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**Attestation Applications by Facilities
Temporarily Employing H-1C
Nonimmigrant Foreign Workers as
Registered Nurses; Final Rule**

DEPARTMENT OF LABOR**Employment and Training Administration****20 CFR Part 655**

RIN 1205-AB52

Attestation Applications by Facilities Temporarily Employing H-1C Nonimmigrant Foreign Workers as Registered Nurses; Final Rule

AGENCY: Employment and Training Administration, Labor, in collaboration with Wage and Hour Division, Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) and the Wage and Hour Division of the Department of Labor (the Department or DOL) are publishing a Final Rule to implement the Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005 (NRDARA), which reauthorized the Nursing Relief for Disadvantaged Areas Act of 1999 (NRDAA), finalizing these rules for enforcement purposes. These Acts allowed certain health care facilities to file, and authorize the Department to review, approve and enforce, attestation applications to employ foreign workers as registered nurses in health professional shortage areas on a temporary basis under the H-1C visa. Facilities (hospitals meeting threshold criteria for the program) filed these forms with the Department as a condition for petitioning the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), for H-1C nurses.

DATES: This Final Rule is effective April 5, 2010.

FOR FURTHER INFORMATION CONTACT: For further information regarding 20 CFR 655, Subpart L, contact William L. Carlson, PhD, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

For further information regarding the H-1C enforcement process in 20 CFR 655, Subpart M of this part, contact Diane Koplewski, Immigration Branch Chief, Division of Enforcement Policy,

Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3516, Washington, DC 20210; Telephone (202) 693-0071 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:**I. Background**

On August 22, 2000, the Department published in the **Federal Register** an Interim Final Rule (IFR) that was effective September 21, 2000 and implemented the NRDAA, Public Law 106-95, 113 Stat. 1312 (1999). See 65 FR 51138, Aug. 22, 2000. The NRDAA amended the Immigration and Nationality Act (INA) to create a new temporary visa program for nonimmigrant foreign workers to work as registered nurses (RNs or nurses) for up to 3 years, in certain facilities which serve Health Professional Shortage Areas (HPSAs). 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m). That temporary visa program expired 4 years after the effective date of regulations promulgated by each agency implementing the NRDAA, which for the Department was September 21, 2004. (For purposes of the nonimmigrant visa process at the Immigration and Naturalization Service (INS), now USCIS, the statute expired on, and no more H-1C petitions were accepted after, June 13, 2005.) The number of H-1C visas that could be issued was limited to 500 per year.

The NRDARA, Public Law 109-423, 120 Stat. 2900 (2006) extended the provisions of the NRDAA for 3 years starting from December 20, 2006, the date the NRDARA was enacted. It made no substantive changes to the NRDAA's provisions. Although the application period for H-1C visa petitions has now expired, H-1C visa holders are allowed to work in the United States (U.S.) until the expiration of their authorized stay, which may be as much as 3 years after the petition was authorized. This Final Rule is being promulgated to ensure worker protections are in place for nurses currently employed in H-1C status, whose stays may extend beyond December 20, 2009.

The Congress modeled the NRDAA (and, by extension, the NRDARA) in large measure after the H-1A registered nurse temporary visa program created by the Immigration Nursing Relief Act of 1989 (INRA), Public Law 101-238, 103 Stat. 2099 (1989), which itself expired on September 1, 1995. See, e.g., H.R. Rpt. 135, at 2 (May 12, 1999). INRA

was enacted in response to a nationwide shortage of nurses in the late 1980s, but also sought to address concerns about the increased dependence of health care providers on foreign RNs. Id. Because there did not appear to be a national nursing shortage at the time the NRDAA was enacted (H.R. Rpt. 135, at 5 (May 12, 1999)), the Congress enacted the NRDAA to respond to a very specific need for qualified nursing professionals in understaffed facilities serving mostly poor patients in certain inner cities and rural areas. See 145 Cong. Rec. H3476 (daily ed. May 24, 1999) (Statement of Rep. Rogan). The NRDAA adopted many of the U.S. worker protection provisions of the H-1A program under INRA. Penalties that the government could impose on employers for violating NRDAA provisions were similar to those under INRA.

The NRDAA also created some attestation obligations for employers that were not found in INRA. A more detailed discussion of the attestation requirements for facilities can be found in the preamble to the IFR at 65 FR 51138, Aug. 22, 2000.

The passage of the NRDARA in December 2006 acknowledged that the shortage of nurses in some places remained a significant problem and again sought to alleviate specific shortages in defined areas. See, e.g., 152 Cong. Rec. S11175 (daily ed. Dec. 5, 2006) (Statement of Sen. Cornyn). No significant policy changes were required by that reauthorizing statute.

The definition of "facility" was not changed by the reauthorizing legislation. Only those hospitals that satisfied the criteria for a facility as of March 1997 continued to qualify as a facility eligible to file under the H-1C program for foreign registered nurses. The Department has consulted with and confirmed from the Health Resources and Services Administration of the Department of Health and Human Services (HHS) that only those 14 hospitals listed in the preamble to the IFR remain eligible to participate in the H-1C program. As explained in greater detail in the preamble to the IFR, the definition of facility requires the application of time-specific tests and does not afford any flexibility with regard to these criteria. 65 FR 51143, Aug. 22, 2000.

The Consolidated Natural Resources Act of 2008 (CNRA), Title VII, Public Law 110-229, 122 Stat. 754, 853, which extended U.S. immigration law to the Commonwealth of the Northern Mariana Islands (CNMI), also exempted facilities in Guam, the CNMI, and the Virgin Islands from certain cost reporting criteria necessary for H-1C eligibility

under sec. 212(m)(6)(B) of the INA (8 U.S.C. 1182(m)(6)(B)). This Final Rule incorporates this exemption. However, the CNRA did not provide any exemption from the requirement that a facility be a hospital located in one of the 50 States or District of Columbia, as defined in 42 U.S.C. 1395ww(d)(1)(B). See 8 U.S.C. 1182(m)(6). Accordingly, despite the exemption from certain cost reporting criteria, facilities in Guam, CNMI, and the Virgin Islands still would not be eligible to participate in the H-1C program. While no hospitals in these territories applied before the expiration of the filing period, the Department believes they would be ineligible because of their inability to meet the definition of a facility at 42 U.S.C. 1395ww(d)(1)(B).

Because the CNRA extended U.S. immigration law to the CNMI, we have included CNMI in the definition of State in this Final Rule to be consistent with the definition of "State" in the INA. The territories of Guam, the Virgin Islands, and Puerto Rico are already included in the definition of "State" in § 655.1102.

Several technical and clarifying amendments have been made to the IFR. These amendments are primarily a result of organizational changes within the Department and the transfer of the functions involving the processing of petitions from the former INS to USCIS. The responsibility of the Department of State has been amended in § 655.1101(d) to clarify that that agency makes determinations of visa eligibility. Finally, the Department has clarified that the Administrator will recommend a particular period for debarment of an entity found to be in violation in § 655.1255.

