

(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.

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

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.

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part or any other DOL regulation promulgated pursuant to section 221 of the Act. In the event of any intimidation or restraint as described in this section, the conduct shall be a violation of the attestation and these regulations, and the Administrator may take such further actions as the Administrator considers appropriate.

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

§ 655.1005 Complaints and investigative procedures.

(a) The Administrator, through an investigation, shall determine whether an employer of F-1 students has:

(1) Provided an attestation which is materially false

NOTE: Federal criminal statutes provide penalties of up to \$10,000 and/or imprisonment of up to 5 years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546.

(2) Failed to pay the appropriate wage rate as required under § 655.940(e) of this part; or

(3) Failed to comply with the provisions of subpart J or K of this part.

(b) Any aggrieved person or organization may file a complaint alleging a violation of the provisions of subpart J or K of this part. No particular form is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint. The complaint shall set forth sufficient facts for the Administrator to determine whether there is reasonable cause to believe that a particular part or parts of the attestation or regulations may have been violated. The complaint may be submitted to any local Wage and Hour Division office, the addresses of which can be found in local Wage and Hour directories. The office or person receiving such a complaint shall refer it to the office of the Wage and Hour Division administering the area in which the reported violation is alleged to have occurred.

(c) The Administrator shall determine whether there is reasonable cause to believe that a complaint warrants investigation. If it is determined that a complaint fails to present reasonable cause, the Administrator shall so notify the complainant, who may submit a new complaint with such additional information as may be available. If the Administrator determines that reasonable cause exists, an investigation will be conducted.

(d) In the event that the Administrator, after an investigation, determines that the employer has committed any violation(s) described in paragraph (a) of this section, the Administrator shall issue a written determination to the employer in accordance with § 655.1015 of this part and an opportunity for a hearing shall be afforded in accordance with the procedures specified in § 655.1020 of this part.

§ 655.1010 Remedies.

Where the Administrator, after notice and opportunity for a hearing, determines that an employer has committed a violation identified in § 655.1005(a) of this part, the employer shall be disqualified from employing F-1 student(s) under section 221 of the Act. The Administrator shall so notify the Attorney General and ETA pursuant to § 655.1055 of this part. Upon receipt of the Administrator's notice, the Attorney General and ETA shall take the action specified in § 655.1055 of this part, *i.e.*, cancel any existing attestation(s) or work authorizations, and shall not accept future attestation(s) or grant new work authorization(s) with respect to that employer.

§ 655.1015 Written notice and service of Administrator's determination.

(a) The Administrator's written determination, issued pursuant to §§ 655.1005 and 655.1010 of this part, shall be served on the employer by personal service or by certified mail at the address of the employer or the employer's agent shown on the attestation. Where service by certified mail is not accepted by the employer, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The Administrator's written determination, issued pursuant to

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§§ 655.1005 and 655.1010 of this part, shall:

(1) Set forth the Administrator's determination of the violation(s) and the Administrator's reason or reasons therefor.

(2) Inform the employer that it may request a hearing pursuant to § 655.1020 of this part.

(3) Inform the employer that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, and give the addresses of the Chief Administrative Law Judge (with whom the request must be filed) and the representative of the Solicitor of Labor (who must be served with a copy of the request).

(5) Inform the employer that, if no timely request for a hearing is filed pursuant to § 655.1020 of this part, the employer shall be disqualified from employing F-1 students, effective upon the expiration of the period for filing a request for a hearing. In such event, the Administrator shall, pursuant to § 655.1055 of this part, notify ETA and the Attorney General of the occurrence of a violation by the employer, and that the employer has been disqualified from employing F-1 students.

§ 655.1020 Request for hearing.

(a) An employer desiring to request an administrative hearing on a determination issued pursuant to § 655.1015 of this part shall make such request in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. Copies of the request shall be served upon the Wage and Hour Division official who issued the notice of determination and upon the representative of the Solicitor of Labor identified in the notice of determination.

(b) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the employer believes such determination is in error;

(5) Be signed by the employer making the request or by an authorized representative of the employer; and

(6) Include the address at which the employer or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar days after the date of the determination.

(d) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the employer or authorized representative, shall be filed within ten days thereafter.

(e) A copy of the request for a hearing shall be sent by the requestor to the Administrator at the address shown on the Administrator's notice of determination.

§ 655.1025 Rules of practice for administrative law judge proceedings.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply, but principles designed to

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ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

§ 655.1030 Service and computation of time.

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., room N-2716, Washington, DC 20210, and one copy on the attorney representing the Administrator in the proceeding.

