

DEPARTMENT OF LABOR**Employment and Training
Administration****20 CFR Part 655**

[RIN 1205-AB29]

**Labor Condition Applications and
Requirements for Employers Using
Nonimmigrants on H-1B Visas;
Implementation of Electronic Filing**

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

ACTION: Final rule.

SUMMARY: The Department of Labor is amending its regulations governing the filing and processing of labor condition applications (LCAs) for the employment of nonimmigrant aliens on H-1B visas in specialty occupations and as fashion models. The amendments will allow employers to submit LCAs electronically, utilizing web based forms and instructions.

DATES: *Effective Date:* This Final Rule is effective on January 14, 2002.

Compliance Dates: Affected parties do not have to comply with the revised information collection requirements in this rule (i.e., provisions relating to the new Form ETA 9035-E), until the Department publishes in the **Federal Register** a notice approving the revision of the information collection provisions. For further information on collection information, see **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Denis Gruskin, Senior Specialist, Division of Foreign Labor Certifications, Employment and Training Administration, 200 Constitution Avenue, NW, Room C-4318, Washington, DC 20210.

SUPPLEMENTARY INFORMATION:**I. What Is the H-1B Nonimmigrant Program?**

On November 29, 1990, the Immigration and Nationality Act (INA) was amended by the Immigration Act of 1990 (IMMACT 90) (Pub. L. 101-649, 104 Stat. 4978) to create the "H-1B visa program" for the temporary employment in the United States (U.S.) of nonimmigrants in "specialty occupations" and as "fashion models of distinguished merit and ability." The H-1B provisions of the INA govern the temporary entry of foreign "professionals" to work in "specialty occupations" in the United States under H-1B visas. 8 U.S.C.

1101(a)(15)(H)(i)(b), 1182(n), and 1184(c). The H-1B category of specialty occupations consists of occupations requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a Bachelor's or higher degree in the specific specialty as a minimum for entry into the occupation in the United States. 8 U.S.C. 1184(i)(1). In addition, an H-1B nonimmigrant in a specialty occupation must possess full State licensure to practice in the United States (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 H-1B provisions of the INA have been amended several times since 1990. A detailed legislative history of the H-1B nonimmigrant program can be found in the preamble to the Interim Final Rule published on December 20, 2000, to implement changes made to the INA by the American Competitiveness and Workforce Improvement Act of 1998. See 65 FR at 80117.

II. Why Is the Department Implementing an Electronic Filing System?

The current regulations permit employers to submit labor condition applications (LCAs) by facsimile transmission (FAX) or by mail. Although submission of LCAs by FAX and processing of such applications have generally been more efficient than submission and processing of LCAs by mail, operational problems delayed the processing of some LCAs submitted by FAX for the first several months of its operation. To improve customer service, the Department will, through this Final Rule, provide employers the option to utilize an electronic filing system which will permit employers to fill out their LCAs on a Department of Labor website and submit them electronically to the Department's Employment and Training Administration (ETA). The electronic filing system will be convenient and less burdensome for employers, since, unlike a system based on filing applications by FAX or by mail, the new system will allow the filing of an application without the submission of a "hard copy," which is required for filing of an application by mail or by FAX. Electronic filing will permit more efficient ETA electronic processing of LCAs without the technical and administrative uncertainties inherent in the technology currently available to process applications that are submitted

by FAX. Further, since the scope of the Department's review of LCAs under section 212(n)(1)(D) of the INA is limited to "completeness and obvious inaccuracies," the filing and processing of LCAs is particularly amenable to an electronic filing system. Because the electronic filing system includes guidance to the employers in filling out their LCAs "on line," the LCAs will have fewer incomplete or obviously inaccurate entries and will, therefore, ordinarily be acceptable for immediate electronic certification.

III. What Changes Are Being Made To Implement an Electronic Filing System?

The creation of an electronic filing and certification system requires changes in the current regulations, because the regulations explicitly permit only two types of submission: FAX transmission and hard copy by U.S. Mail. (20 CFR 655.720(a) and (b)). Therefore, in this Final Rule, the Department is amending the regulations at §§ 655.700, 655.705, 655.720, 655.730, 655.731, 655.732, 655.733, 655.734, 655.736, 655.740, 655.750, 655.760, and 655.805, to implement a new labor condition application form (Form ETA 9035E) and a new electronic submission and certification system. The new LCA form is identical in all respects to the existing LCA (Form ETA 9035), except that the new form contains additional "blocks" to be marked by the employer to acknowledge that the submission is being made electronically and that the employer will be bound by the LCA obligations through such submission. The Department has developed a customer-friendly website (www.lca.doleta.gov) which can be accessed by employers to electronically fill out and submit the Form ETA 9035E. The website includes detailed instructions, prompts and checks to help employers fill out the 9035E. This process is designed to help insure that employers enter the H-1B program based on accurate LCA information and with explicit, immediate notice of the obligations.

