

DEPARTMENT OF LABOR**Employment and Training
Administration****20 CFR Part 655****RIN 1205-AB27****Attestations by Facilities Temporarily
Employing H-1C Nonimmigrant Aliens
as Registered Nurses**

AGENCIES: Employment and Training Administration, Labor, in concurrence with the Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Employment and Training Administration (ETA) and the Employment Standards Administration (ESA) of the Department of Labor (DOL or Department) are proposing regulations governing the filing and enforcement of attestations by facilities seeking to employ aliens as registered nurses in health professional shortage areas (HPSAs) on a temporary basis under H-1C visas.

The attestations, required under the Immigration and Nationality Act, as amended by the Nursing Relief for Disadvantaged Areas Act of 1999 (NRDAA), pertain to the facility's: Qualification to employ H-1C nurses; payment of a wage which will not adversely affect wages and working conditions of similarly employed registered nurses; payment of wages to aliens at rates paid to other registered nurses similarly employed by the facility; taking timely and significant steps designed to recruit and retain U.S. nurses in order to reduce dependence on nonimmigrant nurses; absence of a strike/lockout or lay off of nurses; notice to workers of its intent to petition for H-1C nurses; percentages of H-1C nurses to be employed at the facility; and placement of H-1C nurses within the facility.

Facilities must submit these attestations to DOL as a condition for petitioning the Immigration and Naturalization Service (INS) for H-1C nurses. Within DOL, the attestation process will be administered by ETA, while investigations and enforcement regarding the attestations will be handled by ESA.

DATES: *Effective Date:* This interim final rule is effective September 21, 2000.

Compliance Dates: Affected parties do not have to comply with the information and recordkeeping requirements in §§ 655.1101(b), (c) and (f); 655.1110; 655.1111(e); 655.1112(c)(2) and (4);

655.1113(d); 655.1114(e); 655.1115(b) and (d); 655.1116; 655.1117(b); 655.1150(b) and 655.1205(b) until the Department publishes in the **Federal Register** the control numbers assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control numbers notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

Comments: The Department invites written comments on the interim final rule from interested parties. Comments on the interim final rule must be received by September 21, 2000. Written comments on collections of information subject to the Paperwork Reduction Act must be received by September 12, 2000.

ADDRESSES: Submit written comments concerning part 655, subpart L, to the Assistant Secretary for Employment and Training, ATTN: Division of Foreign Labor Certifications, Office of Workforce Security, Employment and Training Administration, U.S. Department of Labor, Room C-4318, 200 Constitution Avenue, NW., Washington, DC 20210.

Submit written comments concerning part 655, subpart M, to the Administrator, Wage and Hour Division, ATTN: Immigration Team, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Written comments on the collection of information requirements should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Employment Standards Administration, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Michael Ginley, Director, Office of Enforcement Policy, Wage and Hour Division, U.S. Department of Labor, Room S-3510, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Telephone: 202-693-0071 (this is not a toll-free number); Dale Ziegler, Chief, Division of Foreign Labor Certifications, Office of Workforce Security, Employment and Training Administration, U.S. Department of Labor, Room C-4318, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Telephone: 202-219-5263 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:**I. What Is the H-1C Nonimmigrant Program?**

The Nursing Relief for Disadvantaged Areas Act of 1999 (NRDAA), Public Law

106-95, 113 Stat. 1312 (November 12, 1999), amended the Immigration and Nationality Act (INA) to add a new section 101(a)(15)(H)(i)(c) and amend section 212(m) to create a new temporary visa program for nonimmigrant aliens to work as registered nurses (RNs or nurses) for up to three years, in facilities which serve health professional shortage areas. 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m). This temporary visa program expires in four years and limits the number of visas issued to 500 a year.

Congress modeled this legislation after the H-1A registered nurse temporary visa program (H-1A program) created by the Immigration Nursing Relief Act of 1989 (INRA), Public Law 101-238, 103 Stat. 2099 (1989), which expired on September 1, 1995. *See e.g.*, H.R. Rep. No. 106-135, 1st Sess. (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 perceived increased dependence of health care providers on foreign RNs. *Id.* INRA contained no numerical cap on the number of visas which could be issued under the H-1A program, but required an alien nurse seeking admission under the program to be fully qualified and licensed and an employer intending to hire alien nurses to attest that it had taken significant steps to develop, recruit and retain U.S. workers as employees in the registered nursing profession. 103 Stat. 2100. Subsequent legislation allowed nurses who had entered the United States under the H-1A program to stay and work as registered nurses until September 30, 1997. Pub. L. 104-302 (1996).

Because "there does not appear to be a national nursing shortage today" (H.R. Rep. No. 135, 106th Cong., 1st Sess. 5 (1999)), Congress enacted the NRDA to respond to a very specific need for qualified nursing professionals in understaffed facilities serving mostly poor patients in inner-cities and in some rural areas. See 145 Cong. Rec. H3476 (daily ed. May 24, 1999) (statement of Rep. Rogan). The NRDA adopts many of the U.S. worker protection provisions of the H-1A program under the INRA. Those provisions include: Alien nurse licensing and qualification requirements; prospective employer attestations about the working conditions and wages of similarly employed nurses; significant steps taken by the employer to recruit and retain U.S. nurses; and the notification of U.S. workers through their bargaining representative or posting of a notice when a petition for H-1C nurses has been filed. The NRDA also adopts the

INRA provision assigning the Department responsibility for investigating complaints that an employer did not meet the conditions attested to or misrepresented a material fact in the Attestation. As under INRA, employers violating NRDA provisions may be barred from receiving new H-1C visa petition approvals for at least one year, and may be liable for the payment of back wages. NRDA violations are subject to civil money penalties in an amount up to \$1000 per nurse, per violation, with the total penalty not to exceed \$10,000 per violation—a penalty structure similar to INRA.

The NRDA creates some attestation obligations for employers that were not found in INRA. The H-1C employer must attest: That it meets the definition of “facility” based on the Social Security Act and the Public Health Service Act; that it did not and will not lay off a registered nurse in the period between 90 days before and 90 days after the filing of any H-1C petition; that it will not employ a number of H-1C nurses that exceeds 33% of the total number of registered nurses employed by the facility; and that it will not authorize the H-1C nurse to perform nursing services at any worksite other than a worksite controlled by the facility or transfer the H-1C nurse’s place of employment from one work place to another. The NRDA also imposes a filing fee of up to \$250 per Attestation filed by a facility. Furthermore, the NRDA not only limits the number of H-1C visas issued to 500 per year, but also limits the number of visas issued for employment for each state in each fiscal year. The H-1C program will expire four years after the date of promulgation of interim or final regulations.

II. Issuance of Interim Final Rule

The NRDA requires the Department, in consultation with the Department of Health and Human Services, and the Attorney General, to promulgate “final or interim final regulations to carry out section 212(m) of the Immigration and Nationality Act (as amended by subsection (b)),” within 90 days after the date of enactment of the Act (November 12, 1999). The NRDA further stipulates that its provisions shall take effect on the date that “interim or final regulations are first promulgated.” The Department believes that Congress’ specific mandate—that the Department “shall promulgate final or interim final regulations” within 90 days of enactment of the NRDA, and that the Act’s provisions do not take effect until promulgation of these regulations—contemplates displacement

of Administrative Procedure Act (APA) notice and comment procedures and requires the publication of an Interim Final Rule as an initial matter. See *Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1998).

In the alternative, the Department believes that the “good cause” exception to APA notice and comment rulemaking applies to this rule. Under that exception, no pre-adoption procedures are required “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(B). The NRDA was enacted in response to an urgent need for registered nurses in hospitals serving medically underserved areas of the United States. The H-1C temporary visa program created by the NRDA expires in four years and limits the number of visas issued to alien nurses to 500 a year. The H-1C visa program will not take effect until these regulations are promulgated. The steps necessary for the usual notice and comment under APA could not be completed within the 90 days specified by Congress in the NRDA: approval of the notice of proposed rulemaking by the Secretary and the Office of Management and Budget (OMB); publication in the **Federal Register**; receipt of, consideration of, and response to the comments submitted by interested parties; modification of the proposed rules, if appropriate; final approval by the Secretary; clearance by the OMB; and publication in the **Federal Register**. Moreover, completion of these steps will further delay the much needed H-1C visa program from going into effect. Accordingly, the Department believes that under 5 U.S.C. 553(b)(B) good cause exists for waiver of Notice of Proposed Rulemaking since issuance of proposed rules would be impracticable and contrary to the public interest.

While notice of proposed rulemaking is being waived, the Department is interested in comments and advice regarding changes which should be made to these interim rules. We will fully consider any comments on these rules which we receive on or before September 21, 2000, and will publish the Final Rule with any necessary changes.

III. If a Facility Decides To Participate in the H-1C Nonimmigrant Program, What Are the Recordkeeping and Paperwork Requirements (Subject to the Paperwork Reduction Act) Imposed Under NRDA and the Department’s Regulations, and How Are Comments Submitted?

The Department has requested emergency processing by OMB pursuant to 5 CFR 1320.13 of the collections of information contained in this regulation. The Department has requested that OMB approve or disapprove the collections of information by September 12, 2000.

The Nursing Relief for Disadvantaged Areas Act of 1999 (NRDA), Public Law 106–95, 113 Stat. 1312 (November 12, 1999), amended the Immigration and Nationality Act (INA) to add a new section 101(a)(15)(H)(i)(c) and amend section 212(m), creating a new temporary visa program for nonimmigrant aliens to work as registered nurses (RNs or nurses) for up to three years, in facilities which serve health professional shortage areas. 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m). This temporary visa program expires in four years and limits the number of visas issued to 500 a year. The attestation process is administered by the Employment and Training Administration (ETA) of the U.S. Department of Labor (DOL). Investigations concerning whether a facility has failed to satisfy the conditions attested to or has misrepresented a material fact in an Attestation are conducted by the Employment Standards Administration (ESA), Wage and Hour Division (WH) of DOL.

A. The Attestation: Form ETA 9081 (Section 655.1110)

Summary: Facilities seeking to employ aliens as registered nurses in health professional shortage areas (HPSAs) on a temporary basis under H-1C visas are required to file a completed Form ETA 9081 and required documentation. On Form ETA 9081, a prospective employer of H-1C nurses must attest to the following:

1. That it qualifies as a facility. A hospital must attest that it is a “facility” for purposes of the H-1C program as defined in INA section 212(m)(6), 8 U.S.C. 1182(m)(6). If the Attestation is the first filed by the hospital, it shall be accompanied by copies of the pages from HCFA Form 2552 filed with the Department of Health and Human Services 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). A copy of this documentation must be placed in the public access file. (See section 655.1111)

2. That employment of H-1C nurses will not adversely affect the wages or working conditions of similarly employed nurses. (See section 655.1112) (See section B below)

3. That the facility will pay the H-1C nurse the facility wage rate. (See section 655.1113) (See section B below)

4. That the facility has taken and is taking timely and significant steps to recruit and retain U. S. nurses. The facility must attest that it has taken timely and significant steps to recruit and retain U.S. nurses or immigrants who are authorized to perform nursing services in order to remove as quickly as possible the dependence of the facility on nonimmigrant registered nurses. A facility must take at least two such steps, unless it can demonstrate that taking a second step is not reasonable. A list of possible steps is provided in this section, but is not considered exhaustive. However, if a facility chooses a step other than the specific steps described in this section, it must submit with the Attestation a description of the step(s) it is proposing to take and an explanation, along with appropriate documentation, of how the proposed step(s) are as timely and significant as the steps described in the regulation. Furthermore, if a facility claims that a second step is unreasonable it must submit an explanation and appropriate documentation with the Attestation. Copies of this documentation must be placed in the public access file. (See section 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 at the facility, and that the facility did not lay off and will not lay off a registered nurse employed by the facility within the period 90 days before and until 90 days after the date of filing an H-1C petition. (See section 655.1115) (See section D below)

6. That the employer will notify other workers and give a copy of the Attestation to every nurse employed at the facility. (See section 655.1116) (See section E below)

7. That no more than 33% of the nurses employed by the facility will be H-1C nonimmigrants. (See section 655.1117) (See section F below)

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 section 655.1118)

The facility must provide a copy of the Attestation, within 30 days of the date of filing, to every registered nurse employed at the facility. 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. After the Attestation is approved by ETA and used by the facility to support any H-1C petition, the facility shall send to ETA, copies of each H-1C petition and the INS approval notice on such petition. For the duration of the Attestation's validity, and as long as the facility uses any H-1C nurse under the Attestation, the facility must maintain a separate file containing the Attestation and its supporting documentation, and must make this file available to any interested party within 72 hours upon written or oral request. The facility must provide a copy of the file to any interested party upon request. (See section 655.1150)

Need: Under the NRDA, employers are required to make the above attestations in order to be legally authorized to employ nonimmigrant aliens as registered nurses for up to three years in facilities which serve health professional shortage areas.

Respondents and frequency of response: The number of visas which may be issued under the program is limited to 500 per year and based upon operating experience with attestation programs that have been administered by ETA, DOL estimates that 14 facilities will file two Attestations each per year.

Estimated total annual burden: DOL estimates that the completion of each Attestation and the providing of copies to each affected nurse and any collective bargaining representative will take an average of one hour for a total annual burden of 28 hours (14 facilities $\times$ 2 Attestations $\times$ 1 hour).

B. Facility Wage Documentation (Section 655.1112 and .1113)

Summary: The facility must attest that the alien nurse will be paid the wage rate for registered nurses similarly employed by the facility. The facility must pay each nurse the facility wage or the prevailing wage provided by the State employment security agency (SESA), whichever is higher. Documentation must be placed in the public access file setting forth the facility pay schedule or the factors used in setting pay if such documentation exists, as well as the prevailing wage for similarly employed nurses in the area as

provided by the SESA. Further, the facility must maintain the payroll records for nurses employed at the facility required by Regulations, 29 CFR part 516, Records to Be Kept by Employers, and previously cleared by OMB under OMB Approval No. 1215-0017.

Need: This documentation is necessary to ensure the alien nurse is being compensated at the appropriate rate.

Respondents and frequency of response: Each facility applying for H-1C nurses will have to obtain a prevailing wage determination and place the required information in the public access file two times each year.

Estimated total burden: DOL estimates that such documentation will take 20 minutes for an estimated annual burden of 9.3 hours (14 facilities $\times$ 20 minutes $\times$ 2 times a year).

C. Documentation of Steps to Recruit and Retain U.S. Nurses (Section 655.1114)

Summary: The facility must attest that it has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services in order to remove as quickly as possible the dependence of the facility on nonimmigrant registered nurses. The facility must take at least two such steps, unless it demonstrates that taking a second step is not reasonable. The facility must include in the public access file, a description of the activities which constitute its compliance with each timely and significant step attested to on the Form ETA 9081. Documentation which provides a complete description of the nature and operation of its program(s) sufficient to substantiate its full compliance with the requirements of each timely and significant step which is attested to on Form ETA 9081 must also be maintained in the non-public files and made available to the Administrator of the Wage and Hour Division upon request.

Need: This documentation is necessary to ensure a facility is taking steps to recruit and retain U.S. nurses or immigrant nurses authorized to perform nursing services and lessen their dependence on nonimmigrant registered nurses.

Respondents and frequency of response: DOL estimates that 14 facilities will make such documentation once annually.

Estimated total burden: DOL estimates that such documentation will take an average of one hour per

Attestation or 14 hours total burden per year.

D. Notice of Strike/Lockout or Layoff (Section 655.1115)

Summary: If a strike or lockout of nurses occurs during the one year validity period of an approved Attestation, within three days of such occurrence, the facility must submit to the national office of ETA, by U.S. mail or private carrier, a written notice of the strike or lockout. The facility shall include in its public access file, copies of all such notices of strikes or other labor disputes involving a work stoppage of nurses at the facility. The facility must also retain in its non-public files any existing documentation with respect to the departure of each U.S. nurse who left his/her employment with the facility in the period 180 days before or after the facility's petition for H-1C nurse(s), and have a record of the terms of any offer of alternative employment to such a U.S. nurse and the nurse's response to the offer (which may be a note to the file or other record of the nurse's response). The facility must make such record available in the event of an enforcement action pursuant to subpart M.

Need: The notice is necessary to ensure that H-1C nurses are not used to influence an election of a collective-bargaining representative for registered nurses at the facility and to ensure that U.S. nurses are not improperly laid off.

Respondents and frequency of response: DOL estimates that one strike/lockout notice will be submitted by one facility, and that one facility will lay off U.S. nurses and make offers of alternative employment each year.

Estimated total annual burden: DOL estimates that each strike/lockout notice will take 15 minutes, and that one hour will be required to maintain documentation of offers of alternative employment, for a total annual burden of 1.25 hours.

E. Notification of Registered Nurses (Section 655.1116)

Summary: No later than the date the Attestation is transmitted to ETA, and no later than the date that the H-1C petition for H-1C nurses is being submitted to the INS, the facility must notify the bargaining representative (if any) of the registered nurses at the facility that the Attestation, and subsequently the H-1C petition, are being submitted. This notice may be either a copy of the Attestation or petition, or a document stating that the Attestation and H-1C petition are available for review by interested parties at the facility and at the national office

of ETA. Where there is no bargaining representative for the registered nurses at the facility, the facility shall notify the registered nurses at the facility through posting in conspicuous locations, that the Attestation, and subsequently the H-1C petition are being submitted. The facility may accomplish this through electronic means if it ordinarily uses to communicate with nurses about job vacancies or promotion opportunities, provided that the nurses have, as a practical matter, direct access to those sites; or, where the nurses have individual e-mail accounts, the facility may use e-mail. The facility must maintain, in its public access file, copies of the notices required by this section.

Need: The notice ensures that all aspects of the H-1C process are open to public review and facilitates the complaint and enforcement process.

Respondents and frequency of response: DOL estimates that 14 facilities will provide four such notices each year.

Estimated Total Annual Burden: DOL estimates that each such notice will take 15 minutes, for a total annual burden of 14 hours (14 facilities $\times$ 4 times a year $\times$ 15 minutes).

F. Records of Ratio of H-1C Nurses to Total Registered Nurses (Section 655.1117)

Summary: A facility employing H-1C nurses must attest that it will not, at any one time, employ a number of H-1C nurses that exceeds 33% of the total number of registered nurses employed by the facility. Section 655.1117(b) of these regulations requires that the facility maintain documentation—such as payroll records and copies of H-1C petitions—that would demonstrate that the facility has not exceeded the 33% ratio.

Need: The facility must maintain records that DOL can examine to ensure that the facility has not exceeded the 33% ratio.

Respondents and frequency of response: DOL estimates that each facility will copy and file three H-1C petitions per year. Records need only be accessed when DOL requests their production for inspection during an enforcement action.

Estimated total annual burden: As noted above, payroll records are an approved information collection cleared by OMB under OMB Approval No. 1215-0017. DOL estimates the additional burden for copying and filing H-1C petitions at one minute per petition for a total annual burden of 42 minutes (1 minute a year $\times$ 3 petitions a year $\times$ 14 facilities).

G. Complaints (Section 655.1205)

Summary: DOL is authorized to investigate and determine whether an employer has failed to meet the conditions attested to or that a facility has misrepresented a material fact in an Attestation (8 U.S.C. 1182(m)(2)(E)(ii) through (v)). Under this interim final rule, the enforcement functions have been delegated to the Department's Employment Standards Administration (ESA), Wage and Hour Division. Under the NRDA, section 655.1205 provides a process whereby any aggrieved person or organization may provide information alleging that the employer has failed to meet the conditions attested to or that a facility has misrepresented a material fact in their Attestation. No particular order or form of complaint is required, except that the complaint must be written, or if oral, reduced to writing by the WH official who received the complaint. Electronic submission is acceptable.

Need: The complaint process provides a mechanism for affected parties to provide information to DOL regarding alleged violations.

Responses and frequency of response: DOL estimates that two such complaints will be received annually and that each complaint will take approximately 20 minutes for a total burden of 40 minutes.

Total Burden Hours—68 Hours

In the absence of specific wage data about the salaries of employees in facilities who will perform the reporting and record keeping functions required, respondent costs are estimated at \$25.00 an hour. Total annual respondent costs are \$1700.00 (\$25 $\times$ 68 hours).

The public is invited to provide comments on this information collection requirement so that the Department of Labor may:

(1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimates of the burdens of the collections of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology, e.g., permitting electronic submission of responses.

Written comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Employment and Training Administration, U.S. Department of Labor, Washington, D.C. 20503 no later than September 12, 2000.

IV. What Matters do the Regulations Address?

Congress, in enacting the NRDA, created a new H-1C temporary visa program for nonimmigrant registered nurses modeled after the expired H-1A program. H.R. Rep. No. 106-135, 106th Cong., 1st Sess. (1999). For the convenience of the regulated public, in particular those hospitals that hired nonimmigrant nurses under the H-1A program, the Department has in the preamble explained how these H-1C regulations are similar to and different from the H-1A regulations. These regulations also address the new provisions of NRDA, including the definition of facility, the individual notice requirement, the revised penalty structure, and the filing fee. The Department also intends to streamline DOL review and certification of the employer facility's Attestation by foregoing a factual review of the Attestation except in three limited circumstances: The applicant's eligibility as a "facility;" an employer's designation of a "timely and significant step" other than the steps identified in the regulations; and an employer's assertion that taking two "timely and significant steps" would be too burdensome. The following discussion describes the regulations, which will appear as new subparts L and M of 20 CFR part 655.

Subpart L—What requirements must a facility meet to employ H-1C nonimmigrant aliens as registered nurses?

Section 655.1100 What are the purposes, procedures, and applicability of these regulations?

This section of the regulations describes the purpose of the NRDA, and delimits the scope of the regulations.

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

This section of the regulations describes the roles of two DOL agencies (the Employment and Training Administration (ETA) and the Wage and

Hour Division of the Employment Standards Administration (ESA)), as well as those of the Immigration and Naturalization Service and the Department of State (INS and DOS). The section also briefly describes the process which a facility must follow in order to obtain H-1C nurses. This provision provides a facility with an understanding of the overall operation of the H-1C program.

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

This section of the regulations defines terms retained without change from the H-1A program and those retained but revised for the H-1C program. The NRDA does not define the terms "employed or employment." In this circumstance, where Congress has not specified a legal standard for identifying the existence of an employment relationship, the Department is of the view that Supreme Court precedent requires the application of "common law" standards in analyzing a particular situation to determine whether an employment relationship exists. See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). The regulations, therefore, contain the common law definition of "employed or employment." In addition, as required by the INA, the regulations provide that the facility which files a petition on behalf of an H-1C nonimmigrant is deemed to be the employer of that nonimmigrant.

The rule also adds a definition for "aggrieved party," a term used in the NRDA. The Department has, as a result of its enforcement experience in the nonimmigrant programs, developed a definition of "aggrieved party."

Section 655.1110 What requirements does the NRDA impose in the filing of an Attestation?

This section describes the process for a facility submitting an Attestation. To streamline the processing of Attestations, ETA will review the facility's Attestation only for completeness or obvious inaccuracies, except for three Attestation items: the employer's eligibility as a "facility" to participate in the H-1C program; a facility's designation of its intention to utilize alternative methods (rather than the methods identified on the Attestation) to comply with the attestation element on "timely and significant steps" to reduce its reliance on nonimmigrant nurses; and a facility's assertion that taking a second "timely and significant step" to satisfy that attestation element would be

unreasonable. To ensure that only those hospitals which are truly qualified facilities participate in this very limited visa program and that facilities and nurses understand what "timely and significant steps" must be taken to reduce reliance on nonimmigrant nurses prior to certification of the Attestation, supporting information from the facility is required and ETA will review that information in order to certify the Attestation.

As part of the Attestation filing process, the NRDA requires the Department to impose a fee, not to exceed \$250, for every Attestation filed. 8 U.S.C. 1182(m)(2)(F)(i). The statute provides that no more than 500 H-1C nonimmigrant visas may be issued per year. We believe, from information obtained from the Department of Health and Human Services, that there are only about 14 "facilities" which are eligible to participate in the program. Based on operating experience with attestation programs administered by ETA, the Department reasonably anticipates that employers will file about 28 Attestations in a given year. While the Department has not ascertained the exact amount of monies that will be expended to administer and enforce the H-1C program, we are certain that this expenditure will easily exceed the \$7500 that is the maximum the Department may collect from employers' filing fees. To arrive at this estimate, the Department has included: development and promulgation of this Interim Final Rule and the Final Rule which will follow; furnishing employers with the required prevailing wage determinations; development of the form and software to process the Attestations; processing of Attestations once they are received; setting up facilities to disclose Attestations and petitions to the public; publishing a list of facilities which have submitted Attestations, have Attestations on file, have submitted Attestations which were rejected for filing or have had Attestations suspended; education and advice to the public regarding the operation of the programs; investigations of possible violations; any legal support required from the Office of the Solicitor of Labor; and the resources of the Office of Administrative Law Judges that may be required for review of Attestations that are denied or for appeals of enforcement determinations. The Department estimates that staff resources necessary to perform these duties will undoubtedly exceed one-fourth of a full time equivalent employee (FTE) per fiscal year. At an estimated salary level of an average FTE

involved in the program of \$50,000, plus benefits, the Department's costs for at least one-fourth of an FTE will exceed the amount it will collect from charging a fee of \$250 per Attestation. In addition, the Department must set up the infrastructure to support the filing and review of the Attestations, as well as to allow the public to view the Attestations and H-1C petitions as required by the statute. Accordingly, the Department will charge \$250 per Attestation, the maximum allowed under the statute.

The regulation provides that a check or money order must be submitted with the Attestation in order for it to be processed. If an Attestation is rejected by the Department, the fee will not be refunded since the statute characterizes the fee as a "filing fee" based on the costs of carrying out the Secretary's H-1C obligations. 8 U.S.C.1182 (m)(2)(F)(i).

Section 655.1111 Element 1: What hospitals are eligible to participate in the H-1C program?

The NRDA contains a restrictive definition of the "facility" which is eligible to participate in the H-1C program as an employer of nonimmigrant registered nurses. NRDA requires the employer hospital to attest that it is a "facility" within the meaning of paragraph (6) of section 212(m). Under the latter paragraph, a qualifying facility must be a "subpart (d) hospital" as defined in section 1886(d)(1)(B) of the Social Security Act, 42 U.S.C. 1395ww(d)(1)(B). Further, the NRDA requires that the "subpart (d) hospital" must satisfy four other conditions to be an H-1C employer. First, the facility must be located in a health professional shortage area as designated by the Department of Health and Human Services. Second, the facility must have at least 190 acute care beds. Third, at least 35% of the facility's acute care inpatient days must be reimbursed by Medicare. Lastly, at least 28% of the facility's acute care inpatient days must be reimbursed by Medicaid. The NRDA further requires that, to qualify as a "facility," the hospital must meet these conditions at defined times:

(1) The "subpart (d) hospital" must have been located in a health professional shortage area (as determined by the Department of Health and Human Services) on March 31, 1997. A list of such areas was published in the **Federal Register** on May 30, 1997 (62 FR 29395). This notice provides nationwide information on shortage areas by county for Primary Medical Care, Mental Health, and Dental Health. It is the Department's understanding that only the designation of shortage

areas for "primary medical care" would meet the definition of a "subpart (d) hospital."

(2) The facility's requisite number of acute care beds is to be determined by the facility's settled cost report (Form HCFA 2552), filed under title XVIII of the Social Security Act, 42 U.S.C. 1395 *et seq.*, for its fiscal year 1994 cost reporting period.

(3) The facility's requisite percentage of inpatient days reimbursed by Medicaid and Medicare is to be determined by the facility's settled cost report, filed under title XVIII of the Social Security Act, for its fiscal year 1994 cost reporting period.

The Department is of the view that this definition requires the application of time-specific tests and does not afford any flexibility with regard to these criteria. Thus, to determine H-1C eligibility, a "subpart (d) hospital" must determine whether it was in a health professional shortage area (HPSA) on March 31, 1997 (based on the geographic list published by the Department of Health and Human Services (HHS) in the **Federal Register** on May 30, 1997; 62 FR 29395), and also must determine the number of acute care beds and the percentage of acute care inpatient days reimbursed by Medicare and Medicaid reflected in the cost report filed by the hospital for the fiscal year 1994 cost reporting period. A hospital whose location was not included in a HPSA on March 31, 1997 is ineligible to participate in the H-1C program, even if that hospital's area was subsequently or is currently designated a HPSA. Conversely, a hospital that was in a HPSA on March 31, 1997 is eligible to participate in the H-1C program (provided other criteria are satisfied), even if the hospital's area is no longer designated a HPSA. The same sort of time-specific determination with respect to the number of acute care beds and the percentages of Medicaid and Medicare reimbursements must be made, based on the hospital's fiscal year 1994 settled cost report; subsequent changes in the hospital's Medicaid and/or Medicare participation do not affect the hospital's eligibility as a "facility" for the H-1C program. The Department believes that this interpretation reflects the plain meaning of the statute. However, the Department invites comments on this matter.

The Department believes, based on information from the Health Resources and Services Administration of HHS, that only fourteen hospitals satisfy all of the criteria for a "facility" eligible to participate in the H-1C program. These apparently eligible hospitals are: Beaumont Regional Medical Center,

Beaumont, TX; Beverly Hospital, Montebello, CA; Doctors Medical Center, Modesto, CA; Elizabeth General Medical Center, Elizabeth, NJ; Fairview Park Hospital, Dublin, GA; Lutheran Medical Center, St. Louis, MO; McAllen Medical Center, McAllen, TX; Mercy Medical Center, Baltimore, MD; Mercy Regional Medical Center, Laredo, TX; Peninsula Hospital Center, Far Rockaway, NY; Southeastern Regional Medical Center, Lumberton, NC; Southwest General Hospital, San Antonio, TX; St. Bernard Hospital, Chicago, IL; and Valley Baptist Medical Center, Harlingen, TX. However, the Department recognizes that there may be other hospitals which may be "facilities" under the NRDA definition, and be eligible to participate in the H-1C program.

In light of the NRDA's strict limitations on the numbers of H-1C visas available each year—annual total of 500, with further limitations of 50 per State with population of 9,000,000 or more in 1990 and 25 per State with population less than 9,000,000 in 1990 (the unused visa numbers being re-allocated among the States during the last quarter of the Federal fiscal year) (8 U.S.C. 1182(m)(4))—the Department considers it to be important to assure that only eligible "facilities" are authorized to employ H-1C nurses. The regulations afford all hospitals the opportunity to file Attestations demonstrating their eligibility as "facilities" (paying the \$250 filing fee for each Attestation), and provide that ETA will review each Attestation to verify such eligibility before the Attestation is certified for use in filing H-1C petitions. If a hospital's Attestation is rejected on the basis of ineligibility, then the hospital may request an administrative hearing on that issue. The regulations further provide that, once ETA has determined that a hospital is an eligible "facility," a subsequent Attestation filed by that hospital will not require documentation of this point by the hospital or review of this matter by ETA.

Because this document is not readily available to the Department and is essential to a determination of a hospital's eligibility as a "facility," a copy of the pages of the hospital's fiscal year 1994 settled cost report (Form HCFA 2552, filed pursuant to title XVIII of the Social Security Act) relating to the number of its acute care beds and percentages of Medicaid and Medicare reimbursed acute care inpatient days must be filed with the Attestation. The hospital must place a copy of the settled cost report excerpts in the hospital's public access file. The hospital is not to

submit the entire settled cost report to ETA, and need not have the entire document in the public access file.

Section 655.1112 Element II—What does “no adverse effect on wages and working conditions” mean?

As was required in the H-1A program, NRDA requires the facility to attest that “the employment of the alien(s) will not adversely affect the wages and working conditions of RNs similarly employed.” With respect to wages, the Department interprets this language, as it did under the H-1A program, to require that the employer pay the foreign nurses and U.S. nurses no less than the prevailing wage for the occupation and for the geographic area of employment. The phrase “not adversely affect the wages” is a well-established legal term of art that has been used for decades in alien labor certification programs and other nonimmigrant programs (e.g. H-1A and H-2A), with a very specific meaning of requiring the employer to pay at least the area prevailing wage for the occupation. See, e.g., 8 U.S.C. 1182(a)(5) and 1186; 8 CFR 214.2(h); and 20 CFR 656.40. Presumably, Congress was aware of this established meaning when it incorporated this language in the NRDA. With respect to working conditions, due to the administrative infeasibility of making prevailing practice determinations on an area-wide basis, the regulation applies an adverse effect standard on a facility basis (i.e., the facility must provide the H-1C nurse the same working conditions as similarly employed U.S. nurses). This same standard was applied in the H-1A program regulations.

The regulation states that the facility shall attest to its compliance with this requirement and shall maintain documentation in the public access file to show the local prevailing wage. Further, the regulation requires that the facility maintain payroll records in its non-public files, to be able to demonstrate compliance with its prevailing wage and working conditions obligations in the event of an enforcement action.

Section 655.1113 Element III—What does “facility wage rate” mean?

The NRDA requires that, as in the H-1A program, “the alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility,” and that H-1C nurses’ work hours be commensurate with those of nurses similarly employed by the facility. Consistent with this requirement and its administration under the H-1A program, the

Department interprets this language to mean that the facility must pay at least the higher of the area prevailing wage (as described in Attestation element two) or the facility wage, and must compensate H-1C nurses for time in nonproductive status. The Department’s enforcement experience in nonimmigrant visa programs has demonstrated that some employers bring alien workers into this country and then, for a variety of reasons—such as where a nurse is studying for a licensing examination—“bench” the workers in non-productive status and fail to pay them the wages required by law. Consistent with the Department’s interpretation of the H-1A program requirements, the regulations forbid a facility from paying an H-1C nurse less than the required wage for non-productive time, except in situations where the non-productive status is due either to the nurse’s own initiative or to circumstances rendering the nurse unable to work.

The regulations require that the facility maintain documentation in its non-public files to substantiate its compliance with the wage requirement (i.e., payroll records). The facility’s public access file is required to contain a description of the facility’s pay system for nurses (including factors taken into consideration by the facility in making compensation decisions for nurses) or a copy of the facility’s pay schedule, if either document exists.

Section 655.1114 Element IV—What are the timely and significant steps an H-1C employer must take to recruit and retain U.S. nurses?

The NRDA, like the H-1A program, requires a facility to attest that it “has taken and is taking timely and significant steps designed to recruit and retain sufficient RNs who are United States citizens or immigrants who are authorized to perform nursing services,” with the objective to remove, as quickly as reasonably possible, the dependence of the facility on nonimmigrant RNs. 8 U.S.C. 1182(m)(2)(A)(iv). The NRDA sets forth a non-exclusive list of four steps that a facility may take to satisfy this attestation requirement. The statute requires that a facility must take two significant steps, either from the statutory list or alternative steps which meet the objective of this attestation, unless the facility can demonstrate that taking a second step is unreasonable.

The criteria set forth in the regulation have been developed with the objective of removing, as quickly as possible, the facility’s dependence on nonimmigrant nurses through the use of steps which are both “timely” and “significant.” The

Department interprets “significant” to mean that such steps should represent efforts which go beyond the normal practices for the industry; where possible, the regulations on significant steps reflect both qualitative and quantitative criteria. Since the NRDA specifically states that the statutory list of “significant steps” is not intended to be exclusive, the regulations describe each of the statutory steps along with several alternative steps. Further, the regulations include a results-based alternative to the specific steps, where a facility meets certain goals for reducing its reliance on temporary foreign nurses; under this alternative (which would apply only to the second and subsequent years a facility submits an H-1C Attestation), the facility would show its actual reduction in use of such nurses.

If a facility designates two of these specified steps on the Attestation, then the form would be processed by ETA without substantive review. However, where a facility indicates its intention to take one or more timely and significant steps other than those specified in the regulations and on the form, the facility must submit documentation to support that element of the Attestation and ETA will conduct a review (limited to that element). The regulations also specify how a facility may establish that taking a second step is not “reasonable.” If a facility states on its Attestation that a second significant step is unreasonable, the regulations provide that the facility must submit documentation in support of its assertion and that the ETA will conduct a review (limited to that element).

The regulations require the facility to maintain documentation concerning its “timely and significant steps.” In its public access file, the facility must describe the program(s) or activity(ies) which satisfy this Attestation requirement. In the event of an investigation, the facility will be required to provide documentation which would establish compliance with this requirement.

Section 655.1115 Element V—What does “no strike/lockout or lay off” mean?

Like the H-1A program, the NRDA requires that a facility seeking access to nonimmigrant registered nurses must attest that there exists no “strike or lock out” at the facility and “the employment of [H-1C nurses] is not intended or designed to influence an election for a bargaining representative for RNs of the facility.” The facility must also notify ETA if a strike or lockout occurs within the validity

period of the Attestation. Collective bargaining rights are also extended to H-1C nurses in the NRDA provision which requires that a facility which has filed a petition for H-1C nurses "shall not interfere with the right of the nonimmigrant to join or organize a union." 8 U.S.C. 1182(m)(5)(C).

The NRDA also requires that a facility seeking access to H-1C nurses must attest that the facility did not lay off and will not lay off a registered nurse employed by the facility during the period beginning ninety days before and ending ninety days after the date of filing any H-1C petition. The NRDA defines the term "lay off" to include a nurse's separation from his or her position caused by means other than a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract. The NRDA excludes from the term "lay off" any instance in which a registered nurse, as an alternative to the loss of his or her employment, is offered a similar employment opportunity with the same employer at equivalent or higher compensation and benefits. The NRDA also provides that the "no lay off" attestation is not intended to limit an employee's or an employer's rights under a collective bargaining agreement or other employment contract.

The NRDA "no lay off" provision is somewhat different from the H-1A provision. The NRDA uses a different time frame than the H-1A program in protecting U.S. nurses against the risk of losing their jobs to H-1C nurses. Under the NRDA, a facility seeking H-1C nurses must attest that it has not laid off any registered nurse during a 180-day period surrounding the filing of an H-1C petition. Like the H-1A regulations, the regulations define the term "lay off" simply as "any involuntary separation of one or more staff nurses without cause/prejudice." The regulation also excludes from the term "lay off" a registered nurse's separation from employment where the nurse was offered retraining and retention at the same facility in another activity involving direct patient care at the same wage and status.

The Department seeks comments on all aspects of the regulation, including, in particular, our interpretations on two points:

First, the NRDA provides that a nurse's loss of employment does not constitute a "lay off" if it is caused by the "expiration of a grant or contract." The Department distinguishes between a situation where a nurse's loss of a job at the facility occurs upon the

expiration of a contract (such as a personal services contract) unrelated to the facility's loss of funding or specific need for the position (e.g., nurse hired for a category of duties which are ongoing at the facility), and a situation where the job loss is caused by the expiration of a grant or contract without which the nurse would not continue to be employed because there is no alternative funding or need for the position (e.g., nurse hired for duties on specific project such as a grant-funded research project which is completed). Thus, a lay off exists if a facility terminates the employment of a U.S. nurse at the expiration of a grant or contract, including a personal services contract, where there is a continuing need for the nurse's services and funding for the position remains available. The Department does not expect that a facility would attempt to avoid the NRDA's requirements by choosing to depart from a practice of continuing the employment of registered nurses who are hired on a fixed-term basis so long as there is a continuing need for their services and funding remains available. However, the Department will scrutinize any situation in which a facility appears to have attempted to circumvent the NRDA's protection for nurses already employed. In such cases, the Department will examine the facility's past and current practices regarding the use of fixed term or short term contracts for registered nurses and the renewal or extension of such contracts.

Second, the NRDA provides that "lay off" does not include a situation where a nurse "employed by the facility" loses a job but is offered "a similar employment opportunity with the same employer" with equivalent pay and benefits (section 212(m)(2)(v); (m)(7)(B)). The Department believes that the statute requires that the offer of an alternate position must be with the same employer at an eligible "facility."

With regard to documentation, the regulation requires that the facility maintain, in its public access file, all notices of strikes or other labor disputes involving a work stoppage of nurses at the facility. The facility must retain in its non-public files, and make available in the event of an enforcement action, any existing documentation with respect to the departure of each U.S. nurse who left his/her employment in the period from 90 days before or until 90 days after the facility's petition for H-1C nurse(s). The regulations also require the facility to record, and retain in its non-public files, the terms of any offers of alternative employment to such U.S. nurses and the nurses' responses to

the offers. If a nurse's response is oral, the facility is required to make a note to the file or other record setting forth the response.

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

The NRDA requires that a facility attest that "at the time of the filing of the petition for registered nurses [under the H-1C program], notice of the filing has been provided by the facility to the bargaining representative of the RNs at the facility or, where there is no such bargaining representative, notice of the filing has been provided to RNs employed at the facility through posting in conspicuous locations." This provision echoes the H-1A statute. However, the NRDA introduced a new requirement that a copy of the facility's Attestation must, "within 30 days of the date of filing, [be provided] to registered nurses employed at the facility on the date of the filing." The requirements of notice of the filing of the Attestation and the petition (where there is no bargaining representative of the RNs at the facility) and of providing a copy of the facility's Attestation to each of the RNs employed at the facility, may be satisfied by posting at the jobsite or by electronic means. A facility may satisfy the notice of the filing of the Attestation and the petition requirement electronically by any means it ordinarily uses to communicate with its nurses about job vacancies or promotion opportunities, including through its "home page" or "electronic bulletin board," provided that the nurses have, as a practical matter, direct access to the home page or electronic bulletin board; or, where the nurses have individual e-mail accounts, through e-mail or an actively circulated electronic message such as the employer's newsletter. The notice of the filing of the Attestation and the requirement that each nurse employed at the facility be provided a copy of the Attestation may be satisfied simultaneously by sending an individual electronic message with an attached copy of the Attestation to every nurse employed at the facility. Otherwise, the facility can satisfy the individual notice requirement by providing a hard copy of the Attestation to RNs employed at the facility on the date of the Attestation filing. Facilities should note that a copy of the Attestation must be provided to all RNs employed at the facility, including employees of staffing companies or other employers.

The statutory and regulatory standards for notice are consistent with Congressional intent that all aspects of

the H-1C process be open to public review. In recognition of this intent, and of the fact that the notice requirements also facilitate the complaint and enforcement process included in the NRDA, the regulation requires that the facility maintain, in its public access file, copies of the notices which were provided to the union representative or posted at the worksite. The Department invites comments on the implementation of the notice provision.

Section 655.1117 Element VII—What are the limitations as to the number of H-1C nonimmigrants that a facility may employ?

NRDA imposes a new requirement not found in the H-1A program: the facility must attest that H-1C nurses will not comprise, at any time, more than 33% of the total number of RNs “employed by the facility.” The facility must keep documentation to demonstrate its compliance, such as its payroll records, and copies of H-1C petitions filed. As discussed above, “employed or employment” is defined in § 655.1102 in accordance with the common law, under which the key determinant is the putative employer’s right to control the means and manner in which the work is performed. *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968). Therefore, the regulation provides that the calculation of the nursing population for purposes of this attestation would not include nurses who have no such employment relationship with the facility but work there as employees of bona fide contractors. The Department invites comments on this interpretation.

Section 655.1118 Element VIII—What are the limitations as to where the H-1C nonimmigrants may be employed?

The NRDA, adds a new requirement not found in the H-1A program: the attesting facility is prohibited from allowing H-1C nurses to work at worksites that are not under its control, and from relocating H-1C nurses to different “worksites.” The Department considers this statutory provision to be a bar against the facility contracting out the services of its H-1C nurses to other employers. Further, the Department considers the statute to be a prohibition against the facility moving an H-1C nurse from one worksite to another; there is no statutory flexibility to allow relocations, even if the second worksite is under the control of and part of the “facility.” The Department invites comments on its understanding of the plain language of this provision, and on the regulation.

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

This section of the regulation sets forth an H-1C Attestation certification process which is a streamlined version of the H-1A procedure. Under the H-1A program, the ETA conducted a substantive review of all Attestations submitted by facilities. In the H-1C program, the Department intends generally to limit the ETA review to a simple verification that the Attestation form is complete and free of obvious inaccuracies. The Department will rely on the veracity of the attestations made by the facility at the time the Attestation is filed. Examples of obvious inaccuracies which would prevent ETA from certifying an Attestation include: the submission of an incomplete Attestation (i.e. omits required information such as the address of the facility); the failure to include the filing fee; the failure to pay civil money penalties and/or failure to satisfy a remedy assessed by the Wage and Hour Administrator in an H-1C enforcement action, where that penalty or remedy assessment has become the final agency action; or the facility has been debarred from participation in the program.

A substantive ETA review at the time of filing the Attestation will be conducted only for three Attestation items: the employer’s eligibility as a “facility” to participate in the H-1C program; the facility’s designation of its intention to utilize alternative methods (rather than the methods identified on the Attestation) to comply with the attestation element on “timely and significant steps” to reduce its reliance on nonimmigrant nurses; and the facility’s assertion that taking a second “timely and significant step” to satisfy that attestation element would be unreasonable. In these three circumstances, supporting information from the facility is required and ETA will review that information in order to certify the Attestation. In such event, ETA will limit its review to the Attestation provision in question, and any administrative hearing concerning the ETA determination will be limited to that provision.

The regulation contains the NRDA directive that the Attestation expires on the date that is the later of the end of the one-year period beginning on the date of its filing with ETA or the end of the period of admission under section 101(a)(15)(H)(i)(c) of the last alien with respect to whose admission it was applied. Furthermore, the Attestation applies to petitions filed during the one-year period beginning on the date of its

filing with ETA if the facility states in its petition that it continues to comply with the conditions in its Attestation.

Section 655.1132 When will the Department suspend or invalidate an already-approved Attestation?

