

DEPARTMENT OF LABOR

**Employment and Training Administration
Employment Standards Administration**

20 CFR Part 655

RIN 1205–AB43

**Labor Condition Application Requirements for Employers Seeking to Use
Nonimmigrants on E-3 Visas in Specialty Occupations; Filing Procedures**

AGENCIES: Employment and Training Administration and Employment Standards Administration, Wage and Hour Division, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (the Department or DOL) is publishing this Final Rule to amend its regulations regarding the temporary employment of nonimmigrant foreign professionals in order to implement procedural requirements applicable to the E-3 visa category. This visa classification was established by Title V of the REAL ID Act of 2005 (Division B) in the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, and applies to certain Australian nationals coming to the United States solely to perform services in specialty occupations. This Final Rule clarifies the procedures that employers must follow in obtaining a DOL-certified labor condition application before seeking an E-3 visa for a foreign worker.

DATES: *Effective Date:* This final rule is effective on the date of publication and applies to labor condition applications filed on or after that date.

FOR FURTHER INFORMATION: For information regarding the E-3 labor condition application process in 20 CFR Part 655, subpart H, contact the Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210; Telephone: (202) 693-3700 (this is not a toll-free number).

For information regarding the E-3 enforcement process in 20 CFR Part 655, subpart I, contact Diane Koplewski, Immigration Team Leader, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration (ESA), U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3516, Washington, DC 20210; Telephone: (202) 693-0071 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

On January 12, 2007, the Department published in the Federal Register a Notice of Proposed Rulemaking (NPRM) to amend its regulations to include procedures for the newly created E-3 nonimmigrant visa category. 72 FR 1650. Title V of the REAL ID Act of 2005 (Division B) in the Emergency Supplemental Appropriations Act for

Defense, the Global War on Terror, and Tsunami Relief, 2005 (Pub. L. 109-13, § 501, 119 Stat. 231, 278 (2005)) amended section 101(a)(15)(E) of the Immigration and Nationality Act (Act or INA) (8 U.S.C. 1184 et seq.) to add the E-3 nonimmigrant classification for Australian nationals who enter solely to perform services in specialty occupations in the United States. The definition of a specialty occupation for the E-3 visa program is the same as it is for the H-1B visa program. 8 U.S.C. 1184(i)(1); 20 CFR 655.715.

The E-3 visa classification applies only to nationals of the Commonwealth of Australia and is limited to 10,500 initial visas annually. 8 U.S.C. 1184(g)(11)(A) and (B). The sponsoring employer must present a Labor Condition Application (LCA) attesting to the wages and working conditions certified by the Department of Labor to the Department of State (DOS) Consular Officer at the time of the E-3 visa application or the Department of Homeland Security (DHS) at the time of a request for change of status. 8 U.S.C. 1101(a)(15)(E)(iii), 1182(t)(1); see also 22 CFR 41.51 and 8 CFR 214.2(e)(21).

As required under the H-1B and H-1B1 programs, the E-3 employer must attest that:

- It is offering to and will pay the nonimmigrant, during the period of authorized employment, wages that are at least the actual wage level paid to other employees with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of intended employment, whichever is greater (based on the best information available at the time of filing the attestation);

- It will provide working conditions for the nonimmigrant that will not adversely affect working conditions for similarly employed workers;
- There is no strike or lockout in the course of a labor dispute in the occupational classification at the worksite; and
- It has provided notice of its filing of a labor attestation to its employees' bargaining representative for the occupational classification affected or, if there is no bargaining representative, has provided notice to its employees in the affected occupational classification by physical posting in a conspicuous location at the worksite or other means such as electronic notification.

As required by the INA in the H-1B and H-1B1 programs, the Department may review E-3 labor attestations only for completeness and obvious inaccuracies. Unless an LCA is incomplete or obviously inaccurate, the Secretary of Labor must certify the E-3 LCA within seven days of filing. INA section 212(t)(2)(C); 8 U.S.C. 1182(t)(2)(C). The maximum period for which an E-3 labor attestation will be certified is two years from the employment start date as indicated on the LCA. An employer must file a new E-3 labor condition application to renew an attestation beyond the initial two-year period.

As with labor condition applications for H-1B and H-1B1 nonimmigrants, the Secretary of Labor must compile a list by employer and occupational classification of all labor attestations filed regarding E-3 nonimmigrants. The list identifies the wage rate, number of foreign professional workers sought, period of intended employment, and date of need for each attestation. INA sec. 212(t)(2)(B); 8 U.S.C. 1182(t)(2)(B). The Department must make the list available for public inspection in Washington, DC.

Enforcement provisions for E-3 labor condition applications are based on the requirements of the H-1B1 visa program. See INA section 212(t)(3); 8 U.S.C. 1182(t)(3). The Department will receive, investigate, and make determinations on complaints filed by any aggrieved person or organization regarding the failure of an employer to meet the terms of its attestations. DOL is also authorized to conduct random investigations for a period of up to five years of any employer found by DOL to have committed a willful failure to meet a required attestation or to have made a willful misrepresentation of a material fact in an attestation. 8 U.S.C. 1182(t)(3)(E). Penalties for failure to meet conditions of the E-3 labor attestations are the same as those under the H-1B1 program. Enforcement of E-3 labor attestations is handled by the Wage and Hour Division, Employment Standards Administration (ESA), of DOL.

III. Comments Received on the NPRM

The Department received one comment on the NPRM. Virtually all of the issues raised in the single email comment received pertained to issues outside the scope of the NPRM or that would require statutory amendments to implement. As a general matter, the Department's authority to regulate is limited to the responsibilities mandated by the statutory provisions. This Final Rule in particular is limited to extending the H-1B visa procedures to E-3 visas for employers seeking temporary entry for nonimmigrant foreign workers in specialty occupations from Australia.

The commenter expressed concern that foreign workers are being allowed to take American jobs. In response, the Department notes that the statute does not require employers who seek to hire foreign workers on E-3 visas to demonstrate that there are no

available U.S. workers or to test the labor market for U.S. workers as required under the permanent labor certification program and, in limited circumstances, under the H-1B program. Compare INA sec. 212(t) with INA sec. 212(a)(5)(A) and sec. 212(n); 8 U.S.C. 1182(a)(5)(A), (n), and (t).

IV. Technical Changes to the Rule

In addition to the amendments proposed in the NPRM, this Final Rule makes some technical clarifying amendments to three sections of the rule. The date of publication is inserted in the second sentence of § 655.700(c)(3). The Final Rule also amends the first sentence of the definition of “specialty occupation” in § 655.715 and the first sentence in § 655.750(b)(1)(i) to include the E-3 nonimmigrant classification.

In addition, the Final Rule makes technical amendments to further clarify those regulations in 20 CFR part 655 that are common to the E-3, H-1B1, and H-1B programs. Congress made specific provisions for the E-3 visa, as it did for the H-1B1 visa (workers from Singapore and Chile), which differentiate these two visa categories from each other and from the H-1B visa. However, the differences are relatively minor and do not warrant separate subparts for each visa category. Executive Order 12866 mandates that Federal agencies promulgating regulations make them effective, consistent, sensible, and understandable. In reviewing our regulations for the H-1B and the H-1B1, to which the E-3 is being added, we determined that minor changes were warranted to fully comply with the mandate of Executive Order 12866. For the sake of clarity, consistency, and understandability this rule makes technical clarifying changes to 20 CFR part 655 to help stakeholders and others understand which provisions apply to one or both of the H-1B1

and E-3 LCA processes, and which apply only to the H-1B LCA process. Accordingly, the proposed rule is adopted as a Final Rule with the changes stated above.

IV. Administrative Information

Executive Order 12866 – Regulatory Planning and Review: We have determined that this rule is not an “economically significant regulatory action” within the meaning of Executive Order 12866. The procedures for filing a labor attestation under the new E-3 visa category on behalf of nonimmigrant professionals from Australia will not have an economic impact of \$100 million or more. Employers seeking to employ E-3 nonimmigrant professionals will continue to use the same procedures and forms presently required for the H-1B and H-1B1 nonimmigrant programs. E-3 visas for Australians are subject to annual numerical limits. Although this Final Rule is not economically significant as defined by Executive Order 12866, it is a significant rule and has, therefore, been reviewed by the Office of Management and Budget (OMB). This Final Rule is considered otherwise significant because it implements a new program and must be closely coordinated with other Federal agencies that are also responsible for implementing the E-3 program, such as the Departments of State and of Homeland Security in order to avoid any serious inconsistency or otherwise interfere with an action taken or planned by another agency.

