

§ 655.845, holding that a violation was committed by an employer.

(c) The DHS, 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 provided by the Act and described in § 655.810(f).

(d) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall invalidate the employer's labor condition application(s) under this subpart I and subpart H 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 DHS.

[65 FR 80238, Dec. 20, 2000]

Subpart J—Attestations by Employers Using F-1 Students in Off-Campus Work

SOURCE: 56 FR 56865, 56876, Nov. 6, 1991, unless otherwise noted.

§ 655.900 Purpose, procedure and applicability of subparts J and K of this part.

(a) *Purpose.* The Immigration Act of 1990 (Act) at section 221 creates a three-year work authorization program beginning October 1, 1991, for aliens admitted as F-1 students described in subparagraph (F) of section 101 (a)(15) of the Immigration and Nationality Act. 8 U.S.C. 1101(a)(15)(F). The Act specifies that the Attorney General shall grant an alien authorization to be employed in a position unrelated to the alien's field of study (*i.e.*, a position not involving curricular or post-graduate practical training) and off-campus if:

(1) The alien has completed one year of school as an F-1 student and is maintaining good academic standing at the educational institution;

(2) The employer provides the educational institution and the Secretary of Labor with an attestation regarding

recruitment and rate of pay specified in paragraph (b) of this section; and

(3) The alien will not be employed more than 20 hours each week during the academic term (but may be employed on a full-time basis during vacation periods and between academic terms).

Subpart J of this part sets forth the procedure for filing attestations with the Department of Labor (the Department or DOL) for employers who seek to use F-1 students for off-campus work. Subpart K of this part sets forth complaint, investigation, and disqualification provisions with respect to such attestations.

(b) *Procedure.* (1) An employer must comply with the following procedure in order to hire F-1 students for off-campus employment:

(i) Recruit for 60 days before filing an attestation;

(ii) File the attestation with the DOL and the Designated School Official (DSO) of the educational institution before hiring any F-1 student(s);

(iii) Hire F-1 student(s) during the 90-day period following the last day of the recruitment period; and

(iv) Initiate a new 60-day recruitment effort in order to hire any F-1 student(s), under the valid attestation, after the 90-day hiring period. (A job order placed with the SESA as part of the employer's initial recruitment which remains "open" with the SESA shall satisfy the requirement regarding a new 60-day recruitment effort.)

(2) The employer's attestation shall state that the employer:

(i) Has recruited unsuccessfully for at least 60 days for the position and will recruit for 60 days for each position in which an F-1 student is hired under that attestation until September 30, 1996; and

(ii) Will provide for payment to the alien and to other similarly situated workers at a rate not less than the actual wage for the occupation at the place of employment, or if greater, the prevailing wage for the occupation in the area of intended employment.

(3) The employer shall file the attestation with the Designated School Official (DSO) of each educational institution from which it seeks to hire F-1 students. In fulfilling this requirement,

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the employer may file the attestation initially:

(i) With the appropriate Regional Office of ETA only; or

(ii) Simultaneously with the DSO and the appropriate Regional Office of ETA.

In either instance, under paragraph (b)(3) of this section, ETA will return to the employer a copy of the attestation with ETA's acceptance indicated thereon. The employer must then send a copy of each accepted attestation to the DSO. Where the employer has chosen to file the attestation simultaneously with DOL and the DSO, as described in paragraph (b)(3)(ii) of this section, the employer shall provide a copy of the accepted attestation to the DSO within 15 days after receiving the accepted attestation from DOL. The employer shall also retain the accepted attestation and produce it in the event the Department conducts an investigation to determine if the employer has made an attestation that is materially false or has failed to pay wages in accordance with the attestation. In no case may an employer hire an F-1 student for off-campus employment without first filing an attestation with DOL and the DSO. The employer may not file the attestation with the DSO before it is filed with DOL or in the absence of filing the attestation with DOL. The DSO may treat an attestation as accepted for filing by DOL for the purpose of authorizing F-1 student employment upon its receipt by the school.

(4) The employer may file an attestation for one or more openings in the same occupation, or one or more positions in more than one occupation, provided that all occupations are listed on the attestation and all positions are located within the same geographic area of intended employment.

(5) The attestation shall be deemed "accepted for filing" on the date it is received by DOL. Where the attestation is not completed as set forth at § 655.940(f)(1) of this part, it shall be returned to the employer which will have 15 days to correct the deficiency or it will be rejected. If the attestation is rejected, DOL will notify INS. Attestations deemed unacceptable under

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§ 655.940(f)(2) of this part may not be re-submitted.

(c) *Applicability.* Subparts J and K of this part apply to all employers who seek to employ F-1 students in off-campus work in positions unrelated to their field(s) of study.

(d) *Final date.* ETA will not accept attestations under this program after September 30, 1996.

(e) *Revalidation of employer attestations in effect on November 30, 1995.* Any employer's attestation which was valid on November 30, 1995, is revalidated effective on November 30, 1995, and shall remain valid through September 30, 1996, unless withdrawn or invalidated.