As explained in the preamble to the IFR, the NRDA required the Department to impose a filing fee, not to exceed \$250, for every attestation application filed. Since the Department was certain the monies that would be expended to administer and enforce the H-1C program would exceed the monies it was likely to collect from charging a fee of \$250, it set the fee at that amount in the IFR at 65 FR 51142, Aug. 22, 2000. The filing fee under this Final Rule remains set at \$250.

II. Discussion of Comments

The Department received comments on the IFR from four interested parties. In developing this Final Rule, the Department considered all their comments. All are addressed below.

A. Definitions of Terms Used in These Regulations

The definition of "nurse" in § 655.1102 eliminated the special

provision for foreign workers who have received nursing education in Canada in order to implement the changes in the INA that eliminated the previous accommodation. To qualify as an H-1C nurse, the foreign worker must: (1) Have a full and unrestricted license to practice nursing in the country where the foreign worker obtained nursing education, or have received nursing education in the U.S.; (2) have passed the examination given by the Commission on Graduates for Foreign Nursing Schools, or have obtained a full and unrestricted (permanent) license to practice as a registered nurse in the State of intended employment in the U.S., or have obtained a full and unrestricted (permanent) license in any (other) U.S. State or territory and received temporary authorization to practice as a registered nurse in the State of intended employment; and (3) be fully qualified and eligible under the laws governing the place of intended employment to practice as a registered nurse immediately upon admission to the U.S. and be authorized under such laws to be employed by the employer.

A foreign nurse credentialing association expressed concurrence with the definition of "nurse" and stated the Department has correctly recognized that the procedures * * * should determine whether any foreign nursing degree is comparable to a U.S. nursing degree. No commenter opposed this definition. Accordingly, this Final Rule makes no changes to the definition from the IFR.

B. Who May File an Attestation Application

Section 655.1110 requires the employer's Chief Executive Officer (CEO) to sign ETA Form 9081, *Attestation for H-1C Nonimmigrant Nurses* (ETA Form 9081). One commenter contended that this requirement is unduly burdensome to the process of securing an approved attestation and hiring foreign nurses under the H-1C program. However, the commenter provided no documentary evidence or rationale to support its allegation. The same commenter suggested the H-1C requirements for signing ETA Form 9081 should mirror the H-1B requirements for signing a Labor Condition Application (LCA), which allow for an agent's or representative's signature.

The Department believes there is no statutory justification for the H-1C signatory requirements to mirror other program requirements for foreign labor certification programs administered by ETA. Nonetheless, it is worth noting the permanent labor certification program

requires an application signed by the employer (specifically, an authorized representative, which is defined as an employee of the employer whose position or legal status authorizes the employee to act for the employer, see 20 CFR 656.3), and the H-2A and H-2B programs require an application signed by the employer or an individual with hiring authority. Furthermore, H-1C attestations differ from H-1B LCA attestations because, while H-1B attestations relate to the job opportunity, H-1C attestations also cover the eligibility of the institution itself to participate in the H-1C program. The latter represents a much broader attestation relating to the entity as a whole and thus is more appropriately signed by an employee of the employer with the authority to bind that entity.

Because an employer must file only one ETA Form 9081 each year it wishes to hire one or more H-1C nurses, the Department does not believe that requiring an employer's CEO to sign the form will have a significant impact on the entity or on its ability to hire foreign or domestic nurses. An employer-signed application lends credibility to the assertions made on the form by ensuring that each attestation contained on the form is true and correct at the time of signing and that the employer will continue to adhere to each attestation during its validity period. Our experience suggests that chief executives are frequently called on to sign or obligate the entity under their charge as a basic responsibility of the position. As such, the Department does not believe it is unreasonable to require the employer's CEO to sign the form.

C. The Meaning of "No Adverse Effect on Wages and Working Conditions"

The statute requires an attestation that the employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed. To meet this requirement, § 655.1112 requires the employer to pay each nurse employed by the facility at least the prevailing wage for the occupation in the geographic area. If the employer's nurses are covered by collectively bargained wage rates, § 655.1112(c)(1) stipulates such rates shall be considered prevailing for that employer. If the employer's nurses are not covered by collectively bargained wage rates, the IFR stipulated that the State Workforce Agency (SWA) shall determine the prevailing wage for similarly employed nurses in the geographic area in accordance with administrative guidelines or regulations issued by ETA. Section 655.1112(c)(2). Three commenters disagreed with the

requirements. These concerns are addressed in turn below.

The Department notes that the comments on the IFR were made before the publication of the Final Rule for the H-2B nonagricultural temporary worker program on December 19, 2008 (the December 2008 Rule), which amended § 655.1112(c)(2) to provide that the Office of Foreign Labor Certification's (OFLC) National Processing Center (NPC) in Chicago will provide the prevailing wages for nurses under the H-1C program from January 18, 2009.¹ See 73 FR 78020, Dec. 19, 2008. This federalization of prevailing wage determinations, discussed at length in the December 2008 Rule, was undertaken not because of a lack of ability on the part of the SWAs to engage in such determinations but to ensure consistency and uniformity in the process of prevailing wage determinations across all OFLC-administered programs. See 73 FR 78020, Dec. 19, 2008. The arguments presented by commenters to the IFR with regard to the prevailing wage determinations by SWAs are equally applicable to such determinations by the NPCs, and are accordingly reviewed and responded to as such, with any differences in such determinations noted.

1. Effect of the Prevailing Wage Request on the Speed of the Hiring Process

Two commenters expressed concern that obtaining a prevailing wage determination will slow down the hiring process. A third commenter claimed that requiring a prevailing wage determination for RNs will result in long delays because State Employment Security Agencies (the former name for SWAs) generally lack wage surveys for nurses. The Department finds these concerns to be without merit, as explained below, and therefore has made no changes from the IFR, beyond the amendment to § 655.1112(c)(2) by the December 2008 Rule.

The Department believes there is a benefit gained from the employer obtaining a prevailing wage determination; namely, a measurable assurance that the wage proposed to the foreign nurse is at least as high as, and therefore will not adversely affect, the wages of nurses similarly employed in

the area of intended employment. This benefit significantly outweighs the additional time imposed by obtaining a prevailing wage determination. The NPC processes prevailing wage determination requests in an expeditious manner, and there is no information suggesting otherwise. The Department also notes that the relatively small numbers of hospitals able to participate in the program (at the most 14), and the fact that many are already subject to collective bargaining agreements that take precedence over any wage determination from another source, will prevent any significant impact on the workload of the NPC's prevailing wage experts.

The third commenter provided no documentary or other evidence to support its suggestion that SWAs have no wage information for RNs. The allegation is factually incorrect. The SWAs would have used the same database that the NPC currently uses. The Bureau of Labor Statistics' Occupational Employment Statistical Survey (OES) is the source for both the SWAs' and, as of January 2009, the NPC's prevailing wage determinations in the absence of a collective bargaining agreement. The OES produces readily available employment and wage estimates for nurses by geographic area, in some cases by county or counties, and in others by Metropolitan Statistical Area.

2. Dissimilarity Between H-1C and H-1B Regulations

Two commenters argued that the H-1C regulations should mirror the H-1B regulations with respect to the determination of the prevailing wage. The H-1B standard permits an employer to use a wage rate obtained from sources other than the SWA.

The Department has considered these comments. However, given the statutory requirements and substantive distinctions between the programs, the Department has made no changes from the IFR. The statutes authorizing the H-1C and H-1B programs do not mirror each other in their respective requirements for the prevailing wage calculation or attestation.

There are distinct differences between H-1C nurses and H-1B workers in specialty occupations that argue in favor of the Department treating these programs differently. These include, but are not limited to, the differences in the average Specific Vocational Preparation (SVP) for occupations in the H-1B program and the typical SVP for the occupation in the H-1C program; the breadth and narrowness of the range of occupations covered by each program;

and the disparity between the two programs with respect to collective bargaining agreements.

These substantive differences demonstrate some significant distinctions between these two programs. The H-1B program was statutorily accorded flexibility to address prevailing wage rates across diverse professional occupations that are not typically subject to collective bargaining agreements. The H-1C program, by contrast, deals not only with a single occupation, but with job opportunities subject to stricter wage controls due to the specificity of locations and a greater presence of collective bargaining units. The narrowness of the H-1C program lends support to a stricter analysis of the wage, which in turn justifies controlling the source of prevailing wage information. Accordingly, the regulation will continue to make the distinction and not mirror the H-1B attestations.

3. Intent of the Congress

One commenter argued that the requirement to obtain a prevailing wage determination in the absence of collectively bargained wage rates conflicts with the intent of the Congress. This commenter asserted that the language for the second and third obligations assumed by the employer (no adverse effect; foreign worker will be paid the wage rate of registered nurses similarly employed by the facility) was taken verbatim from INRA. As such, this commenter believes that the legislative history for INRA is controlling for the regulations being promulgated for the NRDA.

The comment proposed that the deletion of the words "prevailing wage rate" by Congress from an early draft of the INRA prior to final passage should require the Department to eliminate the necessity of obtaining prevailing wage determinations for the nursing profession. This commenter's solution to this issue is to allow employers to choose their own sources for the prevailing wage as others do in the H-1B program.

The rationale for requiring the NPC to determine the prevailing wage is discussed above. Section 655.1112(c)(2) instructs the NPC to determine the prevailing wage for similarly employed nurses in the geographic area in accordance with administrative guidelines or regulations issued by ETA. These guidelines include the *Prevailing Wage Determination Policy Guidance—Nonagricultural Immigration Programs*, revised November 2009 and located on the Department's Web site at: <http://www.foreignlaborcert.doleta.gov/pdf/>

¹ The Department also issued a **Federal Register** Notice on December 4, 2009, centralizing prevailing wage determination requests at the National Prevailing Wage and Help Center (NPWHC) as of January 1, 2010. See 74 FR 63795, Dec. 4, 2009. However, because the NPWHC did not commence its prevailing wage determination operations until after the period for filing H-1C petitions expired, this Final Rule retains all references to the NPC.

Policy_Nonag_Progs.pdf. This guidance allows the NPC to consider other surveys in their prevailing wage determination process.

The NPC can evaluate an employer's private survey in order to consider its use in determining a prevailing wage, if the employer chooses to submit such evidence and if the survey submitted meets the criteria for eligibility. The point, however, is that the NPC, and not the employer, must make the determination of which is the most appropriate source of the prevailing wage.

4. Effect on Small Hospitals

One commenter alleged that smaller non-profit and religious hospitals with lower wage scales will be prohibited from participating in the program because they will not be able to pay the prevailing wage.

There is no statutory exception for small non-profit or religious hospitals. The Congress duly considered this legislation not once, but twice, and chose not to make an exception for such hospitals, few of which meet the strict eligibility requirements for the H-1C program. As stated above, the second attestation element contained in the statute is that employment of the foreign worker will not adversely affect the wages and working conditions of nurses similarly employed.

The Department interprets this language to require that the employer, regardless of its size or business model, pay foreign workers no less than the prevailing wage for the occupation in the geographic area of employment, *i.e.*, no less than those who are similarly employed. Because DOL must use a consistent wage rate from which to ensure that similarly employed U.S. nurses in each geographic area (as well as in the employ of the same employer) in which H-1C nurses may be employed are not adversely affected, each employer must attest that it will pay each foreign nurse employed by the facility at least the prevailing wage for the occupation in the geographic area and not just in that organization's employ.

5. Expanded Definition of "Prevailing Wage Rate"

One commenter suggested that, if the Department decides to interpret the phrase "not adversely affect" consistently across programs, then it should also define the term "prevailing wage rate" consistently by allowing a 5 percent variance. In the alternative, the commenter suggested allowing independent published wage surveys or other legitimate wage data sources to be

considered when issuing prevailing wages.

The first recommendation can no longer be followed because of legislative restrictions. The Consolidated Appropriations Act of 2005 (Pub. L. 108-447, 118 Stat. 2809) amended sec. 212(p)(3) of the INA to eliminate any variance from the actual and prevailing wage, which had in the past been customary to permit. *See* 69 FR 77326-27, 77366-67, Dec. 27, 2004. The prevailing wage required to be paid shall be 100 percent of the wage determined pursuant to those sections. In short, the Department is no longer permitted to allow a 5 percent variance for the permanent or temporary programs where it was previously allowed. Thus, imposing a 100 percent wage requirement, with no variance, within the H-1C program is consistent with that same requirement within the permanent and temporary programs. The NRDA does not authorize a 5 percent variance from the prevailing wage and the Department believes it appropriate to apply this 100 percent wage requirement to the H-1C program, especially in light of clear congressional direction after the NRDA that prohibited the 5 percent variance from the prevailing wage in other visa programs administered by the Department. With regard to the second suggestion, see discussion above in §§ 655.1112(c)(2) and 655.1112(c)(3).

D. Notification Facilities Must Provide to Nurses

Section 655.1116(d) requires the employer to provide a copy of the attestation, within 30 days of the date of filing, to every registered nurse employed at the facility. * * * This notification includes not only the RNs employed by the facility, but also includes any RN who is providing service at the facility as an employee of another entity, such as a nursing contractor.

Three commenters disagreed with the requirements and requested clarification on language used in this section.

1. Individual Notice Requirement

Two commenters expressed concern over the requirement that employers provide individual notice to RNs within 30 days of filing an attestation, and suggested eliminating the individual notice requirement entirely. These entities contended, in summary, that the requirement does not take into account the shortage of nurses in the U.S.; that there is no reason why notice requirements similar to those in the H-1B program are insufficient to protect U.S. nurses; and that the combined

pressure of the limited number of H-1C visas and prohibition of employing more than 33 percent of total RN workforce through the H-1C program would protect U.S. workers from any negative effect on wages or terms and conditions of employment.

Two commenters also asserted that the regulation is vague and ambiguously worded with respect to the notice requirement. Both illustrated this purported ambiguity in situations in which a facility hires an RN between the date of individual notice and the date of filing, and asked whether the original notices would suffice or whether the facility would be required to provide notice to the newly hired nurse, which it alleged would constitute an administrative burden.

Requiring employers to provide notification to all RNs is a statutory requirement, as the NRDA clearly provides that a copy of the attestation shall be provided, within 30 days of the date of filing, to registered nurses employed at the facility on the date of filing. The requirement of notice to all nurses employed at the facility, regardless of the employer who pays them, is imposed by statute and must accordingly remain. Individual notice is the only way to avoid the very ambiguities pointed out by the commenters. Only with individual notice can an employer attest with any certainty that it can meet the requirement of notice to all nurses employed at the facility.

With regard to the commenters' requests for clarification for notice to those hired after the date of notice but prior to the date of filing, the statute again provides the standard; employers must provide notice to all nurses that are employed at the facility on the date of filing. Every RN employed at the facility on the date of filing must be provided notice, regardless of his or her date of hire. Under the statute, the employer may choose to provide notice prior to filing, on the day of filing, or during the 30 days after filing, or any combination thereof. The regulations have been modified to clarify which nurses must be provided with notification, specifically, those employed at the facility on the date of filing the attestation application.

2. Notice to Contract Nurses

Two commenters expressed concern over the requirement that employers provide individual notice to contract RNs. Both contended that employers should not be required to provide individual notice to contract nurses because the elements of the attestation are not applicable to contract nurses. In

addition, both claimed that it is potentially impossible to locate every contract nurse to whom an employer would be required to provide notice.

The statute instructs employers to provide notice to all registered nurses employed at the facility. The statute does not limit the recipients of such notification to nurses employed by any one employer at the facility. Any such qualification would contravene the intent of the statute or the reauthorization, namely, to provide notice to the nurses at the facility of the hiring of H-1C nurses into the facility, regardless of who pays the U.S. nurses. By using the word "at" instead of "by" the Department believes that Congress specifically included a larger group than just those RNs that the facility itself directly employs. Accordingly, notice must be given to all RNs employed at the facility, including employees of staffing companies or other employers. This requirement is accomplished by the provision of notice outlined in the regulation.

3. Documentation Employers Must Provide to RNs

One commenter contended that the regulation is unclear in that it does not state what documentation employers must provide to nurses. The commenter advised that it interprets the regulations to mean that each nurse must be provided only with a copy of the attestation and asked for confirmation that this interpretation comported with the regulation.

The Department agrees with the commenter's interpretation. The statute requires a copy of the attestation be provided to RNs employed at the facility. No other documentation is required. As stated in the preamble to the IFR at 65 FR 51140, Aug. 22, 2000, this requirement may be satisfied by electronic means if an individual e-mail message, with the attestation as an attachment, is sent to every RN at the facility.

E. Criteria To Determine Whether To Certify an Application

Section 655.1130 requires the Department to conduct a simple verification that the attestation application is complete and not obviously inaccurate, and limits substantive review by the Department to only three attestations: (1) The employer's eligibility to participate in the program; (2) instances where the employer attests it is taking or will take a timely and significant step other than those listed in the regulations to recruit and retain U.S. nurses; and (3) instances where the employer asserts that taking

a second timely and significant step is unreasonable.

One commenter expressed concern that the law does not authorize ETA to adjudicate attestations, merely to act as a repository for filed attestations. The commenter suggested that, in order for ETA to determine whether a hospital qualifies as a facility, it would have to conduct a substantive review of every submission, which the commenter argues conflicts with the original intent of the law.

The review process described in § 655.1130 is a streamlined version of the one used under the H-1A program, upon which the Congress modeled the H-1C legislation and in which the Department conducted full substantive review of all submissions. Unlike H-1B, the statute governing H-1C does not discuss nor limit the Secretary of Labor's (Secretary) review of the attestation. Thus, by limiting its review to only three of the attestation elements, the regulation provides for a lesser scope of review than is available under the statute.

Further, the statute instructs the Secretary to make available for public examination * * * for each such facility [that has filed a nonimmigrant petition], a copy of the facility's attestation (and accompanying documentation). This language implies the employer will submit documentation with an application. As such, it is within the Department's authority to request specific documents and, upon their receipt, to review that evidence.

For example, the statute specifically requires the employer to demonstrate that taking a second step is not reasonable if it chooses to take only one significant step as described in § 655.1114. Similarly, since the statute does not establish what a significant step means, it is within the Department's authority to define the standard and determine whether it has been met. The Department's requirement that the employer submit an explanation and appropriate documentation of any alternate significant step it chooses to take is, therefore, a reasonable exercise of its authority to interpret the statute.

The Department believes it is appropriate to review the application to ensure it is complete and lacking obvious inaccuracies. It is, moreover, incumbent on the Department to review an employer's eligibility to participate in the program, since program participation has been strictly circumscribed by Congress. The Department's past experience with the H-1C program supports continuing this practice, as several ineligible employers

have filed attestations in an attempt to qualify. Based on the information from the Health Resources and Services Administration of HHS, the Department now believes that only those hospitals listed in the **Federal Register** at 65 FR 51143, Aug. 22, 2000, satisfy the eligibility criteria for a facility eligible to participate in the H-1C program.

However, as the certification is limited to the status of the facility as of March 31, 1997, the Department only need certify an employer once as a qualifying facility. Therefore, although the employer must continue to submit, and the Department must continue to review, the applications because attestation applications are only valid for either 1 year or the end of the period of admission for the last H-1C nurse entering under that application, whichever is later, there is no requirement that the employer support subsequent submissions with the same documentary evidence that it qualifies as a facility. Once an employer has qualified as a facility, its eligibility as a facility is thereafter established.

F. Enforcement Authority

Section 655.1200 provides that the Administrator shall conduct investigations as may be appropriate, either pursuant to a complaint or otherwise. This language is identical to that used in the predecessor H-1A program. Per the INA, these investigations are conducted only if the Secretary determines there is reasonable cause to believe the facility failed to meet the conditions attested to.

Two commenters asserted that the inclusion of the phrase or otherwise goes beyond the clear language of the law, which in their view limits the Department's authority to only conducting investigations in response to a complaint. One of these commenters also noted that § 655.1102(4) defines an aggrieved party to include a government agency which has a program that is impacted by the facility's alleged misrepresentation of material fact(s) or non-compliance with the attestation and believed that this definition would allow DOL to initiate investigations on its own initiative as an aggrieved party.

The Department believes that it has authority to investigate NRDA compliance in the absence of a complaint. Although investigations in response to complaints are clearly provided for under 8 U.S.C. 1182(m)(2)(E), the provision also broadly states that the Secretary shall conduct an investigation under this clause if there is reasonable cause to believe that a facility fails to meet conditions attested to. The NDRAA

contains no statutory language prohibiting investigations in the absence of a complaint. Similarly, the legislative history of the NRDA contains no language indicating Congress intended to prohibit directed investigations but instead reflects a broad grant of investigative authority. 145 Cong. Rec. H3478 (May 24, 1999) (statement of Rep. Rush) (The Secretary of Labor will oversee this [H-1C] process and provide penalties for non-compliance.); *Id.* at H3476 (statement of Rep. Rogan) (The H-1C program created by this bill would adopt those protections for American nurses contained in the expired H-1A program * * * additional protections have also been added).

Moreover, the NRDA, 8 U.S.C. 1182(m)(2)(E), uses the same statutory language as was found in the H-1A temporary nurse program and the legislative history of the NRDA indicates that the H-1C program was modeled after the H-1A program, *e.g.*, H.R. Rpt. 106-135, 1999. (The new program would be modeled after the expired 'H-1A' program.); 145 Cong. Rec. H3476 (daily ed. May 24, 1999) (statement of Rep. Rogan). The legislative history of the H-1A program clearly indicates that Congress intended for the Department to be authorized to conduct directed investigations, *see, e.g.*, H.R. Rpt. 288, 1989 U.S.C.C.A.N. at 1990 (Investigations may be initiated in two instances: (1) Through the Secretary of Labor when there is a reasonable cause to believe a facility fails to meet conditions of the attestation, and (2) upon the filing of a complaint by an aggrieved party). This position has been upheld by the Administrative Review Board (ARB) and the United States Court of Appeals for the Seventh Circuit. *Administrator v. Beverly Enterprises, Inc.* ARB Case No. 99-050 (July 31, 2002); *Administrator v. Alden Management Services, Inc.* ARB Case No. 00-020 & 00-021 (Aug. 30, 2002), affirmed, *Alden Management Services, Inc. v. Chao*, 532 F. 3d 578 (7th Cir. 2008). The Department concludes that the text and legislative history of the NRDA, and that of the Nursing Relief Act establishing the H-1A program, support an interpretation that the Department has the authority to conduct investigations where there is reasonable cause to believe, even absent a complaint, that a facility has failed to meet conditions attested to. This position also furthers the purpose of the statute, especially because the Department has found that temporary nonimmigrant workers, such as H-1C nurses, are vulnerable to abuse and often reluctant to complain of violations

of the law. For these reasons, the Department has not adopted the suggestions of the two commenters and retains the or otherwise language in § 655.1200.

One commenter believed that the IFR made it exceedingly simple to file a complaint and, despite the potential for abuse, provides no protection for facilities from those who would file complaints for reasons that are either frivolous or malicious. The commenter believed the IFR provided a golden opportunity for unscrupulous individuals and organizations to shake down hospitals for money and recommended that, at a minimum, copies of complaints should be provided to the hospital.

The Department believes these concerns do not require changes to the regulations, for the following reasons. First, the Department did not receive a single actionable complaint during the initial 4-year life of the NRDA program, and thus has no reason to believe the potential abuses suggested occurred previously under the program or will occur in the future. Second, similar to the H-1B program, complaints are not investigated unless there is a reasonable cause to believe a violation has occurred. *See* § 655.1205(c). This mandatory reasonable cause determination serves as a check against frivolous complaints. Finally, with respect to the comment that copies of the complaint should be provided to the hospital, the Department continues to believe, as explained in the preamble to the IFR, that in order to assure effective enforcement it must maintain confidentiality for complainants. *See* 65 FR 51147, Aug. 22, 2000.

One commenter indicated that the IFR denies hospitals due process of law, violates generally accepted concepts of fairness and provides the Department with sweeping authority to conduct surprise raids of hospitals without notice. Furthermore, the commenter believed any surprise raid or search of a hospital's files would allow a Department investigator to threaten hospital administrators with summary arrest. The commenter recommended that the regulation require a reasonable notice of a DOL investigation that specifies what documents are sought.

The Department disagrees with this portrayal of its authority, and thus offers no regulatory changes, for the following reasons. First, the Department has no authority to arrest any party nor does it seek any such authority. Department investigations conducted to determine compliance with civil laws, not criminal laws, are normally limited to the review

of appropriate records, interviews, and meetings with selected personnel. Further, the Department typically schedules investigations well in advance with employers, providing notice of the documents that are sought. The Department reserves its authority to carry out unannounced investigation visits, but normally does so only in the rare case where key records or personnel may not otherwise be available. In addition, while the Department conducted no investigations in the initial 4 years of the limited NRDA program, Department enforcement of the similar H-1B program during this period provided no evidence of denial of due process or violation of the concepts of fairness. Finally, the INA and the implementing regulations provide explicit employer protections to ensure due process and fairness. *See, e.g.*, 8 U.S.C. 1182(m)(2)(E)(iii) and §§ 655.1215 and 655.1220.

G. Issuance of Findings

Section 655.1215 describes how the Administrator's investigation findings are issued. One commenter indicated that this section gives a party who wants to appeal a DOL determination an unreasonably short time (10 days) to submit a request for an Administrative Law Judge hearing, and recommended that a more appropriate time would be 30 days.

The short appeal time is necessitated by the statutory requirement to provide an opportunity for a hearing within 60 days of the date of the determination of a violation. *See* 8 U.S.C. 1182(m)(2)(E)(iii). The Department appreciates the concern expressed by the commenter and has extended the appeal period in the final regulation to 15 days. This timing will parallel the similar H-1B process, which also provides for a hearing within 60 days and sets a 15-day deadline for appeals.

H. Updates of Internal References and References to DHS Agencies

Several sections of the IFR reference the coordination between the Department and INS or the Department of Justice, which housed the now-defunct agency. Under the Homeland Security Act of 2002, most of the responsibilities assigned under the INA to the Attorney General were transferred to the Secretary of Homeland Security, effective March 2003. *See* 6 U.S.C. 271(b). Consequently, the references in the IFR to the Attorney General are replaced with the DHS or USCIS as appropriate.

In addition, this Final Rule updates references to the several Department

offices and activities. These include the elimination of the Employment Standards Administration, and updates to other internal technical references for the Department, such as the name of OFLC.

I. Miscellaneous Matters

One commenter made two additional miscellaneous suggestions regarding the DOL Web site.

1. List of HPSAs on DOL Web Site

One commenter suggested that ETA post a list of HPSAs on the DOL Web site. The Department assumes, for purposes of this analysis, the commenter intended that DOL post the qualifying HPSAs on its Web site.