Regulatory Flexibility Analysis: The Regulatory Flexibility Act (5 U.S.C. 601-612) requires agencies to prepare and make available for public comment an initial regulatory

flexibility analysis, describing the anticipated impact of the proposed rule on small entities. This initial analysis was published as part of the NPRM. The initial regulatory flexibility analysis concluded that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

The Regulatory Flexibility Act also requires agencies to prepare a final regulatory analysis, assessing comments received on the initial analysis, describing any significant alternatives affecting small entities that were considered in arriving at the Final Rule, and the anticipated impact of the rule on small entities.

The Department received no comments on its initial analysis.

We have notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification under the Regulatory Flexibility Act (RFA) at 5 U.S.C. 605(b), that this Final Rule would not have a significant economic impact on a substantial number of small entities. 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.

This rule implements statutory provisions enacted by Congress, which narrowly extend the scope of DOL's existing H-1B and H-1B1 programs to include similar labor attestation filing requirements for the temporary entry of nonimmigrant Australian professionals under the new E-3 visa classification. Employers seeking to hire these E-3 nonimmigrant professionals use the same procedures and forms presently required for H-1B and H-1B1 nonimmigrant professionals.

Based on E-3 filing data for fiscal year 2006 (FY 2006), the Department estimates that employers file approximately 2600 labor condition applications annually with the Department under the E-3 program. We do not inquire about the size of employers filing labor condition applications; however, the number of small entities that will file labor condition applications in any given year will be less than the expected total of 2600 applications.

In the absence of collected data, the Department determined a size standard analysis based on 13 CFR part 121 that describes the Small Business Administration (SBA) size standards. To group employers by size, the Department relied on information submitted by each employer on the comparable permanent labor certification application, which provides data on the total number of employees in the area of intended employment for each application. Because the Department does not collect information with respect to the annual receipts of employers, it used standard reported numbers, where available, from the SBA's standards found at 13 CFR 121.201 as the size standard for small businesses in each of those industries in which it could be extrapolated.

In terms of the size standards, although some employers will file multiple labor condition applications for E-3 beneficiaries with the Department in each year, the Department's analysis treated each application as a separate economic impact on each employer and, consequently, the economic impact of this Final Rule may be overstated. Moreover, the Department does not anticipate a significant expansion in filings in this program because the E-3 visa category is subject to an annual numerical limit of 10,500. The Department further relied on the FY 2006 data of the major industries that applied

for E-3 temporary visas with the Department to form its analysis, as it does not track the size of any one employer applicant.

To estimate the cost of the Final Rule on small businesses, the Department calculated each employer would likely take one hour to prepare the documentation required for complying with the attestations contained on each application. The cost to prepare the public access file is based on the median hourly wage rate for a Human Resources Manager (\$40.47), as published by the U.S. Department of Labor's Occupational Information Network, O*Net (further discussions of the Human Resource Manager positions may be found at <http://online.onetcenter.org/link/summary/11-3049.99>), and increased by a factor of 1.42 to account for employee benefits and other compensation.

