

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 60605-1509. If the attestation satisfies the criteria stated in § 655.1130 and includes the supporting information required by § 655.1110 and by § 655.1114, ETA shall accept the attestation form for filing, and return the accepted attestation to the facility.

(c) *H-1C petitions.* Upon ETA’s acceptance of the attestation, the facility may then file petitions with U.S. Citizenship and Immigration Services

(USCIS) for the admission of, change to, or extension of status of H-1C nurses. The facility must attach a copy of the accepted attestation (Form ETA 9081) to the petition or the request for adjustment or extension of status, filed with USCIS. At the same time that the facility files an H-1C petition with USCIS, it must also send a copy of the petition to the Employment and Training Administration, Administrator, Office of Foreign Labor Certification, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210. The facility must also send to this same ETA address a copy of the USCIS petition approval notice within 5 days after it is received from USCIS.

(d) *Visa issuance.* USCIS makes determinations, in adjudicating an H-1C petition, whether the foreign worker possesses the required qualifications and credentials to be employed as an H-1C nurse. The Department of State is subsequently responsible for determining visa eligibility.

(e) *Board of Alien Labor Certification Appeals (BALCA) review of Attestations accepted and not accepted for filing.* Any interested party may seek review by the BALCA of an Attestation accepted or not accepted for filing by ETA. However, such appeals are limited to ETA actions on the three Attestation matters on which ETA conducts a substantive review (*i.e.*, the employer’s eligibility as a facility; the facility’s attestation to alternative timely and significant steps; and the facility’s assertion that taking a second timely and significant step would not be reasonable).

(f) *Complaints.* Complaints concerning misrepresentation of material fact(s) in the Attestation or failure of the facility to carry out the terms of the Attestation may be filed with the Wage and Hour Division of DOL, according to the procedures set forth in subpart M of this part. The Wage and Hour Administrator shall investigate and, where appropriate, after an opportunity for a hearing, assess remedies and penalties. Subpart M of this part also provides that interested parties may obtain an administrative law judge hearing and may seek review of the administrative law judge’s decision

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at the Department's Administrative Review Board.

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§ 655.1102 What are the definitions of terms that are used in these regulations?

For the purposes of subparts L and M of this part:

Accepted for filing means that the Attestation and any supporting documentation submitted by the facility have been received by the Employment and Training Administration of the Department of Labor and have been found to be complete and acceptable for purposes of Attestation requirements in §§ 655.1110 through 655.1118.

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

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

Administrator, Office of Foreign Labor Certification (OFLC) means the primary official of the Office of Foreign Labor Certification (OFLC Administrator), or the OFLC Administrator's designee.

Aggrieved party means a person or entity whose operations or interests are adversely affected by the employer's alleged misrepresentation of material fact(s) or non-compliance with the Attestation and includes, but is not limited to:

(1) A worker whose job, wages, or working conditions are adversely affected by the facility's alleged misrepresentation of material fact(s) or non-compliance with the attestation;

(2) A bargaining representative for workers whose jobs, wages, or working conditions are adversely affected by the facility's alleged misrepresentation of material fact(s) or non-compliance with the attestation;

(3) A competitor adversely affected by the facility's alleged misrepresentation of material fact(s) or non-compliance with the attestation; and

(4) A government agency which has a program that is impacted by the facility's alleged misrepresentation of mate-

rial fact(s) or non-compliance with the attestation.

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

Board of Alien Labor Certification Appeals (BALCA) means a panel of one or more administrative law judges who serve on the permanent Board of Alien Labor Certification Appeals established by 20 CFR part 656. BALCA consists of administrative law judges assigned to the Department of Labor and designated by the Chief Administrative Law Judge to be members of the Board of Alien Labor Certification Appeals.

Certifying Officer means a Department of Labor official, or such official's designee, who makes determinations about whether or not H-1C attestations are acceptable for certification.

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 "accepted for filing" by ETA.

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

Division means the Wage and Hour Division of the Employment Standards Administration, DOL.

Employed or *employment* means the employment relationship as determined under the common law, except that a facility which files a petition on behalf of an H-1C nonimmigrant is deemed to be the employer of that H-1C nonimmigrant without the necessity of the application of the common law test. Under the common law, the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968). The determination should consider the following factors and any other relevant factors that would indicate the existence of an employment relationship: