339). All H–1B employers are required to document their objective actual wage system to be applied to H–1B nonimmigrants and U.S. workers. They are also required to keep payroll records for non-FLSA exempt H–1B workers and other employees for the specific employment in question. This proposal would decrease the burden on employers of keeping hourly pay records for U.S. workers, requiring such records only if the worker is either not paid on a salary basis, or if the actual wage is stated as an hourly wage. For H–1B workers, such records must also be kept if the prevailing wage is expressed as an hourly rate.

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 must be able to ascertain the system an employer uses 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 50,000 employers employ H–1B nonimmigrants. The documentation of the actual wage system must be done only one time for each employer. Hourly pay records would have to be prepared with respect to all affected employees each pay period.

Estimated annual burden: The Department 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 50,000 hours in a year. The payroll recordkeeping requirements are virtually the same as those required by the Fair Labor Standards Act (FLSA) and any burden required is subsumed in OMB Approval No. 1215–0017 for those regulations at 29 CFR Parts 516, except with respect to records of hours worked for exempt employees. There will be no burden for U.S. workers since as a practical matter, hours worked records will be required for U.S. workers only if they are not exempt from FLSA, or if they are exempt but paid on an hourly basis (certain computer professionals). The Department estimates that 55,000 H–1B workers will be paid on a salary basis. Hours worked records would be required for these workers only if the prevailing wage is expressed as an hourly rate—estimated to be 17 percent of all cases. The Department estimates a burden of 2.5 hours per worker per year, for 9350 workers, and a total of 23,375 hours.

Retention of Records: Pursuant to section 655.760(c) of Regulations, 20 CFR Part 655, copies of the LCAs, and its documentation are to be kept for a period of one year beyond the end of the period of employment specified on the LCA or one year from the date the LCA was withdrawn, except that if an enforcement action is commenced, these records must be kept until the enforcement procedure is completed as set forth in Part 655, Subpart I. The recordkeeping requirements in this proposed rule would be subject to the same retention period, except, as required by 20 CFR 655.760(c), the payroll records for the H–1B employees and other employees in the same occupational classification, which must be retained for a period of three years from the date(s) of the creation of the record(s); if an enforcement proceeding is commenced, all payroll records are to be retained until the enforcement proceeding is completed as set forth in Part 655, Subpart I. The existing record retention requirements in 20 CFR 655.760(c) have been approved by OMB under OMB No. 1205–0310.

Total public burden: H–1B employers and employees of H–1B employers may be from a wide variety of industries. Salaries for employers and/or their employees who perform the reporting and recordkeeping functions required by this regulation may range from several hundred dollars to several hundred thousand dollars where the Corporate Executive Office of a large company performs some or all of these functions themselves. Absent specific wage data regarding such employers and employees, respondent costs are estimated at $25 an hour. Total annual respondent hour costs for all information collections are estimated at $8,105,887.50 ($25.00 x 324,235.5 hours).

Request for comments: The public is invited to provide comments on this information collection requirement so that the Department of Labor may:

(1) Evaluate whether the proposed collections of information are 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 estimates of the burdens of the collections of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility and clarity of the information to be collected; and

(4) Minimize the burden of the collections 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. Office of Management and Budget, Attention: Desk Officer for Employment Standards Administration, U.S. Department of Labor, Washington, DC 20503.

II. Background

On November 29, 1990, the Immigration and Nationality Act was amended by the Immigration Act of 1990 (IMMACT) (Pub. L. 101–649, 104 Stat. 4978) to create the ''H–1B visa program'' for the temporary employment in the United States (U.S.) of nonimmigrants in ''specialty occupations'' and as ''fashion models of distinguished merit and ability.'' The H–1B provisions of the INA were amended on December 12, 1991, by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA) (Pub. L. 102–232, 105 Stat. 1733). Further amendments were made to the H–1B provisions of the INA on October 21, 1998, by enactment of ACWIA.

These cumulative amendments of the INA assign responsibility to the Department of Labor (Department or DOL) for implementing several provisions of the Act relating to the temporary employment of certain categories of nonimmigrants who have

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

The ACWIA made numerous significant changes in the H–1B provisions. One such change is the temporary increase in the maximum number of H–1B visas over the next three fiscal years: for fiscal years 1999 and 2000, the cap is 115,000; for fiscal year 2001, the cap is 107,500; and for fiscal year 2002 (and thereafter), the cap returns to the original 65,000. Another significant change is the imposition of additional attestation requirements for certain employers to provide better protections to some U.S. workers. The additional attestation requirements apply to an ''H–1B dependent employer'' and an employer who has been found to have committed a willful failure or misrepresentation with respect to the H–1B requirements (for ease of reference, referred to as a ''willful violator''). H–1B-dependent and willful violating employers must attest that they have not displaced and will not displace a U.S. worker from a job that is essentially like the job for which an H–1B worker(s) is being sought, that they will not place an H–1B worker with another employer without making an inquiry to assure such displacement will not take place, that they have taken good faith steps to recruit U.S. workers for the job for which the H–1B workers are sought, and that they will offer the job to any equally or better qualified U.S. worker. A labor condition application (LCA) for an H–1B worker who is ''exceptional,'' an ''outstanding professor or researcher,'' or a ''multinational manager or executive'' within the meaning of Section 203(b)(1) of the INA, is not subject to the recruitment provision. Both the displacement protection and the recruitment/hiring protection become effective upon the date of the Department's final regulation and expire with respect to LCAs filed before October 1, 2001. An H–1B dependent employer or willful violator filing an LCA which will be used only for ''exempt'' H–1B workers is not required to comply with the new attestation requirements.

Also enacted via the ACWIA is a new fee of $500, to be collected by INS, for initial petitions and first extensions filed on or after December 1, 1998 and before October 1, 2001. Institutions of higher education, or related or affiliated nonprofit entities, nonprofit research organizations, or Governmental research organizations are exempt from the new fee. The fees are to be used for job training, low-income scholarships, and program administration/enforcement. The ACWIA includes other generally applicable worker protections, specifically whistleblower protection, prohibitions against fee reimbursement and penalizing an H–1B worker who terminates employment prior to a date agreed with the employer, and a requirement that the employer pay wages during nonproductive time if such time is not due to reasons occasioned by the worker. The ACWIA also requires employers to offer H–1B workers fringe benefits on the same basis and in accordance with the same criteria as U.S. workers. The ACWIA specifies new civil money penalties ranging from $1,000 to $35,000 per violation, along with debarment. New investigative procedures are created, authorizing the Department to conduct ''random'' investigations of willful violators during the five-year period after the finding of such violation, and establishing an alternative investigation protocol based on information indicating potential violations obtained from sources other than aggrieved parties.

The ACWIA mandates a particular method of computation of the local prevailing wage for employees of certain types of employers: institutions of higher education (as defined in section 101(a) of the Higher Education Act); nonprofit entities related or affiliated with such institutions; nonprofit research organizations; and Governmental research organizations. Under the ACWIA provision, the prevailing wage level is to take into account only employees at such institutions and organizations.

The 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.

October 31, 1995, Proposed Rule, 60 FR 55339.

April 22, 1996, Proposed Rule, 61 FR 17610 (Part 656).

May 3, 1996, Final Rule, 61 FR 19982.

September 30, 1996, Final Rule, 61 FR 51013.

November 30, 1998, Final Rule, 63 FR 65657 (Part 656).

III. The Process of Developing Proposed Regulations

In developing proposed regulations, the Department has identified a number of issues arising from the provisions of the ACWIA. On some of these issues, the Department is proposing regulatory language and is seeking comments on those proposals. But on other issues, the Department has not yet developed regulatory language and, in this notice, is seeking public comments on the issues and possible regulatory approaches or alternatives which are set forth.

In addition, the Department is continuing to examine several provisions that were previously addressed in a Notice of Proposed Rulemaking published in the **Federal Register** on October 31, 1995 (60 FR 55339–55348). The Department considers it appropriate to provide, via this notice, an additional opportunity for public comment on those provisions. Some of these existing Final Rule provisions are affected by the enactment of ACWIA, and for some affected provisions the Department has not yet developed new or modified regulatory language. Other Final Rule provisions are being republished for comment, with limited proposed changes as discussed below.

After review of the comments received, the Department intends to publish an Interim Final Rule, inviting comments on that rule, which will contain the full regulatory text. The Department will then review the comments and issue a Final Rule.

The Department requests comments on each of the following issues and proposals, and on any other related matters concerning the temporary employment in the U.S. of nonimmigrants under the H–1B visa program.

A. What Constitutes an ''Employer'' for Purposes of the ACWIA Provisions?

In enacting certain new LCA attestations for ''H–1B-dependent'' (and certain other) employers in the ACWIA, Congress directed (in the definition of H–1B-dependent employer) that ''any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as a single employer.'' These provisions, found at 26 U.S.C. 414(b), (c), (m) and (o), concern the circumstances in which separate businesses are treated as a single employer for purposes of the Internal Revenue Code (IRC). Specifically, the IRC provisions concern treatment of a controlled group of corporations (§ 414(b)); partnerships, proprietorships, etc., under common control (§ 414(c)); an affiliated service group (§ 414(m)); as well as separate organizations, employee leasing, and other arrangements (§ 414(o)). *See* Internal Revenue Service (IRS) regulations at 26 CFR 1.414(b)–1, 1.414(c)–1. *See also* 26 CFR 1.414(q)–1T.

Further, the Department is considering the effect and implications of adopting this single definition of ''employer'' for all purposes under this program, to the extent it may serve to accommodate common business activities and facilitate administration and enforcement of the program. The Department is interested in learning from commenters the consequences of a regulation which would provide that where an ''employer'' files an LCA and thereafter undergoes some change of structure (*e.g.*, buy-out by a successor corporation; corporate restructuring of subsidiaries), the ''employer'' for LCA purposes would be the entity which satisfies the Internal Revenue Code definition of a single employer. The Department is considering whether and how, under this approach, it may be able to modify its position that a new LCA must be filed when the corporate identity changes and a new Employer Identification Number (EIN) is obtained. Thus an employer which merely changes its corporate identity through acquisition or spin-off would be allowed to document this change in its public disclosure file (including an express acknowledgment of all LCA obligations on the part of the successor entity), provided that it satisfies the Internal Revenue Code definition of a single employer.

The Department seeks comments on this proposed regulation and on other related matters, such as whether and how the Internal Revenue Code interpretation of ''single employer'' should be used for other purposes in the H–1B program, such as corporate restructuring, and whether another approach should be utilized to address corporate restructuring.

B. Which Employers are ''H–1B-dependent'' for Purposes of the ACWIA Provisions?

The ACWIA requires new non-displacement and recruitment attestations by ''H–1B-dependent employers'' and by employers found after the date of enactment to have committed a willful violation or misrepresentation during the 5-year period preceding the filing of the LCA (*see* item M.2 below, regarding the ''finding'' of such violations). The ACWIA definition of ''H–1B-dependent employer'' provides a formula for comparing the number of H–1B nonimmigrants to the total number of full-time equivalent employees (including H–1B nonimmigrants) in the employer's workforce. ''Exempt H–1B nonimmigrants'' are not included in the H–1B-dependency computation during a certain period after enactment of the ACWIA (*i.e.*, the longer of the period of six months from the date of enactment (until April 21, 1999), or the date of the Department's interim final rule on this provision).

The Department is developing regulations on the following issues, and seeks comments on these and any other related matters.

1. What Is a ''Full Time Equivalent Employee''?

The ACWIA definition of ''H–1B-dependent employer'' includes a term that is not defined: ''full-time equivalent employees'' (FTEs), as part of the calculation to determine an employer's H–1B dependency status based on the ratio between the number of H–1B workers (a ''head count'') and FTEs (the employer's workforce of employees, expressed as FTEs). Thus ACWIA defines an ''H–1B-dependent employer'' as an employer that has—

- 25 or fewer full-time equivalent employees who are employed in the United States, and employs more than 7 H–1B nonimmigrants;
- At least 26 but not more than 50 full-time equivalent employees who are employed in the United States, and employs more than 12 H–1B nonimmigrants; or
- At least 51 full-time equivalent employees who are employed in the United States; and employs H–1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

For larger employers (at least 51 full-time equivalent employees), the number of H–1B workers is the numerator and the number of FTEs is the denominator in this computation; if 15 percent or more of the employer's workforce are H–1B workers, as computed in this ratio, then the employer is ''H–1B-dependent.''

The term ''full-time equivalent'' lends itself to various interpretations, some of which could significantly increase an employer's possible paperwork burden. One interpretation would require maintaining a record and computing the hours worked in a period of time (a year, a workweek, or some intermediate period of time) for each worker in the entire workforce. For example, the total of all hours worked by all employees would be divided by the full-time ''standard'' in order to arrive at the FTE figure. Such an approach would necessitate collection and maintenance of hourly records for all workers, not just hourly wage earners. Moreover, the complexity of such an approach and the related computations could make it difficult for employers to recognize if and when they become H–1B-dependent. A less onerous approach would allow an employer to simply count the number of workers it employs on a full-time basis, using some standard threshold (e.g., 35 hours per week or more) for identifying a ''full-time'' schedule. This approach would only additionally require a showing of the average weekly hours worked by part-time employees, through hours worked records or by evidence regarding their standard working schedules. (It has been the Department's experience that hours worked records are ordinarily kept for part-time workers since they are ordinarily paid on an hourly basis and typically are not exempt from the Fair Labor Standards Act.) The number of FTEs in the workforce would then be determined by aggregating the average hours of the part-time workers, dividing that total by the standard for a full-time schedule, and adding the resulting number to the number of full-time workers in the workforce.

The Department proposes a procedure by which the determination would be made by an examination of the employer's quarterly tax statement (or

similar document) to determine the number of workers on the payroll (assuming there is no issue as to whether all employees are listed on the tax statement), and a further examination of the last payroll (or the payrolls over the previous quarter if the last payroll is not representative) or other evidence as to average hours worked by part-time employees, to aggregate the average hours of the part-time workers into FTEs based on the employer's definition of full-time employment. The Department would accept an employer's definition of full-time employment, provided that it is at least 35 hours or more per week; in the absence of such an employer definition, the Department would use 40 hours per week as a full-time schedule. However, in no case would a single employee count as more than one FTE, even if the employee commonly worked more hours per week than the ''full-time'' schedule. Finally, it should be noted that the count would be made only of employees of the employer, including both H–1B nonimmigrants and U.S. workers, but would not include *bona fide* consultants and independent contractors who do not meet the employment relationship test described below (*see* item D.1). It is important to note that the number of H–1B nonimmigrants (the numerator in the H–1B-dependency ratio) would be determined by the number of H–1B nonimmigrants employed by the employer in the period reviewed—a simple ''head count''—without regard to their full-time or part-time status.

The Department seeks comments on its proposed approach to determining full-time equivalency, and any other approaches which might be used to accurately make the determination without undue paperwork burden.

2. When Must an Employer Determine H–1B Dependency?

The ACWIA definition of ''H–1B-dependent employer'' and the new LCA attestation elements that are required of such an employer do not clearly define the timing of the dependency determination. Certainly such a determination must be made when a new LCA is filed. The two issues to be resolved are when a new LCA must be filed, and what obligations, if any, an employer has if its dependency status changes.

The Department is particularly concerned about the obligations of employers who already hold or may soon obtain certified LCAs. The Department's current regulations provide that an LCA is valid for three years from its date of certification, during which time the employer may file petitions for H–1B workers based on that LCA (not to exceed the number of positions shown on the LCA). The new recruitment and displacement attestation provisions of the ACWIA are expressly applicable to LCAs filed by a certain subset of H–1B employers after the date of issuance of the Department's interim final regulations. We expect that most H–1B-dependent employers have LCAs in effect and that many such employers may file additional LCAs during the period prior to the effective date of the regulations. Therefore—if this issue is not directly addressed by these regulations—these H–1B-dependent employers could avoid any application of the law's new dependency provisions, which are applicable only to applications filed before October 1, 2001, by continuing to use current or newly certified LCAs. Since this would, as a practical matter, potentially nullify these ACWIA requirements for all or many H–1B-dependent employers, the Department proposes that any current (or non-dependent) LCA will become invalid for H–1B-dependent employers by operation of these regulations with respect to any future H–1B petitions (including extensions), although an employer's obligations under the LCA would continue with respect to all H–1B nonimmigrant petitions under that LCA. The regulations would, therefore, require that all H–1B-dependent employers with existing LCAs file new LCAs if they wish to petition for any new H–1B nonimmigrants (or if they wish to seek the extension of any existing H–1B visas) on or after the effective date of the interim final regulations. Similarly, an employer with an existing LCA which is not H–1B-dependent on the effective date of the regulations but which later becomes H–1B-dependent, would be required to file a new LCA if it wishes to petition for new H–1B nonimmigrants (or seek extensions of existing H–1B visas) at any time after the date it becomes dependent. An employer who fails to take such action but instead uses an existing LCA contrary to these regulations would be subject to sanctions, including debarment and civil money penalties. The Department seeks comments on this proposed approach and on any other approaches which might be used to ensure that U.S. workers are provided with the protections which the Act intended with regard to H–1B-dependent employers.

As suggested above, the Department also recognizes that the makeup of an employer's workforce, and the ratio of H–1B nonimmigrants to total FTEs, could change significantly over the three-year validity period of an LCA. Thus an employer which is not H–1B-dependent at the time it files an LCA under these regulations might later become dependent, or an employer which is initially H–1B-dependent might later become non-dependent. The Department, after careful consideration, has concluded that, in order for the Congressional intent for the new provisions to be appropriately implemented, an employer's H–1B dependency may need to be redetermined as the composition of the workforce changes after the filing of the LCA, where the employer plans to take actions which require recruitment and non-displacement commitments by H–1B-dependent employers (or their clients).

Thus, the Department proposes that an employer would be required to make a determination of dependency not just prior to or on the effective date of these regulations, but when it files any new LCA or H–1B petition (including extensions) after that date. If an employer is not H–1B-dependent at the time an LCA is filed, it would have a continuing obligation to ensure that if it later becomes H–1B-dependent and wishes to file new H–1B petitions (including extensions), it takes the steps necessary to comply with the requirements of the law and the Department's regulations applicable to dependent employers during the period it is H–1B-dependent, with respect to all H–1B nonimmigrant petitions filed under that LCA. Similarly, if an employer which is initially dependent and files an LCA so indicating its dependency later determines that it has become not dependent, it would not be required to comply with the attestation elements applicable to dependent employers with respect to any H–1B workers during any period in which it is not dependent.

The Department believes that this approach is necessary to properly effectuate the law's new requirements and does not believe that this continuing obligation places any undue burden on employers. As a practical matter, the Department's experience in the H–1B program is that the large majority of employers which use the program clearly will not meet the test for H–1B-dependency and that most program users would, therefore, be entirely unaffected by this ACWIA provision and the Department's regulations. With regard to the small minority of employers who would meet the H–1B-dependency test, the

Department's experience is that most such employers employ H–1B workers in such a large proportion that they would almost certainly be subject to the non-displacement and recruitment requirements during the entire LCA validity period. As a practical matter, therefore, any continuing obligation for an employer to monitor its workforce ratio would apply only in the very rare instance where the H–1B-dependency determination is a close question for a ''borderline'' employer on the effective date of these regulations, or upon the date of a subsequent LCA filing or petition and thereafter.

The Department also considered whether the same issues would arise with respect to employers found after the effective date of ACWIA to have committed willful violations or misrepresentations. However, a finding of a willful violation or misrepresentation would commonly result in debarment and consequently, invalidation of all the employer's LCA's. The employer would then be required to file a new LCA(s) to petition for additional H–1B nonimmigrants (or to extend petitions) after the debarment period ends, attesting to the new attestation elements for H–1B dependent employers and willful violators.

The Department seeks comments on its proposal, and specifically whether there are other ways to effectively accomplish the statutory intent that H–1B-dependent employers comply with the new attestation elements. For example, another possible regulatory approach could be to have the dependency up-date determined on a set, regular basis, such as for each calendar quarter. Alternatively, the Department could limit the use of an attestation to a shorter period, such as 90 or 180 days, instead of the current three years.

3. What Kind of Records Are Required Concerning the H–1B-Dependency Determination?

The Department is considering several matters relating to documentation. First, the Department is examining the issue of the kind of record which might need to be made by an employer concerning its determination of whether it is or is not H–1B-dependent at the time that an LCA is completed and filed. It is the Department's view that no record needs to be created or maintained to show how an employer made that determination when its H–1B-dependency or non-dependency status is apparent, and it files an LCA reflecting that obvious status. As discussed above, the Department believes that for the vast majority of employers there is either such a small or large proportion of H–1B nonimmigrants employed that an employer's dependency status will not be a close question. With regard to an employer for which the H–1B-dependency or non-dependency status is not readily apparent, the question of appropriate records is more difficult. The Department believes that it is important that the employer make this determination with proper care and consideration. Further, the Department believes that, in the event of an inquiry by an affected U.S. worker (concerning possible rights regarding displacement or recruitment) or an investigation by the Department, documentation of an employer's determination that it is not H–1B-dependent needs to be available to ascertain and evaluate the method by which the determination was made. Therefore the Department proposes that such documentation be required wherever the determination that an employer is not dependent is not readily apparent and a mathematical calculation must be made (i.e., where the ratio of H–1B workers to U.S. workers is close to that set forth in the statute for dependency). The Department solicits comments on whether the regulations need to define an explicit standard (for example, all circumstances where H–1B workers are 10 percent or more of the workforce) to determine the subset of employers which must make and retain such documentation when an attestation is made.

The Department also is considering whether a record must be kept of an employer's H–1B-dependency status determinations (if any) which are made after the filing of an LCA which is used in support of a petition for an H–1B nonimmigrant worker. The Department believes that—in order that U.S. workers are aware of their rights concerning nondisplacement and recruitment, and that the Administrator is able to conduct fair and effective investigations on those matters—a record needs to be maintained of an employer's determination if at any time an employer which was non-dependent determines that it is dependent, or if an employer which was dependent determines that it is non-dependent. The Department is therefore proposing that a copy of the determination and, where an employer determines that it is not dependent, the underlying computation, be placed in the public disclosure file.

The Department also requests comments on whether it would be feasible and appropriate to specify that no record of an employer's computations would be necessary, if the determination could be made from publicly available documents. This approach presents some difficulties, in that, for example, a publicly available list of an employer's employees may not show the workers' full-time or part-time status, or may not accurately reflect the number of workers who meet the ''employment relationship'' test, and these documents may not be readily available to U.S. workers. The Department therefore solicits comments as to the feasibility of this approach and whether there are any generally available public documents which would normally contain the required information.

It is also necessary that an employer have the underlying records necessary to make the dependency determination. The records required to determine the number of workers on the payroll are required by § 655.731(b) of the existing regulations. An employer would also be required to have a record of the hours worked by part-time workers, or a document showing their normal work schedule if no records of their hours of work are maintained. As discussed above (*see* item B.1), it has been the Department's experience that most part-time workers are paid on an hourly basis and, therefore, that employers maintain hours-worked records for such workers. Finally, the employer would need to maintain copies of its H–1B petitions, in order to determine the number of H–1B nonimmigrants on its payroll.

The Department seeks comments on all of these issues and possible approaches.

4. What Information Will Be Required on the LCA Regarding an Employer's Status as H–1B-Dependent?

The Department expects that every employer will need to read the instructions for determining H–1B dependency and make a determination that it is or is not dependent, in order to determine whether to attest to dependency. In most cases, the Department expects that the determination will be so clear that the employer will not need to make any mathematical calculation. The Department also believes that it is important that those employers constituting the vast majority of those filing LCAs not be subject to any unnecessary burden because of the relatively small number of employers who are dependent.

The Department believes that the revised attestation form (LCA), at a minimum, should require that every

employer which is H–1B-dependent affirmatively acknowledge its status and obligations by checking a box attesting to its dependency and its compliance with the additional attestation requirements concerning non-displacement and recruitment of U.S. workers. Further, as discussed above, the Department proposes that H–1B-dependent employers which filed an LCA before these regulations become effective, may not use such an LCA in support of an H-1B petition filed after the effective date, or, if they do not become dependent until sometime after the effective date of the regulations, may not use such an LCA in support of an H–1B petition filed after they become dependent.

The question arises as to what information should be required of employers who are not H–1B dependent when they file an LCA after the effective date of these regulations. The Department is considering three alternative revisions to the LCA form for such employers:

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

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

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

Under all of the alternatives an employer will be expected to make an initial determination as to whether it is or is not dependent; to remain cognizant as to its status if it later files a new H–1B petition; and would commit misrepresentation if it falsely fails to attest that it is dependent. The first two alternatives do not require the filing of a new LCA should a formerly non-dependent employer become dependent, but such employer will be obliged to comply with the substantive obligations of the additional attestation elements applicable to dependent employers. The third alternative would parallel the approach proposed for H–1B dependent employers with LCAs filed before the effective date of the regulations in that an employer which initially was not dependent would be required to file a new LCA if it later became dependent and would be subject to sanctions, including debarment and civil money penalties, if it failed to do so.

The Department is concerned about the burden of requiring the filing of a new LCA as well as the burden of requiring the overwhelming majority of employers who are not dependent to check a box so attesting. The Department therefore proposes to utilize the second alternative, where the non-dependent employer would not be required to check any additional box(es). The Department is aware that under this alternative the lack of such identification will make it particularly important that the form clearly lay out the obligations of employers. The Department therefore seeks comments on the above alternatives, and the layout and clarity of the proposed attestation form, attached as Appendix I as well as any other comments on these and related matters.

5. What Changes Are Proposed for the Labor Condition Application Form and the Department's Processing Procedures?

Based on the preceding discussion, the Department is publishing for public comment a proposed revised Labor Condition Application form (ETA 9035), and providing advance public notice of a planned change in the existing system for processing LCAs. At present, such applications are submitted by mail, fax or private carrier to one of ten ETA regional offices with jurisdiction, as set forth in § 655.720. The Department has been developing the capacity to automatically receive and, in many cases, automatically process LCAs submitted. The Department intends to implement an automatic system whereby all faxed LCAs will be processed in Philadelphia and San Francisco beginning in January 1999. This new capacity requires changes in the LCA form as well as in the filing instructions.

The Department has redesigned the LCA form (attached as Appendix I) to both reflect the statutory changes in the ACWIA and facilitate the automated receipt and processing of applications. With the exception of the changes occasioned by the provisions of the ACWIA, as discussed in this proposed rulemaking, the proposed revisions to the LCA form are merely aesthetic. The Department's revised processing procedures will not require any substantive changes with respect to the information required of employers in preparing the LCA. When the Department publishes the Interim Final Rule pursuant to this proposal, contingent upon approval by the Office of Management and Budget, the revised form will become the sole form for public use; thereafter, prior versions of the ETA 9035 will not be accepted for processing.

The Department proposes that, after the effective date of the Interim Final Rule, all LCAs—whether submitted by fax or not—will be filed with one of two ETA regional offices. Employers within the jurisdiction of ETA's current Boston, New York, Philadelphia, and Atlanta regions will submit LCAs only to the Philadelphia regional office; employers within the jurisdiction of ETA's current Chicago, Kansas City, Dallas, Denver, Seattle and San Francisco regions will submit LCAs only to the San Francisco regional office. There will be an automated back-up capacity in the Washington, D.C. headquarters for automated processing of LCAs, in the event of a system failure in one of the regional offices.

The proposed revised LCA form can be completed in several ways—in handwriting, in typewriting, or through use of a new ''form filler'' electronic program that will be generally available to program users. The new LCA form will be posted and thereafter can be down-loaded and printed from the Department's World Wide Web site at http://www.doleta.gov. The ''form filler'' electronic program will also be available to be down-loaded from this web site, or can be obtained from ETA headquarters, on request, via e-mail or on diskette. This ''form filler'' electronic program will enable the user to easily complete the LCA form with a font that can be reliably read by the Department's automated LCA processing system.

The Department proposes that, under the Interim Final Rule, the LCA form—whether completed using the ''form filler'' program, in typewriting, or in handwriting—will be submitted by employer applicants to one of the two ETA regional offices either by facsimile transmission (fax), which is preferred, or by mail or private carrier. The Interim Final Rule and the LCA form itself will so indicate and will provide the appropriate fax numbers. The Department anticipates that LCAs submitted by fax can be readily received and processed by the automated system, and that a response—approval or rejection—can be returned to the employer's sending FAX number (*i.e.*, the telephone number designated in the ''Return Fax Number'' block on the LCA form), usually within 48 hours of submission/receipt by ETA. For employer-applicants without the capacity to send the LCA by FAX and receive ETA's response to the employer-applicants' sending FAX machine, the

LCA may still be submitted by mail or other delivery in hard-copy paper form (either typewritten or handwritten) to the two ETA regional offices with jurisdiction Such non-FAX submissions will be processed by the ETA office by being faxed internally or scanned electronically into the automated system, and the ETA decision will be mailed to the submitter.

The automated processing system will electronically scan the incoming facsimile, extract the information contained in the LCA, record the information to a database, and—in most cases—make the appropriate determination to approve/certify or reject the application, with little intervention by system administrators. As under the current manually-operated system, the LCA will be approved/certified and faxed (or mailed) back to the submitter if the appropriate boxes are checked and the required information is provided on the form. If the LCA is incomplete or contains obvious inaccuracies, it will be rejected under the automated system as it is under the manually-operated system.

Comments are requested on the proposed electronic transmission system described and on the proposed form to be utilized.

C. What H–1B Worker Would be an ''Exempt H–1B Nonimmigrant''?

The ACWIA provisions concerning non-displacement and recruitment of U.S. workers do not apply where the only H–1B workers sought in the LCA at issue are ''exempt H–1B nonimmigrants.'' In addition, for a limited time after the ACWIA's enactment, determining whether the employer is H–1B-dependent does not include ''exempt'' H–1B workers. The ACWIA contains alternative definitions of ''exempt H–1B nonimmigrant'' as one ''who * * * receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000; or * * * [who] has attained a master's or higher degree (or its equivalent) in a specialty related to the intended employment.''

The Department notes that the statutory language seems clear—an H–1B-dependent employer, or an employer found to have committed willful violations, is required to comply with the new attestation elements unless the only workers employed pursuant to the LCA are exempt workers. The non-displacement obligation, for example, applies for the period beginning 90 days before and ending 90 days after the filing of any H–1B petition supported by the LCA. The Department therefore reads the statute as requiring that an employer which uses an LCA in support of a petition for any non-exempt worker must comply with the new attestations with respect to all of its H–1B nonimmigrants employed pursuant to the LCA, even the exempt H–1B nonimmigrants.

The Department recognizes that employers commonly apply for multiple positions, and often for multiple locations, on the same LCA. Further, the Department recognizes that when an employer recruits U.S. workers, it often cannot know whether in fact the H–1B worker for whom it eventually petitions will qualify as exempt or non-exempt, since it is not uncommon for both exempt and non-exempt workers to be qualified for the same job. In any event, the Department points out that an H–1B-dependent (or willful violating) employer is free to file separate LCAs for its exempt and non-exempt workers, thereby obviating the requirement of complying with the new attestation elements for its exempt workers.

Determinations as to whether or not H–1B workers meet the requirements necessary to be classified as exempt H–1B nonimmigrants will be made initially by the Immigration and Naturalization Service (INS) in the course of adjudicating the petitions filed on behalf of H–1B nonimmigrants by employers. Employers should maintain, in the public access file, a copy of the INS determinations with the petitions approved for exempt H–1B workers. In the event of an investigation, it is anticipated that considerable weight will be given to INS' determinations that H–1B nonimmigrants, based on the educational attainments of the workers, were ''exempt'' since INS has considerable experience in evaluating the educational qualifications of aliens. However, with respect to H–1B workers claimed to be exempt on the basis of annual wages, employers will be expected in the event of an investigation to be able to document that such H–1B nonimmigrants received sufficient pay to satisfy the statutory wage ''floor'' of $60,000.

The Department seeks comments on this proposed regulation, and on any other related matter including but not limited to the following questions.

1. How Would the $60,000 Annual Rate be Determined?

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

Similarly, in assessing payment to an H–1B nonimmigrant claimed to be ''exempt,'' the Department interprets the statutory language ''* * * receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000; * * *'' to mean that the worker actually receives the $60,000 compensation in the year. Therefore, an H–1B nonimmigrant working part-time, whose actual annual compensation is less than $60,000, would not qualify as exempt on this basis, even if the worker's earnings, if projected to a full-time work schedule, would theoretically exceed $60,000 in a year.

The Department seeks comments on this proposal and any alternative approaches that would ensure the $60,000 wage standard for ''exempt'' workers would be met.

2. How Would the ''Equivalent'' of a Master's or Higher Degree be Determined?

The second definition of ''exempt H–1B nonimmigrant'' requires that the nonimmigrant ''has attained a master's or higher degree (or its equivalent) in a specialty related to the intended employment.'' Based on the language of this provision, the Department and the INS are of the view that work experience cannot be converted to the ''equivalent'' of an academic degree at the master's level or higher. The ACWIA's language differs from INA section 214(i) (8 U.S.C. 1184(i)), which explicitly authorizes a ''time equivalency'' approach. Section 214(i) provides that one of the ways to meet the requirements of a bachelor's or higher degree (or its equivalent) is by experience in the specialty equivalent to

the completion of such a degree and ''recognition of expertise in the specialty through progressively responsible positions relating to the specialty.'' The contrast between these INA provisions demonstrates that when Congress intended to authorize a ''time equivalency,'' such authorization was expressly stated. Further, the statement of one of the sponsors of the legislation shows the intent of Congress: ''the term 'or its equivalent' refers only to an equivalent foreign degree. Any amount of on-the-job experience does not qualify as the equivalent of an advanced degree.'' (144 Cong. Rec. H8571–05, H8584, Sept. 24, 1998, remarks of Rep. Smith). The Department's proposed regulation, therefore, does not allow a work experience equivalency and recognizes only those foreign academic degrees as would be equivalent to a master's or higher degree in the U.S.

The Department is consulting with the INS on this matter, and will work in close cooperation with that agency in developing regulations. As indicated above, the Department will give considerable weight to INS determinations concerning the academic credentials of H–1B nonimmigrants who are claimed to be ''exempt.'' Employers should note that INS' review of academic credentials for its determination on ''exempt H–1B nonimmigrants'' is distinct from its review of academic credentials for its determination on ''specialty occupations'' under Section 214(i) of the INA and 8 CFR 214.2(h)(4).

The Department seeks comments on this regulatory proposal, and on any other or alternative interpretations of the ''equivalency'' provision.

3. How is ''a Specialty Related to the Intended Employment'' Defined?

The H–1B nonimmigrant who holds an advanced academic degree would be ''exempt'' only if that degree is in ''a specialty related to the intended employment.'' The Department proposes to make it clear that, in order for the degree specialty to be sufficiently ''related'' to the employment, the specialty must be generally accepted in the industry or occupation as an appropriate or necessary credential or skill for the person who undertakes the employment in question. Any ''specialty'' which is not generally accepted as appropriate or necessary to the employment would not be sufficiently ''related'' to afford the H–1B worker status as an ''exempt H–1B nonimmigrant.''

The Department is consulting with the INS on this matter, and will work in close cooperation with that agency in developing regulations. As indicated above, the Department will give considerable weight to INS determinations concerning the academic credentials of H–1B nonimmigrants who are claimed to be ''exempt.'' Again, employers should note that INS' review of academic credentials for its determination on ''exempt H–1B nonimmigrants'' is distinct from its review of academic credentials for its determination on ''specialty occupations'' under Section 214(i) of the INA and 8 CFR 214.2(h)(4).

The Department seeks comments on this regulatory proposal, and on any other or alternative interpretations of the ''related'' provision.

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

The ACWIA provides that ''[a]n application is not described in this clause [i.e., is not subject to the new attestation requirements] if the only H–1B nonimmigrants sought in the application are exempt nonimmigrants.'' The Department is considering whether an employer's intention to use the attestation for exempt and/or non-exempt H–1B nonimmigrants should be indicated on the LCA, or whether this issue should be addressed in some other way. The Department recognizes that employers may wish to use separate LCAs for exempt and non-exempt H–1B workers, so they would not be required to comply with the attestations with respect to any exempt H–1B workers. As explained in the introductory discussion, the statutory language seems to require that an employer which initially believed its LCA would be used only for exempt H–1B nonimmigrants would have been obliged to comply with the attestations with respect to all of its H–1B workers under the LCA—exempt and non-exempt—if it later used that LCA in support of a petition for any non-exempt worker.

The Department therefore considered whether there would be any advantage to requiring such separate attestations. The Department is aware, however, that for many occupations, such as in information technology, two different workers might both be qualified for the same job, but because of education, for example, one might be exempt and another non-exempt. Therefore an employer might not know in advance whether the worker will be exempt.

At the same time, the Department believes it is important than an H–1B-dependent employer which intends to use the LCA only for exempt H–1B workers attest that the LCA will only be used to petition for such workers. The INS has made this request so as to allow both INS and the Department to know for which H–1B workers the ''exempt'' status must be ascertained. The Department therefore proposes to require such an attestation on the LCA. Of course, this requirement would not prevent an H–1B-dependent employer from either using separate LCAs for its exempt and non-exempt workers, or using one LCA for all H–1B workers (both exempt and non-exempt) and complying with the new attestation elements for all such workers.

Comments are sought on this proposed approach and on any other alternatives.

D. What Requirements Apply Regarding no ''Displacement'' of U.S. Workers Under the ACWIA?

The ACWIA imposes new obligations on an H–1B-dependent employer (see discussion in items A and B, above) and an employer found to have committed willful violations within the 5 years preceding the filing of an LCA (beginning on or after the date of the ACWIA's enactment). Such an employer is prohibited from ''displacing'' a U.S. worker who is ''employed by the employer'' or is employed by some other employer at whose worksite the sponsoring employer places an H–1B nonimmigrant where there are ''indicia of employment'' between the H–1B worker and that other employer. The prohibition on displacement within the employer's own workforce applies for 90 days before and 90 days after the date of filing of any H–1B petition based on the LCA. The prohibition on ''secondary'' displacement, at another employer's worksite, applies for 90 days before and 90 days after the placement of H–1B worker(s) at the worksite. These prohibitions do not apply to the placement of ''exempt'' H–1B workers, if the employer's LCA involves only ''exempt'' nonimmigrants. (See discussion in item C, above).

The Department recognizes that the non-displacement provisions in the ACWIA raise several issues, and proposes regulatory provisions on each of the following matters. The Department seeks comments on all of these proposed provisions, and on any other related matters.

1. What Constitutes ''Employed by the Employer,'' for Purposes of Prohibiting a Covered Employer From Displacing U.S. Workers in its Own Workforce?

The ACWIA provides that a U.S. worker ''employed by the employer'' is protected from displacement by that employer's H–1B workers. However, the

ACWIA contains no definition of the phrase ''employed by the employer.'' In this circumstance, where Congress has not specified a legal standard for identifying the existence of an employment relationship, the Department is of the view that Supreme Court precedent requires the application of ''common law'' standards in analyzing a particular situation to determine whether an employment relationship exists. *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318 (1992). *See Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730 (1989). Mindful of the Supreme Court's teaching that since the common-law test contains ''no shorthand formula or magic phrase that can be applied to find the answer, * * * all of the incidents of the relationship must be assessed and weighed with no one factor being decisive'' (*NLRB* v. *United Ins. Co. of America,* 390 U.S. 254, 258 (1968)), the Department proposes regulatory language setting out factors that would indicate the existence of an employment relationship under the common law test. These factors would include:

- The firm or the client has the right to control when, where, and how the worker performs the job;
- The work does not require a high level of skill or expertise;
- The firm or the client rather than the worker furnishes the tools, materials, and equipment;
- The work is performed on the premises of the firm or the client;
- There is a continuing relationship between the worker and the firm or the client;
- The firm or the client has the right to assign additional projects to the worker;
- The firm or the client sets the hours of work and the duration of the job;
- The worker is paid by the hour, week, month or an annual salary, rather than for the agreed cost of performing a particular job;
- The worker does not hire or pay assistants;
- The work performed by the worker is part of the regular business (including governmental, educational, and non-profit operations) of the firm or the client;
- The firm or the client is itself in business;
- The worker is not engaged in his or her own distinct occupation or business;
- The firm or the client provides the worker with benefits such as insurance, leave, or workers' compensation;
- The worker is considered an employee of the firm or the client for tax purposes (*i.e.,* the entity withholds federal, state, and Social Security taxes);
- The firm or the client can discharge the worker; and
- The worker and the firm or client believe that they are creating an employer-employee relationship.

(Factors adapted from EEOC Policy Guidance on Contingent Workers, Notice No. 915.002, Dec. 3, 1997). The Department is aware that these analytical factors—all of which are drawn from the Supreme Court's decision in *Darden*—may be expressed somewhat differently. *See, e.g.,* Restatement (Second) of Agency § 220(2) (1958) (listing nonexhaustive criteria for identifying master-servant relationship); Rev. Run. 87–41, 1987–1 Cum. Bull. 296, 298–299 (providing 20 factors as guides in determining whether an individual qualifies as a common-law ''employee'' in various tax law contexts). The Department is also aware that some factors, such as the level of the worker's skill or expertise, have little relevance in the context of this program where, by the terms of the Act, all of the H–1B workers and similarly employed U.S. workers are skilled.

The Department recognizes that there are a number of legal standards—other than the common law test—for determining the existence of an employment relationship. For example, it would appear that the standard most analogous to the H–1B worker protection provisions would be that found in the Fair Labor Standards Act, which provides minimum wage and overtime wage protections to ''employees.'' In addition, there is some suggestion of a preference on the part of some Members of Congress for the use of the Internal Revenue Service standards for the identification of an employment relationship under the ACWIA provisions (*see* Cong. Rec. S12751, Oct. 21, 1998; remarks of Sen. Abraham). While the Department considers both the FLSA and tax standards (which contain some special exemptions from the common law test) to be inappropriate under this statute, in light of the Supreme Court precedents discussed above, the Department would carefully consider any comments which suggest and support these or other alternate tests for determining whether an employment relationship exists.

The Department seeks comments on the proposed regulation applying the common law standards, and on any other, related matters regarding the appropriate factors.

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

In a provision described herein as the ''secondary displacement prohibition,'' the ACWIA prohibits the displacement of U.S. workers employed by another (''secondary'') employer, if an H–1B-dependent employer (or willful violator) intends or seeks to place its own H–1B workers with that other employer in a situation where, among other things, there are ''indicia of an employment relationship between the nonimmigrant and such other employer.'' The Department, after careful consideration, has concluded that this term—''indicia of an employment relationship''—identifies a relationship which is less than an employment relationship but more than the H–1B worker's mere performance of duties at the secondary employer's worksite (such as being dispatched for a brief part of a work day to diagnose or repair equipment at that other employer's location). Further, the Department has concluded that, for purposes of clarity and consistency, the standards indicative of ''indicia of an employment relationship'' with the secondary employer should be consistent with and a sub-set of the criteria which are used in determining an employment relationship between the covered (or ''primary'') employer and its own U.S. workers for purposes of the displacement prohibition concerning such workers (*i.e.,* U.S. workers ''employed by the employer''). The Department considered proposing that indicia of employment would be found to exist wherever a certain number of these criteria are met, but does not believe such a quantitative standard to be appropriate since the determination requires consideration of all of the relevant facts of the relationship, with no single factor or set of factors decisive.

The Department reviewed the factors considered in determining employment relationship, as discussed above, and proposes a sub-set of those factors which it believes are most useful in determining whether indicia of employment are present in evaluating a placement at another company's worksite (here referred to as ''the client''). The sub-set does not include those factors which are relevant to determining whether a worker is an employee of any company (*e.g.* worker's skill level). Such factors do not seem relevant where the H–1B worker is an

acknowledged employee of some entity (*i.e.*, the company filing the LCA), and would virtually never arise in a secondary placement of the H–1B worker (*e.g.*, client's payment of wages and benefits to worker). The sub-set of factors the Department believes are relevant ''indicia of an employment relationship'' include:

- The client has the right to control when, where, and how the worker performs the job;
- The client furnishes the tools, materials, and equipment;
- The work is performed on the premises of the client;
- There is a continuing relationship between the worker and the client;
- The client has the right to assign additional projects to the worker;
- The client sets the hours of work and the duration of the job;
- The work performed by the worker is part of the regular business (including governmental, educational, and non-profit operations) of the client;
- The client is itself in business; and
- The client can discharge the worker from providing services to the client.

(*See* discussion in item D.1 above). The Department seeks comments on this regulatory standard, including the factors to be considered and the manner in which the factors might be applied or weighed.

The Department recognizes that alternative approaches may be available, such as some standard other than the common law factors, or having no regulatory standard. The Department seeks comments on any such alternative approaches, and on any other, related matters including, but not limited to, the possible contents and consequences of a regulation which would apply different standards.

3. What Constitutes an ''Essentially Equivalent Job,'' for Purposes of the Non-Displacement Provisions of ACWIA?

The ACWIA definition of the prohibited displacement of a U.S. worker states, in part, that such displacement is ''lay[ing] off the [U.S.] worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.'' This definition, thus, requires three comparisons to determine whether displacement occurs: job responsibilities; workers; and locations.

The Department is of the view that the job responsibility comparison must focus on the core elements of and competencies for the job, such as supervisory duties, or design and engineering functions, or budget and financial accountability. Peripheral, non-essential duties that could be tailored to the particular abilities of the individual workers would not be determinative in the comparison of the jobs. In other words, the job responsibilities must be similar and both workers capable of performing those duties. In this connection, the Department believes it may be useful to utilize standards under the Equal Pay Act (29 U.S.C. 206(d)(1)) for determining the essential equivalence of jobs. These standards focus on actual job duties and responsibilities, rather than a comparison of sometimes artificial job titles and position descriptions, and recognizes that precise overlap between jobs is not necessary to achieve essential equivalence (*see* the regulations at 29 CFR 1620.13 et seq.). Like the Equal Pay Act, ACWIA's remedial purpose could be thwarted by requiring a match of insubstantial aspects of jobs as a condition for determining their equivalence. The Department therefore seeks comments on the appropriateness of adapting these standards to ACWIA.

As to the qualifications and experience of the workers, the Department considers the comparison to be confined to matters which are normal and customary for the job, and which are necessary for successful performance of the job. Thus, while it would be appropriate to compare whether the workers in question are qualified by virtue of education, skills and experience to perform the job, it would not be appropriate to compare their relative ages or their ethnic identities, nor whether they are exactly alike—which would virtually never be the case—in their educational background and work experience. For example, an H–1B worker who is ''over-qualified'' for a particular job could still ''displace'' a U.S. worker.

The area of employment is defined in ACWIA as ''the area within normal commuting distance of the worksite or physical location where the work of the H–1B nonimmigrant is or will be performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.'' This statutory definition is much the same as the Department's current regulatory definition of ''area of intended employment'' for prevailing wage purposes (20 CFR 655.715). (See item P.5, below.)

The Department proposes regulatory language to implement these provisions and seeks comments on these and any other related matters.

4. How Does the ACWIA Distinguish Between a Prohibited ''Lay Off'' and a Permissible Termination of an Employment Relationship?

The ACWIA distinguishes a ''lay off'' of a U.S. worker from certain other circumstances in which a worker's employment relationship may end. The ACWIA's non-displacement prohibition applies only to a ''lay off.''

The ACWIA specifies that, even though an H–1B worker may be placed in a job similar to one formerly held by a U.S. worker, no ''displacement'' or ''lay off'' is considered to have occurred if the U.S. worker left the job through ''voluntary departure or voluntary retirement.'' As a logical and obvious matter, the requirement of ''voluntariness'' is crucial to the effectiveness of this provision in assuring appropriate protections of U.S. workers' jobs in situations where nonimmigrants are being hired. The Department takes the view that the totality of the circumstances must be considered in assessing whether a U.S. worker's departure was ''voluntary.'' Therefore, the Department will look to well-established principles concerning ''constructive discharge'' of workers who are pressured to leave employment (e.g., a resignation letter would not be conclusive proof of ''voluntariness'' where other information indicates coercion). The Department proposes a regulation that reflects this fair, common sense view of ''voluntary departure or voluntary retirement.''

The ACWIA also specifies that no ''lay off'' is considered to have occurred where the U.S. worker's loss of employment is caused by the expiration of a grant or contract, other than a temporary employment contract entered into in order to evade the employer's obligations under the attestation. The Department believes that this language was designed to address the common situation where scientists and other academic personnel at universities are expressly hired to work under a contract or grant from another institution. Where such funding is lost, and the worker is not replaced because the project funded by the contract or grant ends, there would be no lay off within the meaning of the ACWIA. Similarly, a staffing firm or other commercial firm may hire an employee expressly to work on a specific project under a contract it has

obtained from another entity. If the contract project ends and is not renewed, and the employer does not have a practice of then moving its employees to work under other contracts, or placing its employees on a call-back list or its equivalent, but rather terminates the employment relationship for lack of work, there would be no lay off. The Department does not believe, however, that this ACWIA provision applies to the common situation where a staffing firm, which places employees at other businesses, does not hire employees for a specific client contract, and (upon the expiration, termination, or loss of a client contract) ordinarily would move its employees to perform work under a different contract or on a different project. In such a situation, the Department may find a displacement has occurred if an employer terminates employment of its U.S. workers and hires H–1B workers to perform essentially the same job under a different contract at a different worksite in the same area of employment. The Department notes that the ACWIA provision expressly excludes temporary employment contracts entered into to evade the employer's obligations. The Department intends to closely scrutinize situations under commercial contracts and grants, as well as employment contracts, where it appears that such evasion may be occurring. The Department recognizes, however, that there are situations where employment contracts, like the commercial contracts described above, are excluded from the Act's definition of ''lays off.'' Such situations might include, for example, visiting professors who are hired for a semester or a year because of their special expertise. The expiration of such a contract would not constitute a ''lay off'' of the U.S. worker, unless the circumstances showed some subterfuge or contrivance by the employer to avoid the ACWIA prohibition.

The Department seeks comments on this proposed approach, and on any related matters.

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

The ACWIA further provides that, even though an H–1B worker is placed in a job formerly held by a U.S. worker, no ''displacement'' or ''lay off'' is considered to have occurred if the U.S. worker was first offered but refused ''a similar employment opportunity with the same employer.'' This provision thus allows an employer an affirmative defense to its displacement of a U.S. worker if the employer can establish that it offered a *bona fide* transfer opportunity to the worker. The Department interprets the ACWIA language to require not just that the U.S. worker be offered another job with a similar title, but that the offer must involve a similar opportunity in terms such as a similar level of authority and responsibility, a similar opportunity for advancement within the organization, similar tenure and work scheduling.

The Department proposes a regulation to reflect this statutory requirement of ''opportunity'' for the U.S. worker who has lost a job. At a minimum the Department believes that an offer of a ''similar employment opportunity'' must be a *bona fide* offer, rather than an offer designed so as to induce the employee to refuse, or with the expectation that the employee will refuse the offer.

The Department seeks comments on this proposed regulatory provision, and on any other related matters.

6. What Constitutes ''Equivalent or Higher Compensation and Benefits'' for a U.S. Worker, for Purposes of the Other Job Offer to That Worker so as to Not Constitute a Prohibited ''Lay Off'' or Displacement?

The ACWIA provides that no prohibited ''lay off'' of a discharged U.S. worker has occurred, if the U.S. worker is offered another employment opportunity with the same employer ''at equivalent or higher compensation and benefits than the position from which the employee was discharged.'' It would appear obvious that an ''opportunity'' could not be considered to provide ''equivalent or higher compensation and benefits'' if that ''opportunity'' would provide the worker a lower disposable income or would require the worker to incur expenses that drive down his/her financial standing. By specifying ''equivalent or higher'' pay and benefits, Congress must have intended that the U.S. worker be offered a positive, rather than negative, ''employment opportunity.'' In this regard, one of the sponsors of the ACWIA compromise legislation stated that ''[t]he intent of Congress is that the 'similar employment opportunity with the same employer at equivalent or higher compensation and benefits' would be a meaningful offer. It is Congress' intent that an employer should not be able to evade liability for a violation of the displacement attestation because an offer of an alternative employment opportunity was made without considerations such as relocation expenses and cost of living differentials if the alternative position was in a different geographical location.'' (*See* Cong. Rec. E2324, Nov. 12, 1998, remarks of Rep. Smith). Assuming the regulations provide that a ''similar employment opportunity'' may include a transfer to another commuting area, the Department takes the position that an alternative ''opportunity'' offered to the U.S. worker must take into consideration matters such as cost of living differentials and relocation expenses (*e.g.*, a New York City ''opportunity'' offered to a worker ''laid off'' in Kansas City would provide a wage adjustment from the Kansas City pay scale and would include relocation costs). The Department is also considering adapting relevant provisions of regulations defining equivalent compensation and benefits under the Equal Pay Act regulations (*see* item D.3, above) and of the Family and Medical Leave Act regulations, 29 CFR 825.215(c)–(d). The Department seeks comments on this proposal and on any related matters that encompass this concept.

7. What is Required of an H–1B-dependent (or Willful Violator) Employer Which Seeks Information About Displacement or Potential Displacement of U.S. Workers at a Second Employer's Worksite?

The ACWIA's secondary displacement prohibition requires that certain H–1B employers (H–1B-dependent; willful violator) not place any H–1B worker at another employer's worksite (to work under ''indicia of employment'' with such secondary employer), ''unless the [H–1B] employer has inquired of the other employer as to whether, and has no knowledge that ... the other employer has not displaced or intends to displace a United States worker employed by the other employer'' within the period of 90 days before and 90 days after the H–1B worker's placement at that worksite. The ACWIA further specifies (in the enforcement and penalties provisions) that the H–1B employer may be debarred for a secondary displacement ''only if the Secretary of Labor found that such placing employer ... knew or had reason to know of such displacement at the time of the placement of the nonimmigrant with the other employer.'' The language and structure of these provisions demonstrates that Congress intended for the H–1B employer to take proactive steps to ascertain whether placement of H–1B workers would correspond with the lay off of similarly-employed U.S. workers. In enacting this provision, Congress clearly intended that the employer make a reasonable inquiry and

give due regard to available information. Simply making a *pro forma* inquiry would not insulate a covered employer from liability should the secondary employer displace a U.S. worker from a similar job which would be performed by an H–1B worker.

The Department recognizes that the ACWIA obligation concerning ''secondary displacement'' could easily be subverted if a placing H–1B employer were merely to make a *pro forma* inquiry and rely on a *pro forma* reply. Thus, in order to assure that the purposes of the statute are achieved, the Department proposes to develop a regulatory provision to require that the H–1B employer make a reasonable minimal effort to inquire about potential secondary displacement. The Department believes that a covered H–1B employer may demonstrate such effort through a variety of methods that include, but are not limited to, the following:

- Securing and retaining a written assurance from the secondary employer that it has not and does not intend to displace a similarly-employed U.S. worker within the period 90 days before and 90 days after the placement of an H–1B worker at the work site; or
- Preparing and retaining a note to the file, prepared at the same time or promptly after receiving the secondary employer's oral statement (including the substance of the conversation, the date of the communication, and the names of the individuals involved) that the secondary employer has not and does not intend to displace a similarly-employed U.S. worker within the period 90 days before and 90 days after the placement of an H–1B worker at the work site; or
- Including a secondary displacement clause in the contract between the H–1B employer and the secondary employer, whereby the secondary employer would agree that it has not and will not displace similarly-employed U.S. workers at the work site at any time within the period 90 days before and 90 days after the placement of an H–1B worker.

Further, even with such assurance, a placing H–1B employer should not be able to ignore other information that comes to its attention—such as newspaper reports of relevant lay-offs by the secondary employer—if such information becomes available before its placement of H–1B workers with that other employer. Under such circumstances, the employer would be expected to recontact the secondary employer and receive credible assurances that no lay offs are planned or have occurred in the applicable time frame.

The Department seeks comments on the methods described above, and any other methods for demonstrating that a placing employer has made a reasonable inquiry concerning potential secondary displacement of U.S. workers.

8. What Documentation Will be Required of Employers About ACWIA's Non-Displacement Provisions?

The ACWIA prohibits the small affected class of H–1B employers—H–1B-dependent or willful violators—from hiring H–1B workers if their doing so would displace similar U.S. workers from an essentially equivalent job in the same area of employment. The employer will not be considered to have displaced the U.S. worker if that worker left voluntarily, was dismissed for a valid reason, or turned down the employer's offer of a similar employment opportunity with equivalent or higher compensation and benefits (as previously discussed).

The Department proposes to require that covered H–1B employers retain certain documentation with respect to each U.S. worker in the same locality and same occupation as any H–1B nonimmigrants hired, and who left its employ in the period 90 days before or after the employer's petition for the H–1B worker(s). In addition, because an employer generally takes action to effectuate a layoff at a point before a worker's employment terminates, such documentation would be required for any such employee for whom the employer has taken any action during the period 90 days before or after the petition to cause the employee's termination (*e.g.*, a notice of future termination of the employee's job). For all such employees, the Department proposes that covered H–1B employers maintain the name, last-known mailing address, occupational title and job description, as well as any documentation concerning the employee's experience and qualifications, and principal assignments. In addition, the Department proposes that the employer maintain copies of all documents concerning the departure of such employees, such as notification by the employer of termination of employment prepared by the employer or the employee and any responses thereto, evaluations of the employee's job performance, etc. Finally, the employer would be required to retain copies of the terms of any offers of similar employment to such U.S. workers and the employee's response thereto. Because EEOC regulations (29 CFR 1602.14) currently require retention of all personnel or employment records, the Department does not believe that this requirement in the H–1B regulation would impose any new burden on employers.

The Department seeks comments on this proposed regulation, and on any related matters.

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

The ACWIA requires that an H–1B-dependent employer (or employer found by DOL to have committed willful H–1B violations within a 5-year period) take ''good faith steps to recruit, in the United States using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H–1B nonimmigrants . . ., United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought.'' The Department is charged with enforcing this obligation, while the Attorney General administers a special arbitration process to address complaints regarding an H–1B employer's companion obligation to ''offer the job to any United States worker who applies and is equally or better qualified for the job for which the nonimmigrant or nonimmigrants is or are sought.'' The ACWIA further provides that ''[n]othing in subparagraph (G) [this new attestation element on recruitment] shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.'' An H–1B employer is not subject to these recruitment requirements if its labor condition application involves only ''exempt'' H–1B workers, or if the H–1B worker has ''extraordinary ability,'' or is an ''outstanding professor or researcher'' or a ''multinational manager or executive,'' as defined in section 203(b)(1)of the INA.

It should be noted that the statutory attestation language requires the employer to affirm the statement that, ''prior to filing the application—[the employer] has taken good faith steps to recruit. . .'' This language appears to be based on the presumption that employers file LCAs for individual workers at the time the need for that worker arises. In fact, however, employers may and often do file one LCA for many workers and use that LCA into the future in support of H–1B petitions filed when the actual

employment need does arise. For example, an LCA filed for 100 computer programmers may be used up to 100 times over a period of months or even years (through the three year validity period) in support of separate petitions for individual workers.

Given this common practice by employers, it is not reasonable to assume Congressional intent to require a separate LCA for each worker, particularly in light of the existing regulatory provision allowing the listing of multiple positions and work locations on a single application, which was not altered by ACWIA. At the same time, it is not reasonable to assume that Congress expects employers using the H–1B program (in this case, only H–1B-dependent employers and willful violators) to be able to attest—on the LCA filing date—that they have already recruited in good faith in the U.S. for every job for which they may wish to petition for H–1B workers over the three-year life of the LCA, and further, that they already have offered that job to every equally or better qualified U.S. worker who applies. As a practical matter, it would be virtually impossible for employers to be able to conduct such recruitment, since they have not yet identified every job opportunity which might arise at some point in the LCA's three-year validity period, for which the employer might wish to file an H–1B petition for an H–1B worker. In this context, the Department believes that the ''good faith recruitment'' attestation must be read, interpreted and applied to mean that the employer promises—and agrees to be held accountable—that it has or will recruit with respect to any job opportunity for which the application is used, whether that recruitment occurs before or after the application is filed (if the application is to be used in support of multiple petitions for future workers). The Department invites comments on this approach and any alternative suggestions for how to appropriately balance employers' practices under the program with their good faith recruitment obligations in the context of the statutory language on this labor condition statement.

The Department recognizes that the ACWIA requirements for a small sub-set of H–1B employers to recruit U.S. workers present several points on which views might differ. Therefore, the Department proposes a regulation addressing the following matters and seeks comments on all of these points, as well as on any other related matters.

1. How are ''Industry-wide Standards'' for Recruitment to be Identified?

The benchmark for minimal U.S. worker recruitment under the ACWIA is ''industry-wide'' procedures. This provision allows employers to use normal recruiting practices which are common among similar employers in their industry in the United States (even though, in some cases at least, these have been demonstrably unsuccessful by virtue of the employer seeking access to foreign labor markets). The statute does not require employers to comply with any specific recruitment regimen or practice, nor does the Department believe it is authorized to prescribe any explicit regimen. In this regard, the Department is of the view that the H–1B-dependent employer should look, in particular, to those recruitment strategies by which employers in an industry have successfully recruited U.S. workers; through this rulemaking proposal, the Department solicits and will consider the views of major industry associations, employee organizations, and other interest groups concerning successful recruitment practices and strategies.

The Department is considering a number of options regarding the type or level of recruitment necessary, ranging from prescribing specific required recruitment efforts to simply allowing employers to pursue what they perceive to be industry standard procedures.

There are a number of recognized methods for successfully soliciting U.S. worker applicants, including: advertising in general distribution publications, trade or professional journals, or special interest (*e.g.*, ethnic-oriented) publications; America's Job Bank or other Internet sites advertising job vacancies; outreach to trade or professional associations; use of public and/or private employment agencies, referral agencies, or ''headhunters;'' outreach to colleges, universities, community/junior colleges and business/trade schools; job fairs; contact with labor unions; and recruitment, development or promotion from within an employer's organization (or its competitors), including workers who may have been displaced from similar jobs. The Department's expectation is that good faith recruitment will ordinarily involve several of these methods of solicitation, both passive (where potential applicants find their way to an employer's job announcements, such as to advertisements in publications and the Internet) and active (where the employer takes proactive steps to identify and get information about it's job openings into the hands of potential applicants, such as through job fairs, outreach at universities, use of ''headhunters,'' and providing training to incumbent employees in the employer's organization).

The Department is considering whether the regulation should recognize that if an employer uses at least three of these recognized solicitation tools (at least one or two of which are active), it will be presumed to meet the ''good faith'' standard in this regard. This approach would, in effect, create a presumption for employers which do not wish to demonstrate industry practice for recruitment. An employer which did not use at least three of these approaches could still demonstrate its ''good faith'' by showing that its recruitment methods comport with the industry norm, as discussed below. However, the Department believes that good faith recruitment must, at a minimum, involve solicitation efforts which include advertising in relevant and appropriate print media or the Internet (where common in the industry), in publications and at facilities commonly used by the industry (*e.g.,* higher education institutions), as well as solicitation of U.S. workers within the employer's organization. Of course, an employer would have to use good faith in the recruitment conducted. For example, an employer would be expected to advertise for a reasonable period of time, and would be expected to do so in those publications and to attend those job fairs which would ordinarily be read or attended by the types of workers being recruited. The Department seeks comments as to whether this approach offers an effective means of implementing the Act's objectives, including specifically whether such a presumption should be established and, if so, whether it should involve at least three recognized solicitation tools or some other number.

The Department considers it important that there be a general recognition that good faith recruitment must involve some active methods of solicitation, rather than just passive methods such as posting job announcements at the employer's work site(s) or on its Internet web page. The Department's view is that ''industry-wide standards'' do not mean the lowest common denominator—*i.e.*, the minimum recruitment or least effective methods in attracting U.S. workers used by companies in an industry. Rather, solicitation must be at a level and through methods and media which are normal, common or prevailing in an industry—the ''standard''—including at

least the medium most prevalently used in the industry and employing those strategies that have been shown to be successfully used by employers in an industry to recruit U.S. workers.

The Department believes that, as a general matter, the statutory intent of the recruitment attestation is best effectuated if employers are required to utilize the recruitment methods of the set of employers which primarily compete for the same types of workers as those who are the subjects of the H–1B petitions to be filed pursuant to the LCA. For example, a hospital, university, or computer software development firm would be required to use the standards utilized by the health care, academic, or information technology industries, respectively, in hiring workers in the occupations in question. Similarly, a staffing firm, which places its workers at job sites of other employers, would be required to utilize the standards of the industry which primarily employs such workers—*e.g.*, the health care industry, if the staffing firm is placing physical therapists (whether in hospitals, nursing homes, or private homes); or the information technology industry, if the staffing firm is placing computer programmers, software engineers, or other such workers. These firms are competing for the same kind of workers and the ''industry standard'' should recognize that fact and not reward lack of success in attracting U.S. workers by some sectors of an industry.

The Department seeks comments on this proposed regulation and on any other related matters, including any possible alternative regulatory standards and their contents and consequences.

2. What Constitute ''Good Faith Steps'' in Recruitment?

The essential requirement for good faith recruitment, as mandated by the ACWIA, is that employers maintain a fair and level playing field for all applicants and be able to show that they have not skewed their recruitment process against U.S. workers. The Department believes that ''good faith'' recruitment does not involve only the steps taken to communicate/advertise job openings and solicit applications (ending upon the employer's receipt of the applications), but also encompasses pre-selection treatment of the applicants. The level playing field for U.S. applicants mandated by the ACWIA cannot be guaranteed if only those steps taken to find potential applicants and solicit applications are considered; the pre-selection treatment of applicants must also be considered if good faith is to be assured. For example, an application screening process tailored to favor H–1B workers and bypass U.S. applicants would represent as much a violation of the good faith recruitment requirement as a failure to seek U.S. applicants in the first place.

The Department does not propose any specific regimen or practice for pre-selection treatment of applications and applicants. However, in circumstances where H–1B employers are demonstrably unsuccessful (or less successful than their competitors) in hiring U.S. workers, the Department intends to scrutinize the recruitment process, including pre-selection treatment, to insure that U.S. workers are given a fair chance for consideration for a job, rather than being ignored or rejected through some tailored screening process based on an employer's preferences or prejudices with respect to the make up of its workforce. Examples of such processes could include a practice of interviewing H–1B applicants but not U.S. applicants with equivalent qualifications, or assigning different staff to the screening or interviewing of H–1B and U.S. applicants.

The Department solicits comments on this issue and the relevance of these examples in identifying less than ''good faith'' recruitment, and the existence of any other practices with a similar design or impact.

The Department is of the view that—as a practical matter—there may be little reason to examine the particulars of an employer's recruitment efforts if the results of those efforts amply demonstrate the employer's good faith in employing U.S. workers. Thus, the Department is considering whether to craft a presumption of good faith recruitment based on an employer's hiring of a significant number of U.S. workers and, thereby, accomplishing a significant reduction in the ratio of H–1B workers to U.S. workers in the employer's workforce. Of course, such a presumption would not affect an individual worker's claim that he/she was discriminated against in recruitment or otherwise, or an individual U.S. worker's complaint that he/she was equally or better qualified than an H–1B worker and was not given an offer of employment (a matter which is under the jurisdiction of the Department of Justice). The Department seeks comments on the possibility, the contents, and the consequences of such a presumption.

The Department's regulation will include notification of its intention to refer any potential violations of U.S. discrimination statutes revealed through this scrutiny to the appropriate enforcement agency.

In addition, the Department's regulation will inform employers that the assessment of ''good faith'' recruitment will be based on the whole recruitment process, but will not include an examination or ''second guessing'' of the work-related screening criteria or the hiring decision(s) with regard to any particular applicant(s) (a matter specifically assigned by the ACWIA to the Attorney General's procedures).

The Department seeks comments on this proposed regulation and on any other related matters.

3. How are ''Legitimate Selection Criteria Relevant to the Job That are Normal or Customary to the Type of Job Involved'' to be Identified and Documented?

In conducting the ACWIA-mandated ''good faith'' recruitment of U.S. workers, an affected H–1B employer is specifically authorized to apply ''legitimate selection criteria relevant to the job that are normal or customary to the type of job involved.'' This statutory standard, thus, has several parts. The criteria must be legitimate, which would exclude any criteria which would, in themselves, be violative of any applicable laws (*e.g.*, age, sex, race). The criteria must be relevant to the job, which would require a nexus between the criteria and the job's duties and responsibilities. And the criteria must be normal or customary to the type of job involved, which would be based on the practices and expectations of the industry rather than on the preferences of a particular employer. The Department considers that this requirement would be satisfied, for example, if the employer uses criteria taken from the North American Industrial Classification System (NAICS) being developed to replace the Standardized Occupational Classifications. With regard to selection standards, the language and purpose of the statute mandate that the employer is not to impose spurious hiring criteria that discriminate against U.S. applicants in favor of H–1B workers; such employer actions would subvert the obligation to hire an ''equally or better qualified'' U.S. worker. (*See* Cong. Rec. E2324, Nov. 12, 1998; Cong. Rec. S12751, Oct. 21, 1998).

In evaluating an employer's ''good faith'' recruitment in the pre-selection treatment of applicants and applications, the Department will limit its scrutiny of screening criteria (as opposed to processes) to those factors set forth in the law.

The Department is proposing a regulatory provision which informs the employer of these standards for acceptable hiring criteria. The Department seeks comments on this proposal and on any other related matters.

4. What Actions Would Constitute a Prohibited ''Discriminatory Manner'' of Recruitment?

In prohibiting the employer's application of otherwise-legitimate hiring criteria ''in a discriminatory manner,'' the ACWIA mandates that the employer conduct recruitment on a fair and level playing field for all applicants without skewing the recruitment process against U.S. workers. Obviously, the use of hiring criteria prohibited by any applicable discrimination law (*e.g.*, sex, race, age, national origin) would constitute a prohibited ''discriminatory'' recruitment. The Department is proposing a regulatory provision which will inform the employer of these basic standards, and that solicitation and pre-selection screening processes or criteria that are applied in a disparate manner—either between foreign and U.S. workers, or for those jobs where H–1B workers are involved (as opposed to those where they are not involved)—shall constitute discriminatory recruitment. Employers will also be alerted to the Department's compliance with the Congressional intent that ''[e]mployers who consistently fail to find U.S. workers to fill positions should receive the Department's special attention in this context of 'good faith' recruitment'' (*See* Cong. Rec. E2325, Nov. 12, 1998).

The Department seeks comments on this proposed regulation and on any other related matters.

5. What Documentation Would be Required of Employers?

In order for an employer to demonstrate that it has engaged in good faith recruitment of U.S. workers in accordance with industry-wide standards, and that the compensation offered is at least as great as that offered to H–1B nonimmigrants, an employer will be required to maintain certain documentation. The Department believes that it should not be necessary for the employer to retain actual copies of advertisements, etc., provided that it maintains documentation of the recruiting methods used, including the places and dates of the advertisements and postings or other recruitment methods used, the content of the advertisements and postings, and the compensation terms (if such are not included in the content of the advertisements and postings). In addition, the Department proposes that the employer's public disclosure file contain information summarizing the principal recruitment methods used and the time frame in which such recruitment was conducted.

The Department requests comments on how employers can and should determine industry-wide standards, for example, by obtaining credible evidence such as trade organization surveys, studies by consultative groups, or a statement from a trade organization regarding the industry norm(s). The Department also seeks comments on how to make the employer's determination available for public disclosure to U.S. workers and others.

In order to ensure that good faith recruitment was conducted, the Department proposes that employers retain any documentation they have received or prepared concerning the consideration of applications by U.S. workers, such as copies of applications and/or related documents, test papers, rating forms, records regarding interviews, job offers, etc. As discussed above with regard to documentation on the non-displacement attestation element (*see* item D.8), the EEOC regulations already require that employers retain all personnel or employment records, and the Department therefore believes that this requirement in the H–1B regulation would create no new obligation for employers.

The Department seeks comments on this proposed regulation and on any other related matters, including any possible alternative recordkeeping requirements.

F. What is Required for ''Electronic Posting'' of Notice to Employees of the Employer's Intention to Employ H–1B Nonimmigrants?

The ACWIA modified the existing statutory requirement for worksite posting of notices (where there is no collective bargaining representative), to permit an H–1B employer to use electronic communication as an alternative to posting ''hard copy'' notices in conspicuous locations at the place of employment. In providing this alternative method for notification to affected workers, Congress in no way indicated an intention to reduce the effectiveness of the notice requirement which has been an element of the H–1B program from its inception. Thus, the ACWIA provision must be understood to mean that the electronically posted notices are readily available to the affected workers. An employer may accomplish this by any means it ordinarily uses to communicate with its workers about job vacancies or promotion opportunities, including through its ''home page'' or ''electronic bulletin board'' to employees who have, as a practical matter, direct access to the home page or electronic bulletin board; or through E–Mail or an actively circulated electronic message such as the employer's newsletter. Where employees are not on the ''intranet'' which provides direct access to the home page or other electronic site but do have computer access readily available, the employer may provide notice to such workers by direct electronic communication such as E–Mail. If the employees lack such electronic access, notification may by provided by physical (''hard copy'') posting at the worksite.

The Department proposes regulatory language to convey this requirement, in a revision of the regulation on worksite notices (*see* item O.5, below, concerning republication for further comments). The Department seeks comments on this proposal, as well as on any alternative standard and its possible consequences for affected workers.

G. What Does the ACWIA Require of Employers Regarding Benefits to H–1B Nonimmigrants?

The ACWIA has added to the H–1B statute an express statement of the inherent obligation of all H–1B employers, under the first attestation element on wages and working conditions, ''to offer to an H–1B nonimmigrant, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and non-cash compensation, such as stock options (whether or not based on performance) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.'' The Department proposes regulatory provisions that implement this obligation regarding benefits. The Department seeks comments on the following and related matters.

1. What Does ''Same Basis and * * * Same Criteria'' Mean With Respect to an Employer's Treatment of U.S. Workers and H–1B Workers With Regard to Benefits?

In enacting an explicit statement of an employer's obligation to offer the H–1B worker benefits ''on the same basis, and in accordance with the same criteria, as the employer offers to [United States]

workers,'' Congress emphasized its intention that the wages and working conditions of U.S. workers not be adversely affected through the employment of H–1B workers at wages and fringe benefit levels less than those provided to U.S. workers. It is the Department's view that an employer's obligation to provide benefits to workers ''on the same basis, and in accordance with the same criteria, as the employers offers to [U.S.] workers'' requires that an employer offer to its H–1B workers the same benefit package as is offered to U.S. employees, and on the same basis as it is offered to U.S. workers. In other words, an employer may not provide more strict eligibility or participation requirements for H–1B workers. Of course, the benefits actually provided would not have to be identical, since, for example, one worker might choose family health insurance coverage, and another individual coverage, and yet another might choose not to have health benefits because he or she did not want to pay the employee's share of the premium in a co-pay package. The comparison of the ''basis'' and ''criteria'' should take into account the categories or types of workers to whom the benefits are being provided (*e.g.*, full-time workers compared to full-time workers; professional staff compared to professional staff); in other words, the comparison is between similarly-employed workers. The Department also seeks comments as to whether the ''same basis'' requirement would allow an employer to provide a different, but equivalent, package of benefits. The Department recognizes that determining the equivalency of benefits could be quite burdensome for both employers and the Department—particularly if the test were a qualitative evaluation of benefits, as distinguished from a comparison of the cost to employers.

The Department further understands that this provision would allow an employer to provide greater or additional benefits to H–1B workers than are offered to U.S. workers—that, with respect to H–1B workers, the requirement sets a benefits floor, but not a ceiling. This construction of the statutory language is consistent with the ACWIA directive that the fringe benefits obligation is imposed under attestation (1)(A), which embodies the concept that the prescribed wages and working conditions are minimums which must be afforded the H–1B workers.

The Department recognizes that an alternative interpretation of the benefits standard would interpret the ACWIA phrases ''same basis'' and ''same criteria'' to mean literally that they require the same (or possibly equivalent) treatment of similarly-situated U.S. and H–1B workers with respect to benefits. Such an interpretation would not permit more favorable treatment to either U.S. workers or H–1B nonimmigrants with regard to benefits.

The Department is also aware that there is a possibility of complications with respect to the ''benefits'' obligations of a U.S. employer that is part of a multinational corporate operation, particularly where an H–1B worker works in the U.S. for only a short period of time. The Department recognizes that under these circumstances it may not be practical for the U.S. employer to provide the H–1B worker with exactly the same benefits provided to its U.S. workers. The Department proposes to provide that while U.S. employers may cooperate with their corporate affiliate(s) in the H–1B worker's home country with regard to payment of wages and maintenance of benefits (such as that country's retirement system), the U.S. employer is responsible for compliance with the ACWIA requirements. This concern arises where a foreign affiliate of a petitioning employer is involved as the agent for payment of wages and provision of benefits to H–1B workers. The statutory obligations must be fully met in such instances. The ultimate responsibility for all employer obligations under this Act, including the provision of benefits to the H–1B worker at least equal to those offered its U.S. workers, must lie with the U.S. employer which brings nonimmigrant workers into the country. Ultimately, it is the U.S. employer, not the foreign subsidiary, pledging the H–1B worker a benefit package like that of its U.S. workers. The Department will look with particular care at circumstances involving a foreign subsidiary where there is an appearance of contrivance to avoid the sponsoring employer's obligation to provide at least equal wages and benefits to H–1B and U.S. workers. At the same time, the Department will carefully examine the circumstances in such cases to consider non-equivalent but nonetheless equitable benefits, including in light of the actual length of stay of the H–1B worker in the U.S.

Further, the Department proposes to modify section 655.732 of the existing regulations concerning fringe benefits pursuant to the ''working conditions'' attestation, to make it clear that an employer must provide the H–1B worker at least the fringe benefits and working conditions provided to the employer's U.S. workers. This modification would make it clear that the requirement that the employer provide working conditions that will not adversely affect the working conditions, including fringe benefits, of U.S. workers similarly employed necessarily requires consideration of similarly employed workers in the employer's own work force, as well as to prevailing conditions in the area of employment in some circumstances.

Finally, the Department seeks comments as to whether the Department should define ''benefits'' within the meaning of the ACWIA or simply give a list of examples. Although ''benefits'' are defined in various programs such as the Employee Retirement Income Security Act of 1974 and the Service Contract Act, the Department notes that the ACWIA provision on ''benefits'' clearly contemplates the inclusion of various forms of cash and non-cash compensation, such as bonuses and stock options, which are ordinarily considered wages.

The Department seeks comments on these matters, as well as on any other related matters.

2. How will Various Benefits be Evaluated, and What Documentation Would be Required?

The new statutory language mandates that all employers of H–1B nonimmigrants offer benefits to H–1B workers ''on the same basis and in accordance with the same criteria'' as offered to similarly-employed U.S. workers. To allow the Department to determine whether this statutory obligation has been met, the Department believes it will be necessary at a minimum that employers retain copies of fringe benefit plans and summary plan descriptions provided to workers, including all rules regarding eligibility and benefits, evidence of what benefits are actually provided to individual workers, and how costs are shared between employers and employees.

As discussed above, the Department is considering whether the statute will permit H–1B nonimmigrants to be provided different benefits or greater benefits, such as through an affiliate in their home country. If different benefits are provided, the Department believes an employer must be required to keep detailed information regarding the benefits provided to the H–1B worker and information to demonstrate the value of these benefits, as well as the benefits provided to U.S. workers. The Department solicits suggestions regarding exactly what records would be necessary for such determinations.

It is the Department's understanding that these records are currently kept for most fringe benefits, pursuant to the

requirements of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Service.

The Department seeks comments on this proposal and any related matters.

H. What Does the ACWIA Require of Employers Regarding Payment of Wages to H–1B Nonimmigrants for ''Nonproductive Time''?

In response to concerns and information about many situations in which H–1B workers were brought for employment in the United States but were then ''benched'' in a nonproductive status and paid little or none of the required wages, Congress enacted an explicit requirement—consistent with the Department's regulation—that the employer pay wages to an H–1B worker in ''nonproductive status'' in certain circumstances. This obligation is effective ''after the H–1B worker has entered into employment with the employer,'' but otherwise not later than 30 days after the worker's date of admission into the U.S. (if entering the country pursuant to the petition) or 60 days after the date the worker ''becomes eligible to work for the employer'' (if already present in the country when the petition is approved). The Department is considering whether the H–1B worker ''enters into employment'' when he first makes himself available for work, such as, for example, by reporting for orientation or training, or when he actually begins receiving orientation or training or otherwise performs work or comes under the control of his employer. Once the worker ''enters into employment'' (or after the 30 or 60 day period expires), the ''benching'' rules apply. Subject to the qualifications discussed below, an H–1B worker who is already present in the U.S. is considered by the Department to be ''eligible to work for the employer'' (and thus covered by the ''benching'' rules) upon the completion of the visa issuance process; matters such as the worker's obtaining a State license would not be relevant to this determination.

In a nutshell, the ''benching'' provisions forbid an employer paying an H–1B worker less than the required wage for nonproductive time, except in situations where the nonproductive status is due either to the worker's own initiative or to circumstances rendering the worker unable to work. The Department's enforcement experience has demonstrated that some employers bring H–1B workers into this country and then, for a variety of reasons, ''bench'' the workers in non-productive status and fail to pay them the wages attested on the LCA. Most frequently, such ''benching'' occurs where the employer lacks work to assign to the H–1B worker, or the worker is engaged in training or development activities (such as orientation in the employer's operations or studying for a licensing exam). It is entirely appropriate—as Congress recognized in the ACWIA enactment—for an employer to be prohibited from evading its wage obligations to such workers, who are under the employer's control and entitled to the LCA-attested wages. The ACWIA provisions recognize, however, that the employer should not be liable to pay wages for the worker's time which is nonproductive for reasons unattributable to the employer, such as the worker's hospitalization or requested leave-of-absence (consistent with the conditions related to the H–1B worker's maintenance of legal status in the U.S.).

There is no authorization for a reduction in the prescribed wage rate for any H–1B worker who is in nonproductive status due to employment-related conditions such as training, lack of assigned work, lack of a license, 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. Instead, the H–1B program's purpose is to enable employers to employ fully-qualified nonimmigrants for whom employment opportunities currently exist. When the H–1B worker is ''benched'' and not being paid his/her required wages during nonproductive time, the worker is not permitted to be employed by any other employer (indeed, such employment would expose both the worker and the other employer to INS sanctions). The H–1B worker who is ''benched'' is without any legal means of support in this country. Thus, an H–1B worker affected by a temporary reduction in force or a temporary shut-down of the employer's operations could not accept any other employment (except with an LCA-certified employer who files a petition for the worker, or with another employer able to provide some other adjustment of the nonimmigrant's status under the INA). In contrast, U.S. workers in a reduction in force or temporary shut-down would be able to seek employment elsewhere and, in addition, could be eligible for Federal programs such as food stamps, Aid to Families with Dependent Children, and other similar benefits not available to the H–1B nonimmigrants. (*See, e.g.,* 7 CFR 273.4; 45 CFR 233.50) Where an employer does not have sufficient work for the H–1B worker to make the payment of his/her required wages feasible or advantageous for the employer, such employer may, at any time, terminate the employment of the H–1B worker, notify the INS, pay for the worker's return to his/her country of origin as required by Section 214(c)(5) of the INA and INS regulations at 8 CFR 214.2(h)(4)(iii)(E) (1995), and no longer be subject to the H–1B program's required wage.