The Department determined that the following industries predominate in the E-3 program: (1) Professional, Scientific and Technological Industry (labor condition applications filed for Computer Programmers, Technicians, Information and Support Specialists, Software Engineers, other Engineers, and Systems and Program Analysts); (2) Educational industry (labor condition applications filed for Teachers, Professors, and Tutors); (3) Finance and Insurance industry (labor condition applications filed for Accountants, Business Analysts, Financial Analysts and Investor Analysts); and (4) Healthcare and Social Assistance industry (labor condition applications filed for Medical Residents, Chiropractors, Physical Therapists, Acupuncturists, Dentists, Physicians, Social Workers, etc.). The Department has reviewed the data from each of these industries as described below to determine that there is no significant impact on small businesses.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 602,578 employer establishments were operating year-round in the Professional, Scientific, and Technical Services industries, and that 96.7 percent of those employed less than 50 employees. In FY 2006, 1040 labor condition applications were filed with the Department for E-3 beneficiaries by employers in this category. We estimate that the annual number of employer labor condition applications in this industry that may be impacted by this Final Rule is 1006 at a cost of approximately \$57,815.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 38,293 employer establishments were operating year-round in the Educational Services Industry, and 98.9 percent of those employed less than 100 employees. In FY 2006, 43 labor condition applications were filed with the Department for E-3 beneficiaries in the Educational services sector. We estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 42 at an annual cost of \$2,414.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 198,232 employer establishments were operating year-round in the Finance and Insurance industries, and that 32.5 percent of those employed less than 100 employees. In FY 2006, 282 labor condition applications were filed with the Department by employers in this category. We estimate that the annual number of employer applications in this industry that may be impacted by this Final Rule is 92 at an annual cost of approximately \$5,287.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 619,517 employer establishments were operating year-round in the Healthcare and Social Assistance Industry, and 93 percent of those employed less than 50 employees. In FY

2006, approximately 135 E-3 LCAs were filed with the Department. We estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 126 at a cost of \$7,241. Therefore, the total cost burden across all industries is \$72,757.

These costs are minimal in the nature of both the small business entities that may be affected and the program. Even assuming that all entities who file E-3 labor condition applications are considered to be small businesses, the net economic effect is minimal. DOL accordingly does not believe this final rule will impact a substantial number of small entities. Moreover, the Department of Labor does not believe this final rule will have a significant economic impact on small businesses. The Department does not require employers to submit a filing fee for the E-3 program, which is consistent with past practice. Therefore, under this Final Rule, an employer would submit an E-3 visa application to the Department at no filing cost. An employer will spend the same amount of time preparing and submitting the Form ETA 9035 for the E-3 as it would for the H-1B program for which such employees would otherwise qualify, and this Final Rule establishes no additional economic burden on small entities other than the recordkeeping burden discussed above.

Unfunded Mandates Reform Act of 1995: Title II of the Unfunded Mandates Reform Act of 1996 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. This Final Rule has no “Federal mandate,” which is defined in 2 U.S.C. 658(6) to include either a “Federal intergovernmental mandate” or a “Federal private sector mandate.” A Federal

mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an E-3 worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

Small Business Regulatory Enforcement Fairness Act of 1996: The Department was not required to produce a Regulatory Flexibility analysis, therefore, it is also not required to produce any Compliance Guides for Small Entities as mandated by the Small Business Regulatory Enforcement Fairness Act (SBREFA). The Department has similarly concluded that this rule is not a "major rule" requiring review by the Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801) because it will not likely result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Executive Order 13132 -- Federalism: This Final Rule will not have a substantial direct effect on the States, on the relationship between the Federal government and the States, nor on the distribution of power and responsibilities among the various levels of government as described by Executive Order 13132. Therefore, the Department has

determined that this Final Rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

Assessment of Federal Regulations and Policies on Families: This Final Rule does not affect family well-being.

Paperwork Reduction Act: Forms and information collection requirements related to the Department's E-3, H-1B, and H-1B1 programs under 20 CFR part 655, subpart H, are approved currently under OMB control number 1205-0310 (expiration date November 30, 2008). This Final Rule does not include a substantive or material modification of that collection of information. Existing H-1B/H-1B1 paperwork forms and filing procedures will be used by potential employers of an additional category of foreign temporary workers -- nationals from Australia. Because E-3 visas will be subject to annual numerical limits, the Department does not anticipate a substantial increase in filings under 20 CFR Part 655, subpart H.

Executive Order 12630: The Department certifies that this Final Rule does not have property taking implications, i.e., eminent domain.

Catalog of Federal Domestic Assistance Number: This program is listed in the Catalog of Federal Domestic Assistance at Number 17.273, "Temporary Labor Certification for Foreign Workers."

