DEPARTMENT OF LABOR

Employment and Training Administration

Employment Standards Administration

20 CFR Part 655

RIN 1205–AB38

Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Attestations Regarding H–1B1 Visas

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

ACTION: Final rule.

SUMMARY: The Department of Labor (Department or DOL) is amending its regulations regarding temporary employment of foreign professionals to implement procedural requirements applicable to the H–1B1 visa category. The H–1B1 visa category permits the temporary entry of professionals in specialty occupations from countries that have entered into agreements with the United States as identified in section 214(g)(8)(A) of the Immigration and Nationality Act (INA). Congress created the H–1B1 visa category as part of its approval of the United States-Chile Free Trade Agreement and the United States-Singapore Free Trade Agreement. This Final Rule reflects the public comments received on the interim final rule that the Department published on November 23, 2004 at 69 FR 68222. As a result, the Department did not make any substantive changes; however, this Final Rule reflects one technical change as described in this Part. The Department made this technical change as a result of the recent regulation amendments to the H–1B and H–1B1 regulations that were published on December 5, 2005 at 70 FR 72556. The regulation published on December 5, 2005 generally requires employers to use web-based electronic filing of H–1B and H–1B1 application forms. The Department made the technical change to this Final Rule consistent with the previously published amendments.

DATES: This Final Rule is effective July 31, 2006.

FOR FURTHER INFORMATION CONTACT: Contact William Carlson, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; Telephone: (202) 693–3010 (this is not a toll-free number).

For information regarding the H–1B1 enforcement process in 20 CFR Part 655, subpart I, contact Diane Koplewski, Immigration Team Leader, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration (ESA), U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–3516, Washington, DC 20210; Telephone: (202) 693–0071 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

On November 23, 2004, the Department published an interim final rule (IFR) in the **Federal Register** that extended the regulations regarding the temporary entry of foreign H–1B workers to the H–1B1 visa category. See 20 CFR part 655, subparts H and I. Congress created the H–1B1 visa category as part of its approval of the United States-Chile Free Trade Agreement and United States-Singapore Free Trade Agreement, which took effect January 1, 2004. *See* 8 U.S.C. 1101(a)(15)(H)(i)(b1), 1182(t), 1184(g)(8)(A), and 1184(i). Under the INA amendments that created the H–1B1 visa, the Department of Labor is required to implement the H–1B1 program in a manner similar to the H–1B program to allow for temporary admission of professionals to perform services in a specialty occupation or as fashion models of distinguished merit and ability. *See* 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184(c), (g), and (i). A detailed discussion of the statutory authority and the amendments to the H–1B regulations necessary to implement the H–1B1 visa appears in the preamble to the interim final rule at 69 FR 68222.

II. Comments Received on Interim Final Rule

The Department received comments on the interim final rule (IFR) from two commenter submissions. One commenter inquired whether visa numbers were still available for H–1B1 workers from Singapore. In response, the Department does not administer visa numbers. That responsibility is vested with the Department of State and Department of Homeland Security.

The second commenter submitted comments in two different e-mails on the same day. Many of these comments pertained to issues outside the scope of the IFR or that would require statutory amendments to implement. As a general matter, the Department's authority to regulate is limited to the responsibilities mandated by the statutory provisions. This Final Rule in particular is limited to extending the H–1B visa procedures for employers seeking temporary entry for nonimmigrant aliens in specialty occupations to H–1B1 visas under the Chile and Singapore Free Trade Agreements under the INA.

One such comment suggested that the Department require in-person interviews to address alleged fraud in the program. In response, the Department is unable to address this comment. Under the INA, the statute specifies that employers must file attestations with the Secretary and the Secretary must issue a certification within seven (7) days unless the attestation ''is incomplete or obviously inaccurate.'' *See* INA § 212(n) and (t); 8 U.S.C. 1182(n) and (t).

The commenter also expressed concerns that foreign workers are being allowed to take American jobs. In response, the Department notes that the statute does not require employers who seek to hire foreign workers on H–1B1 visas to demonstrate that there are no available U.S. workers or to test the labor market for U.S. workers as required under the permanent labor certification program, and in limited circumstances under the H–1B program. *Compare* INA § 212(t) *with* INA § 212(a)(5)A and § 212(n); 8 U.S.C. 1182(a)(5)(A), (n) and (t).

The commenter also suggested that the Department establish substantial filing and processing fees for employers who submit H–1B and H–1B1 applications. Although imposition of user fees for filing and processing H–1B1 employer applications could be implemented under the current statute, this issue was not addressed by the interim final rule. Therefore, the Department has concluded that such a significant step would require the Department to publish a proposed rule with a request for comments. Further, the Department does not intend to propose such a fee for the H–1B1 program at this time.

