

§ 655.808

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§ 655.808 Under what circumstances may random investigations be conducted?

(a) The Administrator may conduct random investigations of an employer during a five-year period beginning with the date of any of the following findings, provided such date is on or after October 21, 1998:

(1) A finding by the Secretary that the employer willfully violated

any of the provisions described in § 655.805(a)(1) through (9);

(2) A finding by the Secretary that the employer willfully misrepresented material fact(s) in a labor condition application filed pursuant to § 655.730; or

(3) A finding by the Attorney General that the employer willfully failed to meet the condition of section 212(n)(1)(G)(i)(II) of the INA (pertaining to an offer of employment to an equally or better qualified U.S. worker).

(b) A finding within the meaning of this section is a final, unappealed decision of the agency. See §§ 655.520(a), 655.845(c), and 655.855(b).

(c) An investigation pursuant to this section may be made at any time the Administrator, in the exercise of discretion, considers appropriate, without regard to whether the Administrator has reason to believe a violation of the provisions of this subpart I and subpart H of this part has been committed. Following an investigation, the Administrator shall issue a determination in accordance with § 655.815.

[65 FR 80236, Dec. 20, 2000]

§ 655.810 What remedies may be ordered if violations are found?

(a) Upon determining that an employer has failed to pay wages or provide fringe benefits as required by § 655.731 and § 655.732, the Administrator shall assess and oversee the payment of back wages or fringe benefits to any H-1B nonimmigrant who has not been paid or provided fringe benefits as required. The back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to (or with respect to) such nonimmigrant(s).

(b) *Civil money penalties.* The Administrator may assess civil money penalties for violations as follows:

(1) An amount not to exceed \$1,000 per violation for:

(i) A violation pertaining to strike/lockout (§ 655.733) or displacement of U.S. workers (§ 655.738);

(ii) A substantial violation pertaining to notification (§ 655.734), labor condition application specificity (§ 655.730), or recruitment of U.S. workers (§ 655.739);

(iii) A misrepresentation of material fact on the labor condition application;

(iv) An early-termination penalty paid by the employee (§ 655.731(c)(10)(i));

(v) Payment by the employee of the additional \$500/\$1,000 filing fee (§ 655.731(c)(10)(ii)); or

(vi) Violation of the requirements of the regulations in this subpart I and subpart H of this part or the provisions regarding public access (§ 655.760) where the violation impedes the ability of the Administrator to determine whether a violation of sections 212(n) or (t) of the INA has occurred or the ability of members of the public to have information needed to file a complaint or information regarding alleged violations of sections 212(n) or (t) of the INA;

(2) An amount not to exceed \$5,000 per violation for:

(i) A willful failure pertaining to wages/working conditions (§§ 655.731, 655.732), strike/lockout, notification, labor condition application specificity, displacement (including placement of an H-1B nonimmigrant at a worksite where the other/secondary employer displaces a U.S. worker), or recruitment;

(ii) A willful misrepresentation of a material fact on the labor condition application; or

(iii) Discrimination against an employee (§ 655.801(a)); or

(3) An amount not to exceed \$35,000 per violation where an employer (whether or not the employer is an H-1B-dependent employer or willful violator) displaced a U.S. worker employed by the employer in the period beginning 90 days before and ending 90 days after the filing of an H-1B petition in conjunction with any of the following violations:

(i) A willful violation of any of the provisions described in §655.805(a)(2) through (9) pertaining to wages/working condition, strike/lockout, notification, labor condition application specificity, displacement, or recruitment; or

(ii) A willful misrepresentation of a material fact on the labor condition application (§655.805(a)(1)).

(c) In determining the amount of the civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors. The factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the INA and this subpart I or subpart H of this part;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the employer in good faith to comply with the provisions of 8 U.S.C. 1182(n) or (t) and this subparts H and I of this part;

(5) The employer's explanation of the violation or violations;

(6) The employer's commitment to future compliance; and

(7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

(d) *Disqualification from approval of petitions.* The Administrator shall notify the DHS pursuant to §655.855 that the employer shall be disqualified from approval of any petitions filed by, or on behalf of, the employer pursuant to section 204 or section 214(c) of the INA for the following periods:

(1) At least one year for violation(s) of any of the provisions specified in paragraph (b)(1)(i) through (iii) of this section;

(2) At least two years for violation(s) of any of the provisions specified in paragraph (b)(2) of this section; or

(3) At least three years, for violation(s) specified in paragraph (b)(3) of this section.

(e) *Other administrative remedies.* (1) If the Administrator finds a violation of the provisions specified in paragraph (b)(1)(iv) or (v) of this section, the Ad-

ministrator may issue an order requiring the employer to return to the employee (or pay to the U.S. Treasury if the employee cannot be located) any money paid by the employee in violation of those provisions.

(2) If the Administrator finds a violation of the provisions specified in paragraph (b)(1)(i) through (iii), (b)(2), or (b)(3) of this section, the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including but not limited to reinstatement of workers who were discriminated against in violation of §655.805(a), reinstatement of displaced U.S. workers, back wages to workers who have been displaced or whose employment has been terminated in violation of these provisions, or other appropriate legal or equitable remedies.

(f) The civil money penalties, back wages, and/or any other remedy(ies) determined by the Administrator to be appropriate are immediately due for payment or performance upon the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or upon the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The payment or performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. Distribution of back wages shall be administered in accordance with existing procedures established by the Administrator.

(g) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), requires that inflationary adjustments to civil money penalties in accordance with a specified cost-of-living formula be made, by regulation, at least every four years. The adjustments are to be based on changes in the Consumer Price Index for all Urban Consumers (CPI-U) for the U.S. City Average for

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All Items. The adjusted amounts will be published in the FEDERAL REGISTER. The amount of the penalty in a particular case will be based on the amount of the penalty in effect at the time the violation occurs.

[65 FR 80236, Dec. 20, 2000, as amended at 69 FR 68229, Nov. 23, 2004]

§ 655.815 What are the requirements for the Administrator's determination?

(a) The Administrator's determination, issued pursuant to § 655.806, 655.807, or 655.808, shall be served on the complainant, the employer, and other known interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and the Administrator's determination.

(c) The Administrator's written determination required by § 655.805 of this part shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor, and in the case of a finding of violation(s) by an employer, prescribe any remedies, including the amount of any back wages assessed, the amount of any civil money penalties assessed and the reason therefor, and/or any other remedies assessed.

(2) Inform the interested parties that they may request a hearing pursuant to § 655.820 of this part.

(3) Inform the interested parties 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, give the addresses of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of labor (upon whom copies of the request must be served).

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(5) Where appropriate, inform the parties that, pursuant to § 655.855, the Administrator shall notify ETA and the DHS of the occurrence of a violation by the employer.

[59 FR 65672, 65676, Dec. 20, 1994, as amended at 65 FR 80237, Dec. 20, 2000]

§ 655.820 How is a hearing requested?

(a) Any interested party desiring review of a determination issued under §§ 655.805 and 655.815, including judicial review, shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. If such a request for an administrative hearing is timely filed, the Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

(b) Interested parties may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s). In such a proceeding, the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent; the Administrator may intervene as a party or appear as *amicus curiae* at any time in the proceeding, at the Administrator's discretion.

(2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party and the employer shall be the respondent.

(c) 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 party requesting the