List of Subjects in 20 CFR part 655

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

Accordingly, 20 CFR part 655, Code of Federal Regulations, is amended as follows:

PART 655--TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The seventh paragraph of the authority citation for part 655 is revised to read as follows:

* * * * *

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

* * * * *

2. Revise § 655.0(d) to read as follows:

§ 655.0 Scope and purpose of part.

* * * * *

(d) Subparts H and I of this part. Subpart H of this part sets forth the process by which employers can file labor condition applications (LCAs) with, and the requirements for obtaining approval from, the Department of Labor to temporarily employ the following three categories of nonimmigrants in the United States: (1) H-1B visas for temporary employment in specialty occupations or as fashion models of distinguished

merit and ability; (2) H-1B1 visas for temporary employment in specialty occupations of nonimmigrant professionals from countries with which the United States has entered into certain agreements identified in section 214(g)(8)(A) of the INA; and (3) E-3 visas for nationals of the Commonwealth of Australia for temporary employment in specialty occupations. Subpart I of this part establishes the enforcement provisions that apply to the H-1B, H-1B1, and E-3 visa programs.

* * * * *

3. Revise the heading of subpart H to read as follows:

Subpart H – Labor Condition Applications And Requirements For Employers Seeking To Employ Nonimmigrants On H-1b Visas In Specialty Occupations And As Fashion Models, And Requirements For Employers Seeking To Employ Nonimmigrants On H-1b1 And E-3 Visas In Specialty Occupations

4. Amend § 655.700 as follows:

A. Revise the section heading and introductory text to read as set forth below;

B. Revise paragraph (c)(3);

C. Add new paragraph (c)(4) to read as set forth below;

D. Revise the heading to paragraph (d) to read as set forth below;

E. Revise paragraphs (d)(1), (d)(2), and (d)(3) to read as set forth below;

F. Revise the header and introductory paragraph of (d)(4), (d)(4)(i) and (d)(4)(ii)

to read as set forth below.

The additions and revisions read as follows:

§ 655.700 What statutory provisions govern the employment of H-1B, H-1B1, and E-3 nonimmigrants and how do employers apply for H-1B, H-1B1, and E-3 visas?

Under the E-3 visa program, the Immigration and Nationality Act (INA), as amended, permits certain nonimmigrant treaty aliens to be admitted to the United States solely to perform services in a specialty occupation (INA section 101(a)(15)(E)(iii)).

Under the H-1B1 visa program, the INA permits nonimmigrant professionals in specialty occupations from countries with which the United States has entered into certain agreements that are identified in section 214(g)(8)(A) of the INA to temporarily enter the United States for employment in a specialty occupation. Employers seeking to employ nonimmigrant workers in specialty occupations under H-1B, H-1B1, or E-3 visas must file a labor condition application with the Department of Labor as described in § 655.730(c) and (d). Certain procedures described in this subpart H for obtaining a visa and entering the U.S. after the Department of Labor attestation process, including procedures in § 655.705, apply only to H-1B nonimmigrants. The procedures for receiving an E-3 or H-1B1 visa and entering the U.S. on an E-3 or H-1B1 visa after the attestation process is certified by the Department of Labor are identified in the regulations and procedures of the Department of State and the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security. Consult the Department of State (<http://www.state.gov/>) and USCIS (<http://www.uscis.gov/>) websites and regulations for specific instructions regarding the E-3 and H-1B1 visas.

* * * * *

(c) * * *

(3) E-3 visas: Except as provided in paragraph (d) of this section, this subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the E-3 visa classification in specialty occupations under INA section 101(a)(15)(E)(iii) (8 U.S.C. 1101(a)(15)(E)(iii)). This paragraph (c)(3) applies to labor condition applications filed on or after (insert date of publication in the Federal Register). E-3 labor condition applications filed prior to that date but on or after May 11, 2005 (i.e., the effective date of the statute), will be processed according to the E-3 statutory terms and the E-3 processing procedures published on July 19, 2005 in the Federal Register at 74 FR 41434.