The first of four criteria for a qualifying facility is location in an HPSA as of March 31, 1997. Any person can obtain the March 31, 1997, list of HPSAs from the **Federal Register** at 62 FR 29395, May 30, 1997. The Department has effectively met the commenter's request by providing a link to this particular **Federal Register** notice on the Department's Web site at <http://www.foreignlaborcert.doleta.gov/docs/hpsa.html>.

2. List ETA Form 9081 on DOL Web Site

One commenter suggested that ETA post Form 9081 on the DOL Web site. We agree with this comment, and have posted a current version of ETA Form 9081 on the OFLC Web site at <http://www.foreignlaborcert.doleta.gov/h-1c.cfm>.

III. Administrative Information

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (E.O.) 12866, the Department must determine whether a regulatory action is significant and therefore subject to the requirements of the E.O. and subject to review by the Office of Management and Budget (OMB). Section 3(f) of the E.O. defines a significant regulatory action as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues

arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Department has determined that this Final Rule is not an economically significant regulatory action under sec. 3(f)(1) of E.O. 12866. As noted above, the Department has been advised by the Health Resources and Services Administration of HHS that only those 14 hospitals listed in the preamble to the IFR at 65 FR 51143, Aug. 22, 2000, are known to be eligible to participate in this program. The statute giving rise to the H-1C program, moreover, mandates the introduction of no more than 500 nurses per year (for 3 years, ending in December 2009) through the program. Collectively, the changes made by this Final Rule will not have an annual effect on the economy of \$100 million or more or adversely affect in any material way the economy, a sector of the economy, productivity, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, the Department has concluded that this Final Rule is not economically significant.

The Department anticipates that the changes in this Final Rule would have little to no net direct impact on employers, above and beyond the baseline of the current costs required by the program as it is currently implemented. Further, the Department does not anticipate that this Final Rule would result in significant processing delays on its part.

This Final Rule is being treated as a significant regulatory action within the meaning of E.O. 12866, because it requires inter-agency coordination. Accordingly, OMB has reviewed the rule. The interim Final Rule was published in the **Federal Register** on August 22, 2000 and the Department received comments on the IFR from four interested parties. Only one comment related to inter-agency coordination. The commenter suggested that ETA post a list of HPSAs on the DOL Web site. HPSAs are determined by HHS. DOL has provided a link to the **Federal Register** notice on the Department's Web site at <http://www.foreignlaborcert.doleta.gov/docs/hpsa.html>.

The Department considered alternatives to this Final Rule as discussed in responding to comments, above. The Department has operated the H-1C program under the IFR since 2000. The minor changes made from the IFR to this Final Rule are made to reflect changes in the processing of applications in other areas.

B. Regulatory Flexibility Act

The Department certifies that this Final Rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. Therefore, no regulatory flexibility analysis is required under the Regulatory Flexibility Act (RFA) (5 U.S.C. 603(a)). The Act defines a small entity to include small organizations, which are not-for-profit enterprises independently owned and operated and not dominant in their field. The Final Rule applies to no more than 14 hospitals in the U.S. out of 6,541 hospitals nationwide (Census Bureau statistics for 2002 at <http://www.census.gov/prod/ec02/ec0262i02.pdf>). The Department does not know how many of the 14 hospitals that use this program or the 6,541 hospitals nationwide would be considered a small entity under the RFA. However, the cost to each of these 14 entities using these programs is not significant. The NRDARA requires payment of a filing fee of up to \$250 per application by a facility, limits the number of H-1C visas issued to 500 per year, and limits the number of visas issued for each State in each fiscal year. The reauthorized H-1C program expired 3 years after enactment of the Act. Even taking into account the processing costs for actually filing the application (such as the time of a human resources professional to complete the form, make the necessary documentary records, etc.), these costs are accordingly not significant.²

C. Small Business Regulatory Enforcement Fairness Act

The Department was not required to produce a RFA. Therefore, it is also not required to produce any Compliance Guides for Small Entities as mandated by the Small Business Regulatory Enforcement Fairness Act (SBREFA). The Department has similarly concluded that this Final Rule is not a major rule requiring review by the Congress under the Small Business Regulatory Enforcement Fairness Act of

² The Department estimates that this work would be performed by a human resources manager at a hospital at an hourly rate of \$42.15 (the wage as published by the Department's OES Survey, O*Net Online), which we multiplied by a factor of 1.43 to account for employee benefits (source: Bureau of Labor Statistics) to obtain a total hourly wage rate of \$60.27. The Department multiplies this hourly wage rate by 1 hour, the time calculated to complete the information collection represented by the ETA 9081 and by the total number of H-1C Attestation (8) received in 2009. The Department then allotted an additional 30 minutes to account for paperwork follow-up by that professional, such as filing the retained paperwork to obtain a total cost for this requirement of \$813.65 in 2009.

1996 (5 U.S.C. 801) because it will not likely result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 and 1532) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector if the action includes any Federal Mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any single year. The Department certifies that this Final Rule contains no Federal Mandate.

This Final Rule, promulgated in order to provide guidance to those affected by the NRDARA, relieves the SWAs of the States in which the eligible hospitals are located of a mandate to inform the hospitals of the prevailing wage, but leaves in place a recent amendment to the regulations requiring the NPC to inform the hospitals of the prevailing wage that they are required to pay the nurses who will receive the visas under the H-1C program.

E. Executive Order 13132

The Department has reviewed this Final Rule in accordance with E.O. 13132 regarding federalism, and has determined that it does not have federalism implications. The Final Rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

F. Assessment of Federal Regulations and Policies on Families

This Final Rule does not affect family well being.

G. Paperwork Reduction Act and Privacy Act of 1974

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to

comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

In accordance with the PRA, the Department submitted an information collection request to OMB to reinstate, without change, ETA Form 9081 used in administering the IFR. OMB approved the reinstatement under control number 1205-0415. The form expires on November 30, 2010. This Final Rule introduces no substantive or material changes to ETA Form 9081 as approved by OMB; therefore, the Department is not resubmitting the form to OMB for review and approval under the PRA. An electronic fillable and printable version can be found at <http://www.foreignlaborcert.doleta.gov/pdf/eta9081.pdf>.

H. Executive Order 12630

The Department certifies that this Final Rule does not have property taking implications, *i.e.*, eminent domain.

I. Executive Order 12988

This regulation has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The regulation has been written so as to minimize litigation and provide clear legal standards for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

J. Plain Language

The Department has drafted this Final Rule in plain language.

Catalog of Federal Domestic Assistance Number: This program is not listed in the Catalog of Federal Domestic Assistance because the program does not provide financial assistance as defined in OMB Circular No. A-89.

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Foreign workers, Employment, Health professions, Immigration, Labor, Penalties, Registered nurse, Reporting requirements, Students, Wages.