In all particulars, the ACWIA provision is a statutory enactment of the Department's current regulation, the enforcement of which (along with some other provisions) was enjoined by a district court on Administrative Procedure Act procedural grounds (*National Association of Manufacturers* v *Reich*, No. 95–0715, D.D.C. July 22, 1996). The Department has previously published this regulatory provision for notice and comment (60 FR 55339, Oct. 31, 1995), and is now republishing it for further comments. The Department encourages commenters to review the previous Final Rule and Notice of Proposed Rulemaking (60 FR 4028 and 60 FR 55339) in making their submissions. (*See* item O, below.)

The Department proposes to modify the existing regulation, to implement the ACWIA provision and to require that the employer pay the H–1B worker's wages when the worker is in nonproductive status due to employment-related reasons such as training or lack of assigned work. The regulation does not require payment of such wages where the nonproductive status is due to reasons unrelated to employment (such as the worker's voluntary request and convenience or non-work-related circumstances rendering him/her unable to work), unless such payment is required by INS as a condition of the H–1B workers' continued maintenance of lawful status in the United States, or is required by some other statute, such as the Family and Medical Leave Act. Thus, the required wage need not be paid to the worker who—on his/her own initiative—requests ''time off'' to conduct research on matters unconnected to his/her employment, or requests a delay in his/her first day of work in order to have an opportunity to tour the U.S. before undertaking duties of employment. However, the employer would not be relieved of the wage obligation to H–1B worker(s) for any required leave of absence, even if such leave of absence includes U.S. workers.

I. What Special Rule Does the ACWIA Provide for Academic Salaries?

The ACWIA provision on ''benching'' has a special rule permitting ''a school or other education institution'' to apply an established salary practice which might result in an H–1B worker being in an ostensibly ''unpaid'' status for some part of a calendar year. This provision specifies that the institution is permitted to disburse an annual salary over fewer than 12 months if two conditions are met:

- the H–1B worker agrees to the compressed salary payments prior to commencing employment, and
- the salary practice does not otherwise cause any violation of the H–1B worker's authorization to remain in the U.S.

The Department understands this provision to be directed to the common practice by which colleges, universities, and other educational institutions disburse faculty salaries over a nine-or ten-month period, with no salary payments during the summer or some other period during which the faculty member may be away from the institution, which INS recognizes.

The Department is proposing regulatory language to implement this ACWIA provision, and seeks comments on the proposal and any related matters.

J. What Actions or Circumstances Would be Prohibited as a ''Penalty'' on an H–1B Nonimmigrant Leaving an Employer's Employment?

The ACWIA prohibits an employer from ''requir[ing] an H–1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.'' The Department is authorized to ''determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.'' This provision embodies well-established principles in employment contract law. Under those principles, Congress sought to assure that the application of State law was determinative (rather than the Secretary's independent interpretation of what constitutes ''liquidated damages'' under State law) so that non-punitive payments, serving to compensate an employer for matters such as the loss of proprietary information, would be permissible but that punitive payments would not.

The Department proposes a regulation that would apprise employers and H–1B workers that an employer's ability to enforce ''agreed damage'' provisions in a contract between the parties is limited. The proposed rule would require employers to obtain a State court judgment as a condition for seeking to enforce such provisions (*i.e.*, an employer may not obtain such recovery from the worker without a State court judgment). In the Secretary's view, this best effects the statutory prohibition against the enforcement of penalties by leaving to State courts the resolution of what may be difficult legal questions. In particular cases, for example, it will be necessary to determine the applicable State law to apply, requiring consideration of, among other factors: where the agreement was entered into, and, if entered into in another country, whether that Nation's laws get factored into the analysis; whether the parties have agreed that the contract will be administered in accordance with the laws of a particular State (and, if so, whether it is appropriate to defer to their choice); where the employee was located at the time of the termination; and where the employer seeks to enforce the provision. The regulation would not set out particular guidelines, since it would not be feasible or appropriate to digest the law of all the States in this rule.

In proposing this approach, the Department considered the alternative of establishing a procedure by which the Department would determine whether a particular employment agreement provides for acceptable ''liquidated damages.'' In the Department's view, the State courts are much better versed than a Federal administrative forum to answer the various legal questions posed by any agreement between an employer and an H–1B worker, and to conclusively determine whether a particular provision runs afoul of State law. The Department has no particular expertise in interpreting State law, nor in discerning from the existing State decisional and statutory law (which may not be easily analogized to the H–1B context) the principles that a State court would apply in the particular context of a dispute between an employer and an H–1B worker.

The Department also intends to make it clear that since the ACWIA does not permit employers to accept reimbursement from an H–1B worker of the additional $500 fee imposed on H–1B employers (see section K, below), in no event may the employer collect the fee under the guise of liquidated damages. The Department is also concerned about attempts by employers to collect liquidated damages where their violations of the INA, this program, or other employment law may have caused an H–1B worker to cease employment. The Department anticipates that State courts will often recognize that under these circumstances the claimed payment would constitute a penalty rather than liquidated damages, or that the payment otherwise would be unenforceable. The Department seeks comments as to whether guidelines on this issue would be appropriate and authorized by the statute.

The Department seeks comments on its regulatory proposal and on any related matters.

K. What Standards Apply to Determine if an Employer Received a Prohibited Kickback of the Additional $500 Filing Petition fee From an H–1B Worker?

The ACWIA prohibits an employer from ''requir[ing] an alien who is the subject of a [visa] petition . . . for which a fee is imposed under section 214(c)(9), to reimburse, or otherwise compensate, the employer for part or all of the cost of such fee. It is a violation for such an employer otherwise to accept such reimbursement or compensation from such an alien.'' The referenced filing fee is the additional $500 filing fee enacted by the ACWIA, which is applicable to H–1B petitions filed before October 1, 2001. The effect of this ACWIA provision is to make the employer solely and entirely responsible for the additional $500 filing fee; the H–1B worker is not in any manner to pay or absorb the cost of any of the fee. The Department takes the position that the employee is not to be forced, encouraged, or permitted to rebate any part of the fee to the employer—directly or indirectly, *e.g.*, through an intermediary such as an attorney, relative or co-worker.

The Department proposes a regulatory provision making this requirement clear, and seeks comments on this proposal and any related matters.

L. What Penalties and Remedies Apply if the Employer Imposes an Impermissible Penalty or Receives an Impermissible Rebate?

The ACWIA enforcement provision on penalties and kickbacks is self-contained in that it provides its own sanctions authority. The Department may impose a civil monetary penalty of $1,000 for each violation (willful or non-willful) and, in addition, may order the employer to reimburse the worker (or the Treasury, if the worker cannot be located) for any such payment. The provision does not authorize debarment for these penalty and kickback violations. The Department seeks comments on its regulatory language implementing this ACWIA provision, and on any related matters.

M. How did the ACWIA Change DOL's Enforcement of the H–1B Provisions?

The ACWIA adds two new specific avenues for conducting investigations, explicitly protects employees who seek to exercise their rights against employer retaliation, and enhances the monetary and debarment sanctions against employers who willfully violate the requirements of this part. The Department proposes to modify Subpart I of the current regulations to reflect these new provisions, integrating them into the existing regulatory scheme. The Department requests comments on each of the enforcement-related issues identified below and on any other related matters, including but not limited to the Department's receipt of allegations of employer violations, the investigation and adjudication or other resolution of such allegations, and the extent of the Department's authority to remedy violations.

1. What Changes has the ACWIA Made in the DOL's Enforcement Based on Complaints From ''Aggrieved Parties''?

The ACWIA adds to the Department's authority to investigate ''aggrieved party'' complaints, by (1) specifically authorizing the Department to conduct ''random'' investigations of employers which have been found to have willfully violated their obligations under the H–1B program, and (2) establishing a specific protocol for investigations of possible violations based on information from sources other than aggrieved parties.

2. What Procedure Does the ACWIA Provide for Random Investigations?

The ACWIA authorizes special Departmental scrutiny of any employer which has been found by the Secretary, after ACWIA's enactment on October 21, 1998, to have committed a willful failure to meet an LCA condition or a willful misrepresentation. The same special scrutiny is authorized where an employer is found by the Attorney General to have willfully failed to meet its obligation to offer a job to an ''equally or better qualified'' U.S. worker. ''Random'' investigations of such an employer may be conducted for a period of up to five years, beginning on the date of the finding of the willful violation.

The Department proposes a regulatory provision which will interpret the ''finding'' of willful violation—which triggers such special scrutiny—to be the agency's final action concerning the violation (*e.g.*, the Secretary's decision after opportunity for a hearing; settlement agreement between the Department and the employer; or the Attorney General's decision after an arbitration proceeding). This interpretation comports with the Department's current regulation concerning the debarment notice which is sent to the Attorney General after the completion of the DOL hearing and review process. 20 CFR 655.855(a); 59 FR 65657 (Preamble to Final Rule). The Department seeks comments as to whether it should instead use an earlier date, such as the Wage and Hour Administrator's investigation finding or the ALJ's finding.

3. What Procedure Does the ACWIA Provide for Investigations Arising From Sources Other Than Aggrieved Parties?

The ACWIA provides for the investigation of possible violations which come to the Secretary's attention based on information from sources other than aggrieved parties. Under this ACWIA provision (which will sunset on September 30, 2001), the Department will establish procedures for the receipt and recording of such information, notification where appropriate to employers regarding possible violations, and certification by the Secretary for an investigation where there is reasonable cause to infer the possibility of such violations and other statutory conditions are satisfied. The focus of such investigations will be on whether an employer has willfully failed to meet its statutory obligations, has engaged in a pattern or practice of such failure, or where its failure is ''substantial'' and affects multiple employees.

The ACWIA specifies that the allegations must be put in writing, either by the ''source'' or by a DOL employee on behalf of the source, ''[o]n a form developed and provided by the Secretary . . .''. The Department is developing this form, which like other DOL forms, will go through the normal Office of Management and Budget clearance process. When cleared, the form will be publicly available from Departmental offices and other sources.

The Department proposes a revision of Subpart I of the regulations to recapitulate the new investigative protocol (along with the ''random'' investigation process), so as to provide an integrated procedure for enforcement activities, which would include receiving and processing allegations of and information pertaining to violations of H–1B requirements, initiating and conducting investigations, providing hearings and notifications, and imposing appropriate penalties and remedies.

4. What Protections are Provided to ''Whistleblowers'' by the ACWIA?

The ACWIA provides explicit protection for employees who exercise their H–1B rights by complaining about a violation of the Act or cooperating with an investigation. An employer may not ''intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against [such] employee.'' For purposes of this protection, ''employee'' is broadly defined to include former employees and applicants for employment. Like most whistleblower statutes, the ACWIA provision protects ''internal'' complaints—to the employer or any other person. The ACWIA provision is, in essence, a statutory enactment of the Department's long-existing whistleblower regulation for the H–1B program.

To facilitate whistleblower protection by providing special assurances to nonimmigrants who might lodge complaints and be subject to retaliation from employers, the ACWIA directs the Department and the Attorney General to devise a process to enable such a person to remain in the U.S. and seek other employment for a period not to exceed the maximum length of time authorized for an employee in the H–1B classification (provided that the person is ''otherwise eligible'' to remain and be employed in this country). Congress intends that this process would be expeditious and easy to use. (See S12752, Oct. 21, 1998; remarks of Sen. Abraham) The Department and the INS are working in close cooperation to develop this authorization procedure.

5. What Changes Does the ACWIA Make in Enforcement Remedies and Penalties?

Before the ACWIA's enactment, the H–1B provisions of the INA provided one level of civil money penalty (CMP) (''up to $1,000 per violation'') and one level of debarment from the sponsorship of aliens for employment (''at least one year''). The ACWIA establishes a three-tier scheme for sanctions and remedies, depending upon the nature and severity of the violations. In each of the three tiers, as in the previous statutory provision, the Department is authorized to impose ''such . . . administrative remedies as the Secretary determines to be appropriate.'' The three tiers are:

- $1,000-per-violation maximum CMP, plus a one-year minimum debarment, for a failure to meet obligations pertaining to strike/lockout or non-displacement of U.S. workers; a substantial failure pertaining to notification, LCA specificity, or recruitment of U.S. workers; or a

misrepresentation of material fact on the LCA.

- $5,000-per-violation maximum CMP, plus a two-year minimum debarment, for a willful violation of any attestation element, a willful misrepresentation of a material fact on the LCA; or retaliation against a whistleblower.
- $35,000-per-violation maximum CMP, plus a three-year minimum debarment, for a willful violation of an attestation element or a willful misrepresentation of a material fact on the LCA which involves the displacement of a U.S. worker.

The ''appropriate administrative remedies'' authorized in all of these ACWIA provisions would, in the Department's view, include the imposition of curative actions such as providing notice to workers and affording ''make-whole'' relief for displaced workers, whistleblowers, or H–1B workers who failed to receive proper wages, benefits or eligibility for benefits.

The above-described penalty provisions do not apply to violations of the ACWIA prohibitions on penalizing an H–1B worker for early cessation of employment or kickback by the H–1B worker of the additional $500 filing fee. As discussed above (see item l), these violations are subject to separate penalties: $1,000 CMP for each violation, and restitution of any penalty or kickback to the H–1B worker (or to the Treasury, if the worker cannot be located).

N. What Modification to Part 656 Does the ACWIA Provide for the Determination of the Prevailing Wage for Employees of ''Institutions of Higher Education,'' ''Related or Affiliated Nonprofit Entities,'' ''Nonprofit Research Organizations,'' or ''Governmental Research Organizations''?

The ACWIA requires that the computation of the prevailing wage for employees of institutions of higher education, nonprofit entities related to or affiliated with such institutions, nonprofit research organizations and Governmental research organizations should only take into account the wages paid by such institutions and organizations in the area of employment. This ACWIA directive affects both the H–1B program and the Permanent Labor Certification program, since both programs use the prevailing wage computation procedures set out in the Permanent program regulation at 20 CFR 656.40.

On March 20, 1998, the Department published a Final Rule amending its Permanent Labor Certification regulation to change the effects of the *en banc* decision of the Board of Alien Labor Certification Appeals in *Hathaway Children's Services* (9–INA–386, February 4, 1994), which required prevailing wages to be calculated by using wage data obtained by surveying across industries in the occupation in the area of intended employment. The Final Rule, in effect, allows prevailing wage determinations made for researchers employed by colleges and universities, Federally Funded Research and Development Centers (FFRDC) operated by colleges and universities, and certain Federal research agencies to be made by using wage data collected only from those entities. The Department stated in the Preamble to this Final Rule that the amendment to the regulation also changed the way prevailing wages are determined for those entities filing H–1B labor condition applications on behalf of researchers, since the regulations governing the prevailing wage determinations for the Permanent program are followed by State Employment Security Agencies (SESAs) in determining prevailing wages for the H–1B program as well (*see* 54 FR 13756).

The ACWIA provision goes considerably beyond the regulatory amendments made by the Department, in that the ACWIA provisions extend to all nonprofit research organizations and Governmental research organizations. In addition, the ACWIA provisions extend not only to researchers, but to all occupations in which institutions of higher education, nonprofit entities related to or affiliated with such institutions, and nonprofit research organizations or Governmental research organizations may want to employ H–1B workers or aliens immigrating for the purpose of employment.

The Department is consulting with the INS on the definitional issues, since that agency is addressing similar issues with regard to the implementation of the additional $500.00 fee which the ACWIA required for petitions on behalf of H–1B nonimmigrants. The employers excluded from that fee are the same as the employers specified in the ACWIA provision concerning prevailing wage determinations. The Department worked with the INS in developing the following definitions contained in its Interim Final Rule published on November 30, 1998 (63 FR 65657)—

An institution of higher education, as defined in section 801(a) of the Higher Education Act of 1965;

An affiliated or related nonprofit entity. A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation, operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary;

A nonprofit research organization or Governmental research organization. A research organization that is either a nonprofit organization or entity that is primarily engaged in basic research and/or applied research, or a U.S. Government entity whose primary mission is the performance or promotion of basic and/or applied research. Basic research is research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services.

The INS Interim Final Rule also provides, in relevant part, that a nonprofit organization or entity is one that is qualified as a tax exempt organization under section 501(c)(3), (c)(4) or (c)(6) of the Internal Revenue Code of 1986 and has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

The Department seeks comments on the proper definitions of the entities to which the ACWIA prevailing wage provisions apply. The Department will share these comments with INS in the development of definitions to apply to both the INS and Departmental regulations.

In order to determine prevailing wages as required by the ACWIA, it will be necessary for the Department to determine the appropriate universe(s) to survey, and to determine the availability of relevant, reliable data. The Act treats the four types of organizations in two groups: educational institutions and related research organizations; other nonprofit research organizations and Governmental research organizations. However, the Act does not seem to require that prevailing wages must be

determined separately for those two groups, as distinguished from a universe consisting of all four groups, or surveys of the four types of organizations separately, or some other combination.

Furthermore, the Department has reason to believe that it may not be feasible to identify the different kinds of entities that might comprise educational institutions' related or affiliated nonprofit entities, or nonprofit research organizations. If those entitles cannot be identified, it may not be possible to properly define the universe that should be surveyed to determine the appropriate prevailing wages. One possible alternative the Department is exploring is the use of the prevailing wage data it currently collects in surveying institutions of higher education to determine prevailing wages for one universe consisting of institutions of higher education, affiliated or nonprofit research institutions, and nonprofit research organizations. Data currently being collected by the Office of Personnel Management may be able to be used to determine prevailing wages for Federal Governmental research organizations.

The Department seeks comments on the appropriate universes to use in determining prevailing wages for the entities (employers) mentioned in the ACWIA, methods to develop appropriate universe, and the feasibility and appropriateness of the Department's using data collected from institutions of higher education and Federal Governmental research organizations to determine prevailing wages.

O. What H–1B Regulatory Matters, in Addition to the ACWIA Provisions, are Addressed in This Notice of Proposed Rulemaking?

The Department is re-publishing for notice and comment some of the provisions of the Final Rule promulgated in December 1994 which were proposed for further comment on October 31, 1995, during the pendency of the *NAM* litigation. That litigation resulted in an injunction against the Department's enforcement of some of provisions on Administrative Procedure Act (APA) procedural grounds (*National Association of Manufacturers* v. *Reich*, No. 95–0715, D.D.C., July 22, 1996; *see* item H above).

As indicated in the discussion of the ACWIA provisions above, some portions of these regulations are affected by the enactment of the ACWIA (*e.g.*, ''benching'' or nonproductive time; posting of notice at worksites). For those ACWIA-affected provisions, the Department proposes modifications in the regulations and seeks comments on the new regulatory language. Other previously published provisions—not affected by ACWIA—are being re-proposed with some modifications based on a review of the comments received, as discussed below.

All comments received in response to that earlier Notice of Proposed Rulemaking will be fully considered along with comments received in response to this Proposed Rule. Commenters are urged to review the Notice of Proposed Rulemaking published on October 31, 1995 (60 FR 55339). The re-published provisions concern the following issues.

1. What Are the Opportunities and Guidelines for Short-term Placement of H–1B Workers at Worksite(s) Outside the Location(s) Listed on the LCA?

The most significant regulatory provision affected by the *NAM* decision is the ''short-term placement'' rule (20 CFR 655.735), which the Department was enjoined from enforcing on APA procedural grounds. This provision was published in the October 31, 1995, Proposed Rule. The Department now provides another opportunity for comments, on a slightly-modified version of the provision—allowing the employer to track its ''short-term'' placements at a location via a worker-by-worker count of days of employment in the area (rather than a worksite tally of cumulative workdays of all H–1B workers).

The short-term placement provision was promulgated in the Final Rule (published December 20, 1994; 59 FR 65646), based on comments and suggestions submitted in response to the October 6, 1993, Proposed Rule. This provision—permitting short-term placement of H–1B workers at worksites outside the area(s) of employment listed on the LCA—was intended to allow employers greater flexibility in deploying their H–1B workers in response to business needs and opportunities in new areas. While the Department recognized that employers could, in any instance, choose to file a new LCA for the new area of employment, the Department provided a mechanism by which an employer desiring to move quickly or contemplating a temporary operation in a new location could be accommodated under the program without the delay or obligations involved in filing a new LCA. Simply put, the regulation authorizes the employer to use H–1B worker(s) in a non-LCA location (*i.e.*, location not covered by an existing LCA) for a total of 90 workdays within a three-year period, without having to file a new LCA for that new location. Thus, the employer could use H–1B workers to respond immediately to an opportunity or a problem in a non-LCA location, without waiting to prepare and file an LCA for that location. If the situation were resolved within the regulation's ''short-term'' window (*i.e.*, if the H–1B worker(s) were no longer needed at the location), then a new LCA would never be required. But if the H–1B worker(s) would be needed in the new location for a longer period, then the employer would have ample time within which to prepare and file a new LCA while already using the H–1B worker(s) at the location. The regulation specified that the ''short-term'' 90-day period would be calculated by totaling all days of work by all H–1B workers in the area of employment (thus covering all worksites within that area), beginning with the first workday by any H–1B worker at any worksite in that area. The 90-day period is applied separately for each new area of employment (*e.g.*, 90 cumulative workdays for Los Angeles, 90 cumulative workdays for San Francisco).

The Department has carefully reviewed the comments received on the October 31, 1995, Proposed Rule and, in response to those comments, proposes to modify the regulation to count workdays on a per-worker basis. Thus, the limit of 90 cumulative workdays (*i.e.*, the end of the ''short-term placement'' period) would be reached when any H–1B worker works for 90 days at any worksite or combination of worksites in the new area of employment. As soon as one H–1B worker has worked more than 90 workdays within that area of employment, no more work could be performed by any H–1B worker at any worksite in that area unless and until the employer files and ETA has certified an LCA for the area. Therefore, the regulation, although based on a per-worker count of workdays, still applies to the employer's entire H–1B workforce and to all worksites in the new area of employment. For example, where an H–1B worker works 10 days at Worksite X in Dallas and 80 days at Worksite Y also in Dallas, the employer has exhausted its 90-day ''short-term placement'' period and is, therefore, required to file and have certified a new LCA for Dallas before any H–1B worker may work at any worksite in Dallas.

Under the proposed rule, as an alternative to filing an LCA for a new area of employment, an employer could place H–1B worker(s) at worksite(s) in the new area—without filing a new LCA (and thus without satisfying the notice and prevailing wage requirements for

such new area)—provided that the employer complies with all three of the following requirements:

- No H–1B worker(s) can work at any worksite(s) in the new (non-LCA-covered) area of employment beyond the cut off point of 90 cumulative workdays (unless the employer filed and ETA has certified an LCA for such new area);
- Each H–1B worker working in the new area is compensated at the required wage rate applicable under the employer's already-certified LCA for that worker's original or permanent work location plus travel-related expenses in the new area (with the Federal government per diem travel expense standards serving as the floor or minimum for such expenses); and
- No H–1B worker is placed at a worksite where there is a strike or lockout in the same occupational classification.

Of course, an employer could at any time avoid the short-term placement option simply by filing an LCA covering the new area of employment and complying with all the LCA requirements, including determination of the prevailing wage rate for that area and providing notice at worksites in that area. Once an LCA is filed and certified for the new area of employment, the LCA would define the employer's obligations and the short-term placement option would no longer apply in any manner to H–1B workers or worksites in that area. Thus, the employer would be required to pay at least the prevailing wage for that area of employment to all H–1B workers placed at worksites there. Any H–1B worker on temporary business in the new area—away from his/her permanent worksite located in some other area of employment—could continue to be paid at the required wage rate for his/her permanent location. While the employer would pay that worker's travel costs (including food and lodging) while away from his/her permanent work location, the Federal government per diem travel expense standards would not be applicable as a ''floor'' (as they would be for H–1B workers working in the area under the short-term placement option).

The short-term placement option would not apply when H–1B workers are sent to any new worksite(s) within an area covered by an already-certified LCA filed by the employer. Such new worksite(s) would be fully subject to the requirements of that existing LCA, including payment of at least the prevailing wage, providing notice at the new worksite, and providing a copy of the LCA to H–1B worker(s) placed at the worksite (unless he/she had already received a copy of the LCA).

a. When is the Short-term Placement Option Available?

This option would be available only when an employer wants to send its H–1B worker(s) (already in the U.S. under an LCA filed by the employer) to a new worksite which is in an area of employment for which the employer does not have an LCA in effect. The option would enable the employer to meet its business needs, by sending H–1B worker(s) to the new worksite(s) without waiting to complete the LCA and revised petition process. After the 90-workday limit is reached by any one H–1B worker, the short-term placement option would no longer be available for any workers; the employer would be required to have an LCA in effect for the new area and to be in full compliance with all the LCA requirements.

The short-term placement option would not apply in any of the following circumstances:

- The H–1B worker being sent to the new areas is initially coming into the U.S. from outside the country (*i.e.*, such a worker must be placed at a location covered by the LCA on which the H–1B petition is based);
- The H–1B worker is being relocated to a new worksite within the same area of employment for which the employer already has a valid LCA (*i.e.*, new worksite is covered by the same LCA as the previous worksite); or,
- The H–1B worker is being relocated from one area of employment to another, but the employer has valid LCAs covering both areas (*i.e.*, new worksite is covered by a different LCA than the LCA for the previous worksite).

The short-term placement option would be irrelevant in circumstances where the employer is relocating H–1B workers (who are already in the U.S.) among worksites in areas covered by valid LCAs. In these circumstances, the employer would be required to comply with the LCA applicable to the new worksite (whether that is the same LCA applicable to the area of the old worksite, or a different LCA applicable to the area of the new worksite). Employers generally would be free to relocate H–1B workers among worksites in areas of employment for which they have valid LCAs, provided that the employer complies with all LCA obligations for the area—the relocation of an H–1B worker would be prohibited if there were a strike/lockout involving the H–1B worker's occupation at the new worksite; a wage adjustment for the relocated worker might be required; new notice at the worksite would not be required (assuming notice was already provided at that worksite, either when the LCA was filed or when some other H–1B worker was sent there).

The short-term placement option also would be irrelevant in circumstances where the employer has an LCA in effect for an area of employment and wants to relocate or temporarily place H–1B worker(s) who would cause the LCA for that area to be ''overcrowded'' or ''overfilled'' with H–1B workers (*e.g.*, raising the number of H–1B workers in the area to 11 instead of the 10 stated on the certified LCA). The short-term placement option does not authorize an ''extra'' workforce of H–1B workers for temporary assignments in an area of employment covered by an LCA. The number of H–1B workers authorized for that employer in that area is determined by the employer's LCA (or combination of LCAs, if the employer has more than one LCA in effect for the area). Employers have inquired whether an H–1B worker can be relocated, even temporarily, to a worksite in an area of employment for which the employer has a valid LCA, if the relocation of that worker would raise the number of H–1B workers in that area to more than the number stated on the LCA. The short-term placement option cannot be invoked by the employer in such circumstances, because the employer has an LCA in effect for the area of employment and that LCA—applicable to all worksite in the area—is controlling. As a matter of enforcement discretion, the Department will look carefully at all the facts and circumstances surrounding situations in which H–1B workers are relocated among LCA-covered locations in a manner that results in more H–1B workers being employed in an area than are stated on the certified LCA(s) for that area. Absent other violations, in those circumstances that indicate good faith efforts by the employer to attempt to comply, the Department would not cite violations relating to the number of H–1B workers employed in an area, provided that the number employed does not significantly exceed the number shown on the LCA. In other circumstances, such as where there are other violations and/or the number of H–1B workers employed in an area significantly exceeds the number stated on the LCA(s), the employer may be cited for misrepresentation of a material fact or for a ''substantial failure'' to accurately state the information specified in the statute. In the situation identified above—an eleventh H–1B worker relocated to an area for which the LCA specifies ten H–1B workers—

the Department would not cite a violation, so long as there were no other violations and there were indications of the employer's good faith (such as taking timely steps to file an additional LCA and a revised petition).

b. What Are the Standards for Payment of the H–1B Worker's Travel Expenses Under the Short-Term Placement Option?