(4) H-1B1 visas: Except as provided in paragraph (d) of this section, subparts H and I of this part apply to all employers seeking to employ foreign workers under the H-1B1 visa classification in specialty occupations described in INA section 101(a)(15)(H)(i)(b1) (8 U.S.C. 1101(a)(15)(H)(i)(b1)), under the U.S. - Chile and U.S. - Singapore Free Trade Agreements as long as the Agreements are in effect. (INA section 214(g)(8)(A) (8 U.S.C. 1184(g)(8)(A))). This paragraph (c)(4) applies to H-1B1 labor condition applications filed on or after November 23, 2004. Further, H-1B1 labor condition applications filed prior to that date but on or after January 1, 2004, the effective date of the H-1B1 program, will be handled according to the H-1B1 statutory terms and the H-1B1 processing procedures as described in paragraph (d)(3) of this section.

(d) Nonimmigrants on E-3 or H-1B1 visas. (1) Exclusions. The following sections in this subpart and in subpart I of this part do not apply to E-3 and H-1B1 nonimmigrants, but apply only to H-1B nonimmigrants: §§ 655.700(a), (b), (c)(1) and (2); 655.710(b); 655.730(d)(5) and (e); 655.735; 655.736; 655.737; 655.738; 655.739;

655.760(a)(7), (8), (9), and (10); and 655.805(a)(7), (8), and (9). Further, the following references in subparts H or I of this part, whether in the excluded sections listed above or elsewhere, do not apply to E-3 and H-1B1 nonimmigrants, but apply only to H-1B nonimmigrants: references to fashion models of distinguished merit and ability (H-1B visas, but not H-1B1 and E-3 visas, are available to such fashion models); references to a petition process before USCIS (the petition process applies only to H-1B, but not to initial H-1B1 and E-3 visas unless it is a petition to accord a change of status); references to additional attestation obligations of H-1B-dependent employers and employers found to have willfully violated the H-1B program requirements (these provisions do not apply to the H-1B1 and E-3 programs); and references in § 655.750(a) or elsewhere in this part to the provision in INA section 214(n) (formerly INA section 214(m)) (8 U.S.C. 1184(n)) regarding increased portability of H-1B status (by the statutory terms, the portability provision is inapplicable to H-1B1 and E-3 nonimmigrants).

(2) Terminology. For purposes of subparts H and I of this part, except in those sections identified in paragraph (d)(1) of this section as inapplicable to E-3 and H-1B1 nonimmigrants and as otherwise excluded:

(i) The term “H-1B” includes “E-3” and “H-1B1” (INA section 101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1)) (8 U.S.C. 1101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1)); and

(ii) The term “labor condition application” or “LCA” includes a labor attestation made under section 212(t)(1) of the INA for an E-3 or H-1B1 nonimmigrant professional classified under INA section 101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1) (8 U.S.C. 1101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1)).

(3) Filing procedures for E-3 and H-1B1 labor attestations. Employers seeking to employ an E-3 or H-1B1 nonimmigrant must submit a completed ETA Form 9035 or ETA Form 9035E (electronic) to DOL in the manner prescribed in §§ 655.720 and 655.730. Employers must indicate on the form whether the labor condition application is for an “E-3 Australia,” “H-1B1 Chile,” or “H-1B1 Singapore” nonimmigrant. Any changes in the procedures and instructions for submitting labor condition applications will be provided in a notice published in the Federal Register and posted on the ETA website at <http://www.foreignlaborcert.doleta.gov/>.

(4) Employer’s responsibilities regarding E-3 and H-1B1 labor attestation. Each employer seeking an E-3 or H-1B1 nonimmigrant in a specialty occupation has several responsibilities, as described more fully in subparts H and I of this part, including the following:

(i) By submitting a signed and completed LCA, the employer makes certain representations and agrees to several attestations regarding the employer’s responsibilities, including the wages, working conditions, and benefits to be provided to the E-3 or H-1B1 nonimmigrant. These attestations are specifically identified and incorporated in the LCA, and are fully described on Form ETA 9035CP (cover pages).

(ii) The employer reaffirms its acceptance of all of the attestation obligations by transmitting the certified labor attestation to the nonimmigrant, the Department of State, and/or the USCIS according to the procedures of those agencies.