The regulation provides that a facility’s already-approved Attestation may be suspended or invalidated, for purposes of securing H-1C nurses, where: the facility’s check for the filing fee is not honored by a financial institution; a Board of Alien Labor Certification Appeals (BALCA) decision reverses an ETA certification of the Attestation; ETA finds that it made an error in its review and certification of the Attestation; an enforcement proceeding has finally determined that the facility failed to meet a condition attested to, or that there was a misrepresentation of material fact in an Attestation; or the facility has failed to pay civil money penalties, and/or failed to satisfy a remedy assessed by the Wage and Hour Administrator, where that penalty or remedy assessment has become the final agency action. The regulation provides that a suspension does not relieve the facility from having to continue to comply with the Attestation during the remainder of the Attestation’s one-year period where the facility has one or more H-1C nurses, and that the facility must comply with the terms of the Attestation, even if suspended, invalidated, or expired, as long as H-1C nurses admitted under the Attestation are employed by the facility.

Section 655.1135 What appeals procedures are available concerning ETA’s actions on a facility’s Attestation?

Like the H-1A program, the H-1C regulations provide appeal rights to the Board of Alien Labor Certification Appeals in the Department’s Office of Administrative Law Judges for any interested party aggrieved by the acceptance decision on any of the three matters on which ETA conducts substantive review (i.e., the determination as to whether the employer is a qualified “facility;” where the facility attested to alternative “timely and significant steps;” or where the facility asserted that taking a second “timely and significant step” would be unreasonable), or by an invalidation or suspension of a filed Attestation due to a discovery by ETA that it made an error in its review of the Attestation, as described in § 655.1132.

Section 655.1150 What materials must be available to the public?

This section of the regulation describes the documents which must be

available for public review in the ETA National Office in Washington, D.C., and directs that the facility must make certain documents available to the public in a public access file.

Subpart M—What are the Department's enforcement obligations with respect to H-1C Attestations?

The following enforcement provisions remain largely unchanged from the H-1A program:

Section 655.1200 What enforcement authority does the Department have with respect to a facility's H-1C Attestation?

This section describes the scope of the investigative authority of the Administrator of the ESA Wage and Hour Division (Administrator), through which appropriate investigations are conducted. The regulation provides that the Administrator shall conduct such investigations as may be appropriate, either pursuant to a complaint or otherwise. The regulation states that the investigator may enter and inspect places and records (and make transcriptions thereof), question persons, and gather information as deemed necessary by the Administrator to determine compliance regarding the matters to which a health care facility has attested. In order to assure effective enforcement, this section states the Administrator's intention to maintain confidentiality for complainants, prohibits interference in the investigation and discrimination against any person cooperating in an investigation or exercising that person's rights under 8 U.S.C. 1182(m), and prohibits waivers of rights under 8 U.S.C. 1182(m).

Section 655.1205 What is the Administrator's responsibility with respect to complaints and investigations?

Section 212(m)(2)(E)(ii) through (v) of the INA, as amended by the NRDA, authorizes the Department to investigate allegations that an employer has failed to meet the conditions attested to or that a facility has misrepresented a material fact in an Attestation. Under the regulations, the Administrator will impose administrative remedies, including civil money penalties (CMPs) and other remedies, must impose back wages for wage violations, and for certain violations will notify the Attorney General, who may not approve H-1C petitions for the facility for a period of at least one year. This section implements the NRDA time frame for the Administration's investigation: within 180 days of the receipt of a

complaint sufficient to warrant an investigation, the Administrator will conduct an investigation and issue a written determination. This section also includes the NRDA provision which allows the Administrator enforcement authority whether or not the Attestation is expired at the time of the filing of the complaint.

Section 655.1210 What penalties and other remedies may the Administrator impose?

This section of the regulation describes the Administrator's authority to impose administrative remedies, which may include a civil money penalty (CMP) in an amount not to exceed \$1,000 per nurse per violation, with the total penalty not to exceed \$10,000 per violation. The regulation states that the CMP assessment will be based on numerous relevant factors, which are listed in this section. The Administrator is required to assess back wages for violations of the wage element of the Attestation, and may also assess other appropriate remedies, such as the performance of a "timely and significant step" to which the facility had attested, or reinstatement and/or wages for laid off U.S. workers. All penalties and remedies must be promptly paid or performed when the agency action becomes final. A facility that fails to comply with any penalty or remedy will be ineligible to participate in the H-1C program through any future Attestation until the penalty or remedy is satisfied.

In conformance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (see 28 U.S.C. 2461 note), the regulation provides for inflationary adjustments to be made, by regulation, to civil money penalties in accordance with a specified cost-of-living formula. Such adjustments will be published in the **Federal Register**. The amount of the penalty in a particular case will be based on the penalty in effect at the time of the violation.

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

Section 212(m)(2)(E)(iii) of the INA, as amended by the NRDA, adopts the H-1A provision which requires that the Administrator's decision based on the investigation findings shall set out the determination as to violations, penalties, and remedies, and be served on all interested parties. The Administrator's determination also informs the interested parties of their right to request an administrative law judge (ALJ) hearing through the prescribed proceeding. Finally, the

Administrator's determination informs the interested parties that the Administrator will notify ETA and INS to debar the facility from the H-1C program for at least one year when the enforcement decision becomes a final agency action.

Section 655.1220 Who can appeal the Administrator's findings and what is the process?

This section of the regulation sets out the procedure and deadline by which an administrative law judge hearing may be requested. Any interested party may request a hearing. If the Administrator found no violation and the complainant or other interested party requests a hearing, the requestor will be the prosecuting party, the facility will be the respondent, and the Administrator will have the option to participate as an intervenor or amicus curiae. If the Administrator found a violation and the facility or other interested party requests a hearing, the Administrator will be the prosecuting party and the facility will be the respondent.

Sections 655.1225 through .1240 What are the Administrative Law Judge (ALJ) Proceedings?

These sections of the regulations specify the procedural and evidentiary rules, the methods of service of documents, the rules for computation of time, and the deadlines for the ALJ hearings and decisions.

Section 655.1245 Who can appeal the ALJ's decision and what is the process?

This section of the regulation provides for discretionary review by the Department's Administrative Review Board, at the request of the Administrator or an interested party. The deadlines and procedures for the review are prescribed.

Section 655.1250 Who is the official record keeper for these administrative appeals?

This section of the regulation is the same as the H-1A regulation and provides that the DOL Chief Administrative Law Judge shall maintain custody of the official record of the administrative proceedings and, in the event of a U.S. District Court action, shall certify and file that record with the clerk of the court.

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

This section of the regulation, like the H-1A regulation, requires the Administrator to notify the INS and ETA when there is a final agency action

that found a violation by a facility. Upon notification, the INS will not approve H-1C petitions, and ETA will suspend current H-1C Attestations and not certify new H-1C Attestations for the facility for a period of at least one year.

Section 655.1260 Can Equal Access to Justice Act attorney fees be awarded?

This section of the regulation states that attorney fees and costs under the Equal Access to Justice Act (EAJA) are not available in proceedings under this rule. The EAJA, by its own terms, applies only to proceedings required by statute to be conducted in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 554.

V. Executive Order 12866

This rule is being treated as a "significant regulatory action" within the meaning of Executive Order 12866, because it requires inter-agency coordination. Therefore, the Office of Management and Budget has reviewed the rule. However, because this rule is not "economically significant" as defined in section 3(f)(1) of E.O. 12866, it does not require a full economic impact analysis under section 6(a)(3)(C) of the Order.

The H-1C visa program is a voluntary program that allows certain hospitals which serve health professional shortage areas to temporarily secure and employ nonimmigrants admitted under H-1C visas to work as registered nurses. The NRDA, which created the H-1C visa program, carries over many of the U.S. worker protection provisions of the expired H-1A nurses visa program under the INRA. Those provisions include licensing and qualification requirements for the nonimmigrant nurses. They also include requirements for "attestations" by the prospective employer with regard to the working conditions and wages of similarly employed nurses, the significant steps to be taken by the employer to recruit and retain U.S. nurses, and the notification of U.S. workers when a petition for H-1C nurses has been filed. Several new attestations were introduced by the NRDA. Under the NRDA, an employer must further attest: that it meets the definition of "facility" based on the Social Security Act and the Public Health Service Act; that it did not and will not lay off a registered nurse employed by the facility in the period 90 days before and 90 days after the filing of any H-1C petition; that it will not employ a number of H-1C nurses that exceeds 33% of the total number of registered nurses employed by the facility; and

that it will not authorize any H-1C nurse to perform nursing services at any worksite other than a worksite controlled by the facility nor will it transfer the H-1C nurse's place of employment from one work place to another. The NRDA also requires payment of a filing fee of up to \$250 per Attestation 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 H-1C program expires four years after the date of promulgation of interim or final regulations.

The Department has been advised that only fourteen hospitals are eligible to participate in this program. Collectively, the changes made by this rule will not have an annual effect on the economy of \$100 million or more or adversely affect in a 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 rule is not "economically significant."

VI. Small Business Regulatory Enforcement Fairness Act

The Department has similarly concluded that this rule is not a "major rule" requiring approval by the Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). 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.

VII. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector, "* * * (other than to the extent that such regulations incorporate requirements specifically set forth in law)." For purposes of the Unfunded Mandates Reform Act, this rule does not include any Federal mandate that may result in increased annual expenditures in excess of \$100 million by State, local or tribal governments in the aggregate, or by the private sector. Moreover, the requirements of the Unfunded Mandates

Reform Act do not apply to this rule because it does not include a "Federal mandate," which is defined to include either a "Federal intergovernmental mandate" or a "Federal private sector mandate." 2 U.S.C. 658(6). Except in limited circumstances not applicable here, those terms do *not* include "a duty arising from participation in a voluntary program." 2 U.S.C. 658(5)(A)(i)(II) and (7)(A)(ii). A decision by a facility to obtain an H-1C nurse is purely voluntary, and the obligations arise "from participation in a voluntary Federal program."

VIII. Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for this rule under 5 U.S.C. 553(b), the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* pertaining to regulatory flexibility analysis, do not apply to this interim final rule. See 5 U.S.C. 603(a). In any event, the statutory threshold requirement of 190 licensed acute care beds places eligible facilities in the "modal size hospital" category. A hospital of this size is generally a community hospital. The Department estimates that annual receipts for a typical 190 acute care bed hospital with a 50% occupancy rate, an average stay of 4.7 days at \$4700 per case, would be approximately \$32 million. This estimated annual receipt far exceeds the \$5 million required to be considered a "small entity" under SBA standards.

IX. Executive Order 13132 (Federalism)

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have "federalism implications." The 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."

XI. Catalog of Federal Domestic Assistance Number

This program is not listed in the Catalog of Federal Domestic Assistance.

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Employment, Forest and forest products, Health professions, Immigration, Labor, Longshore work, Migrant labor, Penalties, Registered Nurse, Reporting requirements, Students, Wages.

Text of the Rule

For the reasons set out in the preamble, Title 20 part 655 is amended as follows:

1. The authority citation for part 655 is revised to read as follows—

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); Title IV, Pub. L. 105–277, 112 Stat. 2681; 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), 1182(n), 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).

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.*; Pub. L. 106–95, 113 Stat. 1312.

2. Subparts L and M are added to part 655, to read as follows—

Subpart L—What requirements must a facility meet to employ H–1C nonimmigrant workers as registered nurses?

Sec.

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

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

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

655.1110 What requirements does the NRDA impose in the filing of an Attestation?

655.1111 Element I—What hospitals are eligible to participate in the H–1C program?

655.1112 Element II—What does “no adverse effect on wages and working conditions” mean?

655.1113 Element III—What does “facility wage rate” mean?

655.1114 Element IV—What are the timely and significant steps an H–1C employer must take to recruit and retain U.S. nurses?

655.1115 Element V—What does “no strike/lockout or layoff” mean?

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

655.1117 Element VII—What are the limitations as to the number of H–1C nonimmigrants that a facility may employ?

655.1118 Element VIII—What are the limitations as to where the H–1C nonimmigrant may be employed?

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

655.1132 When will the Department suspend or invalidate an already-approved Attestation?

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

655.1150 What materials must be available to the public?

Subpart M—What are the Department’s enforcement obligations with respect to H–1C Attestations?

655.1200 What enforcement authority does the Department have with respect to a facility’s H–1C Attestation?

655.1205 What is the Administrator’s responsibility with respect to complaints and investigations?

655.1210 What penalties and other remedies may the Administrator impose?

655.1215 How are the Administrator’s investigation findings issued?

655.1220 Who can appeal the Administrator’s findings and what is the process?

655.1225 What are the rules of practice before an ALJ?

655.1230 What time limits are imposed in ALJ proceedings?

655.1235 What are the ALJ proceedings?

655.1240 When and how does an ALJ issue a decision?

655.1245 Who can appeal the ALJ’s decision and what is the process?

655.1250 Who is the official record keeper for these administrative appeals?

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

655.1260 Can Equal Access to Justice Act attorney fees be awarded?

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

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

(a) *Purpose.* The Immigration and Nationality Act (INA), as amended by the Nursing Relief for Disadvantaged Areas Act of 1999, establishes the H–1C nonimmigrant visa program to provide qualified nursing professionals for narrowly defined health professional shortage areas. Subpart L of this part sets forth the procedure by which

facilities seeking to use nonimmigrant registered nurses must submit attestations to the Department of Labor demonstrating their eligibility to participate as facilities, their wages and working conditions for nurses, their efforts to recruit and retain United States workers as registered nurses, the absence of a strike/lockout or layoff, notification of nurses, and the numbers of and worksites where H–1C nurses will be employed. Subpart M of this part sets forth complaint, investigation, and penalty provisions with respect to such attestations.

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

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

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, subparts L and M of this part shall apply to the entry of a nonimmigrant who is a citizen of Mexico under the provisions of section D of Annex 1603 of NAFTA. Therefore, the references in this part to “H–1C nurse” apply to such nonimmigrants who are classified by INS 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 United States Department of Labor (DOL), Department of Justice, 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 of the Employment Standards Administration (ESA) 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 Employment and

Training Administration, Director, Office of Workforce Security, 200 Constitution Ave. NW., Room C-4318, Washington, DC 20210. 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 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 INS for the admission or for the adjustment 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 INS. At the same time that the facility files an H-1C petition with INS, it must also send a copy of the petition to the Employment and Training Administration, Administrator, Office of Workforce Security, 200 Constitution Avenue, NW., Room C-4318, Washington, DC 20210. The facility must also send to this same ETA address a copy of the INS petition approval notice within 5 days after it is received from INS.

(d) *Visa issuance.* INS assures that the alien possesses the required qualifications and credentials to be employed as an H-1C nurse. The Department of State is responsible for issuing the visa.

(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, Employment Standards Administration (ESA) 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.

§ 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, OWS means the Administrator of the Office of Workforce Security, Employment Training Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator, OWS under subpart L of this part.