[56 FR 56865, 56876, Nov. 6, 1991, as amended at 59 FR 64776, 64777, Dec. 15, 1994; 60 FR 61210, 61211, Nov. 29, 1995]

§ 655.910 Overview of process.

This section provides a context for the attestation process to facilitate understanding by employers that seek to employ F-1 students in off-campus work.

(a) *Department of Labor's responsibilities.* The Department of Labor (DOL) administers the attestation process. Within DOL, the Employment and Training Administration (ETA) shall have responsibility for accepting and filing employer attestations on behalf of F-1 students; the Employment Standards Administration (ESA) shall be responsible for conducting any investigations concerning such attestations.

(b) *Employer attestation responsibilities.* Prior to hiring any F-1 student(s) for off-campus employment, an employer must submit an attestation on Form ETA-9034, as described in § 655.940 of this part, to the Employment and Training Administration (ETA) of DOL at the address set forth at § 655.930 of this part.

(1) The attesting employer shall file the attestation with the Designated School Official (DSO) of each educational institution from which it seeks to hire F-1 students. If the employer is filing the attestation with the DSO simultaneously to filing it with DOL, or prior to DOL's accepting it, the employer must provide the DSO with a copy of the accepted attestation

within 15 days after receiving the attestation from DOL.

(2)(i) Each attestation shall be valid through September 30, 1996. Throughout the validity period of the attestation, the employer may hire F-1 students as needed, during the 90-day period immediately following each 60-day recruitment period, for the positions specified on Form ETA-9034, at the required wage rate, from any educational institution in the geographic area of intended employment. In order to employ F-1 students in any occupation(s) different from the occupation(s) specified in the attestation, the employer shall file a new attestation with ETA.

(ii) The employer shall have the burden of proving the truthfulness and accuracy of each attestation element in the event that such attestation element is challenged in an investigation.

(iii) Substantiating documentation in support of each attestation element must be maintained by the employer and shall be made available to DOL for inspection and copying upon request. If the employer maintains the specific documentation recommended in appendix A of this subpart, and the documentation is found to be truthful, accurate, and substantiates compliance, it shall meet the burden of proof. If the employer chooses to support its attestation in a manner other than in accordance with appendix A of this subpart, the employer's documentation must be of equal probative value to that shown in appendix A of this subpart in the event of an investigation.

(c) *Designated School Official (DSO) responsibilities.* The Department notes that the basic responsibilities of the DSO are outlined in INS regulations at 8 CFR 214.2(f).

(1) DOL understands INS regulations to mean that the DSO at the educational institution is expected to assure that, prior to authorizing the off-campus employment of any F-1 student(s):

(i) It has received an attestation from the prospective employer;

(ii) The prospective employer has not been disqualified from participation in the F-1 student work authorization program (Employers disqualified from participation in the program are listed

in the FEDERAL REGISTER. See §655.950(b) of this part); and

(iii) The F-1 student(s) has completed one year of study and is maintaining good academic standing at the institution.

(2) It is also understood that the DSO will not authorize F-1 student(s) to work in excess of 20 hours per week during the academic term, and that the DSO shall notify ETA when the employer of F-1 student(s) has not provided the educational institution with an accepted copy of the attestation within 90 days of its receipt of the attestation from the employer.

(d) *Complaints.* (1) Complaints alleging that an attestation is materially false or that wages were not paid in accordance with the attestation may be filed by any aggrieved party with the Wage and Hour Division (Administrator), of the Employment Standards Administration, DOL, according to the procedures set forth in subpart K of this part.

(i) Examples of violations that may be alleged in a complaint include:

(A) The employer failed to pay an F-1 student the prevailing wage for the occupation in the area of intended employment;

(B) The employer failed to pay the actual wage for the position(s) at the employer's place of business; or

(C) The employer's recruitment efforts demonstrated that qualified U.S. workers were available for the position(s) filled by F-1 students.

(ii) The Administrator shall review the allegations contained in the complaint to determine if there are reasonable grounds to conduct an investigation. If, after investigation, the Administrator finds a violation, the Administrator shall disqualify the employer (after notice and opportunity for a hearing) from employing F-1 students and shall so notify INS.

(2) Complaints alleging that an F-1 student is not maintaining the required academic standing or is working in excess of the authorized number of hours of employment per week shall be filed with the INS.

(e) *Termination of program.* The pilot F-1 student visa program of section 221 of the Immigration Act of 1990 expires

after September 30, 1996, and the Department of Labor will not accept any further employer attestations after that date. 8 U.S.C. 1184 note. However, complaints and appeals arising out of actions occurring prior to September 30, 1996, will continue to be received, investigated, and processed under the standards and procedures of subparts J and K of this part. Therefore, subparts J and K of this part remain in effect through the completion of such enforcement.

[56 FR 56865, 56876, Nov. 6, 1991, as amended at 59 FR 64777, Dec. 15, 1994; 60 FR 61210, 61211, Nov. 29, 1995]

§ 655.920 Definitions.

For the purposes of subparts J and K of this part:

Accepted for filing means that an attestation submitted by the employer or his designated agent or representative has been received and filed by the Employment and Training Administration of the Department of Labor.

Act means the Immigration Act of 1990, as amended.

Actual wage means the wage rate paid by the attesting employer to all similarly situated employees in the occupation at the worksite at the time of employment.

Administrative Law Judge means an official appointed pursuant to 5 U.S.C. 3105.

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

Area of intended employment means the geographic 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.

Attestation means a properly completed Form ETA-9034.

Attesting employer means any employer who has filed an attestation required by section 221 of the Act.

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

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

Date of filing means the date an attestation is received by ETA as indicated by the date stamped on the attestation.

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

Designated School Official (DSO) means the official of the educational institution who has authority to authorize off-campus employment of F-1 students pursuant to Immigration and Naturalization Service regulations at 8 CFR parts 214 and 274a.

Educational institution means the educational institution at which an alien admitted to the United States as an F-1 student is enrolled in a full course of study.

Employer means a person, firm, corporation, or other association or organization, which suffers or permits a person to work; and

(1) Which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States; and

(2) Which has an employer-employee relationship with respect to employees under subparts J and K of this part, as indicated by the fact that it may hire, fire, supervise or otherwise control the work of any such employee.

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

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

F-1 nonimmigrant student (F-1 student) means an alien who has an F-1 visa. See 8 U.S.C. 1101(A)(15)(F)(i). INS grants such a visa to an alien who has a residence in a foreign country which he/she has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who entered the United States temporarily and solely for the purpose of pursuing

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such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him/her and approved by the Attorney General after consultation with the Department of Education of the United States. For purposes of subparts J and K, the term “F-1 student” shall refer to F-1 student(s) who will be employed in off-campus employment unrelated to their field(s) of study.

Immigration and Naturalization Service (INS) means the component of the Department of Justice which administers the Department of Justice’s principal functions under the Act.

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

Independent authoritative source means a professional, business, trade, educational or governmental association, organization, or other similar entity, not owned or controlled by the employer, which has a recognized expertise in the occupational field.

Independent authoritative source survey means a survey of wages conducted by an independent authoritative source and published in a book, newspaper, periodical, looseleaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer’s attestation and each succeeding annual prevailing wage update. Such survey shall:

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

(2) Be based upon recently collected data—e.g., within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.

Position means a single job opening in an occupation for which the attesting employer has recruited and either proposes to fill or has filled with an F-1 student.

Regional Certifying Officer means the official in the Employment and Training Administration in a Department of Labor regional office (or his/her designee) who is authorized to act on labor certifications and employment attesta-

tions on behalf of the Secretary of Labor.

Required wage rate means the rate of pay which is the higher of:

(1) The actual establishment wage rate for the occupation in which the F-1 student is to be (or is) employed; or

(2) The prevailing wage rate (adjusted on an annual basis) for the occupation in which the F-1 student is to be (or is) employed in the geographic area of intended employment.

Secretary means the Secretary of Labor or the Secretary’s designee.

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

United States (U.S.) worker means any U.S. citizen or alien who is legally permitted to work indefinitely within the United States.

§ 655.930 Addresses of Department of Labor regional offices.

Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): One Congress Street 10th Floor, Boston, MA 02114-2021. Telephone: 617-565-4446.

Region II (New York, New Jersey, Puerto Rico, and the Virgin Islands): 201 Varick Street, room 755, New York, NY 10014. Telephone: 212-660-2185.

Region III (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia): Post Office Box 8796, Philadelphia, PA 19101. Telephone: 215-596-6363.

Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee): 1371 Peachtree Street, NE., Atlanta, GA 30309. Telephone: 404-347-3938.

Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin): 230 South Dearborn Street, room 605, Chicago, IL 60604. Telephone: 312-353-1550.

Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, and Texas): 525 Griffin Street, room 314, Dallas, TX 75202. Telephone: 214-767-4989.

Region VII (Iowa, Kansas, Missouri, and Nebraska) 911 Walnut Street, Kansas City, MO 64106. Telephone: 816-426-3796.

Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming) 1961 Stout Street, 16th Floor, Denver, CO 80294. Telephone: 303-844-4613.

Region IX (Arizona, California, Guam, Hawaii, and Nevada) 71 Stevenson Street, room 830, San Francisco, CA 94119. Telephone: 415-744-6647.

Region X (Alaska, Idaho, Oregon, and Washington) 1111 Third Avenue, room 900, Seattle, WA 98101. Telephone: 206-553-5297.

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The telephone numbers set forth in this section are not toll-free.

§ 655.940 Employer attestations.

(a) *Who may submit attestations?* An employer (or the employer's designated agent or representative) seeking to employ F-1 student(s) for off-campus work shall submit an attestation on Form ETA-9034. The attestation shall be signed by the employer (or the employer's designated agent or representative). For this purpose, the employer's authorized agent or representative shall mean an official of the employer who has the legal authority to commit the employer to the terms and conditions of F-1 student attestations.

(b) *Where and when should attestations be submitted?* (1) Attestations shall be submitted, by U.S. mail, private carrier, or facsimile transmission, to the appropriate ETA Regional office, as defined in § 655.920 of this part, not later than 60 days after the employer's recruitment period (see paragraph (d) of this section) has ended and shall be accepted for filing, returned, or rejected by ETA in accordance with paragraph (f) of this section.

(2) Attestations shall also be submitted to the Designated School Official (DSO) at each educational institution from which the employer seeks to hire any F-1 student(s). Attestations may be filed simultaneously with ETA and the DSO, or the employer may file the approved attestation with the DSO. However, in no case shall the employer file the attestation with the DSO before filing the attestation with ETA or in the absence of filing the attestation with ETA.

(3) If the attestation is submitted simultaneously with ETA and the DSO, and ETA does not receive its copy of the attestation, the Administrator, for purposes of enforcement proceedings under subpart K of this part, shall consider that the attestation was accepted for filing by ETA as of the date the attestation is received by the DSO.

(c) *What should be submitted?* (1) Form ETA-9034. One completed and dated original Form ETA-9034 (or a facsimile), containing the attestation elements referenced in paragraphs (d) and (e) of this section, and the original signature (or a facsimile of the original

signature) of the employer (or the employer's authorized agent or representative) and one copy of Form ETA-9034 shall be submitted to ETA. Each attestation form shall identify the position(s) for which the attestation is provided, state the occupational division in which the position is located, by Dictionary of Occupational Titles (DOT) Two-Digit Occupational Divisions code, and shall state the rate(s) of pay for the position(s). The DOT Two-Digit Occupational Division code is required for DOL recordkeeping and reporting purposes only and should not be used by the employer to determine the prevailing wage, as it is too general for this purpose. (Copies of Form ETA-9034 are available at the addresses listed in § 655.930 of this part). When an employer has filed an attestation by facsimile transmission, the employer shall retain in its files the original of the attestation which contains the employer's original signature.

(2) The employer may file an attestation for a single position or for multiple positions in the same occupation, or in multiple occupations, provided that all positions are located within the same geographic area of intended employment.

(3) If the employer files the attestation simultaneously with ETA and the DSO, or files the attestation first with ETA and subsequently files with the DSO before an accepted copy is returned from ETA to the employer, the employer shall, within fifteen days of receipt of ETA's notification of acceptance of the attestation for filing, provide an exact copy of the accepted attestation to the DSO at each educational institution from which the employer seeks to employ an F-1 student. The DSO shall notify ETA if the educational institution has not been provided with a copy of the attestation indicating that it was accepted for filing by ETA within 90 days from the date that the attestation was filed with the DSO.

(4) *Attestation elements.* The attestation elements referenced in § 655.940 (d) and (e) of this section are mandated by section 221(a)(2) of the Act (8 U.S.C. 1184 note). Section 221(a)(2) of the Act provides that one of the conditions for

the Attorney General to grant F-1 students work authorization, as described in INA section 101(a)(15)(F), to be employed off-campus in positions unrelated to their field of study, is that the employer provides the educational institution and the Secretary with an attestation that the employer:

(i) Has recruited for at least 60 days for the position; and

(ii) Will pay the F-1 student and all other similarly situated workers at a rate not less than the "required wage rate" (see § 655.920 of this part).

(d) *The first attestation element: 60-day recruitment.* An employer seeking to employ an F-1 student shall attest on Form ETA-9034 that it has recruited for at least 60 days for the position(s) and that a sufficient number of U.S. workers were not able, qualified, and available for the position(s).

(1) *Establishing the 60-day recruitment requirement.* (i) The first attestation element is demonstrated if the employer attests that:

(A) It has recruited unsuccessfully for U.S. workers for at least 60 days for the position prior to filing the attestation; and

(B) It will conduct at least 60 days of unsuccessful recruitment for U.S. workers for each position in which, and at each time at which (until September 30, 1996), an F-1 student is subsequently employed.

(ii) To satisfy paragraph (d)(1)(i)(A) of this section, the employer shall recruit for the position for 60 consecutive days by posting the job vacancy (or help wanted) notice at the worksite and by placing a job order with the State Employment Service agency (SESA) local office which services the worksite.

(iii) To satisfy paragraph (d)(1)(i)(B) of this section, the employer shall either:

(A) Recruit for each position vacancy in the manner required by paragraph (d)(1)(ii) of this section; or

(B) File an "open job order" with the SESA local office which services the worksite. The employer shall accept referrals from the SESA local office on the "open job order".

(2) *Documenting the first attestation element.* In the event of an investigation, the employer shall have the bur-

den of proving that it has complied with the elements described in paragraph (d)(1) of this section and attested to on ETA Form 9034. Documentation that is truthful, accurate and substantiates compliance as identified in Appendix A to this subpart shall be sufficient to meet the employer's burden of proof. The employer retains the right to meet its burden of proof in proving its attestation through other sufficient means.

(i) Documentation shall not be submitted to ETA or to the DSO with the attestation, but employers must be able to produce sufficient documentary evidence to substantiate the attestation in the event of an investigation. Such documentation shall be made available to DOL as described in §§ 655.900(b)(3) and 655.1000(c) of this part.