Additionally, the Department's website provides an option to permit employers that frequently file LCAs to set up secure files within the ETA electronic filing system containing information which is common to any LCA they may wish to file. Under this option, each time an employer files an LCA, the information common to all its LCAs would be entered automatically by the electronic filing system and the employer would only have to enter the data that was specific to the new LCA it wished to file in the instance at hand.

The electronic submission and certification system implemented by this Rule requires that the new LCA form be printed and signed by the employer immediately after ETA provides the electronic certification. The signed form must then be maintained in the employer's files and a copy of the signed form must be maintained in the public access file; another copy of the signed form must be submitted to the Immigration and Naturalization Service (INS) to support the Petition for Nonimmigrant Worker, INS Form I-129. This requirement is functionally equivalent to the current requirement that employers retain the signed original certified LCA in their files, and place a copy of this LCA in the public access file. This Rule also provides additional procedural guidance which clarifies the interrelationship between the Department's regulations and the INS regulations on the matter of the employer's acceptance of its H-1B obligations under the LCA.

Since the Department does not yet have the technology to satisfy the statutes that deal with electronic signatures on Government applications—Government Paperwork Elimination Act (44 U.S.C. 3504 n.) and/or the Electronic Records and Signatures in Global and National Commerce Act (E-SIGN) (15 U.S.C. 7001-7006)—we are not implementing either of these statutes in this Rule. We consider it to be essential that an electronic LCA filing and certification system be made available as soon as possible. In the event that such technology becomes available in the future, the Department will modify the electronic LCA system to comply with these statutes and will provide appropriate notice(s) and instructions to employers. We view it as inadvisable to delay the electronic LCA system while we develop this additional technology.

IV. Why Is a Final Rule Being Published Without Notice and Comment?

The Department is promulgating this Rule in final form. This Rule makes no substantive alteration in the regulations and does not alter the rights of any parties. The Rule makes changes which constitute a "rule of agency organization, procedure, or practice" which may be published in final form pursuant to section 553(b)(A) of the Administrative Procedure Act (5 U.S.C. 553(b)(A)).

V. Executive Order 12866

We have determined that this Rule is not an "economically significant

regulatory action" within the meaning of Executive Order 12866, in that it will not have an economic effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.

While the Rule is not economically significant, the Office of Management and Budget reviewed this Rule because of the extensive interest on the part of the regulated community in the matters addressed in this Rule.

VI. Small Business Regulatory Enforcement Fairness Act of 1996

This Rule is not a rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996, 5 U.S.C. 804(3)(C). It is a rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of parties other than the Department of Labor.

VII. Unfunded Mandates Reform Act of 1995

This Rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

VIII. Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for this Rule (5 U.S.C. 553(b)), the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. pertaining to regulatory flexibility analysis, do not apply to this Final Rule. See 5 U.S.C. 603(a).

IX. Executive Order 13132

This Rule will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, we have determined that this Rule does not have sufficient federalism implications to warrant the preparation of a summary impact statement.

X. Assessment of Federal Regulations and Policies on Families

This Rule does not affect family well-being.

XI. Paperwork Reduction Act

Summary: Sections 655.700, 655.705, 655.720, 655.730, 655.731, 655.732, 655.733, 655.734, 655.736, 655.740, 655.750, 655.760, and 655.805 have been amended to reflect the option of electronic submission of the Form ETA 9035-E. The amendments parallel the current provisions for submission, recordkeeping and posting requirements for hard copies prepared for submission by mail or by FAX. The new LCA form is the same as the existing LCA (Form ETA 9035), except that the new form contains additional "blocks" to be marked by the employer to acknowledge that the submission is being made electronically and that the employer will be bound by the LCA obligations through such submission. ETA estimates that the time to fill out and submit a Form ETA 9035-E electronically and to comply with recordkeeping and notice requirements under the regulations will be the same as for hard copies of Form ETA 9035 prepared for submission by mail or by FAX. It should be noted, however, that because of certain operational problems with the FAX system, applications submitted by FAX are submitted on average 1.1 times. Such duplication does not occur with respect to applications submitted by mail and the Department does not anticipate duplicate submissions of forms submitted electronically.