■ Accordingly, for the reasons stated in the preamble, 20 CFR part 655, is amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. Revise the authority section for part 655 to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m), (n), and (t), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 323, Pub. L. 103-206, 107 Stat. 2149; Title IV, Pub. L. 105-277, 112 Stat. 2681; Pub. L. 106-95, 113 Stat. 1312 (8 U.S.C. 1182 note); and 8 CFR 213.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b1), 1182(n), 1182(t), and 1184; 29 U.S.C. 49 *et seq.*; sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and Title IV, Pub. L. 105-277, 112 Stat. 2681.

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*, and Pub. L. 109-423, 120 Stat. 2900.

Subparts L and M [Amended]

■ 2. In Subparts L (§§ 655.1100 through 655.1150) and M (§§ 655.1200 through 655.1260):

■ A. Remove the word “INS” and add in its place the word “USCIS” wherever it may occur; and

■ B. Remove the word “SESA” and add in its place the word “NPC” wherever it may occur.

■ 3. Revise § 655.1101 to read as follows:

§ 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 at the Department's Administrative Review Board.

■ 4. Amend § 655.1102 as follows:

■ A. Remove the definitions of "Administrator, OWS", "Employment Standards Administration (ESA)", "Immigration and Naturalization Service (INS)", "Office of Workforce Security (OWS)" and "State Employment Security Agency (SESA)".

■ B. Add, in alphabetical order, the definitions of "Administrator, Office of Foreign Labor Certification (OFLC)", "Office of Foreign Labor Certification (OFLC)", and "U.S. Citizenship and Immigration Services (USCIS)."

■ C. Revise the definitions of "Employment and Training Administration (ETA)", "Facility", "United States", and "United States (U.S.) nurse."

The additions and revisions read as follows:

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

* * * * *

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.

* * * * *

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) which includes the Office of Foreign Labor Certification (OFLC).

Facility means a "subsection (d) hospital" (as defined in section 1886(d)(1)(B) of the Social Security Act (42 U.S.C. 1395ww(d)(1)(B)) that meets the following requirements:

(1) As of March 31, 1997, the hospital was located in a health professional shortage area (as defined in section 332 of the Public Health Service Act (42 U.S.C. 245e)); and

(2) Based on its settled cost report filed under Title XVIII of the Social Security Act (42 U.S.C. 1395 *et seq.*) for its cost reporting period beginning during fiscal year 1994—

(i) The hospital has not less than 190 licensed acute care beds;

(ii) The number of the hospital's inpatient days for such period which were made up of patients who (for such days) were entitled to benefits under

part A of such title is not less than 35 percent of the total number of such hospital's acute care inpatient days for such period; and

(iii) The number of the hospital's inpatient days for such period which were made up of patients who (for such days) were eligible for medical assistance under a State plan approved under Title XIX of the Social Security Act, is not less than 28 percent of the total number of such hospital's acute care inpatient days for such period.

(3) The requirements of paragraph (2) of this definition shall not apply to a facility in Guam, the Commonwealth of the Northern Mariana Islands, or the Virgin Islands.

* * * * *

Office of Foreign Labor Certification (OFLC) means the organizational component within the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the INA concerning foreign workers seeking admission to the United States.

* * * * *

United States (U.S.) means the continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

U.S. Citizenship and Immigration Services (USCIS) means the bureau within the Department of Homeland Security that makes determinations under the INA on whether to approve petitions seeking classification and/or admission of nonimmigrant nurses under the H-1C program.

United States (U.S.) nurse means any nurse who: is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

* * * * *

■ 5. Revise § 655.1110 to read as follows:

§ 655.1110 What requirements are imposed in the filing of an attestation?

(a) *Who may file Attestations?*

(1) Any hospital which meets the definition of facility in §§ 655.1102 and 655.1111 may file an Attestation.

(2) ETA shall determine the hospital's eligibility as a facility through a review of this attestation element on the first Attestation filed by the hospital. ETA's determination on this point is subject to a hearing before the BALCA upon the request of any interested party. The BALCA proceeding shall be limited to the point.

(3) Upon the hospital's filing of a second or subsequent Attestation, its eligibility as a facility shall be controlled by the determination made on this point in the ETA review (and BALCA proceeding, if any) of the hospital's first Attestation.

(b) *Where and when should attestations be submitted?*

(1) Attestations shall be submitted, by U.S. mail or private carrier, to ETA at the following address: 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.

(2) Attestations shall be reviewed and accepted for filing or rejected by ETA within 30 calendar days of the date they are received by ETA. Therefore, it is recommended that attestations be submitted to ETA at least 35 calendar days prior to the planned date for filing an H-1C visa petition with USCIS.

(c) *What shall be submitted?*

(1) Form ETA 9081 and required supporting documentation, as described in paragraphs (c)(1)(i) through (iv) of this section.

(i) A completed and dated original Form ETA 9081, containing the required attestation elements and the original signature of the chief executive officer of the facility, shall be submitted, along with one copy of the completed, signed, and dated Form ETA 9081. Copies of the form and instructions are available at the address listed in paragraph (b) of this section.

(ii) If the Attestation is the first filed by the hospital, it shall be accompanied by copies of pages from the hospital's Form HCFA 2552 filed with the Department of Health and Human Services (pursuant to title XVIII of the Social Security Act) for its 1994 cost reporting period, showing the number of its acute care beds and the percentages of Medicaid and Medicare reimbursed acute care inpatient days (*i.e.*, Form HCFA-2552-92, Worksheet S-3, Part I; Worksheet S, Parts I and II).

(iii) If the facility attests that it will take one or more timely and significant steps other than the steps identified on Form ETA 9081, then the facility must submit (in duplicate) an explanation of the proposed step(s) and an explanation of how the proposed step(s) is/are of comparable significance to those set forth on the Form and in § 655.1114. (*See* § 655.1114(b)(2)(v).)

(iv) If the facility attests that taking more than one timely and significant step is unreasonable, then the facility must submit (in duplicate) an explanation of this attestation. (*See* § 655.1114(c).)

(2) Filing fee of \$250 per Attestation. Payment must be in the form of a check or money order, payable to the "U.S. Department of Labor." Remittances must be drawn on a bank or other financial institution located in the U.S. and be payable in U.S. currency.

(3) Copies of H-1C petitions and USCIS approval notices. After ETA has approved the attestation used by the facility to support any H-1C petition, the facility must send copies of each H-1C petition and USCIS approval notice on such petition to Employment and Training Administration, Administrator, Office of Foreign Labor Certification, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210.