(ii) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the recruitment, the employer should be able to produce such substantiating documentary evidence for a period of no less than 18 months after the close of the recruitment period or, in the event of an investigation, for the period of the enforcement proceeding under subpart K of this part.

(e) *The second attestation element: wages.* An employer seeking to employ F-1 students shall state on Form ETA-9034 that it will pay the F-1 student(s) and other similarly employed worker(s) the "required wage rate" as defined in § 655.920 of this part. For purposes of this paragraph "similarly employed" shall mean employees of the employer working in the same positions under like conditions, such as the same shift on the same days of the week. Neither the actual wage rate nor a prevailing wage determination for attestation purposes made pursuant to this section shall permit an employer to pay a wage lower than that required under any other Federal, State, or local law.

(1) *Establishing the wage requirement.* The second attestation element shall be satisfied when the employer signs Form ETA-9034, attesting that for the validity period of the attestation the "required wage rate" will be paid to the F-1 student(s) and other similarly

situated workers; that is, that the wage will be no less than the actual wage rate paid to workers similarly employed at the worksite, or the prevailing wage (adjusted on an annual basis) for the occupation in the area of intended employment, whichever is higher. The employer's obligation to pay the "required wage rate" for the position(s) named in the attestation shall continue throughout the validity period of the attestation; the employer's determination of the prevailing wage shall be updated annually, beginning with the date of the attestation. The prevailing wage rate for a position(s) named in the attestation, unless the subject of a Davis-Bacon Act or McNamara-O'Hara Service Contract Act wage determination described in paragraph (b)(4)(i) of appendix A of this subpart or a union contract as described in paragraph (b)(4)(ii) of appendix A of this subpart, shall be: The average rate of wages paid to workers similarly employed in the area of intended employment. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. For purposes of this section, "similarly employed" means having substantially comparable jobs in the occupational category in the area of intended employment, except that if no such workers are employed by employers other than the employer applicant in the area of intended employment "similarly employed" shall mean:

(i) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(ii) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(2) *Documentation of the second attestation element.* In the event of a complaint and investigation, the employer shall have the burden of proving the validity of and compliance with the attestation element referenced in paragraph (e)(1) of this section and attested to on ETA Form 9034. Documentation that the Department finds to be truth-

ful, accurate and substantiates compliance as identified in appendix A of this subpart should be sufficient to meet the employer's burden of proof. The employer retains the right to meet its burden of proof in proving its attestation through other sufficient means.

(i) Documentation shall not be submitted to ETA or to the DSO with the attestation, but the employer must substantiate its attestation with appropriate documentation in the event of an investigation. Such documentation shall be made available to DOL as described in §§ 655.900(b)(3) and 655.1000(c) of this part.

(ii) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the determination the employer should be able to produce documentation substantiating its attestation for a period of no less than 18 months after the determination or update, or in the event of an investigation, for the period of the enforcement proceedings under subpart K of this part.

(f) *Actions on attestations submitted for filing.* Upon receipt of an attestation pursuant to this subpart, the Regional Certifying Officer shall determine whether the attestation is properly completed and whether there is cause to return the attestation to the employer as unacceptable.

(1) *Acceptable attestations.* (i) Where all items on Form ETA-9034 have been completed and the attestation contains the signature of the employer or its authorized representative, the Regional Certifying Officer, except as provided in paragraph (f)(2)(ii) of this section, shall accept the attestation for filing. The Regional Certifying Officer shall return a copy of the accepted attestation to the employer or the employer's designated agent or representative, with ETA's acceptance indicated thereon. An attestation which is properly filled out in accordance with this section shall be deemed accepted for filing as of the date it is received by ETA as indicated by the date stamped thereon.

(ii) The employer shall file a copy of the accepted attestation with the DSO at the educational institution pursuant to § 655.940(c)(3) of this part.

(2) *Unacceptable attestations.* ETA shall not accept an attestation for filing and shall return such attestation as unaccepted to the employer or the employer's designated agent or representative, when any one of the following conditions exists:

(i) Form ETA-9034 is not properly completed. Examples of Form ETA-9034 which is not properly completed include: instances where the employer has failed to complete all of the necessary items; or where the employer has failed to identify the position(s) or state the rate(s) of pay; or where the attestation does not contain the original signature (or facsimile of the signature when the attestation is submitted by facsimile transmission) of the employer or its authorized representative.

(ii) The Administrator, Wage and Hour Division, after notice and opportunity for a hearing pursuant to subpart K of this part, has notified ETA in writing that the employer has been disqualified from employing F-1 students under section 221 of the Immigration Act.

(3) If the attestation is not accepted for filing pursuant to paragraph (f)(2)(i) of this section, ETA shall return it to the employer or the employer's agent or representative with written and dated notification of the reason(s) that the attestation is unacceptable. If the employer does not complete and return the attestation within 15 days of the date of such notification (as stated in paragraph (f)(4) of this section), ETA shall invalidate the attestation and shall notify the Attorney General of such invalidation. The Attorney General may then use such notification in its enforcement responsibilities. Employers shall not employ F-1 students without a valid attestation.