(c) Time under this subpart shall be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

§ 655.1035 Administrative law judge proceedings.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.1020 of this part, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) The date of the hearing shall be not more than 60 calendar days from the date of the Chief Administrative Law Judge's receipt of the request for hearing.

(c) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party

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in accordance with § 655.1030 of this part. Posthearing briefs shall not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served in accordance with § 655.1030 of this part.

(d) Amicus curiae participation or intervention by interested parties may be permitted by the administrative law judge in his/her discretion pursuant to 29 CFR 18.10. If such participation is granted, the amicus curiae and/or intervenor shall serve all documents and be served by the parties in accordance with § 655.1030 of this part. In no event, however, shall such participation be permitted to delay the proceedings beyond the deadline specified in paragraphs (b) and (c) of this section.

§ 655.1040 Decision and order of administrative law judge.

(a) Within 90 calendar days after receipt of the transcript of the hearing, the administrative law judge shall issue a decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision.

(c) The administrative law judge, in accordance with § 655.940 (d) and (e) of this part, shall impose upon the employer the burden of proving the validity of and compliance with the attestation.

(d) If the administrative law judge finds that the employer has failed to pay the required wage rate or has provided an attestation which is materially false, the judge shall order that the employer be disqualified from employing F-1 students.

(e) In the event that the Administrator's determination(s) of wage violation(s) is based upon a wage determination obtained by the Administrator

from ETA during the investigation (paragraph (b)(6) of appendix A of subpart J of this part), the administrative law judge shall not determine the prevailing wage rate *de novo*, but shall, based on the evidence (including the ETA administrative record), either accept the wage determination or vacate the wage determination. If the wage determination is vacated, the administrative law judge shall remand the case to the Administrator, who may then refer the matter to ETA and, upon the issuance of a new wage determination by ETA, resubmit the case to the administrative law judge. Under no circumstances shall source data obtained in confidence by ETA, or the names of establishments contacted by ETA, be submitted into evidence or otherwise disclosed.

(f) The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(g) The decision shall be served on all parties in person or by certified or regular mail.

§ 655.1045 Secretary's review of administrative law judge's decision.

(a) Any party desiring review of the decision and order of an administrative law judge shall petition the Secretary to review the decision and order. To be effective, such petition must be received by the Secretary within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and the administrative law judge.

(b) No particular form is prescribed for any petition for the Secretary's review permitted by this subpart. However, any such petition shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;
- (5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Secretary in determining whether review is warranted.

(c) Whenever the Secretary determines to review the decision and order of an administrative law judge, a notice of the Secretary's determination shall be served upon the administrative law judge and all parties within 30 calendar days after the Secretary's receipt of the petition for review.

(d) Upon receipt of the Secretary's notice, the Office of Administrative Law Judges shall within 15 calendar days forward the complete hearing record to the Secretary.

(e) The Secretary's notice may specify:

- (1) The issue or issues to be reviewed;
- (2) The form in which submissions shall be made by the parties (e.g., briefs);
- (3) The time within which such submissions shall be made.

(f) All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210, Attention: Executive Director, Office of Administrative Appeals, room S-4309. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, must be received by the Secretary either on or before the due date.

(g) Copies of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service upon the Administrator shall be in accordance with § 655.1030(b) of this part.

(h) The Secretary's final decision shall be issued within 180 calendar days from the date of the notice of intent to review. The Secretary's decision shall be served upon all parties and the administrative law judge.

(i) Upon issuance of the Secretary's decision, the Secretary shall transmit

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the entire record to the Chief Administrative Law Judge for custody pursuant to § 655.1050 of this part.

§ 655.1050 Administrative record.

The official record of every completed administrative hearing procedure provided by subpart K of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

§ 655.1055 Notice to the Employment and Training Administration (ETA) and the Attorney General (AG).

(a) The Administrator shall notify the Attorney General and ETA of the final determination of a violation by an employer, and of the disqualification of the employer from employing F-1 students, upon the earliest of the following events:

(1) When the Administrator issues a written determination that the employer has committed a violation, and no timely request for hearing is made by the employer pursuant to § 655.1020 of this part; or

(2) When, after a hearing on a timely request pursuant to § 655.1020 of this part, the administrative law judge issues a decision and order finding a violation by the employer; or

(3) When, although the administrative law judge found that there was no violation by the employer, the Secretary, upon subsequent review upon a timely request pursuant to § 655.1045 of this part, issues a decision finding that a violation was committed by the employer.

(b) The Attorney General, upon receipt of notification from the Administrator pursuant to paragraph (a) of this section, shall take appropriate action to cancel work authorization to F-1 students for employment with that employer, and to prevent issuance of new work authorization with respect to that employer.