* * * * *

5. Amend § 655.705 as follows:

A. Remove the first three sentences of paragraph (b) and add two new sentences to read as set forth below;

B. Revise the first three sentences of paragraph (b) to read as set forth below;

C. Add two new sentences at the end of paragraph (b) to read as set forth below;
and

D. Amend the introductory language of paragraph (c) by removing the phrase “employer’s responsibilities under the H-1B1 program are found at § 655.700(d)(4)” and adding in its place the phrase “employer’s responsibilities under the H-1B1 and E-3 programs are found at § 655.700(d)(4).”

The additions and revisions read as follows:

§ 655.705 What Federal agencies are involved in the H-1B, H-1B1, and E-3 programs, and what are the responsibilities of those agencies and of employers?

* * * * *

(b) * * * The Department of State, through U.S. Embassies and Consulates, is responsible for issuing H-1B, H-1B1, and E-3 visas. For H-1B visas, the following agencies are involved: DHS accepts the employer’s petition (DHS Form I-129) with the DOL-certified LCA attached. * * * DOL and DOS are involved in the process relating to the initial issuance of H-1B1 and E-3 visas. DHS is involved in change of status and extension of stays for the H-1B1 and E-3 category.

* * * * *

6. Amend § 655.715 as follows:

- A. Revise the definition of Employer to read as set forth below;
- B. Revise the introductory text of the definition of Place of Employment to read as set forth below;
- C. Revise the first sentence of paragraph (2) under Required Wage Rate to read as set forth below; and
- D. Revise the first sentence in paragraph (1) of Specialty Occupation, to read as set forth below:

The additions and revisions read as follows:

§ 655.715 Definitions.

* * * * *

Employer means a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H-1B, H-1B1, or E-3 nonimmigrants and/or U.S. worker(s). In the case of an H-1B nonimmigrant (not including E-3 and H-1B1 nonimmigrants), the person, firm, contractor, or other association or organization in the United States that files a petition with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant. In the case of an E-3 and H-1B1 nonimmigrant, the person, firm, contractor, or other association or organization in the United States that files an LCA with the Department of Labor on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant.

* * * * *

Place of employment means the worksite or physical location where the work actually is performed by the H-1B, H-1B1, or E-3 nonimmigrant.

* * * * *

Required wage rate * * * * *

(2) The prevailing wage rate (determined as of the time of filing the LCA application) for the occupation in which the H-1B, H-1B1, or E-3 nonimmigrant is to be employed in the geographic area of intended employment. * * *

* * * * *

Specialty Occupation

(1) For purposes of the E-3 and H-1B programs (but not the H-1B1 program), specialty occupation means an occupation that requires theoretical and practical application of a body of specialized knowledge, and attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the United States. * * *

* * * * *

7. Amend § 655.720(a) by revising the first sentence to read as follows:

§ 655.720 Where are labor condition applications (LCAs) to be filed and processed?

(a) Employers must file all LCAs regarding H-1B, H-1B1, and E-3 nonimmigrants through the electronic submission procedure identified in paragraph (b) of this section except as provided in the next sentence. * * *

* * * * *

8. Amend § 655.730 as follows:

A. Revise the introductory paragraph before paragraph (a) to read as set forth below;

B. Revise the parenthetical phrase in paragraph (c)(4)(vii) to read as set forth below;

C. Revise the last sentence in paragraph (c)(5) to read as set forth below; and

D. Revise the first parenthetical phrase in paragraph (d)(5) to read as set forth below.

The additions and revisions read as follows:

§ 655.730 What is the process for filing a labor condition application?

This section applies to the filing of labor condition applications for H-1B, H-1B1, and E-3 nonimmigrants. The term H-1B is meant to apply to all three categories unless exceptions are specifically noted.

* * * * *

(c) * * *

(4) * * *

(vii) * * *(and not applications regarding H-1B1 and E-3 nonimmigrants) * * *

(5) * * * Separate LCAs must be filed for H-1B, H-1B1, and E-3 nonimmigrants.

(d) * * *

(5) * * * (and not applications regarding H-1B1 or E-3 nonimmigrants) * * *

9. Amend § 655.731 by adding a sentence at the end of the introductory paragraph to read as follows:

§ 655.731 What is the first LCA requirement, regarding wages?