(4) *Resubmission.* When the attestation is determined to be unacceptable and is returned to the employer for completion pursuant to paragraph (f)(2)(i) of this section, the employer may resubmit the attestation. The employer shall resubmit the attestation within 15 days of the date of nonacceptance to avoid the invalidation of its attestation and ETA's notice to the Attorney General. Upon resubmission, if the attestation is determined to be acceptable pursuant to paragraph (f)(1) of

this section, the Regional Certifying Officer shall accept the attestation for filing as of the original date of receipt by ETA, and shall return a copy of the attestation to the employer with ETA's acceptance indicated thereon.

(g) *Challenges to Attestations.* (1) ETA will not consider, prior to the acceptance or return of the attestation, information contesting an attestation received by ETA. Such information shall not be made part of ETA's administrative record on the attestation, but shall be referred to the Administrator to be processed as a complaint pursuant to subpart K of this part, and, if such attestation is accepted for filing by ETA, the complaint shall be handled by ESA under subpart K of this part.

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

(h) *Effective date and validity of filed attestations.* (1) A properly completed attestation accepted pursuant to paragraph (f)(1) of this section shall be deemed accepted for filing as of the date it is received and date stamped by the Regional Certifying Officer and shall be valid for the duration of the F-1 student work authorization program which expires on September 30, 1996, unless withdrawn pursuant to paragraph (i) of this section or invalidated pursuant to paragraph (j) of this section or subpart K of this part.

(2) During the validity period of an attestation which has been accepted for filing as described in paragraph (f)(1) of this section, the attesting employer may hire, during the 90-day period following the last day of its 60-day recruitment period, or at any time if the employer has placed an "open job order" with the SESA as part of their recruitment effort, F-1 students as needed from as many educational institutions as it deems necessary to fill the positions described in the attestation, at the location(s) specified in the attestation, and at the "required wage rate." The employer shall provide a copy of the accepted attestation to the DSO at each educational institution from which it hires any F-1 student(s).

(3) The DSO may grant work authorization for an F-1 student to be employed by a particular attesting employer for the duration of the F-1 student's course of study or until September 30, 1996, whichever period is shorter, provided the F-1 student continues to be employed by the attesting employer and is otherwise eligible for F-1 student work authorization as determined by the Attorney General.

(i) *Withdrawal of accepted attestations.* (1) An employer who has submitted an attestation which has been accepted for filing may withdraw such attestation at any time before the expiration of the validity period of the attestation, unless the Administrator has found reasonable cause to commence an investigation of the attestation under subpart K of this part. Requests for such withdrawals shall be in writing and shall be directed to the Regional Certifying Officer with whom the attestation was filed.

(2) Upon the Regional Certifying Officer's receipt of an employer's written request to withdraw an attestation, it shall be the employer's responsibility to promptly notify the DSO at each school where F-1 students it employs are enrolled.

(3) Withdrawal of an attestation shall not affect an employer's liability with respect to any failure to meet the conditions attested to which took place before the withdrawal, or for material misrepresentations in an attestation. However, if an employer has not yet employed any F-1 student(s) pursuant to the attestation, the Administrator shall not find reasonable cause to investigate unless it is alleged, and there is reasonable cause to believe, that the employer has made material misrepresentations in the attestation.

(j) *Invalidation of filed attestation.* Invalidation of an attestation may result from enforcement action(s) by the Administrator, Wage and Hour Division, under subpart K of this part (*i.e.*, investigation(s) conducted by the Administrator regarding the employer's material misrepresentation of an attestation element or failure to pay wages in accordance with attestation). Invalidation of an attestation may also result where ETA determines that the attestation is unacceptable and the em-

ployer fails to resubmit the attestation to ETA within 15 days.

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

(2) *Result of ETA action.* If, after accepting an attestation for filing, ETA finds that it is unacceptable because it falls within one of the categories set forth at paragraph (f)(2)(i) of this section, ETA shall return the attestation to the employer for correction and resubmission within 15 days. If the employer fails to resubmit the attestation within 15 days of the date of the notification, ETA shall invalidate the attestation. ETA shall notify the Attorney General of such invalidation. Where the attestation has been invalidated, ETA shall return a copy of the attestation form to the employer, or the employer's agent or representative, and shall notify the employer in writing of the reason(s) that the attestation is invalidated. When an attestation is invalidated pursuant to paragraph (f)(2)(ii) of this section, ETA shall invalidate all attestations filed by the employer. Such action shall be the final decision of the Secretary of Labor and is not subject to appeal.

(k) *Employers subject to disqualification.* No attestation shall be accepted for filing from an employer which has been found to be disqualified from participation in the F-1 student work authorization program as determined in a final agency action following an investigation by the Administrator pursuant to subpart K of this part.

(Approved by the Office of Management and Budget under control number 1205-0315)

[56 FR 56865, 56876, Nov. 6, 1991, as amended at 59 FR 64777, Dec. 15, 1994; 60 FR 61210, 61211, Nov. 29, 1995]

§ 655.950 Public access.