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 material 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:

- (1) The firm has the right to control when, where, and how the worker performs the job;
- (2) The work does not require a high level of skill or expertise;
- (3) The firm rather than the worker furnishes the tools, materials, and equipment;
- (4) The work is performed on the premises of the firm or the client;
- (5) There is a continuing relationship between the worker and the firm;
- (6) The firm has the right to assign additional projects to the worker;
- (7) The firm sets the hours of work and the duration of the job;
- (8) The worker is paid by the hour, week, month or an annual salary, rather than for the agreed cost of performing a particular job;

(9) The worker does not hire or pay assistants;

(10) The work performed by the worker is part of the regular business (including governmental, educational and nonprofit operations) of the firm;

(11) The firm is itself in business;

(12) The worker is not engaged in his or her own distinct occupation or business;

(13) The firm provides the worker with benefits such as insurance, leave, or workers' compensation;

(14) The worker is considered an employee of the firm for tax purposes (*i.e.*, the entity withholds federal, state, and Social Security taxes);

(15) The firm can discharge the worker; and

(16) The worker and the firm believe that they are creating an employer-employee relationship.

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) which includes the Office of Workforce Security (OWS).

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

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% 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% of the total number of such hospital's acute care inpatient days for such period.

Full-time employment means work where the nurse is regularly scheduled to work 40 hours or more per week,

unless the facility documents that it is common practice for the occupation at the facility or for the occupation in the geographic area for full-time nurses to work fewer hours per week.

Geographic area means the area within normal commuting distance of the place (address) of the intended worksite. If the geographic area does not include a sufficient number of facilities to make a prevailing wage determination, the term "geographic area" shall be expanded with respect to the attesting facility to include a sufficient number of facilities to permit a prevailing wage determination to be made. If the place of the intended worksite is within a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA will be deemed to be within normal commuting distance of the place of intended employment.

H-1C nurse means any nonimmigrant alien admitted to the United States to perform services as a nurse under section 101(a)(15)(H)(i)(c) of the Act (8 U.S.C. 1101(a)(15)(H)(i)(c)).

Immigration and Naturalization Service (INS) means the component of the Department of Justice which makes the determination under the Act on whether to grant H-1C visas to petitioners seeking the admission of nonimmigrant nurses under H-1C visas.

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

Lockout means a labor dispute involving a work stoppage in which an employer withholds work from its employees in order to gain a concession from them.

Nurse means a person who is or will be authorized by a State Board of Nursing to engage in registered nursing practice in a State or U.S. territory or possession at a facility which provides health care services. A staff nurse means a nurse who provides nursing care directly to patients. In order to qualify under this definition of "nurse" the alien must:

(1) Have obtained a full and unrestricted license to practice nursing in the country where the alien obtained nursing education, or have received nursing education in the United States;

(2) Have passed the examination given by the Commission on Graduates for Foreign Nursing Schools (CGFNS), or have obtained a full and unrestricted (permanent) license to practice as a registered nurse in the state of intended employment, or have obtained a full and unrestricted (permanent) license in any state or territory of the United States 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 (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to practice as a registered nurse immediately upon admission to the United States, and be authorized under such laws to be employed by the employer. For purposes of this paragraph, the temporary or interim licensing may be obtained immediately after the alien enters the United States and registers to take the first available examination for permanent licensure.

Office of Workforce Security (OWS) means the agency of the Department of Labor's Employment and Training Administration which is charged with administering the national system of public employment offices.

Prevailing wage means the weighted average wage paid to similarly employed registered nurses within the geographic area.

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

Similarly employed means employed by the same type of facility (acute care or long-term care) and working under like conditions, such as the same shift, on the same days of the week, and in the same specialty area.

State means one of the 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam.

State employment security agency (SESA) means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with OWS in the operation of the national system of public employment offices.

Strike means a labor dispute in which employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operations.

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

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 granted the status of an alien admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

Worksite means the location where the nurse is involved in the practice of nursing.

§ 655.1110 What requirements does the NRDA impose 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 this 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?* Attestations shall be submitted, by U.S. mail or private carrier, to ETA at the following address: Chief, Division of Foreign Labor Certifications, Office of Workforce Security, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Room C-4318, Washington, DC 20210. Attestations shall be reviewed and accepted for filing or rejected by ETA within thirty calendar days of the date they are received by ETA. Therefore, it is recommended that Attestations be submitted to ETA at least thirty-five calendar days prior to the planned date for filing an H-1C visa petition with the Immigration and Naturalization Service.

(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 INS approval notices.* After ETA has approved the Attestation used by the facility to support any H-1C petition, the facility must send to ETA (at the address specified in paragraph (b) of this section) copies of each H-1C petition and INS approval notice on such petition.

(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% of nurses employed by the facility will be H-1C nonimmigrants (See § 655.1117);

(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).

§ 655.1111 Element I—What hospitals are eligible to participate in the H-1C program?

(a) The first attestation element requires that the employer be a "facility" for purposes of the H-1C program, as defined in INA Section 212(m)(6), 8 U.S.C. 1182 (2)(m)(6).

(b) A qualifying facility under that section is a "subpart (d) hospital," as defined in Section 1886(d)(1)(B) of the Social Security Act, 42 U.S.C. 1395ww(d)(1)(B), which:

(1) Was located in a health professional shortage area (HPSA), as determined by the Department of Health and Human Services, on March 31, 1997. A list of HPSAs, as of March 31, 1997, was published in the **Federal Register** on May 30, 1997 (62 FR 29395);

(2) Had at least 190 acute care beds, as determined by its settled cost report, filed under Title XVIII of the Social Security Act, (42 U.S.C. 1395 *et seq.*), for its fiscal year 1994 cost reporting period (i.e., Form HCFA-2552-92, Worksheet S-3, Part I, column 1, line 8);

(3) Had at least 35% of its acute care inpatient days reimbursed by Medicare, as determined by its settled cost report, filed under Title XVIII of the Social Security Act, for its fiscal year 1994 cost reporting period (i.e., Form HCFA-2552-92, Worksheet S-3, Part I, column 4, line 8 as a percentage of column 6, line 8); and

(4) Had at least 28% of its acute care inpatient days reimbursed by Medicaid, as determined by its settled cost report, filed under Title XVIII of the Social Security Act, for its fiscal year 1994 cost reporting period (i.e., Form HCFA-2552-92, Worksheet S-3, Part I, column 5, line 8 as a percentage of column 6, line 8).

(c) The **Federal Register** notice containing the controlling list of HPSAs (62 FR 29395), can be found in federal depository libraries and on the Government Printing Office Internet website at <http://www.access.gpo.gov>.

(d) To make a determination about information in the settled cost report, the employer shall examine its own Worksheet S-3, Part I, Hospital and Hospital Health Care Complex Statistical Data, in the Hospital and Hospital Health Care Complex Cost

Report, Form HCFA 2552, filed for the fiscal year 1994 cost reporting period.

(e) The facility must maintain a copy of the portions of Worksheet S-3, Part I and Worksheet S, Parts I and II of HCFA Form 2552 which substantiate the attestation of eligibility as a "facility." One set of copies of this document must be kept in the facility's public access file. The full Form 2552 for fiscal year 1994 must be made available to the Department upon request.

§ 655.1112 Element II—What does "no adverse effect on wages and working conditions" mean?

(a) The second attestation element requires that the facility attest that "the employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed."

(b) For purposes of this program, "employment" is full-time employment as defined in § 655.1102; part-time employment of H-1C nurses is not authorized.

(c) *Wages.* To meet the requirement of no adverse effect on wages, the facility must attest that it will pay each nurse employed by the facility at least the prevailing wage for the occupation in the geographic area. The facility must pay the higher of the wage required under this paragraph or the wage required under § 655.1113 (*i.e.*, the third attestation element: facility wage).

(1) *Collectively bargained wage rates.* Where wage rates for nurses at a facility are the result of arms-length collective bargaining, those rates shall be considered "prevailing" for that facility for the purposes of this subpart.

(2) *State employment security determination.* In the absence of collectively bargained wage rates, the facility may not independently determine the prevailing wage. The State employment security agency (SESA) shall determine the prevailing wage for similarly employed nurses in the geographic area in accordance with administrative guidelines or regulations issued by ETA. The facility shall request the appropriate prevailing wage from the SESA not more than 90 days prior to the date the Attestation is submitted to ETA. Once a facility obtains a prevailing wage determination from the SESA and files an Attestation supported by that prevailing wage determination, the facility shall be deemed to have accepted the prevailing wage determination as accurate and appropriate (as to both the occupational classification and the wage rate) and thereafter shall not contest the legitimacy of the prevailing wage

determination in an investigation or enforcement action pursuant to subpart M. A facility may challenge a SESA prevailing wage determination through the Employment Service complaint system. See 20 CFR part 658, subpart M. A facility which challenges a SESA prevailing wage determination must obtain a final ruling from the Employment Service prior to filing an Attestation. Any such challenge shall not require the SESA to divulge any employer wage data which was collected under the promise of confidentiality.

(3) *Total compensation package.* The prevailing wage under this paragraph relates to wages only. Employers are cautioned that each item in the total compensation package for U.S. nurses, H-1C, and other nurses employed by the facility must be the same within a given facility, including such items as housing assistance and fringe benefits.

(4) *Documentation of pay and total compensation.* The facility must maintain in its public access file a copy of the prevailing wage, which shall be either the collective bargaining agreement or the determination that was obtained from the SESA. The facility must maintain payroll records, as specified in § 655.1113, and make such records available to the Administrator in the event of an enforcement action pursuant to subpart M.

(d) *Working conditions.* To meet the requirement of no adverse effect on working conditions, the facility must attest that it will afford equal treatment to U.S. and H-1C nurses with the same seniority, with respect to such working conditions as the number and scheduling of hours worked (including shifts, straight days, weekends); vacations; wards and clinical rotations; and overall staffing-patient patterns. In the event of an enforcement action pursuant to subpart M, the facility must provide evidence substantiating compliance with this attestation.

§ 655.1113 Element III—What does "facility wage rate" mean?

(a) The third attestation element requires that the facility employing or seeking to employ the alien must attest that "the alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility."

(b) The facility must pay the higher of the wage required in this section (*i.e.* facility wage), or the wage required in § 655.1112 (*i.e.*, prevailing wage).

(c) *Wage obligations for H-1C nurses in nonproductive status.*

(1) *Circumstances where wages must be paid.* If the H-1C nurse is not

performing work and is in a nonproductive status due to a decision by the facility (*e.g.*, because of lack of assigned work), because the nurse has not yet received a license to work as a registered nurse, or any other reason except as specified in paragraph (c)(2) of this section, the facility is required to pay the salaried H-1C nurse the full amount of the weekly salary, or to pay the hourly-wage H-1C nurse for a full-time week (40 hours or such other number of hours as the facility can demonstrate to be full-time employment) at the applicable wage rate.

(2) *Circumstances where wages need not be paid.* If an H-1C nurse experiences a period of nonproductive status due to conditions unrelated to employment which take the nurse away from his/her duties at his/her voluntary request and convenience (*e.g.*, touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (*e.g.*, maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the facility is not obligated to pay the required wage rate during that period, *provided that* such period is not subject to payment under the facility's benefit plan. Payment need not be made if there has been a *bona fide* termination of the employment relationship, as demonstrated by notification to INS that the employment relationship has been terminated and the petition should be canceled.

(d) *Documentation.* The facility must maintain documentation substantiating compliance with this attestation element. The public access file shall contain the facility pay schedule for nurses or a description of the factors taken into consideration by the facility in making compensation decisions for nurses, if either of these documents exists. Categories of nursing positions not covered by the public access file documentation shall not be covered by the Attestation, and, therefore, such positions shall not be filled or held by H-1C nurses. The facility must maintain the payroll records, as required under the Fair Labor Standards Act at 29 CFR part 516, and make such records available to the Administrator in the event of an enforcement action pursuant to subpart M of this part.

§ 655.1114 Element IV—What are the timely and significant steps an H-1C employer must take to recruit and retain U.S. nurses?

(a) The fourth attestation element requires that the facility attest that it "has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who

are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses." The facility must take at least two such steps, unless it demonstrates that taking a second step is not reasonable. The steps described in this section shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of this section. Nothing in this subpart or subpart M of this part shall require a facility to take more than one step, if the facility can demonstrate that taking a second step is not reasonable. A facility choosing to take timely and significant steps other than those specifically described in this section must submit with its Attestation a description of the step(s) it is proposing to take and an explanation of how the proposed step(s) are of comparable timeliness and significance to those described in this section (See § 655.1110(c)(1)(iii)). A facility claiming that a second step is unreasonable must submit an explanation of why such second step would be unreasonable (See § 655.1110(c)(1)(iv)).

(b) *Descriptions of steps.* Each of the actions described in this section shall be considered a significant step reasonably designed to recruit and retain U.S. nurses. A facility choosing any of these steps shall designate such step on Form ETA 9081, thereby attesting that its program(s) meets the regulatory requirements set forth for such step. Section 212(m)(2)(E)(ii) of the INA provides that a violation shall be found if a facility fails to meet a condition attested to. Thus, a facility shall be held responsible for all timely and significant steps to which it attests.

(1) *Statutory steps.*

(i) Operating a training program for registered nurses at the facility or financing (or providing participation in) a training program for registered nurses elsewhere. Training programs may include either courses leading to a higher degree (*i.e.*, beyond an associate or a baccalaureate degree), or continuing education courses. If the program includes courses leading to a higher degree, they must be courses which are part of a program accepted for degree credit by a college or university and accredited by a State Board of Nursing or a State Board of Higher Education (or its equivalent), as appropriate. If the program includes continuing education courses, they must be courses which meet criteria established to qualify the nurses taking the courses to earn continuing education units accepted by a State Board of Nursing (or its

equivalent). In either type of program, financing by the facility (either directly or arranged through a third party) shall cover the total costs of such training. The number of U.S. nurses for whom such training actually is provided shall be no less than half of the number of nurses who left the facility during the 12-month period prior to submission of the Attestation. U.S. nurses to whom such training was offered, but who rejected such training, may be counted towards those provided training.

(ii) Providing career development programs and other methods of facilitating health care workers to become registered nurses. This may include programs leading directly to a degree in nursing, or career ladder/career path programs which could ultimately lead to a degree in nursing. Any such degree program shall be, at a minimum, through an accredited community college (leading to an associate's degree), 4-year college (a bachelor's degree), or diploma school, and the course of study must be one accredited by a State Board of Nursing (or its equivalent). The facility (either directly or arranged through a third party) must cover the total costs of such programs. U.S. workers participating in such programs must be working or have worked in health care occupations or facilities. The number of U.S. workers for whom such training is provided must be equal to no less than half the average number of vacancies for nurses during the 12-month period prior to the submission of the Attestation. U.S. nurses to whom such training was offered, but who rejected such training, may be counted towards those provided training.

(iii) Paying registered nurses wages at a rate higher than currently being paid to registered nurses similarly employed in the geographic area. The facility's entire schedule of wages for nurses shall be at least 5 percent higher than the prevailing wage as determined by the SESA, and such differentials shall be maintained throughout the period of the Attestation's effectiveness.

(iv) Providing reasonable opportunities for meaningful salary advancement by registered nurses. This may include salary advancement based on factors such as merit, education, and specialty, and/or salary advancement based on length of service, with other bases for wage differentials remaining constant.

(A) Merit, education, and specialty. Salary advancement may be based on factors such as merit, education, and specialty, or the facility may provide opportunities for professional development of its nurses which lead to

salary advancement (*e.g.*, participation in continuing education or in-house educational instruction; service on special committees, task forces, or projects considered of a professional development nature; participation in professional organizations; and writing for professional publications). Such opportunities must be available to all the facility's nurses.