* * * For the purposes of this section, “H-1B” includes “E-3 and H-1B1” as well.

* * * * *

10. Amend § 655.732 by adding a sentence at the end of the introductory paragraph to read as follows:

§ 655.732 What is the second LCA requirement, regarding working conditions?

* * * For the purposes of this section, “H-1B” includes “E-3 and H-1B1” as well.

* * * * *

11. Amend § 655.733 by adding a sentence at the end of the introductory paragraph to read as follows:

§ 655.733 What is the third LCA requirement, regarding strikes and lockouts?

* * * For the purposes of this section, “H-1B” includes “E-3 and H-1B1” as well.

* * * * *

12. Amend § 655.734 by adding a sentence at the end of the introductory paragraph to read as follows:

§ 655.734 What is the fourth LCA requirement, regarding notice?

* * * For the purposes of this section, “H-1B” includes “E-3 and H-1B1” as well.

* * * * *

13. Amend § 655.735 by adding an introductory paragraph to read as follows:

§ 655.735 What are the special provisions for short-term placement of H-1B nonimmigrants at place(s) of employment outside the area(s) of intended employment listed on the LCA?

This section does not apply to E-3 and H-1B1 nonimmigrants.

* * * * *

14. Amend § 655.740(a)(2)(ii) by removing the phrase “disqualified from employing H-1B nonimmigrants under section 212(n)(2) of the INA or from employing H-1B1 nonimmigrants under 212(t)(3) of the INA” and adding in its place the phrase “disqualified from employing H-1B nonimmigrants under section 212(n)(2) of the INA (8 U.S.C. 1182(n)(2)) or from employing H-1B1 or E-3 nonimmigrants under section 212(t)(3) of the INA (8 U.S.C. 1182(t)(3).”

15. Amend § 655.750 as follows:

- A. Revise paragraph (a) to read as set forth below;
- B. Revise paragraph (b)(1)(i) to read as set forth below;
- C. Revise paragraph (b)(2) to read as set forth below.

The additions and revisions read as follows:

§ 655.750 What is the validity period of the labor condition application?

(a) Validity of certified labor condition applications. A labor condition application (LCA) certified under § 655.740 is valid for the period of employment indicated by the authorized DOL official on Form ETA 9035E or ETA 9035. The validity period of an LCA will not begin before the application is certified. If the approved LCA is the initial LCA issued for the nonimmigrant, the period of authorized employment must not exceed 3 years for an LCA issued on behalf of an H-1B or H-1B1 nonimmigrant and must not exceed 2 years for an LCA issued on behalf of an E-3 nonimmigrant. If the approved LCA is for an extension of an H-1B1 it must not exceed two years. The period of authorized employment in the aggregate is based on the first date of employment and ends:

(1) In the case of an H-1B or initial H-1B1 LCA, on the latest date indicated or three years after the employment start date under the LCA, whichever comes first; or

(2) In the case of an E-3 or an H-1B1 extension LCA, on the latest date indicated or two years after the employment start date under the LCA, whichever comes first.

(b) * * *

(1) * * *

(i) H-1B, H-1B1, and E-3 nonimmigrants are not employed at the place of employment pursuant to the LCA; and

* * * * *

(2) Requests for withdrawals must be in writing and must be sent to ETA, Office of Foreign Labor Certification. ETA will publish the mailing address, and any future mailing address changes, in the Federal Register, and will also post the address on the DOL website at <http://www.foreignlaborcert.doleta.gov/>.

* * * * *

16. Amend § 655.760 by adding an introductory paragraph to read as follows:

§ 655.760 What records are to be made available to the public, and what records are to be retained?

Paragraphs (a)(1) thru (a)(6) and paragraphs (b) and (c) of this section also apply to the H-1B1 and E-3 visa categories.

* * * * *

17. Revise the heading of subpart I to read as follows:

Subpart I—ENFORCEMENT OF H-1B LABOR CONDITION APPLICATIONS AND
H-1B1 AND E-3 LABOR ATTESTATIONS

* * * * *

Signed in Washington, DC, this _1st_ day of ____April____, _2008_.

Brent R. Orrell,
Acting Assistant Secretary,
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