(1) The Administrator's notice to the Attorney General shall, to the extent known from the investigation, specify

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the school(s) which issued work authorization for the F-1 students who were employed by the employer. The Attorney General shall inform the appropriate authority at each of the specified school(s) that any work authorization(s) issued for F-1 student(s) to be employed by that employer shall immediately be revoked, and that no new work authorization shall be issued for employment of F-1 student(s) by that employer. The Attorney General shall, in addition, take any other appropriate action to effectuate the disqualification of that employer through revocation of work authorization(s) at any other school(s) that may authorize employment with the disqualified employer.

(2) A copy of the Administrator's notice to the Attorney General may also be sent by the Administrator to each school identified in the notice as a school from which F-1 students have been employed by the disqualified employer. Such copy of the Administrator's notice, upon receipt by the school, shall constitute sufficient notice for the DSO to revoke work authorization(s) and to refuse to issue new work authorization(s) for employment of F-1 students by that employer. Any school which issued or may issue work authorization(s) for employment of any F-1 student(s) by the employer, but which was not known by the Administrator to have done so, or notified by copy of the Administrator's decision, shall comply with any instructions from the Attorney General regarding revocation and nonissuance of work authorization for employment of any F-1 student(s) by the employer. In addition, any school (whether or not it received a copy of the Administrator's notice to the Attorney General regarding the employer) shall revoke F-1 work authorization(s) and refuse to issue new F-1 work authorization(s) for any employer which is identified as a disqualified employer on the list published periodically in the FEDERAL REGISTER by ETA.

(3) Continued or new employment of any F-1 student by the employer shall constitute a violation of the INA's employer sanctions provisions, irrespective of whether the F-1 student's work

authorization has been formally revoked by the DSO or INS.

(c) ETA, upon receipt of the Administrator's notice pursuant to paragraph (a) of this section, shall cancel any F-1 attestation filed by the employer under subpart J of this part, shall not accept for filing any attestation submitted by the employer, and shall so notify the employer.

§ 655.1060 Non-applicability of the Equal Access to Justice Act.

A proceeding under subpart K of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

Subpart L—What Requirements Must a Facility Meet to Employ H-1C Nonimmigrant Workers as Registered Nurses?

SOURCE: 65 FR 51149, Aug. 22, 2000, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to subpart L appear at 75 FR 10403, Mar. 5, 2010.

§ 655.1100 What are the purposes, procedures and applicability of these regulations in subparts L and M of this part?

(a) *Purpose.* The Immigration and Nationality Act (INA), as amended by the Nursing Relief for Disadvantaged Areas Act of 1999, establishes the H-1C nonimmigrant visa program to provide qualified nursing professionals for narrowly defined health professional shortage areas. Subpart L of this part sets forth the procedure by which facilities seeking to use nonimmigrant registered nurses must submit attestations to the Department of Labor demonstrating their eligibility to participate as facilities, their wages and working conditions for nurses, their efforts to recruit and retain United States workers as registered nurses, the absence of a strike/lockout or lay-off, notification of nurses, and the numbers of and worksites where H-1C

nurses will be employed. Subpart M of this part sets forth complaint, investigation, and penalty provisions with respect to such attestations.

(b) *Procedure.* The INA establishes a procedure for facilities to follow in seeking admission to the United States for, or use of, nonimmigrant nurses under H-1C visas. The procedure is designed to reduce reliance on nonimmigrant nurses in the future, and calls for the facility to attest, and be able to demonstrate in the course of an investigation, that it is taking timely and significant steps to develop, recruit, and retain U.S. nurses. Subparts L and M of this part set forth the specific requirements of those procedures.

(c) *Applicability.* (1) Subparts L and M of this part apply to all facilities that seek the temporary admission or use of H-1C nonimmigrants as registered nurses.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, subparts L and M of this part shall apply to the entry of a nonimmigrant who is a citizen of Mexico under the provisions of section D of Annex 1603 of NAFTA. Therefore, the references in this part to "H-1C nurse" apply to such nonimmigrants who are classified by USCIS as "TN."

§ 655.1101 What are the responsibilities of the government agencies and the facilities that participate in the H-1C program?

(a) *Federal agencies' responsibilities.* The Department of Labor (DOL), Department of Homeland Security, and Department of State are involved in the H-1C visa process. Within DOL, the Employment and Training Administration (ETA) and the Wage and Hour Division have responsibility for different aspects of the process.

(b) *Facility's attestation responsibilities.* Each facility seeking one or more H-1C nurse(s) must, as the first step, submit an attestation on Form ETA 9081, as described in § 655.1110 of this part, to the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center, 536 South Clark Street, Chicago, IL