Need: The creation of an optional electronic filing and certification system requires changes in the current regulations because the regulations explicitly permit only two types of submission: FAX transmission and hard copy by U.S. mail (20 CFR 655.720(a) and (b)).

Respondents and frequency of response: Employers submit LCAs when they wish to employ an H-1B nonimmigrant worker. ETA estimates, based on its operating experience with the H-1B program, that in the upcoming year employers will file approximately 260,000 LCAs (including duplicate FAX submissions). Specifically, ETA estimates that it will receive 7,000 hard copies submitted by mail, 123,000 hard copies submitted by FAX (which includes 12,300 duplicate submissions), and 130,000 LCAs submitted electronically.

Estimated total annual burden: DOL estimates that the completion of LCAs, complying with recordkeeping requirements and providing a copy to each H-1B nonimmigrant will result in a total burden of 247,700 hours in the upcoming year (7,000 hard copies submitted by mail x 1 hour + 123,000

FAX submissions (which includes 12,300 duplicate submissions) x .90 hours + 130,000 electronic submissions x 1 hour = 247,700 hours, or about 57 minutes per application submitted).

Request for comments: The public is invited to provide comments on the revised 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 Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for Department of Labor, Employment and Training Administration, 725 17th Street, NW., Washington, DC 20503. Comments should be received by January 4, 2002.

The revised information collection requirements are not effective until they have been approved by OMB. A notice will be published in the **Federal Register** when approval is obtained of the revision to the information collection.

Copies of the information collection request submitted to OMB may be obtained by contacting Denis Gruskin, Senior Specialist, Division of Foreign Labor Certifications, Employment and Training Administration, 200 Constitution Avenue NW., Room N-4318, Washington, DC 20210. Telephone (202) 693-2953 (this is not a toll-free number).

XII. Catalog of Federal Domestic Assistance Number

This program is listed in the Catalog of Federal Domestic Assistance at 17.252.

List of Subjects in 20 CFR 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.

Accordingly, subparts H and I of part 655 of title 20 of the Code of Federal Regulations are amended as follows:

Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas

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

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 et seq.; sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 323, Pub. L. 103-206, 107 Stat. 2149; Title IV, Pub. L. 105-277, 112 Stat. 2681; Pub. L. 106-95, 113 Stat. 1312 (8 U.S.C. 1182 note); and 8 CFR 213.2(h)(4)(i).

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

Subparts A and C issued under 8 U.S.C. 1101(a)(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(m), and 1184; 29 U.S.C. 49 et seq.; sec 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and Title IV, Pub. L. 105-277, 112 Stat. 2681.

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

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c), 1182 (m) and 1184; and 29 U.S.C. 49 et seq.

2. Section 655.700 is amended by revising the third sentence of paragraph (b)(1) to read as follows:

§ 655.700 What statutory provisions govern the employment of H-1B nonimmigrants and how do employers apply for an H-1B visa?

* * * * *

(b) * * * (1) * * * The LCA (Form ETA 9035 or ETA 9035E) and cover page (Form ETA 9035CP, containing the full attestation statements that are incorporated by reference in Form ETA 9035 and ETA 9035E) may be obtained from <http://ows.doleta.gov>, from DOL

regional offices, and from the Employment and Training Administration (ETA) national office.

* * * * *

3. Section 655.705 is amended by revising paragraph (c) to read as follows:

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

* * * * *

(c) *Employer's responsibilities.* Each employer seeking an H-1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities, as described more fully in this subpart and subpart I of this part, including—