(B) Length of service. Salary advancement may be based on length of service using clinical ladders which provide, annually, salary increases of 3 percent or more for a period of no less than 10 years, over and above the costs of living and merit, education, and specialty increases and differentials.

(2) *Other possible steps.* The Act indicates that the four steps described in the statute (and set out in paragraph (b)(1) of this section) are not an exclusive list of timely and significant steps which might qualify. The actions described in paragraphs (b)(2)(i) through (iv) of this section, are also deemed to be qualified; in paragraph (b)(2)(v) of this section, the facility is afforded the opportunity to identify a timely and significant step of its own devising.

(i) Monetary incentives. The facility provides monetary incentives to nurses, through bonuses and merit pay plans not included in the base compensation package, for additional education, and for efforts by the nurses leading to increased recruitment and retention of U.S. nurses. Such monetary incentives may be based on actions by nurses such as: Instituting innovations to achieve better patient care, increased productivity, reduced waste, and/or improved workplace safety; obtaining additional certification in a nursing specialty; accruing unused sick leave; recruiting other U.S. nurses; staying with the facility for a given number of years; taking less desirable assignments (other than shift differential); participating in professional organizations; serving on task forces and on special committees; or contributing to professional publications.

(ii) Special perquisites. The facility provides nurses with special perquisites for dependent care or housing assistance of a nature and/or extent that constitute a "significant" factor in inducing employment and retention of U.S. nurses.

(iii) Work schedule options. The facility provides nurses with non-mandatory work schedule options for part-time work, job-sharing, compressed work week or non-rotating shifts (provided, however, that H-1C nurses are employed only in full-time work) of a nature and/or extent that constitute a "significant" factor in inducing

employment and retention of U.S. nurses.

(iv) Other training options. The facility provides training opportunities to U.S. workers not currently in health care occupations to become registered nurses by means of financial assistance (e.g., scholarship, loan or pay-back programs) to such persons.

(v) Alternative but significant steps. Facilities are encouraged to be innovative in devising timely and significant steps other than those described in paragraphs (b)(1) and (b)(2)(i) through (iv) of this section. To qualify, an alternative step must be of a timeliness and significance comparable to those in this section. A facility may designate on Form ETA 9081 that it has taken and is taking such alternate step(s), thereby attesting that the step(s) meet the statutory test of timeliness and significance comparable to those described in paragraphs (b)(1) and (b)(2)(i) through (iv) in promoting the development, recruitment, and retention of U.S. nurses. If such a designation is made on Form ETA 9081, the submission of the Attestation to ETA must include an explanation and appropriate documentation of the alternate step(s), and of the manner in which they satisfy the statutory test in comparison to the steps described in paragraphs (b)(1) and (b)(2)(i) through (iv). ETA will review the explanation and documentation and determine whether the alternate step(s) qualify under this subsection. The ETA determination is subject to review by the BALCA, upon the request of an interested party; such review shall be limited to this matter.

(c) *Unreasonableness of second step.* Nothing in this subpart or subpart M of this part requires a facility to take more than one step, if the facility can demonstrate that taking a second step is not reasonable. However, a facility shall make every effort to take at least two steps. The taking of a second step may be considered unreasonable if it would result in the facility's financial inability to continue providing the same quality and quantity of health care or if the provision of nursing services would otherwise be jeopardized by the taking of such a step.

(1) A facility may designate on Form ETA 9081 that the taking of a second step is not reasonable. If such a designation is made on Form ETA 9081, the submission of the Attestation to ETA shall include an explanation and appropriate documentation with respect to each of the steps described in paragraph (b) of this section (other than the step designated as being taken by the facility), showing why it would be

unreasonable for the facility to take each such step and why it would be unreasonable for the facility to take any other step designed to recruit, develop and retain sufficient U.S. nurses to meet its staffing needs.

(2) ETA will review the explanation and documentation, and will determine whether the taking of a second step would not be reasonable. The ETA determination is subject to review by the BALCA, upon the request of an interested party; such review shall be limited to this matter.

(d) *Performance-based alternative to criteria for specific steps.* Instead of complying with the specific criteria for one or more of the steps in the second and/or succeeding years of participation in the H-1C program, a facility may include in its *prior* year's Attestation, in addition to the actions taken under specifically attested steps, that it will reduce the number of H-1C nurses it utilizes within one year from the date of the Attestation by at least 10 percent, without reducing the quality or quantity of services provided. If this goal is achieved, the facility shall so indicate on its subsequent year's Attestation. Further, the facility need not attest to any "timely and significant step" on that subsequent attestation, if it again indicates that it shall again reduce the number of H-1C nurses it utilizes within one year from the date of the Attestation by at least 10 percent. This performance-based alternative is designed to permit a facility to achieve the objectives of the Act, without subjecting the facility to detailed requirements and criteria as to the specific means of achieving that objective.

(e) *Documentation.* The facility must include in the public access file a description of the activities which constitute its compliance with each timely and significant step which is attested on Form ETA 9081 (e.g., summary of a training program for registered nurses; description of a career ladder showing meaningful opportunities for pay advancements for nurses). If the facility has attested that it will take an alternative step or that taking a second step is unreasonable, then the public access file must include the documentation which was submitted to ETA under paragraph (c) of this section. The facility must maintain in its non-public files, and must make available to the Administrator in the event of an enforcement action pursuant to subpart M of this part, documentation which provides a complete description of the nature and operation of its program(s) sufficient to substantiate its full compliance with the requirements

of each timely and significant step which is attested to on Form ETA 9081. This documentation should include information relating to all of the requirements for the step in question.

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

(a) The fifth attestation element requires that the facility attest that "there is not a strike or lockout in the course of a labor dispute, the facility did not lay off and will not lay off a registered nurse employed by the facility within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition, and the employment of such an alien is not intended or designated to influence an election for a bargaining representative for registered nurses of the facility." Labor disputes for purposes of this attestation element relate only to those involving nurses providing nursing services; other health service occupations are not included. A facility which has filed a petition for H-1C nurses is also prohibited from interfering with the right of the nonimmigrant to join or organize a union.

(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 one year validity of the Attestation. Within three days of the occurrence of such strike or lockout, the facility must submit to the Chief, Division of Foreign Labor Certifications, Office of Workforce Security, Employment and Training Administration, Department of Labor, 200 Constitution Avenue N.W., Room C-4318, Washington, D.C. 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 8 CFR 214.2(h)(17), INS's *Effect of strike* regulation for "H" visa holders, ETA must certify to INS, 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.

(c) *Lay off* of a U.S. nurse means that the employer has caused the nurse's loss of employment in circumstances *other than* where—

(1) A U.S. nurse has been discharged for inadequate performance, violation of workplace rules, or other reasonable work-related cause;

(2) A U.S. nurse's departure or retirement is voluntary (to be assessed in light of the totality of the circumstances, under established principles concerning "constructive discharge" of workers who are pressured to leave employment);

(3) The grant or contract under which the work performed by the U.S. nurse is required and funded has expired, and without such grant or contract the nurse would not continue to be employed because there is no alternative funding or need for the position; or

(4) A U.S. nurse who loses employment is offered, as an alternative to such loss, a similar employment opportunity with the same employer. The validity of the offer of a similar employment opportunity will be assessed in light of the following factors:

(i) The offer is a *bona fide* offer, rather than an offer designed to induce the U.S. nurse to refuse or an offer made with the expectation that the worker will refuse;

(ii) The offered job provides the U.S. nurse an opportunity similar to that provided in the job from which he/she is discharged, in terms such as a similar level of authority, discretion, and responsibility, a similar opportunity for advancement within the organization, and similar tenure and work scheduling;

(iii) The offered job provides the U.S. nurse equivalent or higher compensation and benefits to those provided in the job from which he/she is discharged.

(d) *Documentation.* The facility must include in its public access file, copies of all notices of strikes or other labor disputes involving a work stoppage of nurses at the facility (submitted to ETA under paragraph (b) of this section). The facility must retain in its non-public files, and make available in the event of an enforcement action pursuant to subpart M of this part, any existing documentation with respect to the departure of each U.S. nurse who left his/her employment with the facility in the period from 90 days before until 90 days after the facility's petition for H-1C nurse(s). The facility is also required to have a record of the terms of any offer of alternative employment to such a U.S. nurse and the nurse's response to the offer (which may be a note to the file or other record of the nurse's response), and to make such record available in the event of an enforcement action pursuant to subpart M.

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

(a) The sixth attestation element requires the facility to attest that at the

time of filing of the petition for registered nurses under section 101(a)(15)(H)(i)(c) of the INA, notice of filing has been provided by the facility to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to registered nurses at the facility through posting in conspicuous locations, and individual copies of the Attestation have been provided to registered nurses employed at the facility.

(b) *Notification of bargaining representative.* At a time no later than the date the Attestation is transmitted to ETA, the facility must notify the bargaining representative (if any) for nurses at the facility that the Attestation is being submitted. No later than the date the facility transmits a petition for H-1C nurses to INS, 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 the Attestation or petition, or a document stating that the Attestation 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 Division of Foreign Labor Certifications, Office of Workforce Security, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW., Room C-4318, 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 of the United States Department of Labor."

(c) *Posting notice.* If there is no bargaining representative for nurses at the facility, the facility must post a written notice in two or more conspicuous locations at the facility. Such notices shall be clearly visible and unobstructed while posted, and shall be posted in conspicuous places where nurses can easily read the notices on their way to or from their duties. Appropriate locations for posting hard copy notices include locations in the immediate proximity of mandatory Fair Labor Standards Act wage and hour notices and Occupational Safety and Health Act occupational safety and health notices. In the alternative, the facility may use electronic means if it ordinarily uses to communicate with its nurses about job vacancies or promotion opportunities, including through its "home page" or "electronic bulletin board," provided that the nurses have,

as a practical matter, direct access to those sites; or, where the nurses have individual e-mail accounts, the facility may use e-mail. This must be accomplished no later than the date when the facility transmits an Attestation to ETA and the date when the facility transmits an H-1C petition to the INS. The notice may be either a copy of the Attestation or petition, or a document stating that the Attestation or petition has been filed and is available for review by interested parties at the facility (explaining how these documents can be inspected or obtained) and at the national office of ETA. The notice shall 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 of the United States Department of Labor." Unless it is sent to an individual e-mail address, the Attestation notice shall remain posted during the validity period of the Attestation; the petition notice shall remain posted for ten days. Copies of all notices shall be available for examination in the facility's public access file.

(d) *Individual notice to RNs.* In addition to notifying the bargaining representative or posting notice as described in paragraphs (b) and (c) of this section, the facility must provide a copy of the Attestation, within 30 days of the date of filing, to every registered nurse employed at the facility. 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. 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.

(e) Where RNs lack practical computer access, a hard copy must be posted in accordance with paragraph (c) of this section and a hard copy of the Attestation delivered, within 30 days of the date of filing, to every RN employed at the facility in accordance with paragraph (d) of this section.

(f) The facility must maintain, in its public access file, copies of the notices required by this section. The facility must make such documentation available to the Administrator in the event of an enforcement action pursuant to subpart M of this part.

§ 655.1117 Element VII—What are the limitations as to the number of H-1C nonimmigrants that a facility may employ?

(a) The seventh attestation element requires that the facility attest that it will not, at any time, employ a number of H-1C nurses that exceeds 33% of the total number of registered nurses employed by the facility. The calculation of the population of nurses for purposes of this attestation includes only nurses who have an employer-employee relationship with the facility (as defined in § 655.1102).

(b) The facility must maintain documentation (e.g., payroll records, copies of H-1C petitions) that demonstrates its compliance with this attestation. The facility must make such documentation available to the Administrator in the event of an enforcement action pursuant to subpart M of this part.

§ 655.1118 Element VIII—What are the limitations as to where the H-1C nonimmigrant may be employed?

The eighth attestation element requires that the facility attest that it will not authorize any H-1C nurse to perform services at any worksite not controlled by the facility or transfer any H-1C nurse from one worksite to another worksite, even if all of the worksites are controlled by the facility.

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

(a) An Attestation form which is complete and has no obvious inaccuracies will be accepted for filing by ETA without substantive review, *except that* ETA will conduct a substantive review on particular attestation elements in the following limited circumstances:

(1) Determination of whether the hospital submitting the Attestation is a qualifying “facility” (*see* § 655.1110(c)(ii), regarding the documentation required, and the process for review);

(2) Where the facility attests that it is taking or will take a “timely and significant step” other than those identified on the Form ETA 9081 (*see* § 655.1114(b)(2)(v), regarding the documentation required, and the process for review);

(3) Where the facility asserts that taking a second “timely and significant step” is unreasonable (*see* § 655.1114(c), regarding the documentation required, and the process for review).

(b) The certifying officer will act on the Attestation in a timely manner. If the officer does not contact the facility for information or make any determination within 30 days of

receiving the Attestation, the Attestation shall be accepted for filing. If ETA receives information contesting the truth of the statements attested to or compliance with an Attestation prior to the determination to accept or reject the Attestation for filing, such information shall not be made part of ETA’s administrative record on the Attestation but shall be referred to the Administrator to be processed as a complaint pursuant to subpart M of this part if such Attestation is accepted by ETA for filing.

(c) Upon the facility’s submitting the Attestation to ETA and providing the notice required by § 655.1116, the Attestation shall be available for public examination at the facility. When ETA accepts the Attestation for filing, the Attestation will be made available for public examination in the Office of Workforce Security, Employment Training Administration, U.S. Department of Labor, Room C-4318, 200 Constitution Avenue, NW., Washington, DC 20210.

(d) *Standards for acceptance of Attestation.* ETA will accept the Attestation for filing under the following standards:

(1) The Attestation is complete and contains no obvious inaccuracies.

(2) The facility’s explanation and documentation are sufficient to satisfy the requirements for the Attestation elements on which substantive review is conducted (as described in paragraph (a) of this section).

(3) The facility has no outstanding “insufficient funds” check(s) in connection with filing fee(s) for prior Attestation(s).

(4) The facility has no outstanding civil money penalties and/or has not failed to satisfy a remedy assessed by the Wage and Hour Administrator, under subpart M of this part, where that penalty or remedy assessment has become the final agency action.

(5) The facility has not been disqualified from approval of any petitions filed by, or on behalf of, the facility under section 204 or section 212(m) of the INA.

(e) *DOL not the guarantor.* DOL is not the guarantor of the accuracy, truthfulness or adequacy of an Attestation accepted for filing.

(f) *Attestation Effective and Expiration Dates.* An Attestation becomes filed and effective as of the date it is accepted and signed by the ETA certifying officer. Such Attestation is valid until the date that is the later of the end of the 12-month period beginning on the date of acceptance for filing with the Secretary, or the end of the period of admission (under INA

section 101(a)(15)(H)(i)(c)) of the last alien with respect to whose admission the Attestation was applied, unless the Attestation is suspended or invalidated earlier than such date pursuant to § 655.1132.

§ 655.1132 When will the Department suspend or invalidate an approved Attestation?

(a) Suspension or invalidation of an Attestation may result where: the facility’s check for the filing fee is not honored by a financial institution; a Board of Alien Labor Certification Appeals (BALCA) decision reverses an ETA certification of the Attestation; ETA finds that it made an error in its review and certification of the Attestation; an enforcement proceeding has finally determined that the facility failed to meet a condition attested to, or that there was a misrepresentation of material fact in an Attestation; the facility has failed to pay civil money penalties and/or failed to satisfy a remedy assessed by the Wage and Hour Administrator, where that penalty or remedy assessment has become the final agency action. If an Attestation is suspended or invalidated, ETA will notify INS.