The commenter also questioned whether the text described as on page 7 of an 18 page document ''meets the requirements of the plain [E]nglish [sic] law.'' The Department notes that the interim final rule that was published in the **Federal Register** is a 9-page document. Therefore, the Department is unable to address this comment because the text at issue cannot be identified. However, the Department has concluded that the interim final rule was written in plain language and was consistent with all the legal requirements of the Administrative Procedure Act and the implementing

statutes for the H–1B and H–1B1 programs.

Further, the commenter opined that the names and phones numbers of all employers that apply for H–1B1 visas should be listed on the Internet. Although this comment is outside the scope of the interim final rule, the Department notes that it posts information regarding labor condition applications filed on behalf of H–1B and H–1B1 nonimmigrants on the Internet as required by the INA. See INA §§ 212(n)(G)(2)(ii) and 212(t)(2)(B); 8 U.S.C. 1182(n)(G)(2)(ii) and 1182(t)(2)(B). The Web site provides a list of information categorized by employer and occupational classification, which identifies the attested wage rate, number of aliens sought, period of intended employment and date of need. Interested parties may find this information posted at *http://www.flcdatacenter.com.*

Finally, the commenter stated that there should be an extension of time for the public to comment on the interim final rule. In response, the Department does not find that extending of comment period of the interim final rule is warranted in this situation. The Department only received a small number of comments, most of which were not within the scope of the interim final rule. In addition, the Department did not receive any other comments requesting an extension of the comment period.

III. Technical Change to the Rule

The Department made a technical amendment to the first sentence of § 655.700(d)(1) of this final rule, consistent with the 2005 final rule amending H–1B and H–1B1. See 70 FR 72556. The Department published the 2005 final rule that amended the regulations for H–1B and H–1B1 after it published the interim final rule for this regulation. As a result, the Department made a technical amendment to the first sentence in paragraph (d)(1) in § 655.700 to remove the inconsistent language. Accordingly, the interim final rule is adopted as a final rule below with one change.

IV. Administrative Information

Executive Order 12866—Regulatory Planning and Review: We have determined that this final rule is not an ''economically significant regulatory action'' within the meaning of Executive Order 12866. The procedures for filing a labor attestation under the new H–1B1 visa category on behalf of nonimmigrant professionals from Chile and Singapore will not have an economic impact of $100 million or more. Employers seeking to employ H–1B1 nonimmigrant professionals will continue to use the same procedures and forms presently required for the H–1B nonimmigrant professionals program, and H–1B1 visas will be subject to annual numerical limits. Although this Final Rule is not economically significant as defined by Executive Order 12866, the Office of Management and Budget (OMB) reviewed this Final Rule as a significant rule. This Final Rule is significant because it implements a new program and must be closely coordinated with other Federal agencies that are also responsible for implementing the H–1B1 program, such as the Departments of State and of Homeland Security.

Regulatory Flexibility Analysis: We have notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act (RFA) at 5 U.S.C. 605(b), that this Final Rule will not have a significant economic impact on a substantial number of small entities. The factual basis for that certification follows.

This rule, which is procedural in nature, implements statutory provisions that narrowly extend the scope of the Department of Labor's existing H–1B program to include similar labor attestation filing requirements for the temporary entry of Chilean and Singaporean professionals under the H–1B1 program. The regulatory change will affect only those employers seeking nonimmigrant H–1B1 professionals in specialty occupations from Chile or Singapore for temporary employment in the United States. Employers seeking to hire these H–1B1 nonimmigrant professionals will use the same procedures and forms presently required for H–1B nonimmigrant professionals. In addition, H–1B1 visas will be subject to annual numerical limits.

Based on past H–1B1 filing data of fiscal year 2004 (FY 2004), the Department estimates that in the upcoming year employers will file approximately 349 attestations with the Department under the H–1B1 program. According to the definition of small business under the Small Business Administration Act, the Department has determined that a majority of employers filing in FY 2004 are not categorized as small businesses. Under the Small Business Administration Act, a small business is one that ''is independently owned and operated and which is not dominant in its field of operation.'' Further, the definition varies from industry to industry to properly reflect industry size differences.

The Department determined its size standard analysis based on the regulations at 13 CFR part 121 that describe the size standards. Although some employers will file multiple attestations in a year, the Department does not anticipate a significant expansion in filing in this program because the H–1B1 visa category is subject to statutory annual numerical limits (1,400 from Chile and 5,400 from Singapore). The Department further relied on the FY 2004 data of the major industries that apply for temporary visas under the H–1B1 program to form its analysis.

The Department determined that the following represent the predominant industries that use the H–1B1 program: (1) Healthcare and Social Assistance industry (attestations filed for Medical Residents, Chiropractors, Physical Therapists, Acupuncturists, Dentists, Physicians, Veterinarians, Physiatrists, Mental Health Counselors, and Medical Lab Technicians); (2) Educational industry (attestations filed for Teachers, Professors, and Tutors); (3) Finance and Insurance industry (attestations filed for Accountants, Business Analysts, Financial Analysts and Investor Analysts); and (4) Professional, Scientific and Technological Industry (attestations filed for Computer Programmers, Technicians, Information and Support Specialists, Software Engineers, and Systems and Program Analysts). The Department has reviewed the data from each of these industries as described below to determine that there is no significant impact on small businesses.