(1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035 or Form ETA 9035E in the manner prescribed in § 655.720. By completing and submitting the LCA, and in addition by signing the LCA, the employer makes certain representations and agrees to several attestations regarding an employer's responsibilities, including the wages, working conditions, and benefits to be provided to the H-1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. The LCA contains additional attestations for certain H-1B-dependent employers and employers found to have willfully violated the H-1B program requirements; these attestations impose certain obligations to recruit U.S. workers, to offer positions to U. S. workers who are equally or better qualified than the H-1B nonimmigrant(s), and to avoid the displacement of U.S. workers (either in the employer's workforce, or in the workforce of a second employer with whom the H-1B nonimmigrant(s) is placed, where there are indicia of employment with that second employer (8 U.S.C. 1182(n)(1)(E)-(G)). These additional attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. If the LCA is certified by ETA, notice of the certification will be sent to the employer, either by return FAX (where the Form ETA 9035 was submitted by FAX), by hard copy (where the Form ETA 9035 was submitted by U.S. Mail), or by electronic certification (where the Form ETA 9035E was submitted electronically). The employer reaffirms its acceptance of all of the attestation

obligations by submitting the LCA to the Immigration and Naturalization Service in support of the Petition for Nonimmigrant Worker, INS Form I-129, for an H-1B nonimmigrant. See INS regulation 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies that the employer will comply with the terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay.

(2) The employer shall maintain the original signed and certified LCA in its files, and shall make a copy of the LCA, as well as necessary supporting documentation (as identified under this subpart), available for public examination in a public access file at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with ETA.

(3) The employer then may submit a copy of the certified, signed LCA to INS with a completed petition (Form I-129) requesting H-1B classification.

(4) The employer shall not allow the nonimmigrant worker to begin work until INS grants the alien authorization to work in the United States for that employer or, in the case of a nonimmigrant previously afforded H-1B status who is undertaking employment with a new H-1B employer, until the new employer files a nonfrivolous petition (Form I-129) in accordance with INS requirements.

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

4. Section 655.720 is revised to read as follows:

§ 655.720 Where are labor condition applications to be filed and processed?

(a) *Facsimile transmission (FAX)*. If the employer submits the LCA (Form ETA 9035) by FAX, the transmission shall be made to 1-800-397-0478 (regardless of the intended place of employment for the H-1B nonimmigrant(s)). (Note: the employer submitting an LCA via FAX shall not use the FAX number assigned to an ETA regional office, but shall use only the 1-800-397-0478 number designated for this purpose.) The cover pages to Form ETA 9035 (i.e., Form ETA 9035CP)

should not be FAXed with the Form ETA 9035.

(b) *U.S. Mail*. If the employer submits the LCA (Form ETA 9035) by U.S. Mail, the LCA shall be sent to the ETA service center at the following address: ETA Application Processing Center, P.O. Box 13640, Philadelphia PA 19101 (regardless of the intended place of employment for the H-1B nonimmigrant(s)).

(c) *Electronic submission*. If the employer submits the LCA (Form ETA 9035E) by electronic transmission, the submission shall be made on the Department of Labor WEB page at www.lca.doleta.gov (regardless of the intended place of employment for the H-1B nonimmigrant(s)). The employer shall follow the instructions in the electronic submission process, which include the requirement that the employer shall print out and sign the LCA immediately after ETA's certification, shall maintain the "signed original" in its files, shall place a copy of the "signed original" in the public access file, and shall submit a copy of the "signed original" to the Immigration and Naturalization Service in support of the Form I-129 petition for the H-1B nonimmigrant. In the event that ETA implements the Government Paperwork Elimination Act (44 U.S.C.A. 3504 n.) and/or the Electronic Records and Signatures in Global and National Commerce Act (E-SIGN) (15 U.S.C.7001-7006) for the submission and certification of the ETA 9035E, instructions will be provided (by public notice(s) and by instructions on the Department's WEB page) to employers as to how the requirements of these statutes will be met in the ETA-9035E procedures.

(d) All matters other than the processing of LCAs (e.g., prevailing wage challenges by employers) that are the responsibility of ETA are within the jurisdiction of the Regional Certifying Officers in the ETA regional offices identified in § 655.721.

5. Section 655.730 is amended by revising paragraphs (b) and paragraph (c)(1) introductory text to read as follows:

§ 655.730 What is the process for filing a labor condition application?

* * * * *

(b) *Where and when is an LCA to be submitted?* An LCA shall be submitted by the employer to ETA in accordance with the procedure prescribed in § 655.720 no earlier than six months before the beginning date of the period of intended employment shown on the LCA. It is the employer's responsibility to ensure that a complete and accurate

LCA is received by ETA. Incomplete or obviously inaccurate LCAs will not be certified by ETA. ETA will process all LCAs sequentially upon receipt regardless of the method used by the employer to submit the LCA (i.e., FAX, or U.S. Mail, or electronic submission, as prescribed in § 655.720) and will make a determination to certify or not certify the LCA within seven working days of the date the LCA is received by ETA.