(b) *BALCA decision or final agency action in an enforcement proceeding.* If an Attestation is suspended or invalidated as a result of a BALCA decision overruling an ETA acceptance of the Attestation for filing, or is suspended or invalidated as a result of an enforcement action by the Administrator under subpart M of this part, such suspension or invalidation may not be separately appealed, but shall be merged with appeals on the underlying matter.

(c) *ETA action.* If, after accepting an Attestation for filing, ETA discovers that it erroneously accepted that Attestation for filing and, as a result, ETA suspends or invalidates that acceptance, the facility may appeal such suspension or invalidation under § 655.1135 as if that suspension or invalidation were a decision to reject the Attestation for filing.

(d) A facility must comply with the terms of its Attestation, even if such Attestation is suspended, invalidated or expired, as long as any H-1C nurse is at the facility, unless the Attestation is superseded by a subsequent Attestation accepted for filing by ETA.

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

(a) *Appeals of acceptances or rejections.* Any interested party may appeal ETA’s acceptance or rejection of

an Attestation submitted by a facility for filing. However, such an appeal shall be limited to ETA's determination on one or more of the attestation elements for which ETA conducts a substantive review (as described in § 655.1130(a)). Such appeal must be filed no later than 30 days after the date of the acceptance or rejection, and will be considered under the procedures set forth at paragraphs (d) and (f) of this section.

(b) *Appeal of invalidation or suspension.* An interested party may appeal ETA's invalidation or suspension of a filed Attestation due to a discovery by ETA that it made an error in its review of the Attestation, as described in § 655.1132.

(c) *Parties to the appeal.* In the case of an appeal of an acceptance, the facility will be a party to the appeal; in the case of the appeal of a rejection, invalidation, or suspension, the collective bargaining representative (if any) representing nurses at the facility shall be a party to the appeal. Appeals shall be in writing; shall set forth the grounds for the appeal; shall state if *de novo* consideration by BALCA is requested; and shall be mailed by certified mail within 30 calendar days of the date of the action from which the appeal is taken (*i.e.*, the acceptance, rejection, suspension or invalidation of the Attestation).

(d) *Where to file appeals.* Appeals made under this section must be in writing and must be mailed by certified mail to: Director, Office of Workforce Security, Employment Training Administration, U.S. Department of Labor, Room C-4318, 200 Constitution Avenue, NW., Washington, DC 20210.

(e) *Transmittal of the case file to BALCA.* Upon receipt of an appeal under this section, the Certifying Office shall send to BALCA a certified copy of the ETA case file, containing the Attestation and supporting documentation and any other information or data considered by ETA in taking the action being appealed. The administrative law judge chairing BALCA shall assign a panel of one or more administrative law judges who serve on BALCA to review the record for legal sufficiency and to consider and rule on the appeal.

(f) *Consideration on the record; de novo hearings.* BALCA may not remand, dismiss, or stay the case, except as provided in paragraph (h) of this section, but may otherwise consider the appeal on the record or in a *de novo* hearing (on its own motion or on a party's request). Interested parties and *amici curiae* may submit briefs in accordance with a schedule set by BALCA. The ETA official who made the

determination which was appealed will be represented by the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, Department of Labor, or the Associate Solicitor's designee. If BALCA determines to hear the appeal on the record without a *de novo* hearing, BALCA shall render a decision within 30 calendar days after BALCA's receipt of the case file. If BALCA determines to hear the appeal through a *de novo* hearing, the procedures contained in 29 CFR part 18 will apply to such hearings, except that:

(1) The appeal will not be considered to be a complaint to which an answer is required.

(2) BALCA shall ensure that, at the request of the appellant, the hearing is scheduled to take place within a reasonable period after BALCA's receipt of the case file (see also the time period described in paragraph (f)(4) of this section).

(3) Technical rules of evidence, such as the Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B), will not apply to any hearing conducted pursuant to this subpart, but rules or principles designed to assure production of the most credible evidence available, and to subject testimony to test by cross-examination, shall be applied where reasonably necessary by BALCA in conducting the hearing. BALCA may exclude irrelevant, immaterial, or unduly repetitious evidence. The certified copy of the case file transmitted to BALCA by the Certifying Officer must be made part of the evidentiary record of the case and need not be moved into evidence.

(4) BALCA's decision shall be rendered within 120 calendar days after BALCA's receipt of the case file.

(g) *Dismissals and stays.* If BALCA determines that the appeal is solely a question of misrepresentation by the facility or is solely a complaint of the facility's nonperformance of the Attestation, BALCA shall dismiss the case and refer the matter to the Administrator, Wage and Hour Division, for action under subpart M. If BALCA determines that the appeal is partially a question of misrepresentation by the facility, or is partially a complaint of the facility's nonperformance of the Attestation, BALCA shall refer the matter to the Administrator, Wage and Hour Division, for action under subpart M of this part and shall stay BALCA consideration of the case pending final agency action on such referral. During such stay, the 120-day period described

in paragraph (f)(1)(iv) of this section shall be suspended.

(h) *BALCA's decision.* After consideration on the record or a *de novo* hearing, BALCA shall either affirm or reverse ETA's decision, and shall so notify the appellant; and any other parties.

(i) *Decisions on Attestations.* With respect to an appeal of the acceptance, rejection, suspension or invalidation of an Attestation, the decision of BALCA shall be the final decision of the Secretary, and no further review shall be given to the matter by any DOL official.

§ 655.1150 What materials must be available to the public?

(a) *Public examination at ETA.* ETA will make available for public examination at the Office of Workforce Security, Employment Training Administration, U.S. Department of Labor, Room C-4318, 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 INS along with the INS approval notices (if any).

(b) *Public examination at facility.* For the duration of the Attestation's validity and thereafter for so long as the facility employs any H-1C nurse under the Attestation, the facility must maintain a separate file containing a copy of the Attestation, a copy of the prevailing wage determination, a description of the facility pay system or a copy of the facility's pay schedule if either document exists, copies of the notices provided under § 655.1115 and § 655.1116, a description of the "timely and significant steps" as described in § 655.1114, and any other documentation required by this part to be contained in the public access file. The facility must make this file available to any interested parties within 72 hours upon written or oral request. If a party requests a copy of the file, the facility shall provide it and any charge for such copy shall not exceed the cost of reproduction.

(c) *ETA Notice to public.* ETA will periodically publish a notice in the **Federal Register** announcing the names and addresses of facilities which have submitted Attestations; facilities which have Attestations on file; facilities which have submitted Attestations which have been rejected for filing; and facilities which have had Attestations suspended.

Subpart M—What are the Department's enforcement obligations with respect to H-1C Attestations?

§ 655.1200 What enforcement authority does the Department have with respect to a facility's H-1C Attestations?

(a) The Administrator shall perform all the Secretary's investigative and enforcement functions under 8 U.S.C. 1182(m) and subparts L and M of this part.

(b) The Administrator, either because of a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance with the matters to which a facility has attested under section 212(m) of the INA (8 U.S.C. 1182(m)) and subparts L and M of this part.

(c) A facility being investigated must make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. A facility must fully cooperate with any official of the Department of Labor performing an investigation, inspection, or law enforcement function under 8 U.S.C. 1182(m) or subparts L or M of this part. Such cooperation shall include producing documentation upon request. The Administrator may deem the failure to cooperate to be a violation, and take such further actions as the Administrator considers appropriate. (Note: Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 1114.)

(d) No facility may intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person because such person has:

(1) Filed a complaint or appeal under or related to section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart L or M of this part;

(2) Testified or is about to testify in any proceeding under or related to section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart L or M of this part.

(3) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart L or M of this part.

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to the Act or to subparts L or M of this part or any other

DOL regulation promulgated under 8 U.S.C. 1182(m).

(5) In the event of such intimidation or restraint as are described in this paragraph, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate.

(e) A facility subject to subparts L and M of this part must maintain a separate file containing its Attestation and required documentation, and must make that file or copies thereof available to interested parties, as required by § 655.1150. In the event of a facility's failure to maintain the file, to provide access, or to provide copies, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate.

(f) No facility may seek to have an H-1C nurse, or any other nurse similarly employed by the employer, or any other employee waive rights conferred under the Act or under subpart L or M of this part. In the event of such waiver, the Administrator may deem the conduct to be a violation and take such further actions as the Administrator considers appropriate. This prohibition of waivers does not prevent agreements to settle litigation among private parties, and a waiver or modification of rights or obligations in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act or subpart L and M of this part.

(g) The Administrator shall, to the extent possible under existing law, protect the confidentiality of any complainant or other person who provides information to the Department.

§ 655.1205 What is the Administrator's responsibility with respect to complaints and investigations?

(a) The Administrator, through investigation, shall determine whether a facility has failed to perform any attested conditions, misrepresented any material facts in an Attestation (including misrepresentation as to compliance with regulatory standards), or otherwise violated the Act or subpart L or M of this part. The Administrator's authority applies whether an Attestation is expired or unexpired at the time a complaint is filed. (Note: Federal criminal statutes provide for fines and/or imprisonment for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; *see also* 18 U.S.C. 1546.)

(b) Any aggrieved person or organization may file a complaint of a violation of the provisions of section 212(m) of the INA (8 U.S.C. 1182(m)) or subpart L or M of this part. No

particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint. The complaint must set forth sufficient facts for the Administrator to determine what part or parts of the Attestation or regulations have allegedly been violated. Upon the request of the complainant, the Administrator shall, to the extent possible under existing law, maintain confidentiality about the complainant's identity; if the complainant wishes to be a party to the administrative hearing proceedings under this subpart, the complainant shall then waive confidentiality. The complaint may be submitted to any local Wage and Hour Division office; the addresses of such offices are found in local telephone directories. Inquiries concerning the enforcement program and requests for technical assistance regarding compliance may also be submitted to the local Wage and Hour Division office.

(c) The Administrator shall determine whether there is reasonable cause to believe that the complaint warrants investigation and, if so, shall conduct an investigation, within 180 days of the receipt of a complaint. If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary.

(d) When an investigation has been conducted, the Administrator shall, within 180 days of the receipt of a complaint, issue a written determination, stating whether a basis exists to make a finding that the facility failed to meet a condition of its Attestation, made a misrepresentation of a material fact therein, or otherwise violated the Act or subpart L or M. The determination shall specify any sanctions imposed due to violations. The Administrator shall provide a notice of such determination to the interested parties and shall inform them of the opportunity for a hearing pursuant to § 655.1220.

§ 655.1210 What penalties and other remedies may the Administrator impose?

(a) The Administrator may assess a civil money penalty not to exceed \$1,000 per nurse per violation, with the total penalty not to exceed \$10,000 per violation. The Administrator also may impose appropriate remedies, including the payment of back wages, the performance of attested obligations such

as providing training, and reinstatement and/or wages for laid off U.S. nurses.

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

(1) Previous history of violation, or violations, by the facility under the Act and subpart L or M 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 violator in good faith to comply with the Attestation as provided in the Act and subparts L and M of this part;

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

(6) The violator's commitment to future compliance, taking into account the public health, interest, or safety; and

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury or adverse effect upon the workers.

(c) The civil money penalty, back wages, and any other remedy determined by the Administrator to be appropriate, are immediately due for payment or performance upon the assessment by the Administrator, or the decision by an administrative law judge where a hearing is requested, or the decision by the Secretary where review is granted. The facility must 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 must be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violation(s) occurred. The payment of back wages, monetary relief, and/or the performance or any other remedy prescribed by the Administrator will follow procedures established by the Administrator. The facility's failure to pay the civil money penalty, back wages, or other monetary relief, or to perform any other assessed remedy, will result in the rejection by ETA of any future Attestation submitted by the facility until such payment or performance is accomplished.

(d) 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 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.

§ 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 therefor; 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 therefor.

(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 10 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 Attorney General and ETA of the occurrence of a violation by the employer.

§ 655.1220 Who can appeal the Administrator's findings and what is the process?

(a) Any interested party desiring review of a determination issued under § 655.1205(d), including judicial review, must make a request for 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) An interested party may request a hearing in the following circumstances:

(1) Where the Administrator determines that there is no basis for a finding of violation, the complainant or other interested party may request a hearing. In such a proceeding, the party requesting the hearing shall be the prosecuting party and the facility 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) Where the Administrator determines that there is a basis for a finding of violation, the facility or other interested party may request a hearing. In such a proceeding, the Administrator shall be the prosecuting party and the facility shall be the respondent.

(c) No particular form is prescribed for any request for hearing permitted by this part. 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 hearing believes such determination is in error;

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

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

(d) The request for such hearing must be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 10 days after the date of the determination. An interested party which fails to meet this 10-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party under 29 CFR 18.10 (b) through (d) or through participation as an *amicus curiae* under 29 CFR 18.12.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is filed by mail, it should be certified mail. If the request is filed by facsimile transmission, the original of the request, signed by the requestor or authorized representative, must be filed

within 10 days of the date of the Administrator's notice of determination.

(f) Copies of the request for a hearing must be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

§ 655.1225 What are the rules of practice before an ALJ?

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

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) do not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

§ 655.1230 What time limits are imposed in ALJ proceedings?

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

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

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or

Federally-observed holiday, in which case the time period includes the next business day.

§ 655.1235 What are the ALJ proceedings?

(a) Upon receipt of a timely request for a hearing filed in accordance with § 655.1220, the Chief Administrative Law Judge shall appoint an administrative law judge to hear the case.

(b) Within seven (7) days following the assignment of the case, the administrative law judge shall notify all interested parties of the date, time, and place of the hearing. All parties shall be given at least five (5) days notice of such hearing.

(c) The date of the hearing shall be not more than 60 days from the date of the Administrator's determination. Because of the time constraints imposed by the Act, no requests for postponement shall be granted except for compelling reasons and by consent of all the parties to the proceeding.

(d) The administrative law judge may prescribe a schedule by which the parties are permitted to file a pre-hearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party in accordance with § 655.1230. Posthearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party in accordance with § 655.1230.

§ 655.1240 When and how does an ALJ issue a decision?

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

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision. The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

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

§ 655.1245 Who can appeal the ALJ's decision and what is the process?

(a) The Administrator or any interested party desiring review of the decision and order of an administrative law judge, including judicial review, must petition the Department's Administrative Review Board (Board) to review the ALJ's decision and order. To be effective, such petition must be received by the Board within 30 days of the date of the decision and order. Copies of the petition must be served on all parties and on the administrative law judge.

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

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the administrative law judge's decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;
- (5) Be signed by the party filing the petition or by an authorized representative of such party;
- (6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and
- (7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

(c) Whenever the Board determines to review the decision and order of an administrative law judge, a notice of the Board's determination must be served upon the administrative law judge and upon all parties to the proceeding within 30 days after the Board's receipt of the petition for review. If the Board determines that it will review the decision and order, the order shall be inoperative unless and until the Board issues an order affirming the decision and order.

(d) Within 15 days of receipt of the Board's notice, the Office of Administrative Law Judges shall forward the complete hearing record to the Board.

(e) The Board's notice shall specify:

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

(f) All documents submitted to the Board must be filed with the Administrative Review Board, Room S—

4309, U.S. Department of Labor, Washington, D.C. 20210. An original and two copies of all documents must be filed. Documents are not deemed filed with the Board until actually received by the Board. All documents, including documents filed by mail, must be received by the Board either on or before the due date.