(a) *Public examination at ETA.* ETA shall compile and maintain a list of employers who filed attestations specifying the occupation(s), geographical location, and wage rate(s) attested to. The list shall be available for public inspection at the ETA office at which the

attestation was filed and such list shall be updated monthly.

(b) *Notice to Public.* ETA shall publish semiannually a list in the FEDERAL REGISTER of employers which have been disqualified from participating in the F-1 student work authorization program pursuant to §655.940(k) of this part.

APPENDIX A TO SUBPART J OF PART 655—DOCUMENTATION IN SUPPORT OF ATTESTATIONS MADE BY EMPLOYERS

This appendix sets forth the documentation that the Department of Labor considers to be sufficient to satisfy the employer's burden of proof regarding substantiate attestations made on Form ETA-9034, pursuant to subpart J of this part, provided the documentation is found to be truthful, accurate, and substantiates compliance. The employer retains the right to meet its burden of proof in proving its attestations through other sufficient means. The employer's failure to substantiate its attestation in the event of an investigation shall be found to be a violation.

(a) *Documenting the first attestation element.* The employer shall have the burden of proving that it has complied with the recruitment requirements described in regulations at §655.940(d)(1) of this part and attested to on ETA Form-9034. The employer's failure to satisfy the burden of proof through the production of adequate documentation shall be found to be a violation.

(1) Documentation shall not be submitted to ETA or to the DSO with the attestation, but shall be made available to DOL as described in §§655.900(b)(3) and 655.1000(c) of this part. To be effective in satisfying the burden of proof, the documentation should be contemporaneous with the recruitment, not created after the fact and particularly not after the commencement of an investigation under subpart K of this part.

(2) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the recruitment, the employer should maintain the documentation for a period of no less than 18 months after the close of the recruitment period or, in the event of an investigation, for the period of the enforcement proceeding under subpart K of this part.

(3) The employer should be able to produce the following documentation:

(i) Evidence that a job order for the position was on file with the SESA local office within the area of intended employment for at least 60 consecutive days. Such evidence of a job order should include the employer's contemporaneous written statement setting forth the name and address of the SESA of-

office with which the job order was placed; the name of the SESA employee with whom the job order was placed; the date on which the order was placed; and the dates on which the job order was on file with the SESA office.

(ii) Evidence that a vacancy notice announcing the position was posted for 60 consecutive days at the worksite. Evidence should include a copy of the notice that was posted at the worksite, the dates when the notice was posted, and a description of the specific location at the worksite at which the notice was posted.

(iii) Evidence that a job order for the position was continuously on file and "open" with the SESA local office within the area of intended employment, throughout the validity period of the attestation. Such evidence should include the employer's contemporaneous written statement setting forth the name and address of the SESA office with which the job order was placed; the name of the SESA employee with whom the job order was placed; the date on which the order was placed; and the dates on which the job order was on file with the SESA office.

(iv) Evidence that the employer was unsuccessful in recruiting a sufficient number of U.S. workers who are able, qualified, and available for the position(s) through the SESA job order and the worksite posting notice. Such evidence should include a contemporaneous written summary of the results of recruitment for each position for which an attestation was filed by the employer. Such summary should include:

(A) The number of job openings in each occupation included in the occupation;

(B) The number of U.S. workers and F-1 students that applied for each position;

(C) The number of U.S. workers that were hired;

(D) The number of F-1 students that were hired;

(E) The number of U.S. workers that were not hired; and

(F) The lawful job-related reason(s) for which each U.S. worker was not hired. An example of a job-related reason for which a U.S. worker can be rejected for a job opportunity is that the U.S. worker does not have the training and experience required for the position.

(4) *Investigations.* In the event that an investigation is conducted pursuant to regulations at subpart K of this part, concerning whether the employer failed to satisfy its recruitment requirement, in that it failed to conduct recruitment or to hire qualified U.S. worker(s) for a position for which an F-1 student(s) was hired, the Administrator shall determine whether the employer has produced documentation sufficient to prove the employer's compliance with the attestation requirements.

(i) Where the focus of the investigation is upon whether recruitment was conducted,

the employer shall have satisfied its burden of proof if the documentation described in paragraphs (a)(3) (i), (ii), and (iii) of this appendix is produced, provided the documentation is found to be truthful, accurate and substantiates compliance.

(ii) Where the focus of the investigation is upon whether the employer's recruitment of U.S. workers was unsuccessful because the employer declined to hire U.S. worker(s) without lawful reason(s) for such action, the employer shall have satisfied the burden of proof if the documentation described in paragraph (a)(3)(iv) of this appendix is produced, provided that the Administrator has no significant evidence which reasonably shows that the employer's recruitment or hiring was deficient. In determining whether the employer has demonstrated that U.S. workers were rejected for lawful job-related reasons, the Administrator may contact ETA which shall provide the Administrator with advice as to whether U.S. workers were properly rejected.

(b) *Documentation of the second attestation element.* The employer shall have the burden of proving the validity of and compliance with the attestation element referenced in §655.940(e) of this part and attested to on Form ETA-9034.