A component of the proposed short-term placement rule is a requirement that employers who wish to avail themselves of this option must pay travel-related expenses at a level at least equal to the rate prescribed for Federal Government employees on travel or temporary assignment, as set out in the General Services Administration (GSA) regulations 41 CFR Part 301–7 and Chapter 301, Appendix A. The Department believes that some uniform guidelines or benchmarks are necessary so that employers do not require H–1B workers to absorb some or all travel expenses themselves, or reimburse them at unreasonably low rates, while the workers are in travel status under the short-term placement option. Further, the Department is aware of no universally available source of information on per diem and travel expenses, other than the GSA regulations which are based on surveys of two-star hotels and comparable restaurants. Therefore, the Department proposes to continue to use the GSA regulations as the benchmark.

The Department believes that some clarification of the requirements is appropriate. The proposed rule clarifies that the H–1B worker's travel expenses (lodging, transportation, meals and incidentals) are to be paid for all days in travel status (wages would not be required for non-workdays). The proposed rule also clarifies the application of the GSA standards to lodging, transportation, meals and incidental expenses. For *lodging*, the regulation would be modified to require the employer to reimburse no more than the worker's *actual cost of lodging up to the GSA specified level* for the location in question, plus applicable taxes. Where the H–1B worker incurs no lodging cost, no payment to the worker for lodging would be required. The Department proposes that the employer may house its workers on travel in company-owned or company-leased accommodations and make no ''lodging'' payments to the workers, provided that such accommodations are reasonable and would be customarily used by its U.S. workers in a similar circumstance. The Department would consider the furnishing of or requirement to use overcrowded or otherwise unreasonable accommodations, as has sometimes been found to be the case, to be an unacceptable method of meeting the employer's obligation to cover the worker's lodging costs while on travel. If the employer provides a lodging allowance to the worker, such allowance would be required to cover the worker's actual expenses but need not be more than the GSA rate for the location in question, plus applicable taxes. For *transportation*, the employer would be required to pay the *actual cost of transportation expenses*, except that where the worker uses a privately-owned vehicle, the employer must cover the cost to operate the vehicle at the per-mile rate set out in 41 CFR 301–4, plus out-of-pocket expenses such as tolls and parking fees. For *meals and incidental expenses*, the employer would be required to pay the H–1B worker at no less than the GSA *per diem* rate for the location. Back wages would be assessed based on the GSA rates where the employer fails to document actual costs or where the employer's payments do not satisfy the GSA standards.

2. What Are an Employer's Wage Obligations for an H–1B Worker's ''Nonproductive Time''?

As described above (*see* item H), the Department is publishing for further notice and comment the provision of the December 20, 1994 Final Rule concerning an employer's obligation to pay the H–1B worker's required wages for certain ''nonproductive'' time, which was enjoined by the district court in *NAM* for procedural reasons. In addition, the Department is proposing a modification of this regulation to implement the ACWIA provision which adds some flexibility for the employer with regard to an H–1B worker ''who has not yet entered into employment.''

3. What Are the Guidelines for Determining and Documenting the Employer's ''Actual Wage''?

The Department is publishing for further notice and comment Appendix A to Subpart H—Guidance for Determination of the ''Actual Wage,'' certain provisions of which were enjoined by the court in the *NAM* litigation for procedural reasons. This provision was also published in the October 31, 1995, Proposed Rule. As the Preamble to that proposal stated, the contents of Appendix A—which consists of examples and guidance on the Department's enforcement policy regarding the computation and documentation of the actual wage—had first appeared, in slightly different format, in the Preamble to the January 13, 1992, Interim Final Rule.

Under Appendix A as proposed, the employer would not be required to create or to document an elaborate ''step'' or ''grid'' type pay system, such as that used by Federal agencies for government employees; no rigid or complex system is mandated by the regulations. The employer's actual wage system may take into consideration any objective, business-related factors relating to experience, qualifications, education, specific job responsibilities and functions, specialized knowledge and other legitimate business factors, including documented job performance. Whatever factors are used in the employer's actual wage system are to be applied to H–1B nonimmigrant workers in the same, nondiscriminatory manner that they are applied to U.S. workers in the occupational classification. The employer's public access documentation must include a description of its actual wage system. The description may consist of a summary document which identifies the business-related factors that are considered and which describes the manner in which they are implemented (*e.g.*, stating the wage/salary range for the occupation in the employer's workforce and identifying the pay differentials assigned to factors such as holding an advanced degree or performing supervisory duties). The employer's description of its actual wage system should be sufficient to enable a third party—such as an employee looking at the public disclosure file—to understand how the system would apply to a particular worker and to derive a reasonably accurate understanding of that worker's wage. Wage rates for each H–1B worker must be in the public access file. However, computation of an H–1B worker's particular wage need not appear in the public access file; that information must be available in the worker's personnel file maintained by the employer. For clarity, the Department purposes to modify Appendix A to include job performance among the legitimate business factors which may be taken into consideration in determining the actual wage.

4. What Records Must the Employer Keep, Concerning Employees' Hours Worked?

The Department seeks further comments on section § 655.731(b)(1) of the regulation, which requires the employer to retain records for ''all employees in the specific employment in question'' (*i.e.*, same occupation as the H–1B worker). This provision, which has been enjoined by the *NAM*

court for procedural reasons, revised former § 655.730(e)(2)(i), which required the employer to maintain documentation for ''all other individuals with experience and qualifications similar to the H–1B nonimmigrant for the specific employment in question.'' For virtually all employers, this change in the regulation had no impact on recordkeeping because most records required under the H–1B program would be the same as those already required under the Fair Labor Standards Act (''FLSA''). However, for employers with salaried non-H–1B workers who satisfy the FLSA exemption for ''bona fide executive, administrative, or professional'' employees (29 CFR Part 541), the change resulted in a requirement not already imposed under the FLSA: to keep records of hours worked each day and each week for FLSA-exempt non-H–1B workers in the ''specific employment in question'' (regardless of their experience and qualifications) *if* the prevailing or actual wage is expressed as an hourly wage.

On September 26, 1995, the Department issued a Notice of Enforcement Position (60 FR 49505) stating that, until further rulemaking, the Department would enforce § 655.731(b)(1) of the Final Rule as stated, except that, with respect to any additional workers for whom that Rule extended recordkeeping requirements beyond those specified in the Interim Final Rule, the employer would need to keep only those records which are required by the FLSA regulations at 29 CFR Part 516.

In the October 31, 1995, Proposed Rule, the Department proposed to amend § 655.731(b)(1) to make it consistent with FLSA recordkeeping requirements. Under the proposal, employers would be required to retain records of hours worked for non-H–1B workers in the specific employment in question (whether or not the non-H–1B workers have similar experience and qualifications) only if the non-H–1B workers are paid on an hourly basis or if the actual wage is expressed as an hourly rate. Since the first element of the FLSA Part 541 exemption test is that the employees be paid ''on a salary basis'' (*i.e.*, not paid hourly wages (29 CFR 541.118)), the effect of this proposal would be that records of hours worked would be required for U.S. workers only if the worker is either not paid on a salary basis, or if the actual wage is stated as an hourly wage. For H–1B workers, such records must also be kept if the prevailing wage is expressed as an hourly rate.

5. What are the Requirements for Posting of ''Hard Copy'' Notices at Worksite(s) Where H–1B Workers are Placed?

The Department proposes for comment a revision of §§ 655.734(a)(1)(ii)(C) and (D) of the regulation, which it previously republished for notice and comment in the October 31, 1995, Proposed Rule. The Department proposes that this provision be modified to implement the ACWIA provision concerning electronic notification (*see* item F), but it would be unchanged with regard to ''hard copy'' notices. Subparagraph (C) requires employers to post notice at worksites on or within 30 days before the date the LCA is filed. Subparagraph (D) requires that, where the employer places an H–1B nonimmigrant at a worksite which is not contemplated at the time of filing the LCA but is within the area of intended employment listed on the LCA, the employer is to post notice at such worksite on or before the date any H–1B nonimmigrant begins work there. Under both subparagraphs, such notice is to remain posted for ten days. The regulation provides that worksite notice may be accomplished either by posting hard copies of the notice or by providing electronic notice. Where the H–1B worker(s) will be employed at the worksite of another employer, the H–1B employer is required to provide notice to the affected workers at that worksite, and may make arrangements with the other employer to accomplish the notice (*e.g.*, have the other employer ''post'' the electronic notice on its intranet or employee newsletter) .

It should be noted that if a location does not constitute a ''worksite,'' the employer is not required to post notice there. (*See* proposed Appendix B, below, regarding clarification of ''place of employment.'') The requirement to post notice at the ''place of employment'' is statutory. 8 U.S.C. 1182(n)(1)(C). The Department's definition of ''place of employment'' focuses on the ''worksite'' or place where the work is actually performed. This definition achieves the intent of the law's notice requirement to inform affected employees that an LCA has been filed and that nonimmigrants may work at that place of employment. Without such information, potentially affected employees would not be aware of employer obligations under and compliance with the LCA conditions, and would be unlikely to be able to file complaints where the situation would warrant it. As explained in proposed Appendix B, the Department has reasonably interpreted ''place of employment'' as not including locations where the H–1B worker's presence is short-sterm and transitory due to the nature of his/her job (*e.g.*, computer ''troubleshooter''; sales representative; trial witness) or due to the developmental nature of his/her activity (*e.g.*, management seminar; formal training seminar).

6. What Are the Time Periods or ''Windows'' Within Which Employers May File LCAs?

The Department seeks further comment on two current regulatory provisions which restrict the time periods or ''window'' within which LCAs may be filed—no earlier than 180 days (6 months) prior to the starting date of the employment period identified on the LCA, and no later than 90 days (3 months) from the date of any State Employment Security Agency (SESA) prevailing wage determination used in the LCA. Both of these provisions are reproposed without modification.

The October 31, 1995, Proposed Rule republished for notice and comment § 655.730(b), which requires that the employer file the LCA no earlier than 6 months before the beginning date of the specified period of employment. This provision addressed the situation of some employers who were filing LCAs for periods of employment months in the future. The Department believes that, because the prevailing wage and notice obligations are based upon actions taken and conditions which exist at the time the LCA is filed, such premature applications can defeat the intent of these statutory elements. In one case, for example, an employer filed an LCA for a period of employment two years from the time of filing. Such an employer could use a prevailing wage determination from an independent authoritative source based on wage information which is up to four years old. By the time the nonimmigrants actually enter the U.S. two years after the LCA date, the prevailing wage information would be as much as six years old. In addition, this employer would post notice for ten days at the time of filing the LCA, and then import the nonimmigrants two years later. By that time, U.S. workers who might otherwise file complaints regarding violations of the LCA would be unaware of essential information listed on the posted LCA, such as the number of nonimmigrants, rate(s) of pay, job title(s), and the location where documentation is kept.

The October 31, 1995, Proposed Rule also republished for notice and comment current

§ 655.731(a)(2)(iii)(A)(*1*), which requires the employer to file an LCA relying upon a SESA prevailing wage determination within 90 days of the SESA's issuance of the determination. The 90-day validity period of a SESA prevailing wage determination is designed to prevent the employer's use of aged or stale wage determinations, which can adversely affect the wages of U.S. workers. In the Department's view, it is unreasonable to permit employers to use SESA determinations which are more than three months old since those determinations may well be based on wage information that is already years old, and they may be relied upon by the employer for the entire 3-year validity period of the LCA (periodic updates of the prevailing wage not being required under the Final Rule). An employer's use of SESA prevailing wage determinations more than three months old would be inconsistent with the statutory requirement that employers pay at least the wage which is prevailing at the time the LCA is filed.

It should be noted that employers are not required to use SESA determinations in filing LCAs. Employers may, instead, determine the prevailing wage from other sources (*i.e.*, independent authoritative sources or other legitimate sources of wage information). Those sources are not subject to a 90-day validity period, but must satisfy the appropriate regulatory definitions or description.

7. How May an Employer Challenge a SESA-Issued Prevailing Wage Determination?

The Department seeks further comment on §§ 655.731(a)(2)(iii)(A)(*1*), 655.731(d)(2), and 655.840(c) regarding the use of the Employment Service (''ES'') complaint system to challenge any SESA prevailing wage determinations. These provisions were republished for notice and comment in the October 31, 1995, Proposed Rule.

Irrespective of whether the SESA wage determination is obtained by the employer prior to filing the LCA or by the Wage and Hour Division in an enforcement proceeding, these provisions (taken together) require employers to assert any challenge to the SESA prevailing wage determination under the ES complaint system, rather than in an enforcement proceeding before the Office of Administrative Law Judges. In designing the program, the Department had envisioned that the ES complaint process would be used for all challenges of SESA prevailing wage determinations. However, after substantial enforcement litigation experience, the Department found that some employers were instead attempting to contest these wage determinations through the enforcement hearing provided under § 655.835. That hearing process was not intended to handle these prevailing wage challenges, and the proposed regulatory provisions (which are currently in effect) achieve the Department's original intent.

P. What Additional Interpretative Regulations is the Department Proposing?

During the course of the Department's administration and enforcement of the H–1B program, a number of issues have been raised by employers and interest groups regarding the interpretation and application of the existing regulations. In order to provide more complete guidance for these affected parties—and thereby facilitate compliance, administration, and enforcement under the H–1B program—the Department is publishing for comment a proposed Appendix B for Part H of the regulation. The interpretations presented in Appendix B are matters which have been discussed with employers and interest groups in numerous outreach meetings over the last several years. The Department considers it appropriate to include these provisions in the regulations, either as an appendix or in the regulatory text, and therefore is providing a more formal process for interested parties to express their views concerning these interpretations.

The Department seeks comments on the matters addressed in Appendix B (described below).

1. What Constitutes an H–1B Worker's ''Worksite'' or ''Place of Employment'' for Purposes of the Employer's Obligations Under the Program?

The H–1B program's attestation requirements are largely focused on the H–1B worker's ''place of employment'' or ''worksite.'' That location—''place'' or ''site''—determines the appropriate prevailing wage; that location is where the employer must provide notice to workers concerning the employment of H–1B nonimmigrants; and the strike/lockout prohibition is applicable to that location. Thus, it is essential that employers be able to determine whether a particular location constitutes a ''worksite'' (triggering the program's requirements) or is, instead, a non-worksite at which the H–1B worker may perform certain of his/her job duties for a short period of time. Appendix B explains that ''worksite'' ordinarily encompasses any location at which the H–1B worker performs his/her job duties, but does not include a location at which the worker is engaged in employee development activity (*e.g.*, receiving formal training) or at which the worker's presence is due to the nature of his/her duties and is of short duration (*e.g.*, making a sales call on a customer; testifying at a court hearing; conducting research at a library).

2. Under What Circumstances May an H–1B Worker ''Rove'' or ''Float'' From His/Her ''Home Base'' Worksite?

The Department recognizes that some employers—due to the nature of their businesses—need to move their H–1B workers from place to place in order to meet the needs of clients or to respond to new business opportunities. This practice is described as having H–1B workers ''rove'' or ''float'' from their ''home base'' locations. Because the H–1B program's requirements focus on the H–1B worker's ''worksite'' (*see* item O.5), it is important that employers be able to determine the circumstances under which an H–1B worker may legally be dispatched from his/her ''home base'' worksite to other location(s) to perform job duties. In Appendix B, the Department explains that every H–1B worker is, by law, covered by an LCA and that, consequently, there is no means by which an H–1B worker may ''float'' in the U.S. economy without being subject to the wage, working conditions, and other requirements of an LCA. However, as the Appendix further explains, an H–1B worker may legally be dispatched from his/her home base location in any of three circumstances—

- H–1B worker is dispatched to a ''non-worksite'' location (*see* item O.5). The worker would still be covered by his/her home base LCA.
- H–1B worker is dispatched to a worksite that is covered by an LCA (either the LCA for the home base, or a different LCA if the new location is outside the home base LCA's area). The worker would be covered by the LCA applicable to the new worksite.
- H–1B worker is dispatched for a short-term placement under the regulation authorizing up to 90 workdays of such placement in an area not covered by an LCA (*see* item O.1, above). The worker would be covered by his/her home base LCA.

3. What H–1B Related Fees and Costs Are Considered to Be an Employer's Business Expenses?

The Department believes that where the employer is required by law to perform certain functions and no other party can legally perform those functions, all expenses connected with such functions are the employer's

business expenses, which must be borne by the employer without being imposed on the H–1B worker in any manner. As explained in Appendix B, the application of this analysis to the H–1B program leads, necessarily, to the conclusion that all fees and costs connected with the filing of the LCA and the H–1B petition (*e.g.*, prevailing wage survey preparation; attorney fees; INS fees) are to be borne by the employer since—by the express terms of the statute—the employer must file both the LCA and the petition, and the H–1B worker is not permitted to perform either of those functions. As further explained in Appendix B, the Department recognizes that expenses connected to the H–1B worker's own function of filing for and obtaining the visa itself (*e.g.*, translations of academic records) could appropriately be borne by the H–1B worker, since such costs would not necessarily be the employer's business expenses. This interpretation is fully consistent with the ACWIA provision relating to the new $500 petition filing fee (*see* item K).

4. When Is the Service Contract Act Wage Rate Required to Be Applied as the ''Prevailing Wage''?

The regulation provides that, if there is an SCA wage determination for the occupational classification in the area of employment for which an employer is filing an LCA, that SCA wage determination is considered by the Department to constitute the prevailing wage for that occupation in that area. Appendix B explains that, because the SCA rates cover the occupation in the area, these rates are applicable to the LCA, without regard to whether individual H–1B worker(s) eventually employed under the LCA may have qualifications or job descriptions that could satisfy an exemption from the rate if he/she were working on an SCA contract. Further, Appendix B explains that because the SCA wage determination for occupations in the computer industry are capped by statute (SCA, incorporating FLSA) at $27.63, even where the prevailing wage is higher, the Department has instructed the SESA not to issue a prevailing wage from the SCA wage determination where that SCA wage is stated as $27.63.

5. How Are the ''PMSA'' and ''CMSA'' Concepts Applied?

Appendix B explains that in computing prevailing wages for an ''area of intended employment,'' the Department will consider all locations within either a metropolitan statistical area (MSA) or a primary metropolitan statistical area (PMSA) to constitute ''normal commuting distance'' and, thus, subject to the same prevailing wage rates. Further, Appendix B explains that a consolidated metropolitan statistical area (CMSA) will not be used in this manner in determining the prevailing wage rates (*i.e.*, all locations within a CMSA will not necessarily be deemed to be within normal commuting distance). The Department has determined, based on its operational experience, that CMSAs can be too geographically broad to be used in this manner. As explained in Appendix B, the Department has not adopted any rigid measure of distance as a ''normal commuting area'' (*e.g.*, 20, 30, 50 miles) and, therefore, locations that are outside any ''statistical area,'' locations near the boundaries of MSAs and PMSAs, and locations within or near the boundaries of CMSAs may be within normal commuting distance, depending on the factual circumstances.

6. How Does the ''Weighted Average'' Apply in the Determination of the Prevailing Wage?

Appendix B explains that, due to the inadvertent omission of the word ''weighted'' from one provision in the regulation, there has been a suggestion of confusion for an employer which uses an ''independent authoritative source'' to determine the local prevailing wage to be used on an LCA. When read together, the regulations on the computation of the prevailing wage require the use of the ''weighted average'' statistical methodology. In Appendix B, the Department describes this methodology and clearly states how and when it is to be used.

7. What is the Effect of a New LCA on the Employer's Prevailing Wage Obligation Under a Pre-Existing LCA?

Employers who, over a period of time, file several LCAs for the same occupation in the same area of employment—so as to increase their staff of H–1B workers—may well find that these LCAs reflect a changing prevailing wage for that occupation and area. There is a possibility for confusion in such situations, concerning the prevailing wage which is required for the various H–1B workers. As explained in Appendix B, the Department considers the employer's prevailing wage obligation to any individual H–1B worker to be prescribed by the LCA which supports the H–1B petition for that worker. Thus, the employer is required to pay that worker at least the amount of that prevailing wage; a different prevailing wage appearing on a different LCA would not be applicable. The employer is not required to ''adjust'' the prevailing wage amounts for the entire H–1B workforce, based on a new prevailing wage that appears on a new (later) LCA. However, as further explained in Appendix B, the employer would be required to make ''adjustments'' for all H–1B workers in accordance with the employer's actual wage system (*e.g.*, merit increases; cost of living increases), since all H–1B workers are covered by the actual wage system (regardless of any difference among prevailing wage rates under various LCAs).

IV. Summary

The Department welcomes comments on any issues addressed in the proposed regulations—including the proposals caused by the enactment of the ACWIA; the reproposal of provisions published for comment in October, 1995; and the proposed interpretative provisions in Appendix B—as well as on any other issues that commenters believe need to be addressed.

V. Executive Order 12866

This proposed rule is being treated as a ''significant regulatory action'' within the meaning of Executive Order 12866, because of its importance to the public and the Administration's priorities. Therefore, the Office of Management and Budget has reviewed the proposed rule. However, because this rule is not ''economically significant'' as defined in section 3(f)(1) of E.O. 12866, it does not require a full economic impact analysis under section 6(a)(3)(C) of the Order.

The H–1B visa program is a voluntary program that allows employers to temporarily secure and employ nonimmigrants admitted under H–1B visas to fill specialized jobs not filled by U.S. workers. The statute requires that the employer pay an H–1B worker the higher of the actual wage or the prevailing wage, to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers. This rule would implement statutory changes in the H–1B visa program enacted by the ACWIA of 1998. The ACWIA (1) temporarily increases the maximum number of H–1B visas permitted each year; (2) temporarily requires, during the increased H–1B cap period, new non-displacement (layoff) and recruitment attestations by ''H–1B dependent'' employers and employers found to have committed willful violations or misrepresentations; (3) requires employers of H–1B workers to offer the same fringe benefits to H–1B workers as it offers its U.S. workers; (4) requires an employer in certain cases to

pay an H–1B worker even if work is not available and the worker is placed in a non-productive status (but not for non-productive time due to non-work-related factors like a voluntary request to be absent); and (5) provides whistleblower protections to employees (including former employees and applicants) who disclose information about potential violations or cooperate in an investigation or proceeding.

The direct, incremental costs that an employer would incur because of this rule above customary and usual business expenses for recruiting qualified job applicants and retaining qualified employees in specialized jobs are expected to be minimal. Collectively, the changes proposed by this rule will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, the Department has concluded that this rule is not ''economically significant.''

VI. Small Business Regulatory Enforcement Fairness Act

The Department has similarly concluded that this proposed rule is not a ''major rule'' requiring approval by the Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). It will not likely result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

VII. Unfunded Mandates Reform Act of 1995; Executive Order 12875

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector, ''* * * (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' For purposes of the Unfunded Mandates Reform Act, this rule does not include any Federal mandate that may result in increased annual expenditures in excess of $100 million by State, local or tribal governments in the aggregate, or by the private sector. Moreover, the requirements of the Unfunded Mandates Reform Act do not apply to this proposed rule because it does not include a ''Federal mandate,'' which is defined to include either a ''Federal intergovernmental mandate'' or a ''Federal private sector mandate.'' 2 U.S.C. 658(6). Except in limited circumstances not applicable here, those terms do *not* include ''a duty arising from participation in a voluntary program.'' 2 U.S.C. 658(5)(A)(i)(II) and (7)(A)(ii). A decision by an employer to obtain an H–1B worker is purely voluntary, and the obligations arise ''from participation in a voluntary Federal program.''

For similar reasons, the proposed rule is not an ''unfunded mandate'' within the meaning of Executive Order 12875. By its terms, section 1 of E.O. 12875 applies to ''any regulation that is not required by statute and that creates a mandate upon a State, local or tribal government.'' The order requires agencies to consult with State, local, and tribal governments when developing regulatory proposals containing significant unfunded mandates. For the reasons noted, the proposed rule does not create any significant unfunded mandate on units of government.

VIII. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis, describing the anticipated impact of the proposed rule on small entities. The following analysis has been prepared to assess the impact of the proposed rule on small entities. Based on this analysis, we have concluded that this rule will not have a significant economic impact on a substantial number of small entities. The impact of the rule derives from specific statutory obligations set forth in the underlying H–1B legislation, which DOL does not have the discretion to alter. The direct, incremental costs are not believed to be significant in any case. Moreover, as discussed below, most of the new compliance obligations addressed in this rulemaking apply to only a small subset of the full universe of employers that participate in the H–1B program, namely, those that meet the new definition of ''H–1B-dependent employer,'' which we estimate to number no more than 200. Even assuming that all of the entities within this subset of 200 employers qualify as ''small,'' the number is not considered substantial.

1. Why Is This Action Being Considered?

On October 21, 1998, President Clinton signed into law the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), which was enacted as Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999 (Public Law 105–277). ACWIA amended the Immigration and Nationality Act (INA), as amended (8 U.S.C. 1101 *et seq.*), relating to the H–1B visa program. Under the H–1B visaprogram, employers may temporarily import and employ nonimmigrants admitted into the U.S. under H–1B visas in specialty occupations and as fashion models, instead of employing U.S. workers, under certain conditions. Section 412(d) of ACWIA provides that some of the amendments made by ACWIA do not take effect until the Department promulgates implementing regulations, which are the subject of this proposed rulemaking. Under Section 412(e) of ACWIA, in order to promulgate implementing regulations in a timely manner, the Department of Labor may reduce to 30 days the period for public comment on proposed regulations.

2. What Are the Objectives of, and the Legal Basis for, the Proposed Rule?

The proposed rule is issued pursuant to provisions of the INA, as amended, and the ACWIA, 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and sec. 412(d) and (e), Pub. L. 105–277, 112 Stat. 2681. Its objectives are to enable employers to understand and comply with applicable requirements under the amended H–1B visa program, and to advise employees and applicants of the protections afforded by the amendments to U.S. and H–1B workers.

3. How Many Small Entities Will Be Covered by the Proposed Rule?

At least some parts of this proposed rule would apply to all employers which seek to temporarily employ nonimmigrants admitted into the U.S. under the H–1B visa program in specialty occupations and as fashion models. The obligations differ under the law and the rules for ''H–1B-dependent'' employers from those that are not ''H–1B-dependent.''

The definition of ''small'' business varies considerably, depending on the policy issues and circumstances under review, the industry being studied, and the measures used. The size standards

used by the U.S. Small Business Administration (SBA) to define small business concerns according to their Standard Industrial Classification (SIC) codes are codified at 13 CFR 121.201. SBA's small size standards are generally expressed either in maximum number of employees or annual receipts (in millions of dollars).

If we could construct a profile of each business that used H–1B workers showing both the total number of workers employed and the portion that are H–1B workers, together with total annual receipts and the applicable SIC industry code, we could then apply SBA's size standards and gauge precisely how many of the affected businesses are ''small.'' Unfortunately, the precise data required for this analysis are not available. However, we know that nearly one-half (44.4 percent) of the job openings being certified under the H–1B program are for computer-related occupations, and over one-fourth (25.9 percent) are for therapists (principally physical and occupational).[1] Looking just at these categories would present a view of nearly three-fourths of all the certified job openings under the H–1B program.

For Major Group 73, Business Services, the SBA's small business size standards for SIC codes in which computer-related occupations would likely be employed are all at the $18 million level (annual receipts).[2] Data from the *1992 Census of Service Industries: Establishment and Firm Size* (published February 1995) indicate that 39,511 out of a total 40,242 firms (or 98.18 percent) have annual receipts less than $18 million.

The Business Services category would not include other users of H–1B workers in computer-related occupations, such as computer equipment manufacturers. For computer and other electronic equipment manufacturers, the SBA's small size threshold is 1,000 employees.[3] In 1994 (latest data on size distribution), 1.6 percent of the establishments employed 1,000 or more workers (comprising 42.1 percent of the employment in the industry).[4] There were more than 14,000 establishments in this industry in 1996.