(c) *What is to be submitted?* Form ETA 9035 or ETA 9035E.

(1) *General*. One completed and dated Form ETA 9035 or ETA 9035E shall be submitted to ETA by the employer (or by the employer's authorized agent or representative) in accordance with the procedure prescribed in § 655.720. In submitting the Form ETA 9035 or the ETA 9035E, the employer, or its authorized agent or representative on behalf of the employer, attests that the statements in the Form are true and promises to comply with the attestation requirements set forth in full in the ETA 9035-CP. The Form ETA 9035 must be used if the employer uses FAX or U.S. Mail for submission; this Form must bear the original signature of the employer (or that of the employer's authorized agent or representative) when it is submitted to ETA. The Form ETA 9035E must be used for electronic submission; this Form must be printed out and signed by the employer immediately upon certification by ETA. The signed original of the Form ETA 9035 or the Form ETA 9035E must be maintained by the employer in its files, as set forth at § 655.720(c) and § 655.760(a)(1), if it is submitted by FAX or by electronic submission to ETA. A copy of the signed, certified Form ETA 9035 or ETA 9035E must be made available in the public access file, as set forth at § 655.760(a)(1). The signature of the employer or its authorized agent or representative on Form ETA 9035 or Form ETA 9035E constitutes the employer's representation of the truth of the statements on the Form and acknowledges the employer's agreement to the labor condition statements (attestations), which are specifically identified in Forms ETA 9035 and ETA 9035E, as well as set forth in the cover pages (Form ETA 9035CP) and incorporated by reference in Forms ETA 9035 and ETA 9035E. Another copy of the signed, certified Form ETA 9035 or ETA 9035E must be submitted to the Immigration and Naturalization Service in support of the Form I-129 petition, thereby reaffirming the employer's acceptance of all of the attestation obligations in accordance with 8 CFR 214.2(h)(4)(iii)(B)(2). The labor

condition statements (attestations) are described in detail in §§ 655.731 through 655.735, and 655.736 through 655.739 (if applicable). Copies of Form ETA 9035 and cover pages Form ETA 9035CP are available from ETA regional offices and on the ETA website at http://ows.doleta.gov. Form ETA 9035E is found on the DOL WEB page at www.lca.doleta.gov, where the electronic submission is made. Each Form ETA 9035 and ETA 9035E shall identify the occupational classification for which the LCA is being submitted and shall state:

* * * * *

§ 655.731 [Amended]

6. Section 655.731 is amended in the introductory text, the first sentence of paragraph (a), and the first sentence of paragraph (b)(1), by inserting the phrase "or 9035E" after the phrase "Form ETA 9035".

§ 655.732 [Amended]

7. Section 655.732 is amended in the introductory text by inserting the phrase "or 9035E" after the phrase "Form ETA 9035".

§ 655.733 [Amended]

8. Section 655.733 is amended in the introductory text by inserting the phrase "or 9035E" after the phrase "Form ETA 9035".

9. Section 655.734 is amended in the introductory text by revising the phrase "Form ETA 9035" to read "Form ETA 9035 or 9035 E" and by revising (a)(3) and the first sentence of paragraph (b) as follows:

§ 655.734 What is the fourth LCA requirement, regarding notice?

An employer seeking to employ H-1B nonimmigrants shall state on Form ETA 9035 or 9035E that the employer has provided notice of the filing * * *.

(a) * * *

(3) The employer shall, no later than the date the H-1B nonimmigrant reports to work at the place of employment, provide the H-1B nonimmigrant with a copy of the LCA (Form ETA 9035, or Form ETA 9035E) certified by ETA and signed by the employer (or by the employer's authorized agent or representative). Upon request, the employer shall provide the H-1B nonimmigrant with a copy of the cover pages, Form ETA 9035CP.

(b) * * * The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the statement referenced in paragraph (a) of this section and attested to on Form ETA 9035 or 9035E. * * *

* * * * *

10. Section 655.736 is amended in the first sentence of paragraph (e) by inserting the phrase "or 9035E" after the phrase "Form ETA-9035".