In the United States, there are 560,083 Healthcare and Social Assistance small businesses. In FY 2004, 45 attestations were filed with the Department for positions in the Healthcare and Social Assistance industry. Using this data, we estimate that the number of different (or non-duplicated) employers who will file the expected 45 applications with the Department represents approximately 0.008% of all Healthcare and Social Assistance small businesses.

In the United States, there are 65,933 Educational small businesses. In FY 2004, 29 attestations were filed with the Department for positions in the Education industry. Using this data, we estimate that the number of different (or non-duplicated) employers who will file the expected 29 applications with the Department represents approximately 0.044% of all Educational small businesses.

In the United States, there are 259,846 Finance and Insurance small businesses. In FY 2004, 18 attestations were filed with the Department for positions in the

Finance and Insurance industry. Using this data, we estimate that the number of different (or non-duplicated) employers who will file the expected 18 applications with the Department represents approximately 0.007% of all Finance and Insurance small businesses.

In the United States, there are 708,000 Professional, Scientific and Technological small businesses. In FY 2004, 62 attestations were filed with the Department for positions in the Professional, Scientific and Technological industry. Using this data, we estimate the number of different (or non-duplicated) employers who will file the expected 62 applications with the Department represents approximately 0.009% of all Professional, Scientific and Technological small businesses.

There are additional reasons why the Department of Labor does not believe that this rule will have a significant economic impact on small businesses. First, the Department does not require employers to submit a filing fee for the H–1B1 program, consistent with past practice. Therefore, under this Final Rule, an employer will continue to submit applications to the Department at no cost. Second, the Department estimates that it takes less than thirty minutes to complete the application form. Given that the Department did not add additional fields to the OMB approved forms (ETA 9035E or ETA 9035), no additional time is required to prepare and submit the forms. Therefore, under this Final Rule, an employer will spend the same amount of time preparing and submitting the Form ETA 9035E or Form ETA 9035 for the H–1B1 program as the employer would for application under the H–1B program. In sum, the attestation and filing activities under this Final Rule are no different from those required under the existing H–1B program, and this Final Rule establishes no additional economic burden on small entities.

Unfunded Mandates Reform Act of 1995: This Final 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 one 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.

Small Business Regulatory Enforcement Fairness Act of 1996: This Final Rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The standards for determining whether a rule is a major rule as defined by section 804 of SBREFA are similar to those used to determine whether a rule is an ''economically significant regulatory action'' within the meaning of Executive Order 12866. Because we certified that this Final Rule is not an economically significant rule under Executive Order 12866, we certify that it also is not a major rule under SBREFA. Therefore, this rule will not result in an annual effect on the economy of $100 million or more; cause a major increase in costs or prices; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132—Federalism: This Final 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 Final Rule does not have sufficient federalism implications to warrant the preparation of a summary impact statement.

Assessment of Federal Regulations and Policies on Families: This Final Rule does not affect family well-being.

Paperwork Reduction Act: Forms and information collection requirements related to the Department's H–1B and H–1B1 programs under 20 CFR Part 655, subpart H, are currently approved under OMB control number 1205–0310. This Final Rule does not include a substantive or material modification of that collection of information. Under this Final Rule, employers filing labor attestations regarding H–1B1 nonimmigrants will use the same forms and follow the same procedures as employers seeking entry for H–1B nonimmigrants. This Final Rule permits the use of existing H–1B paperwork forms and filing procedures to include nationals of Chile and Singapore.

Catalog of Federal Domestic Assistance Number: This program is listed in the *Catalogue of Federal Domestic Assistance* at Number 17.252, ''Attestations by Employers Using Non-Immigrant Aliens in Specialty Occupations.''

List of Subjects in 20 CFR Part 655

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

■ Accordingly, the interim final rule amending 20 CFR part 655, which was published at 69 FR 68222 on November 23, 2004, is adopted as a Final Rule with the following change:

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

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

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m), (n), and (t), 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) and (b1), 1182(n), 1182(t), 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 first sentence in paragraph (d)(1) to read as follows:

§ 655.700 What statutory provisions govern the employment of H–1B and H–1B1 nonimmigrants and how do employers apply for an H–1B or H–1B1 visa?

* * * * *

(d) * * *

(1) *Exclusions.* The following sections and portions of sections in this subpart and in subpart I of this part do not apply to H–1B1 nonimmigrants but apply only to H–1B nonimmigrants: Sections 655.700(a), (b), (c)(1) and (c)(2); 655.705(b) and (c); 655.710(b); 655.730(d)(5) and (e)(3); 655.736; 655.737; 655.738; 655.739;

655.760(a)(8), (9) and (10); and 655.805(a)(7), (8) and (9). * * *

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Signed at Washington, DC, this 24th day of May 2006.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration.

Alfred B. Robinson, Jr.,

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

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