(1) The employer shall be prepared to produce documentation sufficient to satisfy this requirement. Documentation shall not be submitted to ETA or to the DSO with the attestation, but shall be made available to DOL as described in §§655.900(b)(3) and §655.1000(c) of this part. The documentation specified in paragraphs (b) (4) and (5) of this appendix will be sufficient to satisfy the employer's burden of proof, provided the documentation is found to be truthful, accurate and substantiates compliance upon investigation. The employer's failure to satisfy the burden of proof through the production of adequate documentation shall be found to be a violation.

(2) To be effective in satisfying the employer's burden of proof regarding the determination of the prevailing wage, the employer's documentation should be contemporaneous with the determination or the annual update of the prevailing wage, not created after the fact and particularly not after the commencement of an investigation under subpart K of this part.

(3) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the determination or the annual update, the employer should be prepared to produce documentation for a period of no less than 18 months after the determination or update, or in the event of an investigation, for the period of the enforcement proceedings under subpart K of this part.

(4) Documentation described in paragraphs (b) (1) through (3) of this appendix should consist of the following:

(i) If the position is in an occupation which is the subject of a wage determination in the area under the provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, (see 29 CFR part 1) or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*, (see 29 CFR part 4), an excerpt from the wage determination showing the wage rate for the occupation in the area of intended employment; or

(ii) If the position is covered by a union contract which was negotiated at arms-length between a union and the employer, an excerpt from the union contract showing the wage rate(s) for the occupation(s) set forth in the union contract.

(iii) If position is not covered by the provisions of paragraph (b)(4) (i) or (ii) of this appendix, the employers's documentation shall consist of:

(A) A prevailing wage finding from the SESA for the occupation within the area of employment; or

(B) A prevailing wage survey for the occupation in the area of intended employment published by an independent authoritative source as defined in §655.920 of this part. For purposes of this paragraph (b)(4)(iii)(B) "prevailing wage survey" means a survey of wages published in a book, newspaper, periodical, looseleaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's attestation and each succeeding annual prevailing wage update. Such survey shall:

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

(2) Be based upon recently collected data, e.g., within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.

(5) The employer should be prepared to produce documentation to prove the payment of the required wage, including payroll records, commencing on the date on which the employer first employs the F-1 student, showing the wages paid to employees in the occupation(s) named in the attestation at the worksite. Such payroll records maintained in accordance with regulations under the Fair Labor Standards Act (see 29 CFR part 516) would include for each employee in the occupation:

(i) The rate(s) of pay, including shift differentials, if any;

(ii) The employee's earnings per pay period;

(iii) The number of hours worked per week by the employee; and

(iv) The amount of and reasons for any and all deductions made from the employee's wages.

(6) *Investigations.* In the event that an investigation is conducted pursuant to subpart K of this part, concerning whether the employer made a material misrepresentation regarding the required wage or failed to pay the required wage, the Administrator shall determine whether the employer has produced documentation sufficient to satisfy the burden of proof.

(i) The employer's documentation of the prevailing wage determination shall be found to be sufficient where the determination is pursuant to the Davis-Bacon Act or Service Contract Act wage determination or a SESA determination.

(ii) Where the employer's prevailing wage determination is based on a survey by an independent authoritative source, the Administrator shall consider the employer's documentation to be sufficient, provided that it satisfies the standards for independent authoritative source surveys and is properly applied, and provided further that the Administrator has no significant evidence which reasonably shows that the prevailing wage finding obtained by the employer from an independent authoritative source varies substantially from the wage prevailing for the occupation in the area of intended employment. In the event such significant evidence shows a substantial variance, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for the determination as to violations. ETA may consult with the appropriate SESA to ascertain the prevailing wage applicable to the occupation under investigation.

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Subpart K—Enforcement of the Attestation Process for Attestations Filed by Employers Utilizing F-1 Students in Off-Campus Work

SOURCE: 56 FR 56872, 56876, Nov. 6, 1991, unless otherwise noted.

§ 655.1000 Enforcement authority of Administrator, Wage and Hour Division.

(a) The Administrator shall perform all the Secretary's investigative and enforcement functions under section 221 of the Act and subparts J and K of this part.

(b) The Administrator 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 to determine compliance with section 221(a) of the Act and subparts J and K of this part.

(c) An employer being investigated pursuant to this subpart shall have the burden of proof as to compliance with section 221(a) of the Act and the validity of its attestation, and in this regard 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 221 of the Act and subparts J and K of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to section 221 of the Act or subpart J or K of this part. Any such interference shall be a violation of the attestation and subparts J and K of this part, and the Administrator may take such further actions as the Administrator deems 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) An employer subject to subparts J and K of this part shall at all times cooperate in administrative and enforcement proceedings. No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person because such person has:

- (1) Filed a complaint or appeal under or related to section 221 of the Act or subparts J or K of this part;
- (2) Testified or is about to testify in any proceeding under or related to section 221 of the Act or subpart J or K of this part;
- (3) Exercised or asserted on behalf of himself or herself or others any right or protection afforded by section 221 of the Act or subpart J or K of this part.
- (4) Consulted with an employee of a legal assistance program or an attorney on matters related to section 221 of the Act or to subpart J or K of this part.