For Major Group 80, Health Services, the SBA's small size threshold for all categories within the group are at the $5 million (annual receipts) level. Data from the *1992 Census of Service Industries: Establishment and Firm Size* (February 1995) indicate that 244,437 out of a total 249,052 firms (or 98.15 percent) have annual receipts less than $5 million.[5]

Based on the above data, the vast majority (over 98 percent) of the businesses in the industries in which H–1B workers are likely to be employed would meet SBA's definition of ''small.'' However, as noted above, the new compliance obligations under ACWIA (and, therefore, under these regulations) differ for employers who meet a new statutory definition of being ''H–1B dependent'' or have been found after the effective date of ACWIA to have committed willful violations or misrepresentations. Section 412(a)(3) of ACWIA defines ''H–1B-dependent employer'' as an employer that has 25 or fewer full-time equivalent employees employed in the U.S. and more than 7 H–1B nonimmigrants, at least 26 but not more than 50 full-time equivalent employees and more than 12 H–1B nonimmigrants, or at least 51 full-time equivalent employees and a workforce of H–1B nonimmigrants comprising at least 15 percent of its full-time equivalent employees. ACWIA requires H–1B-dependent employers and employers found to have willfully violated H–1B requirements to attest that they will not displace (layoff) U.S. workers and replace them with H–1B workers in essentially equivalent jobs, that they will not place H–1B workers with other employers without first inquiring as to whether they intend to displace U.S. workers, and that they have taken good faith steps to recruit in the United States for U.S. workers to fill the jobs for which they are seeking H–1B workers. An employer filing an LCA pertaining only to ''exempt H–1B nonimmigrants'' need not comply with the non-displacement and good faith recruitment attestations, regardless of status as an H–1B-dependent or willful violator. ''Exempt H–1B nonimmigrants'' are defined as those who earn at least $60,000 annually or who have attained a master's degree or its equivalent in a specialty related to the intended employment.

The Department estimates that approximately 50,000 employers a year file LCA's for H–1B nonimmigrants. The Department estimates that not more than ten (10) employers a year will be found to have committed willful violations. There are no data available to determine precisely how many ''H–1B-dependent'' employers will exist under the rule. We tried to estimate the number of ''H–1B-dependent'' employers for purposes of this analysis, as follows. Although the test for H–1B dependency varies with the size of the employer, an employer must employ at least seven (7) H–1B workers to be dependent. Therefore, if we assume that every H–1B-dependent employer had the smallest workforce threshold (25 full-time equivalent employees) and therefore subject to the ''more than seven H–1B'' workers test, we can estimate the maximum potential number of H–1B-dependent employers in computer-related fields and health services (using therapists) by determining how many of those employers submitted LCAs seeking certification of more than seven H–1B nonimmigrants on a single LCA. This approach undercounts the potential number of H–1B-dependent employers because some employers requesting fewer than seven H–1B workers on a single LCA may already employ other H–1B workers or may file more than one LCA. For purposes of this analysis, therefore, we calculated the number of employers for which more than five (5) H–1B nonimmigrants were certified on a single LCA to work in computer-related fields or as therapists in FY 1997, to estimate an upper-bound limit of the maximum potential number of H–1B-dependent employers. This yielded a

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[1] Analysis of number of job openings certified in Fiscal Year (FY) 1997 by occupational classification. A total of 180,739 LCAs were filed with the Department in FY 1997, certifying 398,324 job openings.

[2] Major Group 73 includes the following SIC industries: Computer Programming Services (7371); Prepackaged Software (7372); Computer Integrated Systems Design (7373); Computer Processing and Data Preparation and Processing Services (7374); Information Retrieval Services (7375); Computer Facilities Management Services (7376); Computer Rental and Leasing (7377); Computer Maintenance and Repair (7378); and Computer Related Services, Not Elsewhere Classified (N.E.C.) (7379).

[3] According to BLS, the following five SICs comprise the electronic equipment manufacturing industry: 357, Computer and Office Equipment; 365, Household Audio and Video Equipment; 366, Communications Equipment; 367, Electronic Components and Accessories; and 381, Search and Navigation Equipment. These five SICs share common need for high levels of computer programmers, analysts, engineers and other computer scientists. BLS has published data on establishment size for the industry as a whole, but not its five components. See *Career Guide to Industries,* BLS Bulletin 2503, pp. 53–56, January 1998. The products of this industry include computers and computer storage devices such as disk drives; semiconductors (silicon or computer chips or integrated circuits) which are the core of computers and other advanced electronic products; computer peripheral equipment such as printers and scanners; calculating and accounting machines such as automated teller machines; and other electronic equipment using highly skilled computer and other scientists and professionals.

[4] BLS Bulletin 2503 (January 1998). Source: U.S. Department of Commerce, *County Business Patterns,* 1994.

[5] SIC industries 8021 (Offices and Clinics of Dentists), 8042 (Offices and Clinics of Optometrists), 8072 (Dental Laboratories), and 8092 (Kidney Dialysis Centers) were subtracted from the total number of health service firms in SIC 80 for purposes of this analysis, based on the assumption that such firms would not likely employ physical or occupational therapists.

total of 1,425 employers (8.7 percent of the total in the sample). This approach for setting the maximum upper limit greatly overstates H–1B dependency, however, because many larger firms employing more than 25 full-time employees would automatically be included in the count of H–1B dependents. For example, we know, that many major employers of H–1B workers have workforces larger than 25 full-time equivalent employees. In addition, some employers file LCAs certifying a need for H–1B workers but for various reasons never fill all the positions. Realistically, we estimate that the actual number of H–1B-dependent employers and willful violators under the rule to be no more than from between 100 and 200 employers.

4. What Are the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Which Small Entities Will They Affect, and What Type of Professional Skills are Needed to Meet the Requirements?

The reporting and recordkeeping requirements of this rule are described above in the Supplementary Information section entitled ''Paperwork Reduction Act'' and in various places throughout the preamble. They are also briefly summarized here. In sum, the reporting and recordkeeping requirements of the rule are not overly complex, and in most cases simply require that a copy be kept of a record made for other purposes or that a simple arithmetic calculation be performed. There are no requirements for technical, specialized or professional skills to comply with the reporting or recordkeeping provisions of the rule.

As noted, most new recordkeeping and compliance requirements imposed by ACWIA and this rule apply only to employers meeting the new definition of ''H–1B-dependent employer'' or employers found to have committed willful violations or misrepresentations, which we estimate to number between 100 and 200. To determine if it meets the new definition of ''H–1B-dependent employer,'' an employer of H–1B workers must compare the number of its H–1B workers to the number of full-time equivalent employees. H–1B-dependent employers and willful violators must comply with the new ''non-displacement'' and ''good faith recruitment'' requirements of ACWIA. In many cases, it will be readily apparent, at either end of the spectrum, whether an employer is or is not H–1B dependent. When H–1B dependency is not apparent or it is a close question, the employer must make a mathematical determination, and if it determines it is not dependent, document the determination in its public disclosure file. In order to make the determination, employers will need to keep copies of H–1B petitions and, for part-time workers, either hourly payroll records or a document showing the employee's regular schedule.

The ACWIA provisions on non-displacement and recruitment of U.S. workers do not apply if the LCA is used for petitioning only ''exempt H–1B nonimmigrants.'' If INS determines in the course of adjudicating an H–1B petition that an H–1B nonimmigrant is exempt, the employer must keep a copy of the determination in the public access file.

The proposed rule would require an H–1B-dependent employer or willful violator that is seeking to place an H–1B nonimmigrant with another employer to secure and retain either a written assurance from the second employer, a contemporaneous written record of the second employer's verbal statement, or a prohibition in the contract between the two employers, stating that it has not displaced and intends not to displace a U.S. worker.

H–1B-dependent employers and willful violators must maintain documentation that they have not displaced U.S. workers for a period 90 days before and 90 days after the employer petitions for an H–1B worker. The rule proposes that employers maintain typical personnel records that would ordinarily be readily available, including name, last known mailing address, title and description of job, and any documentation kept on the employee's experience and qualifications and principal assignments, for all U.S. workers who left employment during the 180-day window. The employer must also keep all documents concerning the departure of any such U.S. employees and the terms of any offers of similar employment made to them and their responses. No special records need to be created to meet these requirements. EEOC requires under its regulations that any such existing records be maintained by employers.

H–1B-dependent employers and willful violators must make good faith efforts to recruit U.S. workers using procedures that meet industry-wide standards before hiring H–1B workers. These employers will be required to keep documentation of the recruiting methods they used, including the places, dates, and contents of advertisements or postings, and the compensation terms (if not included in contents of advertisements and postings). These employers must also summarize in the public disclosure file the principal recruitment methods used and the time frame within which the recruitment was conducted. The Department has requested comments on how employers should determine industry-wide standards, and how to make this determination available to U.S. workers. We expect that most employers would ordinarily follow industry standards for recruiting qualified job applicants for specialized jobs. Thus, inasmuch as the requirements are based on industry-wide standards, meeting this statutory standard should not impose significant burdens on affected employers in most cases. To ascertain whether employers have given good faith consideration to U.S. worker/applicants, the proposed regulation would also require retention of applications and related documents, rating forms, job offers, etc. Retention of such records is already required by EEOC, so no additional burden will be imposed.

All employers of H–1B workers must offer fringe benefits to H–1B workers on the same basis and terms as offered to similarly-employed U.S. workers. To document that they have done so, employers must keep copies of their fringe benefit plans and summary plan descriptions, including rules on eligibility and benefits, evidence of what benefits are actually provided to workers, and how costs are shared between employers and employees. Because regulations of the Pension and Welfare Benefits Administration and the Internal Revenue Service generally require employers to keep copies of such fringe benefit information, meeting this requirement should not impose any additional burdens on most affected employers, and in the few cases where such information is not currently retained, it is anticipated that the additional burden will be minor.

The Department has also republished and asked for comment on several provisions of the December 20, 1994 Final Rule (59 FR 65646), which were published for notice and comment on October 31, 1995 (60 FR 55339). As explained above, H–1B workers are required to be paid at least the actual wage or the prevailing wage, whichever is higher. To ensure this requirement is met, employers are required to include in the public access file documents explaining their actual wage system, and to maintain payroll records for the specific employment in question for both their H–1B workers and their U.S. workers. This proposal modifies the payroll recordkeeping requirement with respect to U.S. workers, to require that hours worked records be retained only if the employee is not paid on a salary

basis or the actual wage is expressed as an hourly rate. In virtually all cases, these employees would be paid hourly and hourly pay records would therefore be kept.

5. Are There Any Federal Rules That Duplicate, Overlap or Conflict With This Proposed Rule?

Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), enforced by the U.S. Equal Employment Opportunity Commission (EEOC), prohibits national origin discrimination by employers with 15 or more employees (*see* 29 CFR 1606). The Immigration Reform and Control Act of 1986 (*see* 8 U.S.C. 1324b; 8 U.S.C. 1103(a)), enforced by the U.S. Department of Justice, prohibits national origin discrimination by employers with between four (4) and 14 employees (those not covered by Title VII), and citizenship-status discrimination by employers with at least four (4) employees (*see* 28 CFR 44). In addition, under ACWIA, an ''H–1B dependent'' employer must attest that it has taken good faith steps to recruit in the U.S. for the position for which it is seeking the H–1B worker, and that it has offered the job to any U.S. worker/applicant who is equally or better qualified. The Department of Labor is responsible for enforcing the required recruitment, and the Department of Justice is responsible for administering an arbitration process detailed in ACWIA if U.S. worker/applicants complain that they were not offered a job for which they were equally or better qualified, as required.

6. Are There Significant Alternatives Available Such as Differing Compliance or Reporting Requirements or Timetables for Small Entities?

The compliance and reporting requirements of the proposed rule, together with those significant alternatives which have been identified, are discussed in the ''Supplementary Information'' section of the preamble above. Different timetables for implementing the statutory requirements for smaller businesses would not appear to be consistent with the statute. The legislation temporarily increases the maximum allowable number of nonimmigrants that may be admitted into the U.S. to perform specialized jobs not filled by U.S. workers, and temporarily adds corresponding provisions intended to protect the wages and working conditions of U.S. workers in similar jobs during the same period.

7. Can Compliance and Reporting Requirements be Clarified, Consolidated, or Simplified Under the Proposed Rule for Small Entities?

The compliance and reporting requirements of the proposed rule, and each of the alternatives considered together with their expected advantages and disadvantages, are described in the preamble above. The Department has attempted to keep new recordkeeping requirements to the minimum necessary for the Department to ascertain compliance and for the public to be aware of the primary documentation relied on by the employer to satisfy the statutory requirements. (See Section 212(n)(1) of the INA.) In addition, most recordkeeping requirements are already imposed by other statutes, or only require retention of documents which would be kept by a prudent businessman. Comments are invited on ways to clarify or simplify the compliance requirements for small businesses without undermining the Congressional intent of the new statutory provisions.

8. Can Other Standards be Used (Such as Performance, Rather Than Design Standards)?

The underlying legislation allows employers to temporarily import and employ nonimmigrants admitted into the U.S. under H–1B visas to fill specialized jobs not filled by U.S. workers. As a condition of participating in this voluntary program, the employer must pay the H–1B worker at least the prevailing wage or the actual wage (whichever is higher). Certain employers of H–1B workers must also engage in good faith recruitment to try to find qualified U.S. workers to fill their job openings, and may not displace (lay off) a U.S. worker in order to hire an H–1B worker in the same job. Given the objectives of the applicable statutory provisions, the use of performance rather than design standards has been considered and such alternatives, where perceived to be appropriate, are discussed. For example, the Department is considering a presumption of good faith recruitment based on the employer's hiring a significant number of U.S. workers and, thereby, accomplishing a significant reduction in the ratio of H–1B workers to U.S. workers in the employer's workforce. The available alternatives that were considered in developing this proposed rule are discussed in the preamble above and are not repeated here.

9. Can Small Entities be Exempted From Coverage of the Rule, or Any Part of the Rule?

Exemption from coverage under this proposed rule for small entities would not be appropriate under the terms of the controlling H–1B statutory mandates. The ACWIA contains no authority for the Department to grant such an exemption except to the extent that the statute itself grants an exemption (*e.g.*, the definition of ''H–1B-dependent employer'').

IX. Catalog of Federal Domestic Assistance Number.

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

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Employment, Forest and forest products, Health professions, Immigration, Labor, Longshore work, Migrant labor, Penalties, Reporting requirements, Students, Wages.

Text of the Proposed Rule

The text of the proposed rule to amend 20 CFR chapter V appears below. (In addition to the proposed regulatory text, other proposed changes to parts 655 and 656 are discussed in the preamble.)

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The authority citation for Part 655 is proposed to be 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); 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); Title IV, Pub. L. 105–277, 112 Stat. 2681; 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 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182

note); and Title IV, Pub. L. 105–277, 112 Stat. 2681.

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

Subpart H—Labor Condition Applications and Requirements for Employers Using Non-Immigrants on H–1B Visas in Specialty Occupations and as Fashion Models

2. In § 655.700, paragraph (a)(1) is proposed to be revised to read as follows:

§ 655.700 Purpose, procedure and applicability of subparts H and I.

(a) * * *

(1) Establishes the following annual ceilings (exclusive of spouses and children) on the number of foreign workers who may be issued H–1B visas or otherwise accorded H–1B nonimmigrant status):

(i) 115,000 in fiscal year 1999;

(ii) 115,000 in fiscal year 2000;

(iii) 107,500 in fiscal year 2001; and

(iv) 65,000 in each succeeding fiscal year;

* * * * *

3. In § 655.715, a new definition of ''Employed or employed by the employer'' is proposed to be added, to read as follows:

§ 655.715 Definitions.

* * * * *

Employed or employed by the employer means the employment relationship as determined under the common law, under which ''no shorthand formula or magic phrase * * * can be applied to find the answer, * * * all of the incidents of the relationship must be assessed and weighed with no one factor being decisive'' (*NLRB* v. *United Ins. Co. of America,* 390 U.S. 254, 258 (1968)), in considering the following factors that would indicate the existence of an employment relationship:

(1) The firm or the client has the right to control when, where, and how the worker performs the job;

(2) The work does not require a high level of skill or expertise;

(3) The firm or the client rather than the worker furnishes the tools, materials, and equipment;

(4) The work is performed on the premises of the firm or the client;

(5) There is a continuing relationship between the worker and the firm or the client;

(6) The firm or the client has the right to assign additional projects to the worker;

(7) The firm or the client sets the hours of work and the duration of the job;

(8) The worker is paid by the hour, week, month or an annual salary, rather than for the agreed cost of performing a particular job;

(9) The worker does not hire or pay assistants;

(10) The work performed by the worker is part of the regular business (including governmental, educational, and nonprofit operations) of the firm or the client;

(11) The firm or the client is itself in business;

(12) The worker is not engaged in his or her own distinct occupation or business;

(13) The firm or the client provides the worker with benefits such as insurance, leave, or workers' compensation;

(14) The worker is considered an employee of the firm or the client for tax purposes (*i.e.*, the entity withholds federal, state, and Social Security taxes);

(15) The firm or the client can discharge the worker; and

(16) The worker and the firm or client believe that they are creating an employer-employee relationship.

* * * * *

4. In § 655.730, in paragraph (b), the first sentence is proposed to continue to read as follows:

§ 655.730 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 § 655.720 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. * * *

* * * * *

5. In § 655.730, paragraph (d)(4)(i)(B) is proposed to be revised to read as follows:

§ 655.730 Labor condition application.

* * * * *

(d) * * *

(4) * * *

(i) * * *

(B) If there is no such bargaining representative, provides electronic notice or posts notice of the filing of the labor condition application in conspicuous locations in the employer's establishment(s) in the area of intended employment, in the manner described in § 655.734(a)(1)(ii) of this subpart, and provides a copy of the labor condition application to the H–1B worker, in the manner described in § 655.734(a)(2) of this subpart; and

* * * * *

6. In § 655.731, the second sentence of paragraph (a)(1) is proposed to be amended by adding the phrase ''job performance,'' after the phrase ''job responsibility and function,''.

7. In § 655.731, paragraph (a)(2)(iii)(A)(*1*) is proposed to continue to read as follows:

§ 655.731 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 a SESA prevailing wage determination through the Employment Service complaint system, by filing a complaint with the SESA. See 20 CFR part 658.410 *et seq.* Employers which challenge a SESA prevailing wage determination must obtain a final ruling from the Employment Service complaint system prior to filing an LCA based on such determination. In any challenge, the SESA shall not divulge any employer wage data which was collected under the promise of confidentiality.

* * * * *

8. In § 655.731, paragraph (b)(1) is proposed to be revised to read as follows:

§ 655.731 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 § 655.760(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 § 655.760 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 employee; and

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

* * * * *

9. In § 655.731, paragraph (b)(3)(iii)(B)(*1*) is proposed to be revised to read as follows:

§ 655.731 The first labor condition statement: wages.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(B) * * *

(*1*) Reflect the weighted average wage paid to workers similarly employed in the area of intended employment;

* * * * *

10. In § 655.731, paragraph (c)(4) is proposed to be deleted and reserved.

11. In § 655.731, paragraph (c)(5) is proposed to be revised to read as follows:

§ 655.731 The first labor condition statement: wages.

* * * * *

(c) * * *

(5)(i) In accordance with the standards specified in paragraphs (c)(5)(ii) and (iii) of this section, an H–1B nonimmigrant shall receive the full wage which the LCA-filing employer is required to pay, beginning on the date when the nonimmigrant enters into employment with the employer and continuing throughout the nonimmigrant's period of employment. In the case of an H–1B nonimmigrant who has not yet entered into employment with an employer who has had approved a labor condition application and an H–1B petition for such nonimmigrant, the employer's obligation to pay wages in accordance with the standards specified in paragraphs (c)(5)(ii) and (iii) of this section shall begin 30 days after the date the nonimmigrant first is admitted into the U.S. pursuant to the petition, or 60 days after the date the nonimmigrant becomes eligible to work for the employer (if the nonimmigrant is present in the U.S. on the date of the approval of the petition).

(ii) 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 number 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.

(iii) If, however, during the period of employment, an H–1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (*e.g.*, touring the U.S. prior to commencing performance of duties for employer, caring for ill relative) or render the nonimmigrant unable to work (*e.g.*, maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period, provided that 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 the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*).

* * * * *

12. In § 655.731, paragraph (d)(2) is proposed to continue to read as follows:

§ 655.731 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 § 655.835 of this part.

* * * * *

13. In § 655.734, paragraph (a)(1)(ii) is proposed to be revised to read as follows:

§ 655.734 The fourth labor condition statement: notice.

(a) * * *

(1) * * *

(ii) Where there is no collective bargaining representative, the employer shall, on or within 30 days before the date the labor condition application is

filed with ETA, provide a notice of the filing of the labor condition application. The notice shall indicate that H–1B nonimmigrants are sought; the number of such nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the location(s) at which the H–1B nonimmigrants will be employed; and that the labor condition application is available for public inspection at the employer's principal place of business in the U.S. or at the worksite. The notice shall also include the statement: ''Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor. Complaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street & Constitution Avenue, N.W., Washington, D.C. 20530.'' The notice shall be provided in one of the two following manners:

(A) By posting a notice in at least two conspicuous locations at each place of employment where any H–1B nonimmigrant will be employed.

(*1*) The notice shall be of sufficient size and visibility, and shall be posted in two or more conspicuous places so that the employer's workers at the place(s) of employment can easily see and read the posted notice(s).

(*2*) Appropriate locations for posting the notices include, but are not limited to, locations in the immediate proximity of wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a).

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

(*4*) 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.

(B) By providing electronic notification to employees in the occupational classification for which H–1B nonimmigrants are sought. Such notification shall be given on or before the date any H–1B nonimmigrant begins work, and shall be available to the affected employees for a total of ten days. Such notification shall be readily available to the affected employees. An employer may accomplish this by any means it ordinarily uses to communicate with its workers about job vacancies or promotion opportunities, including through its ''home page'' or ''electronic bulletin board'' to employees who have, as a practical matter, direct access to the home page or electronic bulletin board; or through E-Mail or an actively circulated electronic message such as the employer's newsletter. Where employees are not on the ''intranet'' which provides direct access to the home page or other electronic site but do have computer access readily available, the employer may provide notice to such workers by direct electronic communication such as E-Mail.

* * * * *

14. Section 655.735 is proposed to be revised to read as follows:

§ 655.735 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) without filing new labor condition application(s) for the area(s) of intended employment which would encompass such worksite(s).

(b) The following restrictions must 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 §§ 655.730 through 655.734 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:

(i) 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);

(ii) Pay such worker(s) the actual cost of lodging (for both workdays and non-workdays) up to the rate prescribed by the General Services Administration (''GSA'') for Federal Government employees on travel or temporary assignment, plus applicable taxes, as set out in 41 CFR Part 301–7 and Ch. 301, App. A.; and

(iii) Provide such worker(s) per diem for meals and incidental expenses (for both workdays and non-workdays) at rate(s) no lower than the rate(s) prescribed by the GSA as set out in 41 CFR Part 301–7 and Ch. 301, App. A.

(iv) Provide such worker(s) the actual cost of transportation expenses, except that where the worker uses a privately-owned vehicle, the employer must provide such worker(s) the cost to operate the vehicle at the rate(s) set out in 41 CFR Part 301–4, plus out-of-pocket expenses for miscellaneous expenses such as tolls and parking fees.

(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 total of ninety workdays for any H–1B nonimmigrant within a three-year period. For purposes of this section, ''workday'' shall mean any day on which an H–1B nonimmigrant performs any work at any worksite(s) within the area of employment. For example, three workdays would be counted where a nonimmigrant works three non-consecutive days at three different worksites, whether or not the employer owns or controls such worksite(s), within the same area of employment.

(c) Once any H–1B nonimmigrant has worked 90 workdays in a three-year period in any area of employment, the employer may not continue to employ H–1B nonimmigrant(s) in the same occupational classification at any worksite(s) within the area of employment unless the employer has 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; on-site notice to workers), whether or not the employer owns or controls such worksite(s).

(d) The employer may not continuously rotate H–1B nonimmigrants to an area of employment in a manner that would defeat the purpose of the short-term placement option, which is to provide the employer with enough time to file an LCA for areas where it intends to have a significant presence (*e.g.*, an employer may not rotate H–1B nonimmigrants to an area of employment for 60-day periods, with the result that nonimmigrants are continuously or virtually continuously employed in the area of employment, in order to avoid filing an LCA would be found to be in violation of these short-term placement provisions).

(e) The employer may at any time file a labor condition application for an area of intended employment, performing all actions required in connection with such labor condition application. Upon certification of such application, the employer's obligation to comply with paragraph (b)(3) shall terminate. (However, *see* § 655.731(c)(7)(iii)(C) regarding payment of business expenses for employee's travel on employer's business.)

15. Appendix A to Subpart H is proposed to be revised to read 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, job performance, 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:

(1) 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 § 655.731(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.

16. A new Appendix B to Subpart H is proposed to be added, to read as follows:

Appendix B to Subpart H—Guidance for Determination of the ''Place of Employment'' and Other Matters.

a. ''Place of employment'' or ''worksite.''

The regulation defines ''place of employment'' as ''the worksite or physical location where the work actually is performed'' (§ 655.715). The Department recognizes that some H–1B employers have expressed a concern that a strict or literal application of this definition might lead to absurd and/or unduly burdensome compliance requirements, particularly with regard to the employer providing required notices and adjusting the H–1B worker's wages to comport with different prevailing wages for various locations. These employers have inquired whether the ''worksite'' definition would be applicable where, for example, an H–1B worker has a business lunch at a local restaurant, or appears as a witness in a court, or attends a training seminar at an out-of-town hotel.

1. The term ''place of employment'' or ''worksite'' (defined as ''physical location where the work actually is performed'') is interpreted by the Department as not including any location where either of the following criteria—1 or 2—is satisfied:

i. Employee developmental activity. An H–1B worker who is stationed and regularly works at one location may temporarily be at another location for a particular individual or employer-required developmental activity such as a management conference, a staff seminar, a business meeting or a formal training course (other than ''on-the-job-training'' at a location where the employee is stationed and regularly works). For the H–1B worker participating in such activities, the location of the activity would not be considered a ''place of employment'' or ''worksite,'' and that worker's presence at such location—whether owned or controlled by the employer or by a third party—would not invoke H–1B program requirements with regard to that employee at that location. However, if the employer uses H–1B nonimmigrants as instructors or resource or support staff who continuously or regularly perform their duties at such locations, the locations would be ''places of employment'' or ''worksites'' for any such employees and, thus, would be subject to H–1B program requirements with regard to those employees.

ii. Employee's job functions. The nature and duration of an H–1B worker's job functions may necessitate frequent changes of location with little time spent at any one location. For such a worker, a location would not be considered a ''place of employment'' or ''worksite'' if the following 3 requirements are all met—

A. The nature and duration of the H–1B worker's job functions mandates his/her short-time presence at the location. For this purpose, either the H–1B worker's job must be peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location; or the H–1B worker's duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations; and

B. The H–1B worker's presence at the locations to which he/she travels from the ''home'' worksite is on a casual, short-term basis, which can be recurring but not excessive (*i.e.*, not exceeding five consecutive workdays for any one visit); and

C. The H–1B worker is not at the location as a ''strikebreaker'' (*i.e.*, not performing work in an occupation in which workers are on strike or lockout).

2. Examples of ''non-worksite'' locations based on worker's job functions: a computer engineer sent out to customer locations to ''troubleshoot'' complaints regarding software malfunctions; a sales representative making calls on prospective customers or established customers within a ''home office'' sales territory; a manager monitoring the performance of out-stationed employees; an auditor providing advice or conducting reviews at customer facilities; a physical therapist providing services to patients in their homes within an area of employment; an individual making a court appearance; an individual lunching with a customer representative at a restaurant; or an individual conducting research at a library.

3. Examples of ''worksite'' locations based on worker's job functions: a computer engineer who works on projects or accounts at different locations for weeks or months at a time; a sales representative assigned on a continuing basis in an area away from his/her ''home office;'' an auditor who works for extended periods at the customer's offices; a physical therapist who ''fills-in'' for full-time employees of health care facilities for extended periods; or a physical therapist who works for a contractor whose business is to provide staffing on an ''as needed'' basis at hospitals, nursing homes, or clinics.

4. Whenever an H–1B worker performs work at a location which is not a ''worksite'' (under either criterion above), that worker's ''place of employment'' or ''worksite'' for purposes of H–1B obligations is the worker's home station or regular work location. The employer's obligations regarding notice, prevailing wage and working conditions are focused on the home station ''place of employment'' rather than on the above-described location(s) which do not constitute worksite(s) for these purposes.