11. Section 655.740 is amended by revising the first sentence of paragraph (a)(1), and paragraphs (a)(2)(i), and (a)(2)(ii) as follows:

§ 655.740 What actions are taken on labor condition applications?

(a) * * *

(1) *Certification on labor condition application.* Where all items on Form ETA 9035 or Form ETA 9035E have been completed, the form is not obviously inaccurate, and in the case of Form ETA 9035, it contains the signature of the employer or its authorized agent or representative, the regional Certifying Officer shall certify the labor condition application unless it falls within one of the categories set forth in paragraph (a)(2) of this section.

* * *

(2) * * *

(i) *When the Form ETA 9035 or 9035E is not properly completed.* Examples of a Form ETA 9035 or 9035E which is not properly completed include instances where the employer has failed to check all the necessary boxes; or where the employer has failed to state the occupational classification, number of nonimmigrants sought, wage rate, period of intended employment, place of intended employment, or prevailing wage and its source; or, in the case of Form ETA 9035, where the application does not contain the signature of the employer or the employer's authorized representative.

(ii) *When the Form ETA 9035 or ETA 9035E contains obvious inaccuracies.* An obvious inaccuracy will be found if the employer files an application in error—e.g., where the Administrator, Wage and Hour Division, after notice and opportunity for a hearing pursuant to subpart I of this part, has notified ETA in writing that the employer has been disqualified from employing H-1B nonimmigrants under section 212(n)(2) of the INA. Examples of other obvious inaccuracies include stating a wage rate below the FLSA minimum wage, submitting an LCA earlier than six months before the beginning date of the period of intended employment, identifying multiple occupations on a single LCA, identifying a wage which is below the prevailing wage listed on the LCA, or identifying a wage range where the bottom of such wage range is lower than the prevailing wage listed on the LCA.

* * * * *

12. Section 655.750 is amended by revising paragraph (a) to read as follows:

§ 655.750 What is the validity period of the labor condition application?

(a) *Validity of certified labor condition applications.* A labor condition application which has been certified pursuant to the provisions of § 655.740 shall be valid for the period of employment indicated on Form ETA 9035 or ETA 9035E by the authorized DOL official. The validity period of a labor condition application shall not begin before the application is certified (whether through the FAX submission or U.S. Mail submission of the Form ETA 9035, or the electronic submission of the Form ETA 9035E) or exceed three years. However, in the event employment pursuant to section 214(m) of the INA commences prior to certification of the labor condition application, the attestation requirements of the subsequently certified application shall apply back to the first date of employment. Where the labor condition application contains multiple periods of intended employment, the validity period shall extend to the latest date indicated or three years, whichever comes first.

* * * * *

13. Section 655.760 is amended by revising paragraph (a)(1) to read as follows:

§ 655.760 What records are to be made available to the public, and what records are to be retained?

(a) * * *

(1) A copy of the certified labor condition application (Form ETA 9035 or Form ETA 9035E) and cover pages (Form ETA 9035CP). If the Form ETA 9035 is submitted by facsimile transmission, the application containing the original signature shall be maintained by the employer in its files. If the Form ETA 9035E is submitted electronically, a printout of the certified application shall be signed by the employer and maintained in its files.

* * * * *

14. Section 655.805 is amended by revising paragraph (d) to read as follows:

§ 655.805 What violations may the Administrator investigate?

* * * * *

(d) The provisions of this part become applicable upon the date that the employer's LCA is certified pursuant to §§ 655.740 and 655.750, or upon the date employment commences pursuant to section 214(m) of the INA, whichever is earlier. The employer's submission and signature on the LCA (whether Form ETA 9035 or Form ETA 9035E) each constitutes the employer's representation that the statements on

the LCA are accurate and its acknowledgment and acceptance of the obligations of the program. The employer's acceptance of these obligations is re-affirmed by the employer's submission of the petition (Form I-129) to the INS, supported by the LCA. See 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies that the employer will comply with the

terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay. If the period of employment specified in the LCA expires or the employer withdraws the application in accordance with § 655.750(b), the provisions of this part will no longer apply with respect to such application, except as provided in § 655.750(b)(3) and (4).

Signed at Washington, DC, this 29th day of November, 2001.

Emily Stover DeRocco,
Assistant Secretary for Employment and Training.

Annabelle T. Lockhart,
Acting Administrator Wage and Hour Division.

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