(g) Copies of all documents filed with the Board must be served upon all other parties involved in the proceeding. Service upon the Administrator must be in accordance with § 655.1230(b).

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

(i) Upon issuance of the Board's decision, the Board shall transmit the entire record to the Chief Administrative Law Judge for custody in accordance with § 655.1250.

§ 655.1250 Who is the official record keeper for these administrative appeals?

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

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

(a) The Administrator shall notify the Attorney General 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) The Attorney General, 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.

(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 Attorney General for visa petitions filed by that employer under section 212(m) of the INA.

§ 655.1260 Can Equal Access to Justice Act attorney fees be awarded?

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

Signed at Washington, DC, this 11th day of August, 2000.

Raymond Bramucci,

Assistant Secretary for Employment and Training, Employment and Training Administration.

T. Michael Kerr,

Administrator, Wage and Hour Division, Employment Standards Administration.

BILLING CODE 4510-30-P

APPENDIX I

ETA Form 9081

[This appendix will not appear in the Code of Federal Regulations.]

Attestation for H-1C
Nonimmigrant NursesU.S. Department of Labor
Employment and Training AdministrationETA Form 9081
OMB Approval:
Expiration:**ATTESTATIONS: See instructions and regulations (20 CFR Part 655, Subparts L & M)**

Sections III through X on this form are the required attestations.

Place an X in the appropriate boxes below:

III. Eligibility

- (1) ☐ The hospital meets all of the following facility requirements: 1) it is a "subpart (d) hospital," 2) which was located in a health professional shortage area on March 31, 1997, and 3) had at least 190 acute care beds with at least 35% of its acute care inpatient days reimbursed by Medicare and at least 28% of its acute care inpatient days reimbursed by Medicaid as reported on the hospital's Form HCFA-2552-92, Worksheet S-3 for the fiscal year 1994 cost reporting period.

AND Mark the one appropriate circle below:

- (2) ☐ (a) This facility was determined to meet the eligibility requirements on a previous attestation certified as DOL Case Number : ☐ - ☐ ☐ ☐ ☐ ☐ - ☐ ☐ ☐ ☐ ☐ ☐
- OR
- ☐ (b) The facility's Form HCFA-2552, Worksheet S-3, Part I, and Worksheet S, Parts I and II, are attached.

IV. No Adverse Effect

- ☐ The employment of the H-1C nurse(s) will not adversely affect the wages and working conditions of registered nurses similarly employed.

V. Facility Wage

- ☐ The H-1C nurses employed at the facility will be paid the wage rate for registered nurses similarly employed by the facility.

VI. Recruitment and Retention of Registered Nurses**Timely and Significant Steps** (Mark (X) all of the appropriate boxes.)

- ☐ The facility has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses.

The following timely and significant steps are being taken by this facility (mark two of items 1 through 9, unless item 10 is marked, in which case mark one of items (1) through (9); or unless item (11)(B) is marked, in which case, items (1) through (10) need not be marked):

- (1) ☐ Operating a training program for registered nurses at the facility or financing (or providing participation in) a training program for registered nurses elsewhere.
- (2) ☐ Providing career development programs and other methods of facilitating health care workers to become registered nurses.
- (3) ☐ Paying registered nurses wages at a rate higher than currently being paid to registered nurses similarly employed in the geographic area.
- (4) ☐ Providing reasonable opportunities for meaningful salary advancement by registered nurses.
- (5) ☐ Providing monetary incentives to nurses for additional education, and for efforts by the nurses leading to increased recruitment and retention of U.S. nurses.
- (6) ☐ Providing nurses with special perquisites for dependent care or housing assistance of a nature and/or extent that constitute a significant factor in inducing employment and retention of U.S. nurses.
- (7) ☐ Providing nurses with non-mandatory work schedule options of a nature and/or extent that constitute a significant factor in inducing employment and retention of U.S. nurses.
- (8) ☐ Providing training opportunities to U.S. workers not currently in health care occupations to become registered nurses by means of financial assistance (e.g., scholarship, loan or pay-back programs).
- (9) ☐ Other step of comparable timeliness and significance in promoting the development, recruitment and retention of U.S. nurses (attach explanation).
- (10) ☐ Only one timely and significant step has been and is being taken by this facility because a second step is unreasonable (attach explanation) -- Mark one of the above boxes 1 to 9.
- (11) ☐ This facility will reduce or has reduced the number of nonimmigrant nurses it utilizes by at least 10%.
- (A) ☐ This facility will, within the next year, reduce the number of nonimmigrant nurses it utilizes by at least 10% without reducing the quality and quantity of services provided. (Mark in first year and all succeeding years).
- (B) ☐ Pursuant to its prior Attestation, this facility has reduced the number of nonimmigrant nurses it uses by 10% within one year of the date of such prior Attestation, without reducing the quality and quantity of services provided. (Mark in second and subsequent years) (If this item is marked, items (1) through (10) need not be marked).

DOL Case Number for the prior Attestation:

☐ - ☐ ☐ ☐ ☐ ☐ - ☐ ☐ ☐ ☐ ☐ ☐

☐	☐	☐	☐	☐	☐
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Employer's
Control
Number

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Employer's Control Number must
be the same on all three (3)
pages, including the last page

INSTRUCTIONS FOR COMPLETING FORM ETA 9081

ATTESTATION FOR H-1C NONIMMIGRANTS

IMPORTANT: READ INSTRUCTIONS CAREFULLY BEFORE COMPLETING FORM

If you hand write the form, print legibly in ink using a medium to thick pen. Print *only* in CAPITAL LETTERS and avoid contact with the edge of the boxes. If you use a typewriter to complete the form use a font equivalent to 12-14 pt. Center each letter in the box and use *only* CAPITAL LETTERS.

Submit a completed, signed and dated original and duplicate of Form ETA 9081 and a non-refundable check or money order in the amount of \$250 U.S. dollars made out to the U.S. Department of Labor, along with one (1) copy of any required explanatory statements and documents to: Chief, Division of Foreign Labor Certifications, Office of Workforce Security, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, N.W., Room C-4318, Washington, D.C. 20210.

Knowingly and willfully furnishing any false information in the preparation of this form, attachments and any explanatory statements thereto, is a felony punishable by fine or imprisonment, or both (18 U.S.C. 1001). Other penalties apply as well to fraud and misuse of this immigration document (18 U.S.C. 1546) and to perjury with respect to this form (18 U.S.C. 1546 and 1621).

Citations below to "regulations" are citations to the provisions of 20 CFR Part 655, Subparts L and M.

Item I. Applicant's Information

(1) **Name of Applicant:** Enter full legal name of the applicant. Some abbreviation may be required for long names.

(2) **Federal Employer Identification Number (EIN) (9 digits):** Enter the applicant's federal employer identification number assigned by the Internal Revenue Service.

(3) **Applicant's Telephone Number:** Enter the applicant's telephone number with an extension, if available.

(4) **Return FAX Number:** Enter the applicant's fax (facsimile machine) number.

(5) **Contact's Telephone Number (optional):** Enter the area code and telephone number of the person to whom questions regarding the Attestation should be directed.

(6) **Applicant's Address:** The first two lines are for the street address. The last line is for the

city, county, state, and postal code.

(7) **Contact's Name:** Enter the name of the person to whom questions regarding the Attestation should be directed.

(8) **Correspondence Address:** Enter only if different from the facility's address. The first two lines are for the street address. The third line is for the city, state, and postal code. The last two lines are for an e-mail address.

Item II. Location of Facility

(1) **County:** The first two lines are for the name of the county, city, state and postal code in which the facility is located.

(2) **Census Tract:** Enter the name of the census tract in which the facility is located, if known.

ATTESTATIONS

In order to be eligible to hire nonimmigrant alien (H-1C) nurses, a hospital must attest to the conditions listed in items III through X by marking (X) in the box for each item and by signing the Attestation form. The Attestation cannot be accepted for filing if the explanations and information required for items III (1), VI (9), and VI (10) are not attached to the Form 9081. See § 655.1110(c)(1) of the regulations for guidance on the supporting information and documentation that must be attached to the Form 9081. See §§ 655.1111 through .1118 for complete information on the requirements for each attested element and the documentation required to be maintained by the facility.

Item III. Eligibility:

(1) To be an eligible "facility," the hospital must mark the box for item III (1), by which the hospital attests that it meets all of the following requirements:

- 1) it is a "subpart (d) hospital" as defined in § 1886(d)(1)(B) of the Social Security Act (42 U.S.C. ww(d)(1)(B));
- 2) it was located in a health professional shortage area (HPSA) on March 31, 1997 (see 20 FR 29395 (May 30, 1997) for a list of HPSAs); and
- 3) it had at least 190 acute care beds with at least 35% of its acute care inpatient days reimbursed by Medicare and 28% of its acute care inpatient days reimbursed by Medicaid, as determined by its settled cost report for the fiscal year 1994 cost reporting period (see Form HCFA-2552, Worksheet S-3, Part I, and Worksheet S, Parts I and II).

(2) In addition, the hospital must mark either box (a) or box (b):

(a) If the facility has a previous Attestation certified by DOL, it must attest that it continues to be an eligible facility (by marking the first box for item (a)) and report the 8 digit Case Number in the blocks provided.

(b) A copy of the hospital's Form HCFA-2552-92, Worksheet S-3, Part I; and Worksheet S, Parts I and II, for the fiscal year 1994 cost reporting period must be

submitted with this form.

Item IV. No Adverse Effect:

The hospital must attest that the employment of H-1C nurses will not adversely affect the wages and working conditions of registered nurses similarly employed. To make this attestation, the hospital must mark the box for item IV, by which the hospital attests that unless wages for registered nurses are covered by a collective bargaining agreement, it has obtained a prevailing wage determination from the State Employment Security Agency (SESA) and is paying both U.S. and H-1C nurses at least the prevailing wage for the geographic area. The hospital is also attesting that it will provide the same working conditions to U.S. and H-1C nurses.

Item V. Facility Wage:

The hospital must attest that the H-1C nurses employed at the hospital will be paid the wage rate for registered nurses similarly employed by the hospital. To make this attestation, the hospital must mark the box for item V, by which the hospital attests that H-1C nurses will not be paid less than similarly employed U.S. nurses, even if the wages paid U.S. nurses are higher than the prevailing wage level.

Item VI. Recruitment and Retention of Registered Nurses:

Timely and Significant Steps: The hospital must attest that it has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform registered nursing services, in order to remove as quickly as reasonably possible the dependence of the hospital on nonimmigrant registered nurses. To make this attestation, the hospital must mark the appropriate blocks for item VI, as follows --

Items (1) through (8): Specified Steps. These items identify the timely and significant steps which are described in detail in the regulations at 20 CFR 655.1114. The hospital must mark *two* of these items, unless item (9), (10), or (11)(B) is marked. The hospital is required to comply with all items marked.

Item (9): Alternative Step. This item authorizes the hospital to identify a timely and significant step *other than* those specified in items (1) through (8). If the hospital marks this item, it must attach an explanation of the alternative step. *See* the regulation at 20 CFR 655.1114(b)(2)(v).

Item (10): Second Step is Unreasonable. This item allows the hospital to assert that it is taking only one timely and significant step (from items (1) through (9)) because taking a second step is unreasonable. If the hospital marks this item, it must attach an explanation. *See* the regulation at 20 CFR 655.1114(c) (*note* additional step (1) through (8) required).

Item (11): Performance-based Alternative Step. This item allows the hospital to satisfy its obligation by declaring its intention to reduce its use of nonimmigrants by at least 10% within the coming year, and then achieving that goal. For the first year and subsequent years, the hospital must mark the box for item (11)(A), which declares the hospital's intention to make the reduction in the use of nonimmigrant nurses in the following year. (*Note:* For the first year, this item

(11)(A) is *in addition to other steps* in items (1) through (10), and for subsequent years this item (11)(A) is *in addition to* item (11)(B)). For the second year (and subsequent years, if appropriate), the hospital must mark the box for item (11)(B), which declares that the hospital achieved the 10% reduction in the immediately preceding year. (*Note:* This item (11)(B) satisfies the timely and significant steps requirement, and no other items from (1) through (10) need be marked.)

Item VII. No Strike/Lockout or Layoff:

The hospital must attest that there is not a strike or lockout in the course of a labor dispute and that it did not lay off and will not lay off a RN employed by the facility within the period beginning 90 days before and ending 90 days after the filing of any H-1C petition. In addition, the hospital must attest that the employment of H-1C nurse(s) is not intended or designed to influence an election for a bargaining representative for RNs of the facility and that it will not interfere with the right of H-1C nurses to organize a union. To make this attestation, the hospital must mark the box for item VII.

Item VIII. Notice:

A hospital must attest that, at the time of filing of the petition for H-1C nurses, notice of filing of the Attestation and the petition for H-1C nurses has been provided by the hospital to the bargaining representative of registered nurses at the facility or, where there is no such bargaining representative, notice of the filing of the Attestation and the petition for H-1C nurses has been provided to registered nurses at the facility through hard copy posting in conspicuous locations or through electronic communication. The hospital must also attest that individual copies of the Attestation, either hard copy or electronically, will be provided to each registered nurse employed at the facility within 30 days of its filing. To make this attestation, the hospital must check one of the boxes in item (1) *and* item (2).

Item IX. Limitation on Number of H-1C Nurses Employed:

The hospital must attest that it will not, at any time, employ a number of H-1C nurses that exceeds 33% of the total number of registered nurses employed by the hospital. To make this attestation, the hospital must mark the box for item IX.

Item X. Limitation on Where H-1C Nurses May be Employed:

The hospital must attest that it will not authorize any H-1C nurse to perform services at any worksite not controlled by the hospital or transfer any H-1C nurse from one worksite to another, even if all of the worksites are controlled by the hospital. To make this attestation, the hospital must mark item X.

Item XI. Declaration of Facility: One copy of this form must bear the original signature of the official designated by the facility to act on its behalf (such as the hiring official). By signing this form the official is attesting on behalf of the facility to items III through X and all of the elements included in those items on the Form 9081 and to the accuracy of the information provided on the form and in the explanatory statements and supporting documents. Furthermore, by signing this form the official is declaring that the facility will comply with the Department of Labor regulations

(20 CFR Part 655, Subparts L and M) governing this program and make available to officials of the Department of Labor, upon request, this Attestation, supporting documentation and other records, files and documents during any investigation under this Attestation or the Immigration and Nationality Act. False statements are subject to Federal criminal penalties, as stated above.

If the Attestation form is accepted for filing, the Department shall document such acceptance on the original and copy of Form ETA 9081 submitted. The original of the Attestation form indicating the Department's acceptance will be returned to the facility. The facility may then make a copy of the accepted Attestation and file visa petitions with INS for H-1C nurses in accordance with INS regulations. The facility shall include a copy of the accepted Form ETA 9081 with each visa petition filed with the INS.

A copy of this Attestation, along with any explanatory statements and supporting documentation, and a copy of each of the facility's H-1C petitions (if any) to INS and INS approval notices (if any), will be available for public inspection at the ETA National Office in Room C-4318, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The facility must submit a copy of an H-1C visa petition to the ETA national office at the same time that it is submitted to the INS. The address is:

Chief, Division of Foreign Labor Certification
Office of Workforce Security
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, N.W., Room C-4318
Washington, D.C. 20210