(d) *Attestation elements.* The attestation elements referenced in paragraph (c)(1) of this section are mandated by section 212(m)(2)(A) of the INA (8 U.S.C. 1182(m)(2)(A)). Section 212(m)(2)(A) requires a prospective employer of H-1C nurses to attest to the following:

(1) That it qualifies as a facility (*See* § 655.1111);

(2) That employment of H-1C nurses will not adversely affect the wages or working conditions of similarly employed nurses (*See* § 655.1112);

(3) That the facility will pay the H-1C nurse the facility wage rate (*See* § 655.1113);

(4) That the facility has taken, and is taking, timely and significant steps to recruit and retain U.S. nurses (*See* § 655.1114);

(5) That there is not a strike or lockout at the facility, that the employment of H-1C nurses is not intended or designed to influence an election for a bargaining representative for RNs at the facility, and that the facility did not lay off and will not lay off a registered nurse employed by the facility 90 days before and after the date of filing a visa petition (*See* § 655.1115);

(6) That the facility will notify its workers and give a copy of the Attestation to every nurse employed at the facility (*See* § 655.1116);

(7) That no more than 33 percent of nurses employed by the facility will be H-1C nonimmigrants (*See* § 655.1117); and

(8) That the facility will not authorize H-1C nonimmigrants to work at a worksite not under its control, and will not transfer an H-1C nonimmigrant from one worksite to another (*See* § 655.1118).

■ 6. Amend § 655.1115 by revising paragraph (b) to read as follows:

§ 655.1115 Element V—What does "no strike/lockout or layoff" mean?

* * * * *

(b) *Notice of strike or lockout.* In order to remain in compliance with the no strike or lockout portion of this attestation element, the facility must notify ETA if a strike or lockout of nurses at the facility occurs during the 1 year validity period of the attestation. Within 3 days of the occurrence of such strike or lockout, the facility must submit to the Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210, by U.S. mail or private carrier, written notice of the strike or lockout. Upon receiving a notice described in this section from a facility, ETA will examine the documentation, and may consult with the union at the facility or other appropriate entities. If ETA determines that the strike or lockout is covered under USCIS regulation 8 CFR 214.2(h)(17), *Effect of a strike*, for "H" nonimmigrants, ETA must certify to USCIS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of nurses is in progress at the facility.

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■ 7. Amend § 655.1116 by revising paragraph (b) to read as follows:

§ 655.1116 Element VI—What notification must facilities provide to registered nurses?

* * * * *

(b) *Notification of bargaining representative.*

(1) At a time no later than the date the attestation is transmitted to ETA, on ETA Form 9081, Attestation for H-1C Nonimmigrant Nurses, the facility must notify the bargaining representative (if any) for nurses at the facility that the attestation is being submitted. This notice may be either a copy of the attestation (ETA Form 9081) or a document stating that the attestations are available for review by interested parties at the facility (explaining how they can be inspected or obtained) and at the Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210. The notice must include the following statement: "Complaints alleging misrepresentation of material facts in the attestation or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division, United States Department of Labor."

(2) No later than the date the facility transmits a petition for H-1C nurses to USCIS, the facility must notify the

bargaining representative (if any) for nurses at the facility that the H-1C petition is being submitted. This notice may be either a copy of petition, or a document stating that the attestations and H-1C petition are available for review by interested parties at the facility (explaining how they can be inspected or obtained) and at the Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210. The notice must include the following statement: "Complaints alleging misrepresentation of material facts in the attestation or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division, United States Department of Labor."

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■ 8. Amend § 655.1130 by revising paragraph (c) to read as follows:

§ 655.1130 What criteria does the Department use to determine whether or not to certify an Attestation?

* * * * *

(c) When the facility submits the attestation to ETA and provides the notice required by § 655.1116, the attestation must be made available for public examination at the facility. When ETA accepts the attestation for filing, the attestation will be made available, upon request, for public examination in the Office of Foreign Labor Certification, Employment Training Administration, U.S. Department of Labor, Room C-4312, 200 Constitution Avenue, NW., Washington, DC 20210.

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■ 9. Amend § 655.1135 by revising paragraph (d) to read as follows:

§ 655.1135 What appeals procedures are available concerning ETA's actions on a facility's Attestation?

* * * * *

(d) *Where to file appeals.* Appeals made under this section must be in writing and must be mailed by certified mail to: 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.

* * * * *

■ 10. Amend § 655.1150 by revising paragraph (a) to read as follows:

§ 655.1150 What materials must be available to the public?

(a) *Public examination at ETA.* ETA will make available, upon request, for public examination at the Office of

Foreign Labor Certification, Employment Training Administration, U.S. Department of Labor, Room C-4312, 200 Constitution Avenue, NW., Washington, DC 20210, a list of facilities which have filed attestations; a copy of the facility's attestation(s) and any supporting documentation; and a copy of each of the facility's H-1C petitions (if any) to USCIS along with the USCIS approval notices (if any).

* * * * *

■ 11. Revise § 655.1215 to read as follows:

§ 655.1215 How are the Administrator's investigation findings issued?

(a) The Administrator's determination, issued under § 655.1205(d), shall be served on the complainant, the facility, and other 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. Where the complainant has requested confidentiality, the Administrator shall serve the determination in a manner which will not breach that confidentiality.

(b) The Administrator's written determination required by § 655.1205(c) shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefore; prescribe any remedies or penalties including the amount of any unpaid wages due, the actions required for compliance with the facility Attestation, and the amount of any civil money penalty assessment and the reason or reasons therefore.

(2) Inform the interested parties that they may request a hearing under § 655.1220.

(3) Inform the interested parties that if a request for a hearing is not received by the Chief Administrative Law Judge within 15 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 address of the Chief Administrative Law Judge.

(5) Inform the parties that, under § 655.1255, the Administrator shall notify the Department of Homeland Security and ETA of the occurrence of a violation by the employer.

■ 12. Revise § 655.1255 to read as follows:

§ 655.1255 What are the procedures for debarment of a facility based on a finding of violation?

(a) The Administrator shall notify the Department of Homeland Security and ETA of the final determination of a violation by a facility upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by a facility, and no timely request for hearing is made under § 655.1220; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by a facility, and no timely petition for review to the Board is made under § 655.1245; or

(3) Where a petition for review is taken from an administrative law judge's decision and the Board either declines within 30 days to entertain the appeal, under § 655.1245(c), or the Board affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by a facility, and the Board, upon review, issues a decision under § 655.1245(h), holding that a violation was committed by a facility.

(b) U.S. Citizenship and Immigration Services, upon receipt of the Administrator's notice under paragraph (a) of this section, shall not approve petitions filed with respect to that employer under section 212(m) of the INA (8 U.S.C. 1182(m)) during a period of at least 12 months from the date of receipt of the Administrator's notification. The Administrator must provide USCIS with a recommendation as to the length of the debarment.

(c) ETA, upon receipt of the Administrator's notice under paragraph (a) of this section, shall suspend the employer's attestation(s) under subparts L and M of this part, and shall not accept for filing any attestation submitted by the employer under subparts L and M of this part, for a period of 12 months from the date of receipt of the Administrator's notification or for a longer period if one is specified by the Department of Homeland Security for visa petitions filed by that employer under section 212(m) of the INA.

Signed in Washington, DC, this 26th day of
February 2010.

Jane Oates,

*Assistant Secretary, Employment and
Training Administration.*

Nancy Leppink,

*Deputy Administrator, Wage and Hour
Division.*

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