5. In applying this interpretation of ''place of employment'' or ''worksite,'' the Department will look carefully at situations which appear to be contrived or abusive. The Department would seriously question any situation where the H–1B worker's purported ''place of employment'' is a location other than where the worker spends most of his/her work time, or where the purported ''area of employment'' does not include the location(s) where the worker spends most of his/her work time. For example, where an H–1B worker is nominally ''home-based'' in City A and is claimed by the employer to be covered by the LCA for City A, but spends most of his/her time in City B, going from one customer location to another, the Department would consider City B to be the worker's ''area of employment'' and, further, would expect the employer to have a certified LCA for City B and be in compliance with all of the program requirements under that LCA.

6. The Department's interpretation of the regulation will not result in absurd or unduly burdensome situations, and should alleviate the legitimate concerns of employers seeking to comply with the requirements of the H–1B program. However, employers should carefully note that whether or not a location is considered to be a ''worksite''/''place of employment'' for an H–1B worker, the employer is required to provide reimbursement to the H–1B worker for expenses incurred in traveling to that location on the employer's business, since such expenses are considered to be ordinary business expenses of employers which may not be transferred to employees (§§ 655.731(c)(7)(iii)(C); 655.731(c)(9)).

b. ''Roving'' or ''floating'' H–1B employees.

The statute and regulations do not permit the employment of H–1B workers as ''roving'' or ''floating'' employees for whom no particular LCA (and thus no specific set of LCA requirements) would be applicable. While H–1B workers may move about (''floating'' or ''roving'' from their ''homebase'' worksites), they are subject to the following restrictions and standards.

(1) Employers are advised that, under the H–1B program, every H–1B worker is protected by an LCA, and no H–1B worker is legally permitted to ''rove'' or ''float'' without an applicable LCA prescribing the employer's obligations as to notice, wages, and all other program requirements for that worker. Every H–1B worker has a ''home station,'' ''home office,'' or ''home base,'' regardless of frequency of travel or variation in job duties. The LCA for the worker's ''home station'' area of employment prescribes the employer's obligations as to that worker, unless or until an LCA for some other area of employment becomes applicable due to the nature and duration of the worker's presence at worksite(s) in that other area.

(2) Employers are cautioned that an H–1B worker may legitimately and legally be dispatched from his/her home station worksite—thus, ''rove'' or ''float'' from that worksite—only in the following three circumstances:

(i) Dispatch to non-worksite location(s). An H–1B employee may leave his/her home station worksite to perform job functions at location(s) which do not constitute ''worksites(s)'' within the regulatory definition as interpreted by the Department (*see* subparagraph (a), above). The employer's obligations as to that H–1B worker for work time at that non-worksite location (*e.g.*, wages; travel expenses) are prescribed by the LCA for the worker's home station area of employment, even if the non-worksite

location is within an area of employment covered by a different LCA.

(ii) Dispatch to worksite(s) within area(s) of employment covered by LCA(s). An H–1B worker may leave his/her home station worksite to perform job functions at worksite(s) within the same area of employment and thus covered by the same LCA already applicable for that employee, or at worksite(s) in some other area of employment covered by a different LCA. The employer's obligations as to that H–1B worker for that work time (*e.g.*, wages, travel expenses) are prescribed by the home station LCA unless the worker is permanently reassigned to the new area or is dispatched to that area for an extended period of time (to be determined case-by-case, depending on the nature of the employee's job functions and the employer's operations in the area). When a different LCA becomes applicable for the employee, the employer would be required to assure compliance with that LCA (*e.g.*, wage adjustments, if appropriate).

(iii) Dispatch to worksite(s) not covered by any LCA, pursuant to short-term placement option. An H–1B worker may leave his/her home station worksite to perform job functions at worksite(s) not covered by any LCA, provided the placement of the worker at such worksite(s) is in compliance with the short-term placement option (§ 655.735).

c. Attorney fees and H–1B petition fees as employer's business expense.

(1) Under the regulations, an employer is not permitted to impose its business expense(s) on its H–1B workers (§§ 655.731(c)(7)(iii)(C); 655.731(c)(9)). To the extent that an employer shifts any portion of business expense(s) to an H–1B worker, that action constitutes a failure by the employer to satisfy the required wage obligation to that worker, regardless of whether the required wage is the employer's actual wage rate or the local prevailing wage rate.

(2) The employer's business expenses include costs incurred in the filing of an LCA with ETA and of an H–1B petition with INS (regardless of whether the INS filing is to bring an H–1B nonimmigrant into the U.S., or to amend, change, or extend an H–1B nonimmigrant's visa status). These filing functions are legal obligations of the employer; the employer is required by law to perform these functions and the H–1B nonimmigrant is not permitted by law to do so. Performance of such a legal obligation is necessarily an integral part of the employer's administration of its business. Therefore, any costs associated with such filings—including attorney fees—are business expenses to be borne by the employer. The regulations prohibit the employer from shifting such expenses to the H–1B worker(s), either directly (*e.g.*, by the employer paying an attorney's fees and then recouping the costs through deduction from the worker's wages) or indirectly (*e.g.*, by the employer requiring or encouraging the worker to pay for an attorney's services to perform these functions). Some employers have contended that they have experienced situations in which prospective H–1B nonimmigrants have demanded the responsibility for obtaining and paying the attorney who prepares the LCA and H–1B petition. Employers are cautioned that their business expenses are not to be paid by the nonimmigrant, and that an employer cannot acquiesce to the nonimmigrant's ''demand for responsibility'' which amounts to shifting the employer's legal responsibilities to the nonimmigrant.

(3) *Bona fide* costs in connection with visa functions which are required by law to be performed by the nonimmigrant (*e.g.*, translation fees and other costs relating to visa application and processing for prospective nonimmigrant residing outside the U.S.) do not constitute and will not be considered to be an employer's business expense. The Department will, however, look behind what appear to be contrived allocations of costs—such as attorney's fees for preparing the H–1B LCA and/or H–1B petition being assigned to the nonimmigrant's visa application or to petitions for the nonimmigrant's family members—should such situations appear to be occurring.

d. SCA wage determinations as prevailing wage.

(1) Under the regulation, if there is a Service Contract Act (''SCA'') wage determination for the occupational classification in the area of employment, that SCA wage determination is considered by the Department to constitute the prevailing wage for that occupation in that area (§ 655.731(a)(2)(i) and (iii)(A)). Therefore, the SCA wage rate will be issued by the SESA in response to a request for a prevailing wage determination and should be used by the employer in the event that the employer chooses to determine the prevailing wage without consulting the SESA. However, where an SCA wage determination for an occupational classification in the computer industry states a rate of $27.63, that rate will not be issued by the SESA and may not be used by the employer as the prevailing wage; that rate does not represent the actual prevailing wage but, instead, is reported by the Wage and Hour Division in the SCA determination merely as an artificial ''wage cap'' as contemplated by an SCA exemption provision (*see* 29 CFR 4.156; 541.3). In such circumstances, the SESA and the employer must consult another source for wage information (*e.g.*, Bureau of Labor Statistics report).

(2) For purposes of the determination of the H–1B prevailing wage for an occupational classification through the use of an SCA wage determination, it is irrelevant whether a particular job or particular worker would be exempt from the SCA wage determination in the performance of an SCA contract, through application of the SCA/FLSA ''professional employee'' exemption test (*i.e.*, duties and compensation; see 29 CFR 4.156; 541.3). Thus, in issuing the SCA wage rate as the prevailing wage determination for the occupational classification, the SESA will not consider questions of employee exemption, and in an enforcement action, the Department will consider the SCA wage rate to be the prevailing wage without regard to whether any particular H–1B employee(s) could be exempt from that wage as SCA contract workers under the SCA/FLSA exemption. An employer who employs H–1B employee(s) to perform services under an SCA-covered contract may find that the H–1B employees are required to be paid the SCA rate as the H–1B prevailing wage even though non-H–1B employees performing the same services may be exempt from the SCA rate pursuant to the SCA regulation.

e. ''CMSA'' and ''PMSA.''

(1) There is some possibility for confusion regarding the appropriate interplay among several concepts or terms—area of intended employment, area of employment, metropolitan statistical area (''MSA''), primary metropolitan statistical area (''PMSA''), and consolidated metropolitan statistical area (''CMSA''). The following clarification is intended to alleviate any confusion and to facilitate compliance with H–1B program requirements.

(2) For purposes of determining the applicable locally prevailing wage under the H–1B program, the procedures at 20 CFR 656.40, governing the Permanent Alien Labor Certification Program, are to be used. Section 656.40(a)(2)(i) ties the prevailing wage to the ''area of intended employment.'' ''Area of intended employment'' is defined at 20 CFR § 656.3 as:

''* * * the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of intended employment.''

Pursuant to 44 U.S.C. 3504(d)(3), 31 U.S.C. 1104(d), and Executive Order No. 10,253 (June 11, 1951), the Office of Management and Budget (OMB) defines MSAs and PMSAs for use in Federal statistical activities. The Department takes the position that where a worksite is within an MSA or PMSA as defined by OMB, any other location within the MSA or PMSA shall be deemed to be within normal commuting distance of the worksite and, therefore, within the area of intended employment for purposes of both the permanent and H–1B programs. Thus, one prevailing wage determination for an occupational classification would be applicable throughout an MSA or PMSA. However, this concept of ''commuting distance'' for prevailing wage purposes is not extended to all locations within a CMSA, because the Department has determined, based on its operational experience, that CMSAs can be too geographically broad for this purpose. Thus, all locations within a CMSA will not automatically be deemed to be within ''normal commuting distance.'' This does not mean, however, that a location outside of an MSA, PMSA, or for that matter a CMSA, cannot be ''within normal commuting distance'' of a worksite that is, for example, close to the border of the MSA and adjacent to the other location.

(3) The Department has not adopted any rigid measure of distance involved in a ''normal commuting area'' (*e.g.*, 20, 30, 50 miles), because, in the Department's view, it is necessary that the concept afford sufficient flexibility to be able to reflect widely varying factual circumstances among different locations.

f. ''Weighted average'' in determining prevailing wages.

(1) The regulation requires that a legitimate source of wage information (other than one specified in the regulations such as a SESA determination or an independent authoritative source) must ''reflect the weighted average wage paid to workers similarly employed in the area of intended employment'' (§ 655.731(b)(3)(iii)(C)(*1*)). The regulation also requires that an independent authoritative source must ''reflect the average wage paid to workers similarly employed in the area of intended employment'' (§ 655.731(b)(3)(iii)(B)(*1*)). Because the word ''weighted'' was left out of the subparagraph dealing with independent authoritative sources, there have been some suggestions of confusion as to whether use of a weighted average of wages for an occupational classification is necessary only when the employer uses ''another legitimate source'' of wage information.

(2) When used in a statistical sense, the word ''average'' ordinarily refers to the arithmetic mean; *i.e.*, a weighted average. The Department has always required that a weighted average be used in determining the prevailing wage (except where either the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act applies). It is DOL's long-standing position—because Congress expressly stated that prevailing wages for the H–1B program are to be determined in accordance with the methodology used for the permanent employment-based immigration program, which produces a weighted average—that the H–1B employer's prevailing wage determination must be based on a weighted average. (*See* 20 CFR 656.40(a)(2)(i).) The word ''weighted'' was inadvertently omitted from § 655.731(b)(3)(iii)(B)(*1*).

g. Effect of New LCA on Prevailing Wage Obligation Under Old LCA.

(1) There is some possibility for confusion regarding the prevailing wage obligation of an employer which has filed more than one LCA for the same occupational classification in the same area of employment. In such circumstances, the employer could have H–1B employees in the same occupational classification in the same area of employment, brought into the U.S. (or accorded H–1B status) based on petitions approved pursuant to different LCAs (filed at different times) with different prevailing wage determinations. Employers are advised that the prevailing wage rate as to any particular H–1B nonimmigrant is prescribed by the LCA which supports that nonimmigrant's H–1B petition. The regulations require that the employer obtain the prevailing wage at the time that the LCA is filed (§ 655.731(a)(2)). The LCA is valid for the period certified by ETA, and the employer must satisfy all the LCA's requirements (including the ''required wage'' which encompasses both prevailing and actual wage rates) for as long as any H–1B nonimmigrants are employed pursuant to that LCA (§ 655.750). Where new nonimmigrants are employed pursuant to a new LCA, that new LCA prescribes the employer's obligations as to those new nonimmigrants. The prevailing wage determination on the later/subsequent LCA does not ''relate back'' to operate as an ''update'' of the prevailing wage for the previously-filed LCA for the same occupational classification in the same area of employment.

(2) Employers are cautioned that the actual wage component of the ''required wage'' may, as a practical matter, eliminate any wage-payment differentiation among H–1B employees based on different prevailing wage rates stated in applicable LCAs. Every H–1B worker is to be paid in accordance with the employer's actual wage system, and thus is to receive any pay increases which that system provides.

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

17. § 655.800 is proposed to be revised to read as follows:

§ 655.800 Enforcement authority of Administrator, Wage and Hour Division.

(a) Authority of Administrator. Except as provided in § 655.806 of this part, the Administrator shall perform all the Secretary's investigative and enforcement functions under section 212(n) of the INA (8 U.S.C. 1182(n)) and subparts H and I of this part.

(b) Conduct of Investigations. The Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters which are the subject of the investigation.

(c) Availability of Records. An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of section 212(n) of the INA (8 U.S.C. 1182(n)) and/or subpart H or I of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1182(n) or subpart H or I of this part. Any such interference shall be a violation of the labor condition application and these regulations, 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) Employee Protection. (1) No employer subject to subpart H or I of this part shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee has

(i) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of section 212(n) of the INA or subpart H or I of this part; or

(ii) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of section 212(n) of the INA or subpart H or I of this part.

(2) It shall be a violation of § 655.805(a)(12) of this part for any employer to engage in such retaliatory conduct. Such conduct shall be subject to the penalties prescribed by section 212(n)(2)(C)(ii) of the INA and § 655.810 of this part, i.e., a fine of up to $5,000 and debarment for at least two years, and such further action as the Administrator considers appropriate.

(3) An employee who has filed a complaint alleging that an employer has discriminated against the employee in violation of paragraph (d)(1) of this section may be allowed to seek other appropriate employment in the United States, provided the employee is otherwise eligible to remain and work in the United States. Such employment may not exceed the maximum period of stay authorized for a nonimmigrant classified under section 212(n) of the INA (8 U.S.C. 1182(n)).

(e) Confidentiality. The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under subpart H or I of this part.

18. Section 655.805 is proposed to be revised to read as follows:

§ 655.805 Complaints and investigative procedures.

(a) The Administrator shall receive allegations that an employer subject to subpart H or I of this part has violated section 212(n) of the INA or these regulations from any aggrieved party (as defined at § 655.715 of this part, including a government agency other than the Labor Department) or other sources where these sources meet the conditions prescribed by § 655.806 of this part, and shall conduct such investigations as may be appropriate in accordance with § 655.806 of this part (pertaining to allegations from other sources), § 655.807 of this part (pertaining to spot investigations), or as the Administrator, on his or her own

initiative, directs. In conducting such investigations, the Administrator shall determine whether an H–1B employer has:

(1) Filed a labor condition application with ETA which misrepresents a material fact; (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);

(2) Failed to pay wages as required under § 655.731 of this part (including payment of wages for certain nonproductive time), for purposes of the assessment of back wages;

(3) Failed to provide fringe benefits and other working conditions as required under § 655.732 of this part;

(4) Filed a labor condition application for H–1B nonimmigrants during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment (see § 655.733 of this part);

(5) Failed to provide notice of the filing of the labor condition application as required in § 655.734 of this part;

(6) Failed to be specific on the labor condition application as to the number of workers sought, the occupational classification in which the H–1B nonimmigrants will be employed, or the wage rate and conditions under which the H–1B nonimmigrants will be employed;

(7) Failed to comply with the displacement protections for U.S. workers (if applicable);

(8) Failed to make the required displacement inquiry provision of another employer (if applicable);

(9) Failed to take good faith steps in recruitment (if applicable);

(10) Required, accepted, or attempted to require an employee to remit to the employer payment for any part of the additional $500 fee incurred in filing a petition in connection with the employee's visa (if applicable);

(11) Required or attempted to require an employee to pay a penalty for ceasing employment prior to an agreed upon date (see § 212(n)(2)(C)(vi)(I) of INA);

(12) Discriminated against an employee as prohibited by § 655.800(d) of this part;

(13) Failed to make available for public examination the application and necessary document(s) at the employer's principal place of business or worksite as required in § 655.760(c) of this part;

(14) Failed to retain documentation as required by § 655.760(c) of this part; and (15) Failed otherwise to comply in any other manner with the provisions of subpart H or I of this part.

(b) Failures pertaining to the violations (a)(1) through (a)(9) may be cited as ''willful'' failures. Failures pertaining to the violations (a)(5), (6), and (9) may be cited as ''substantial'' failures. The determination letter (see § 655.815 of this part) shall specifically cite the appropriate finding and the requirement to notify the Attorney General and the Employment and Training Administration as required for purposes of debarment. See section 655.855 of this part.

(c) For purposes of this part, ''willful failure'' means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to section 212(n)(1)(A)(i) or (ii) of the INA, or §§ 655.731 or 655.732 of this part. See *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985).

(d) Pursuant to §§ 655.740(a)(1) and 655.750 of this part, the provisions of this part become effective upon the date of ETA's notification that the employer's labor condition application is certified, whether or not the employer hires any H–1B nonimmigrants in the occupation for the period of employment covered in the labor condition application. Should the period of employment specified in the labor condition application expire or should the employer withdraw the application in accordance with § 655.750(b) of this part, the provisions of this part will no longer be in effect with respect to such application, except as provided in § 655.750(b)(3) and (4) of this part.

(e) Any aggrieved person or organization (including bargaining representatives and governmental officials) may file a complaint alleging a violation described in paragraph (a) of this section. The procedures for filing a complaint and its processing by the Administrator are set forth in this section. Other persons with information regarding an employer's alleged violation of section 212(n) of the INA or subpart H or I of this part instead should follow the requirements of § 655.806 of this part. With regard to complaints filed by any aggrieved person or organization—

(1) No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint.

(2) The complaint shall set forth sufficient facts for the Administrator to determine whether an investigation is warranted, in that there is reasonable cause to believe that a violation as described in paragraph (a) of this section has been committed. This determination shall be made within 10 days of the date that the complaint is received by a Wage and Hour Division official. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary. No hearing pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted.

(3) If the Administrator determines that an investigation on a complaint is warranted, the complaint shall be accepted for filing; an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing.

(4) In the event that the Administrator seeks a prevailing wage determination from ETA pursuant to § 655.731(d) of this part, or advice as to prevailing working conditions from ETA pursuant to § 655.732(c)(2) of this part, the 30-day investigation period shall be suspended from the date of the Administrator's request to the date of the Administrator's receipt of the wage determination (or, in the event that the employer challenges the wage determination through the Employment Service complaint system, to the date of the completion of such complaint process).

(5) A complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or allegedly took an action which, through such action or inaction, demonstrates a misrepresentation of a material fact in the LCA regarding such action or inaction. This jurisdictional bar does not affect the scope of the remedies which may be assessed by the Administrator. Where, for example, a complaint is timely filed, back wages may be assessed for a period prior to one year before the filing of a complaint.

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

(f) When an investigation has been conducted, the Administrator shall, pursuant to § 655.815 of this part, issue

a written determination as to whether or not any violation(s) as described in paragraph (a) of this section has been committed.

19. A new § 655.806 is proposed to be added, to read as follows:

§ 655.806 Allegations of employer violations by persons other than aggrieved parties.

(a) Sources other than aggrieved parties may submit information alleging that an employer may have violated section 212(n) of the INA or these regulations by committing a willful failure to meet certain of the conditions prescribed by section 212(n)(2)(G)(i) of the INA. Such information should be submitted to the Administrator by contacting any local Wage and Hour Division office. The Administrator shall receive and process such information in accordance with this subsection, subject to the personal determination by the Secretary or the Acting Secretary pursuant to paragraph (e) of this section as to whether an investigation should be commenced based on the information.

(b) Information from sources other than aggrieved parties must be submitted not later than 12 months after the latest date on which the alleged violation(s) were committed. The 12-month period shall be applied in the manner described in § 655.805(e)(5) of this part.

(c) In submitting information, sources other than aggrieved parties are encouraged to utilize the form provided by the Administrator for this purpose. The Administrator will prepare the form where the source provides information but does not utilize the form.

(d) Where the Administrator receives information from a source other than an aggrieved party, the Administrator (by mail or facsimile transmission) shall notify the employer that the information has been received, describe the nature of the allegation in sufficient detail to permit the employer to respond (but without providing the identity of the source), and request that the employer respond to the allegation within 10 days of its receipt of the notification. The Administrator may dispense with such notification if the Administrator determines that such notification might interfere with an effort to secure the employer's compliance.

(e) Upon the receipt of such information and review of the employer's response, if any, to the allegations, the Administrator will determine whether the allegations should be referred to the Secretary (or the Acting Secretary in the case of the Secretary's absence or disability) for a determination whether an investigation should be commenced by the Administrator. The Administrator may request authorization to commence an investigation where the following conditions are satisfied:

(1) The source of the information identifies himself or herself;

(2) The source likely possesses knowledge of the employer's practices or employment conditions or the employer's compliance with the with the requirements of this part;

(3) The source has provided specific credible information alleging a violation of the requirements of this part;

(4) The information provided is other than the information submitted by the employer to the Attorney General or the Secretary in securing the employment of an H–1B nonimmigrant;

(5) The information originated from a source other than an officer or employee of the Department of Labor, or, if it originated from an officer or employee of the Department of Labor, it was obtained in the course of a lawful investigation; and (6) The information in support of the allegations provides reasonable cause to believe that an employer has

(i) Willfully failed to meet a condition established by—

(A) Section 655.731 of this part relating to wages or § 655.732 of this part relating to working conditions;

(B) Section 655.733 of this part relating to strikes or lockouts;

(C) Section 655.———of this part relating to the displacement of U.S. workers (see Section 212(n)(1)(E) of INA); [1]

(D) Section 655.——— of this part relating to displacement of U.S. workers by receiving employer (see Section 212(n)(1)(F) of INA); or

(E) Section 655.——— of this part relating to recruitment of qualified U.S. workers (see Section 212(n)(1)(G)(i)(I)); or

(ii) Engaged in a pattern or practice of failures to meet a condition contained in subparagraph 6(i); or

(iii) Committed a substantial failure, affecting multiple employees, to meet a condition contained in paragraph (e)(6)(i) of this section.

(f) No investigation pursuant to this section will be commenced unless the Administrator requests authorization from the Secretary (or the Acting Secretary under the circumstances noted above) and the Secretary or the Acting Secretary personally certifies that the conditions listed in § 655.806(d) of this part have been met. If the Secretary issues a certification, an investigation shall be conducted and a determination issued within 30 days after the certification is received by the local Wage and Hour office undertaking the investigation.

(g) No hearing shall be available from a decision by the Administrator declining to refer allegations addressed by this section to the Secretary; and none shall be available from a decision by the Secretary certifying or declining to certify that an investigation is warranted.

(h) If following the Secretary's certification, the Administrator determines that a reasonable basis exists for a determination that the employer has violated a requirement of subpart H or I of this part, the Administrator shall notify the employer and other interested parties of the Administrator's determination and their right to a hearing, subject to the limitation established by paragraph (f) of this section, under the procedure prescribed in § 655.815 of this part.

(i) The identity of the source of information submitted to the Administrator shall not be disclosed.

(j) This section shall expire on October 1, 2001 unless section 212(n)(2)(G) of the INA is extended by future legislative action.

20. A new § 655.807 is proposed to be added, to read as follows:

§ 655.807 Authority to investigate employers found to have committed willful violations

(a) The Administrator may conduct random investigations of an employer during a five-year period beginning on the date of one of the following findings (on or after October 21, 1998, the date of the enactment of the ACWIA)—

(1) A finding by the Secretary that the employer willfully failed to meet a condition of section 212(n) of the INA (pertaining to attestations in the labor condition application; *see* § 655.730 *et seq.* of subpart H);

(2) A finding by the Secretary that the employer willfully misrepresented material fact(s) in a labor condition application (*see* § 655.730 *et seq.* of subpart H); or

(3) A finding by the Attorney General that the employer willfully failed to meet the condition of section 212(n)(1)(G)(i)(II) of the INA (pertaining to an offer of employment to an equally or better qualified U.S. worker).

(b) Where the Administrator undertakes such an investigation, the Administrator shall issue a determination in the manner provided by § 655.805(e) and § 655.815 of this part.

[1] **Note:** The sections referenced in § 655.806(e)(6)(i)(C) through (E) are under development. See discussion in the preamble.

(c) The Administrator's authority to undertake such investigations does not affect the Administrator's authority to undertake investigations under other circumstances (*see* §§ 655.805; 655.806).

20. Section 655.810 is proposed to be revised to read as follows:

§ 655.810 Remedies.

(a) Upon determining that an employer has failed to pay wages as required by § 655.731 of this part, the Administrator shall assess and oversee the payment of back wages to any H–1B nonimmigrant employed by the employer in the specific employment in question. The back wages shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to such nonimmigrant(s). The Administrator may appropriately impose an administrative remedy or order for any violation of the Act.

(b) The Administrator may assess appropriate administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation) for the following violations:

(1) A failure pertaining to strike/lockout, displacement, or contractor inquiry;

(2) A substantial failure pertaining to notification, labor condition application specificity, or recruitment; or

(3) A misrepresentation of material fact on the labor condition application.

(c) The Administrator may assess a civil monetary penalty of $1,000—and also issue an administrative order requiring the employer to return to the employee (or pay to the U.S. Treasury if the employee cannot be located) any money paid to the employer—for the following violations:

(1) A penalty paid by the employee to the employer for ceasing employment with the employer prior to a date agreed to by the employee and employer; or

(2) A payment or compensation by the employee to the employer of the additional $500 filing fee required for the filing the petition under section 214(c)(9) of the INA.

(d) The Administrator may assess appropriate administrative remedies (including civil monetary penalties in an amount not to exceed $5,000 per violation) for the following violations:

(1) A willful failure pertaining to wages/working conditions, strike/lockout, notification, labor condition application specificity, displacement, or recruitment;

(2) A willful misrepresentation of a material fact on the labor condition application; or

(3) A discrimination, retaliation or intimidation against an employee (*see* § 655.800(d)).

(e) The Administrator may assess appropriate administrative remedies (including civil monetary penalties in an amount not to exceed $35,000 per violation) for a displacement violation which is accompanied by one of the following violations:

(1) A willful failure pertaining to wages/working condition, strike/lockout, notification, labor condition application specificity, displacement, or recruitment; or

(2) A willful misrepresentation of a material fact on the labor condition application.

(f) The Administrator shall notify the Attorney General (pursuant to § 655.855) for the implementation of the following period(s) of disqualification of the employer from approval of any petitions filed by or on behalf of the employer:

(1) Disqualification for at least one year, for violation(s) specified in paragraph (b) of this section;

(2) Disqualification for at least two years, for violation(s) specified in paragraph (d) of this section; or

(3) Disqualification for at least three years, for violation(s) specified in paragraph (e) of this section;

(g) In determining the amount of the civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors. The factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the INA and subpart H or I 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. 1182(n) and subparts H and I of this part;

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

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

(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.

(h) Appropriate administrative remedies, which may be assessed by the Administrator under subparagraphs (b), (d) and (e) of this section, include make-whole relief for displaced U.S. workers, whistleblowers, or H–1B workers who failed to receive benefits or eligibility for benefits.

(i) The civil money penalties, back wages, and/or any other remedy(ies) determined by the Administrator to be appropriate are immediately due for payment or performance upon the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or upon the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of ''Wage and Hour Division, Labor.'' The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The payment or performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. Distribution of back wages shall be administered in accordance with existing procedures established by the Administrator.

21. In § 655.815, paragraph (a) is proposed to be revised to read as follows:

§ 655.815 Written notice and service of Administrator's determination.

(a) The Administrator's determination, issued pursuant to §§ 655.805, 655.806, or 655.807 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.

* * * * *

22. Section 655.855 is proposed to be revised to read as follows:

§ 655.855 Notice to the Employment and Training Administration and the Attorney General.

(a) The Administrator shall notify the Attorney General and ETA of the final determination of any violation requiring the Attorney General not to approve petitions filed by an employer. The Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions. Violations requiring notification to the Attorney General are identified in § 655.810(f).

(b) The Administrator shall notify the Attorney General and ETA upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made pursuant to § 655.820 of this part; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review to the Secretary is made pursuant to § 655.845 of this part; or

(3) Where a petition for review is filed from an administrative law judge's decision finding a violation and the Secretary either declines within thirty days to entertain the appeal, pursuant to § 655.845(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 employer, and the Secretary, upon review, issues a decision pursuant to § 655.845 of this part, holding that a violation was committed by an employer.

(c) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (a) of this section, shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for nonimmigrants to be employed by the employer, for the period of time required by the Act and described in § 655.810(f).

(d) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a), shall invalidate the employer's labor condition application(s) under subparts H and I of this part, and shall not accept for filing any application or attestation submitted by the employer under 20 CFR part 656 or subparts A, B, C, D, E, H, or I of this part, for the same calendar period as specified by the Attorney General.

23. In § 655.840, paragraph (c) is proposed to continue to read as follows:

§ 655.840 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 § 655.731(d) of this part), and the administrative law judge determines that the Administrator's request was not warranted (under the standards in § 655.731(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 wages 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 § 655.731 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.

* * * * *

Signed at Washington, DC, this 23rd day of December, 1998.

Raymond J. Uhalde,

Deputy Assistant Secretary for Employment and Training, Employment and Training Administration.

John R. Fraser,

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

Appendix I (Not to be codified in the CFR): Form ETA 9035.

BILLING CODE 4510–27–p;

Labor Condition Application for H-1B Nonimmigrants

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

ETA Form 9035
OMB Approval:
Expiration Date:

It is preferred that this form be completed using the form fill program available from the U.S. Department of Labor. If you cannot use the program, please follow the guidelines below.

Circles must be filled completely.

When using a **typewriter**, use a sans serif font equivalent to 12-14 point. Center each letter in each box. DO NOT put more than one character per box. Use only CAPITAL LETTERS.

If you need to **hand write** the form, for optimum accuracy, use a medium to thick pen with black ink. Print in CAPITAL LETTERS and avoid contact with the edge of the box.
The following will serve as an example:

A	B	C	D	E	F	G	H	I	J	K	L	M
N	O	P	Q	R	S	T	U	V	W	X	Y	Z

0	1	2	3	4	5	6	7	8	9

1. Employer's Information

Full Legal Name of Employer

Federal Employer I.D. Number (9 digits) (EIN from IRS) -

Employer's Telephone Number -

Return FAX Number -

Contact Telephone Number (Optional) -

Contact's Name (Optional) (This may be an attorney or an employer's contact other than hiring official.)

Employer's Address (Number / Street)

City State Zip Code

Address Where Public Disclosure File is Kept (* ONLY If Different than Employer's Address -- If the address is the same leave this BLANK *)

City State Zip Code

NOTE: See OMB notice on page 3 of this form.

Employer's Control Number

Draft

Labor Condition Application for H-1B Nonimmigrants

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

ETA Form 9035
OMB Approval:
Expiration Date:

2. Occupational Information

Three-Digit Occupational Code | Number of H-1B Nonimmigrants

Job Title

3. Rate of Pay

$. PER — Fill Only ONE Circle: Year Month 2 Weeks Week Hour

Mark (X) if Part Time

4. Period of Intended Employment

Begin Date: M M / D D / Y Y Y Y

End Date: M M / D D / Y Y Y Y

5. Location Where H-1B Nonimmigrants Will Work and Related Information

5(a) Initial Work Location Information – REQUIRED -- Do not write 'Same as above' et al.

City | State

Prevailing Wage $. PER — Fill Only ONE Circle: Year Month 2 Weeks Week Hour

Source SESA Other

Source of Other

5(b) Additional or Subsequent Work Location Information – IF Applicable

City | State

Prevailing Wage $. PER — Fill Only ONE Circle: Year Month 2 Weeks Week Hour

Source SESA Other

Source of Other

5(c) Additional or Subsequent Work Location Information – IF Applicable

City | State

Prevailing Wage $. PER — Fill Only ONE Circle: Year Month 2 Weeks Week Hour

Source SESA Other

Source of Other

NOTE: See OMB notice on page 3 of this form.

Employer's Control Number

Draft

Labor Condition Application for H-1B Nonimmigrants

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

ETA Form 9035
OMB Approval:
Expiration Date:

5(d) Additional or Subsequent Work Location Information -- IF Applicable

City | State

Prevailing Wage $. PER — Fill Only ONE Circle: Year ○ Month ○ 2 Weeks ○ Week ○ Hour ○ — Source: SESA ☐ Other ☐

Source of Other

5(e) Additional or Subsequent Work Location Information -- IF Applicable

City | State

Prevailing Wage $. PER — Fill Only ONE Circle: Year ○ Month ○ 2 Weeks ○ Week ○ Hour ○ — Source: SESA ☐ Other ☐

Source of Other

6. Employer Labor Condition Statements

All applicants are required to develop and maintain documentation supporting labor condition statements 6(a), (b), and (d). Employers are also required to make available for public examination a copy of the labor condition application and necessary supporting documentation within one (1) working day after the date on which the application is filed with DOL. Mark (X) each box to indicate that the employer will comply with each statement.

☐ (a) H-1B nonimmigrants will be paid at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question *or* the prevailing wage level for the occupation in the area of employment, *whichever is higher.*

☐ (b) The employment of H-1B nonimmigrants will not adversely affect the working conditions of workers similarly employed. H-1B nonimmigrants will be offered benefits and eligibility for benefits on the same basis, and in accordance with the same criteria, as offered to similarly employed U.S. workers.

☐ (c) On the date of this application there is not a strike, lockout, or work stoppage in the course of a labor dispute in the occupation in which H-1B nonimmigrants will be employed at the place of employment. If such a strike, lockout, or work stoppage occurs after this application is submitted, I will notify ETA within 3 days of such occurrence and the application will not be used in support of a petition filing with INS for H-1B nonimmigrants to work in the same occupation at the place of employment until ETA determines the strike, lockout, or work stoppage has ceased.

☐ (d) A copy of this application has been, or will be, provided to each H-1B nonimmigrant employed pursuant to this application, and, as of this date, notice of this application has been provided to workers employed in the occupation in which H-1B nonimmigrants will be employed, either by:

- Providing notice of this filing to the bargaining representative of workers in the occupation in which H-1B nonimmigrants will be employed; OR
- There is no such bargaining representative, therefore, providing notice of this filing either through physical posting for 10 consecutive days in the locations where H-1B nonimmigrants will be employed, or through electronic notification to employees in the occupational classification for which H-1B nonimmigrants are sought.

7. Notice to Employers

☐ **Every employer who, as of the date of this application, (a) is H-1B dependent or (b) has been found to have commited a willful violation or misrepresentation during the five (5) year period preceding the date of this application, is required to check this box and complete the attestations in Item 8 on page 4 of this form. NOTE: See Item 7 of the instructions for the definition of 'H-1B dependent employer'. NOTE: If an employer is or becomes H-1B dependent, or is found to have committed a willful violation or misrepresentation, any labor condition application for H-1B nonimmigrants which was certified by the Department of Labor prior to [insert effective date of interim final rule], will be demed invalid, and may not be used in support of a petition or an extention of a petition for an H-1B nonimmigrant..**

Employer's Control Number

Draft

Labor Condition Application for H-1B Nonimmigrants

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

ETA Form 9035
OMB Approval:
Expiration Date:

Employers who, as of the date of this application, are H-1B dependent (as defined in Item 7 of the instructions) *or* who have been found to have committed a willful violation or misrepresentation during the past five (5) years (and after October 20, 1998) must complete this section:

8. Additional Employer Labor Condition Statements:

All applicants are required to develop and maintain documentation supporting labor condition statements 8(a), (b), and (c). Employers are also required to make available for public examination a copy of the labor condition application and necessary supporting documentation within one (1) working day after the date on which the application is filed with DOL. The Employer must mark (X) in any of the appropriate box(es) below:

☐ Is H-1B dependent; ***and/or***

☐ Has been found to have committed a willful violation or misrepresentation during the five (5) year period preceding the filing of this application.

and hereby agrees to observe the following labor condition statements unless the exemption requirements noted below are met:

(a) The employer will not displace any similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the date of filing a visa petition supported by this application.

(b) The employer will not place any H-1B nonimmigrant employed pursuant to this application with any other employer or at another employer's worksite *unless* the employer first makes a *bona fide* inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the placement, and the employer has no contrary knowledge. NOTE: If the other employer displaces a U.S. worker during the period described, the displacement will constitute a failure to comply with the terms of the labor condition application and the employer applicant may be subject to civil money penalties and debarment.

(c) Prior to filing this application, or prior to filing any petition for an H-1B nonimmigrant pursuant to this application, the employer took or will take good faith steps meeting industry-wide standards to recuit U.S. workers for the job for which the nonimmigrant is sought, and offering compensation as least as great as offered to the H-1B nonimmigrant. The employer will (has) offer(ed) the job to any U.S. worker who (has) applies and is equaly or better qualified for the job for which the H-1B nonimmigrant is sought. NOTE: This requirement does not apply to the employment of an H-1B nonimmigrant who is a "priority worker" (persons with extraordinary ability, or outstanding professors or researchers, or certain multinational executives or managers) within the meaning of Section 203(b)(1)(A), (B), or (C) of the Immigration and Nationality Act.

☐ NOTE: An employer who uses this application *only* to support visa petitions for H-1B nonimmigrants who are exempt because they receive wages at a rate equal to at least $60,000 per year, *or* have attained a Master's degree (or its equivalent) or a higher degree in a specialty related to the employment, is not required to comply with the requirements of this Item 8 and should mark (X) this box. Employers are cautioned that if this application is used to petition for *any* non-exempt employees, they will be required to comply with these additional labor condition statements with respect to *all* of its H-1B nonimmigrants whether or not this box is marked (X) .

9. Declaration Of Employer

By signing this form, I, personally and on behalf of the employer, agree to comply with the Department of Labor regulations (see 20 CFR Part 655 Subparts H and I) governing this program and, in particular, to make this application, supporting documentation, and other records, files and documents available to officials of the Department of Labor, upon request, during any investigation under the Immigration and Nationality Act. If the employer is or becomes an H-1B dependent employer, or is found to have committed a willful violation or misrepresentation of these provisions, I personally and on behalf of the employer, further agree to comply with the attestation elements set forth in Item 8.

Name of Hiring or Other Designated Official

Title of Hiring or Other Designated Official

Signature -- DO NOT let signature extend beyond the box.

M M / D D / Y Y Y Y

NOTE: Falsification of any statements on this form may subject the employer to civil or criminal prosecution (see 18 U.S.C. 1001), as well as to civil money penalties and debarment.

Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor.

FOR U.S. GOVERNMENT AGENCY USE ONLY:

By virtue of my signature below I acknowledge that this application is hereby certified and will be valid from _____ through _____.

Signature and Title of Authorized DOL Official | ETA Case No. | Date

The Department of Labor is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application.

NOTE: See OMB notice on page 3 of this form.

Employer's Control Number

Draft

INSTRUCTIONS FOR COMPLETING FORM ETA 9035
LABOR CONDITION APPLICATION FOR H-1B NONIMMIGRANTS

IMPORTANT: READ CAREFULLY BEFORE COMPLETING THE FORM

The completed form will be electronically scanned. To ensure the accuracy of readability and avoid rejections based upon the lack thereof, it is preferred that the form be completed using the ETA 9035 form fill program available from the U.S. Department of Labor. If you hand write the form, print legibly in ink using a medium to thick pen. Print *only* in CAPITAL LETTERS and avoid contact with the edge of the boxes. See example hand writing on page 1 of the application. If you use a typewriter to complete the form use a font equivalent to 12-14 pt. Center each letter in the box and use *only* CAPITAL LETTERS. Be sure to sign and date the form. Citations below to regulations are citations to 20 CFR part 655, subparts H and I.

To knowingly furnish any false information in the preparation of the Form ETA 9035 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 a penitentiary, or both (18 U.S.C. 1001). Other penalties apply as well to fraud or 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).

Employers seeking to hire H-1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability must submit the completed and dated original Form ETA 9035 to the designated certifying officer in the Department of Labor (Department or DOL), Employment and Training Administration (ETA) servicing office having jurisdiction over the state in which the job opportunity is located. Labor condition applications for work to be performed in ETA regions I though IV should be submitted via facsimile transmission to the ETA servicing office in Philadelphia, Pennsylvania **(FAX TO: (215) 596-____)**; and labor condition applications for work to be performed in ETA regions V through X should be submitted via facsimile transmission to the ETA servicing office in San Francisco, California **(FAX TO: (415) 975-____)**. To determine the geographical jurisdiction of these ETA regional offices, or if you wish to submit the application by mail or private carrier, see 20 CFR 655.720 for the ETA regional office addresses. An application which is complete and has no obvious inaccuracies will be certified by the Department and returned to the employer, who may then file it in support of its petition for an H-1B nonimmigrant with the Immigration and Naturalization Service (INS).

Item 1. Employer's Information. Enter the information requested under the appropriate subheading.

Full Legal Name of Employer: Enter the full legal name of the business, firm or organization, or, if an individual, enter the name used for legal purposes on documents. Some abbreviation may be required for long names.

Federal Employer I.D. Number: Enter the employer's Federal Employer Identification Number (EIN) assigned by the Internal Revenue Service. (9 digits).

Employer's Telephone No: Self-explanatory.

Return FAX No: If you want the application to be returned via facsimile transmission, enter the area code and fax number to which you want the Department to the send the final determination on the application.

Contact Telephone Number: Enter the area code and telephone number of the person to whom questions regarding the labor condition application should be directed.

Contact Name: Enter the name of the person to whom questions regarding the labor condition application should be directed.

Employer's Address: The first two lines are for the street address. The last line is for the city, state, and zip code.

Address Where Public Disclosure File is Kept: The first two lines are for the street address. The last line is for the city, state, and zip code. Enter *only* if different from the Employer's Address. Otherwise, leave blank.

Item 2. Occupational Information. Enter the information requested under the appropriate subheading.

Three-Digit Occupational Group Code: Enter the three-digit code from Appendix 1 which most clearly describes the job to be performed. (Departmental purposes only.)

Number of H-1B Nonimmigrants: Enter the number of H-1B nonimmigrants that will be hired in the three-digit occupational code stated above. Use only numerals. Do **not** spell out the number; *e.g.*, enter "001", **not** "ONE".

Job Title: Enter the common name or payroll title of the job being offered. A separate labor condition application shall be filed for each occupation in which H-1B nonimmigrants will be employed.

Item 3. Rate of Pay. Enter the salary to be paid in terms of the amount per hour, week, two weeks, month, or year. If a range of wages is to be paid to H-1B nonimmigrants under the application, enter the bottom of the wage range, which must meet the prevailing wage listed in Item 5. Mark (X) in the box to the right if the position is part-time and enter the rate of pay on an hourly basis.

Item 4. Period of Intended Employment. Enter the beginning and ending dates (month, date, and four-digit year) during which the H-1B nonimmigrants will be employed. Fill all boxes; *e.g.*, July 5, 2000, should be written as "07/05/2000".

Item 5. Location Where H-1B Nonimmigrants Will Work and Related Information. Enter the information requested under the appropriate subheading.

5(a). Initial Work Location Information: Enter the city and state of the site where the work will actually be performed.

Prevailing Wage Rate and its Source: Enter the prevailing wage rate in terms of the amount per hour, week, two weeks, month, or year. If the position is part-time, enter the prevailing wage on an hourly basis. If the employer is relying on a wage determination obtained from a State Employment Security Agency, mark (X) the "SESA" box. If the employer is using another source, mark (X) the "Other" box and specify such other source in the space provided, *i.e.*, the year published and the name of the published wage survey, or other source utilized by the employer to determine the prevailing wage for the occupational classification in which H-1B nonimmigrants will be employed; *e.g.*, "1998 collective bargaining agreement", "1998 BLS Survey", "1998 employer-conducted survey", *etc.*

5(b)-(e). Additional or Subsequent Work Location Information: If H-1B nonimmigrants are to be employed concurrently or sequentially in more than one location, enter the city and state of the other sites or locations where the work will actually be performed in Items 5(b) through (e), as needed. Enter the prevailing wage rate and its source for each additional work location in the manner described in Item 5(a).

Item 6. Employer Labor Condition Statements. The employer must attest to the conditions listed in Items 6(a) through (d) by marking (X) in each box and by signing the application form. Employers must develop and maintain documentation to support labor condition statements 6(a), (b), and (d). Documentation in support of a labor condition application shall be retained at the employer's principal place of business or the worksite and made available to DOL officials upon request. See §§655.731 through 655.734 for guidance on the documentation that must support each labor condition statement.

6(a). Wages: The employer must attest that H-1B nonimmigrants will be paid wages which are at least the higher of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the

prevailing wage level for the occupational classification in the area of intended employment. See §655.731.

6(b). Working Conditions: The employer must attest that the employment of H-1B nonimmigrants in the named occupation will not adversely affect the working conditions of workers similarly employed. The employer must further attest that H-1B nonimmigrants will be offered benefits and eligibility for benefits on the same basis, and in accordance with the same criteria, as offered to similarly employed U.S. workers. See §655.732.

6(c). Strike, Lockout, or Work Stoppage: The employer must attest that on the date the application is signed and submitted, there is not a strike, lockout or work stoppage in the course of a labor dispute in the named occupation at the worksite(s) and that, if a such a strike, lockout, or work stoppage occurs after the application is submitted, the employer will notify ETA within 3 days of such occurrence and the application will not be used in support of a petition filing with INS for H-1B nonimmigrants to work in the same occupation at the place of employment until ETA determines the strike, lockout, or work stoppage has ceased. See §655.733.

6(d). Notice: The employer must attest that as of the date of filing, notice of the labor condition application has been or will be provided to workers employed in the named occupation. Notice of the application may be provided to workers through the bargaining representative, or where there is no such bargaining representative, notice of the filing must be provided either through physical posting in conspicuous locations where H-1B nonimmigrants will be employed, or through electronic notification to employees in the occupational classification for which H-1B nonimmigrants are sought. Further, the employer must attest that each H-1B nonimmigrant employed pursuant to the application will be provided with a copy of the application. This notification shall be provided no later than the date the H-1B nonimmigrant reports to work at the place of employment. See §655.734.

Item 7. Notice to Employers. An employer who is either H-1B dependent or has been found to have committed a willful violation or misrepresentation during the five year period preceding the date of the application must mark (X) the box and attest to the additional labor condition statements in Item 8 on page four of the application. The determination as to whether an employer is H-1B dependent is a function of the number of H-1B nonimmigrants employed as a proportion of the total number of full-time equivalent employees employed in the U.S. The following table can be used to determine whether the employer is or is not H-1B dependent.

An employer is H-1B dependent if it employs in the U.S.:		
Number of full-time equivalent employees:		Number of H-1B nonimmigrant employees:
1 to 25	*inc'l*	8 or more
26 to 50	*inc'l*	13 or more
51 or more	*inc'l*	15% or more of its U.S. workforce

See §655.7__ for more detailed guidance as to what constitutes an "H-1B dependent employer". No employer who is or becomes an H-1B dependent employer, or is found to have committed a willful violation or misrepresentation, may continue to use *any* labor condition application for H-1B nonimmigrants which was certified by the Department of Labor before **[insert effective date of interim final rule]**, in support of a petition or extension of a petition for an H-1B nonimmigrant which is filed on or after that date.

Item 8. Additional Employer Labor Condition Statements. Every employer who, as of the date of the application, is H-1B dependent (as defined in Item 7) or who has been found to have committed a willful violation or misrepresentation during the five year period preceding the date of the application, must attest to the additional labor condition statements by completing Item 8 and by signing the application form. Such employers are required to develop and maintain documentation supporting these additional labor condition statements and are further required to make such documentation available for public examination in the same manner as the documentation required to be made publicly available under Item 6 of the application. An employer subject to Item 8 must mark (X) the appropriate box(es).

8(a). Displacement: The employer must attest that it will not displace any similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the date of filing a visa petition for an H-1B nonimmigrant supported by the application. See §655.7__.

8(b). Secondary Displacement: The employer must attest that it will not place any H-1B nonimmigrant employed pursuant to the application with any other employer or at another employer's worksite where there are indicia of employment between the nonimmigrant and such other employer, *unless* the employer applicant first makes a *bona fide* inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the placement, and the employer applicant has no contrary knowledge. If the other employer displaces a similarly employed U.S. worker during such period, the displacement will constitute a failure by the employer applicant to comply with the terms of the labor condition application and the employer applicant may be subject to civil money penalties and debarment. See §655.7__.

8(c). Recruitment: The employer must attest that prior to filing the application, or prior to filing any petition for an H-1B nonimmigrant pursuant to the application, it took or will take good faith steps meeting industry-wide standards to recruit U.S. workers for the job for which the H-1B nonimmigrant is sought and offered, or will offer, compensation at least as great as offered to the H-1B nonimmigrant. The employer must further attest that it has offered, or will offer, the job to any U.S. worker who applies and was or is equally or better qualified for the job for which the H-1B nonimmigrant is sought. This recruitment labor condition statement does not apply to the employment of an H-1B nonimmigrant who is a "priority worker" (a person with extraordinary ability, an outstanding professor or researcher, or a certain multinational executive or manager) within the meaning of Section 203(b)(1)(A), (B), or (C) of the Immigration and Nationality Act. See §655.7__.

Note: An employer who uses the application *only* to support visa petitions for H-1B nonimmigrants who are exempt because they receive wages at a rate equal to at least $60,000 per year, or have attained a Master's degree (or its equivalent) or a higher degree in a specialty related to the employment, is not required to comply with requirements of Item 8 and should mark (X) this box to so indicate. The employer is cautioned that if the application is used to petition for *any* non-exempt H-1B nonimmigrants, it will be required to comply with these additional labor condition statements with respect to *all* of its H-1B nonimmigrants, if these statements are applicable under item 8.

Item 9. Declaration of Employer. By signing the form, the employer is attesting to the accuracy of the labor condition statements and to its obligation to comply with these conditions. False statements are subject to Federal criminal penalties, as stated above. Failure to meet a condition of the application, or misrepresentation of a material fact may result in additional penalties.

THREE-DIGIT OCCUPATIONAL GROUPS

PROFESSIONAL, TECHNICAL, AND MANAGERIAL OCCUPATIONS AND FASHION MODELS

OCCUPATIONS IN ARCHITECTURE, ENGINEERING, AND SURVEYING

001 ARCHITECTURAL OCCUPATIONS
002 AERONAUTICAL ENGINEERING OCCUPATIONS
003 ELECTRICAL/ELECTRONICS ENGINEERING OCCUPATIONS
005 CIVIL ENGINEERING OCCUPATIONS
006 CERAMIC ENGINEERING OCCUPATIONS
007 MECHANICAL ENGINEERING OCCUPATIONS
008 CHEMICAL ENGINEERING OCCUPATIONS
010 MINING AND PETROLEUM ENGINEERING OCCUPATIONS
011 METALLURGY AND METALLURGICAL ENGINEERING OCCUPATIONS
012 INDUSTRIAL ENGINEERING OCCUPATIONS
013 AGRICULTURAL ENGINEERING OCCUPATIONS
014 MARINE ENGINEERING OCCUPATIONS
015 NUCLEAR ENGINEERING OCCUPATIONS
017 DRAFTERS
018 SURVEYING/CARTOGRAPHIC OCCUPATIONS
019 OTHER OCCUPATIONS IN ARCHITECTURE, ENGINEERING, AND SURVEYING

OCCUPATIONS IN MATHEMATICS AND PHYSICAL SCIENCES

020 OCCUPATIONS IN MATHEMATICS
021 OCCUPATIONS IN ASTRONOMY
022 OCCUPATIONS IN CHEMISTRY
023 OCCUPATIONS IN PHYSICS
024 OCCUPATIONS IN GEOLOGY
025 OCCUPATIONS IN METEOROLOGY
029 OTHER OCCUPATIONS IN MATHEMATICS AND PHYSICAL SCIENCES

COMPUTER-RELATED OCCUPATIONS

030 OCCUPATIONS IN SYSTEMS ANALYSIS AND PROGRAMMING
031 OCCUPATIONS IN DATA COMMUNICATIONS AND NETWORKS
032 OCCUPATIONS IN COMPUTER SYSTEM USER SUPPORT
033 OCCUPATIONS IN COMPUTER SYSTEM TECHNICAL SUPPORT
039 OTHER COMPUTER-RELATED OCCUPATIONS

OCCUPATIONS IN LIFE SCIENCES

040 OCCUPATIONS IN AGRICULTURAL SCIENCES
041 OCCUPATIONS IN BIOLOGICAL SCIENCES
045 OCCUPATIONS IN PSYCHOLOGY
049 OTHER OCCUPATIONS IN LIFE SCIENCES

OCCUPATIONS IN SOCIAL SCIENCES

050 OCCUPATIONS IN ECONOMICS
051 OCCUPATIONS IN POLITICAL SCIENCE
052 OCCUPATIONS IN HISTORY
054 OCCUPATIONS IN SOCIOLOGY
055 OCCUPATIONS IN ANTHROPOLOGY
059 OTHER OCCUPATIONS IN SOCIAL SCIENCES

OCCUPATIONS IN MEDICINE AND HEALTH

070 PHYSICIANS AND SURGEONS
071 OSTEOPATHS
072 DENTISTS
073 VETERINARIANS
074 PHARMACISTS
076 THERAPISTS
077 DIETICIANS
078 OCCUPATIONS IN MEDICAL AND DENTAL TECHNOLOGY
079 OTHER OCCUPATIONS IN MEDICINE AND HEALTH

OCCUPATIONS IN EDUCATION

090 OCCUPATIONS IN COLLEGE AND UNIVERSITY EDUCATION
091 OCCUPATIONS IN SECONDARY SCHOOL EDUCATION
092 OCCUPATIONS IN PRESCHOOL, PRIMARY SCHOOL, AND KINDERGARTEN EDUCATION
094 OCCUPATIONS IN EDUCATION OF PERSONS WITH DISABILITIES
096 HOME ECONOMISTS AND FARM ADVISERS
097 OCCUPATIONS IN VOCATIONAL EDUCATION
099 OTHER OCCUPATIONS IN EDUCATION

OCCUPATIONS IN MUSEUM, LIBRARY, AND ARCHIVAL SCIENCES

100 LIBRARIANS
101 ARCHIVISTS
102 MUSEUM CURATORS AND RELATED OCCUPATIONS
109 OTHER OCCUPATIONS IN MUSEUM, LIBRARY, AND ARCHIVAL SCIENCES

OCCUPATIONS IN LAW AND JURISPRUDENCE

110 LAWYERS
111 JUDGES
119 OTHER OCCUPATIONS IN LAW AND JURISPRUDENCE

OCCUPATIONS IN RELIGION AND THEOLOGY

120 CLERGY
129 OTHER OCCUPATIONS IN RELIGION AND THEOLOGY

OCCUPATIONS IN WRITING

131 WRITERS
132 EDITORS: PUBLICATION, BROADCAST, AND SCRIPT
139 OTHER OCCUPATIONS IN WRITING

OCCUPATIONS IN ART

141 COMMERCIAL ARTISTS: DESIGNERS AND ILLUSTRATORS, GRAPHIC ARTS
142 ENVIRONMENTAL, PRODUCT, AND RELATED DESIGNERS
149 OTHER OCCUPATIONS IN ART

OCCUPATIONS IN ENTERTAINMENT AND RECREATION

152 OCCUPATIONS IN MUSIC
159 OTHER OCCUPATIONS IN ENTERTAINMENT AND RECREATION

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