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20 CFR Parts 655 and 656

Temporary Employment in the United States of Nonimmigrants under H–1B Visas; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

RIN 1215–AB09

Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States

AGENCY: 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: This document contains interim final regulations implementing recent legislation and clarifying existing Departmental rules relating to the temporary employment in the United States of nonimmigrants under H–1B visas. On January 5, 1999, the Department published a notice of proposed rulemaking (64 FR 628) seeking public comment on issues to be addressed in regulations to implement changes made to the Immigration and Nationality Act (INA) by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). In particular, the ACWIA requires H–1B-dependent employers and willful violators to comply with certain additional attestations regarding anti-displacement and recruitment obligations. The Department also sought further comment on certain proposals which were previously published for comment as a Proposed Rule on October 31, 1995 (60 FR 55339), and on certain interpretations of the statutes and its existing regulations which the Department proposed to incorporate in the regulations.

DATES: *Effective Dates:* These regulations are effective January 19, 2001, with the exception of §§ 655.731(a)(2) and 656.40, (c) and (d) which are effective December 20, 2000.

Applicabililty Date: Sections 655.731(a)(2) and 656.40 apply retroactively to any prevailing wage determinations thereunder which were not final as of October 21, 1998. Sections 655.720 and 655.721 are applicable to Labor Condition Applications filed on or after February 5, 2001.

Comment Date: Written comments on these regulations and issues raised in the preamble may be submitted by February 20, 2001, with the exception of any comments on Form WH–4, which must be submitted by January 19, 2001.

ADDRESSES: Submit written comments concerning Part 655 to Deputy 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. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card. Comments may also be transmitted by facsimile (''FAX'') machine to (202) 693–1432. This is not a toll-free number.

Submit written comments concerning Part 656 to the Assistant Secretary for Employment and Training, ATTN: Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room C–4318, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card. Comments may also be transmitted by facsimile (''FAX'') machine to (202) 693–2769. This is not a toll-free number.

FOR FURTHER INFORMATION CONTACT: Michael Ginley, Director, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration, Department of Labor, Room S–3510, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693–0745 (this is not a toll-free number).

James Norris, Chief, Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room C–4318, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693–3010 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

The H–1B nonimmigrant program is a voluntary program that allows employers to temporarily import and employ nonimmigrants admitted under H-1B visas to fill specialized jobs not filled by U.S. workers. (Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(H)(I)(b), 1182(n), 1184(c)). The statute, among other things, requires that an employer pay an H–1B worker the higher of the actual wage or the prevailing wage, to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.

Under the Immigration and Nationality Act (INA), as amended by the Immigration Act of 1990 (Act), and as amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, an employer seeking to employ an alien in a specialty occupation or as a fashion model of distinguished merit and ability on an H–1B visa is required to file a labor condition application with and receive certification from DOL before the Immigration and Naturalization Service (INS) may approve an H–1B petition. The labor condition application process is administered by ETA; complaints and investigations regarding labor condition applications are the responsibility of ESA.

On January 5, 1999, the Department of Labor (DOL) published a proposed rule which would implement statutory changes in the H–1B program made to the INA by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) (Title IV, Pub. L. 105–277). The ACWIA, as amended by the American Competitiveness in the Twenty-First Century Act of 2000 (Pub. L. 106–313), among other things, temporarily (until October 2003) increases the maximum number of H–1B visas permitted each year; temporarily requires new non-displacement (layoff) and recruitment attestations by ''H–1B dependent'' employers (as defined by the ACWIA) and willfully violating employers; and requires employers to offer the same fringe benefits to H–1B workers on the same basis as it offers fringe benefits to U.S. workers. The public was invited to comment on the proposed rule, including the information collection requirements noted below. In addition, pursuant to the Paperwork Reduction Act of 1990, DOL submitted a paperwork package to the Office of Management and Budget (OMB), requesting review and approval of the information collection requirements included in the proposed rule.

Since publication of the NPRM, additional amendments to the H–1B provisions were enacted by the American Competitiveness in the Twenty-first Century Act of 2000 (Pub. L. 106–313, 114 Stat. 1251, October 17, 2000), the Immigration and Nationality Act—Amendments (Pub. L. 106–311, 114 Stat. 1247, October 17, 2000), and section 401 of the Visa Waiver Permanent Program Act (Pub. L. 106–396, 114 Stat. 1637, October 30, 2000) (collectively, the October 2000 Amendments). Most pertinent to these regulations were provisions that raised the ceiling on the number of H–1B visas that may be issued and extended the

period of effectiveness of the additional attestations applicable only to H–1B-dependent employers and willful violators.

Comments were received from members of Congress, OMB, law firms, information technology industry associations, other industry associations, information technology firms, research firms, other employers of H–1B workers, Federal agencies and individuals. Commenters questioned DOL authority under the ACWIA and/or the Immigration and Nationality Act to impose the paperwork requirements contained in the proposed rule. Further, commenters questioned the DOL burden estimates for these information collections, indicating that the estimates were much too low. Many commenters contended DOL should only require the production of records in an investigation context. One commenter suggested for clarity that DOL provide a check list for H–1B employers indicating which records must be kept, which records are required by other statutes or regulations and where these records must be kept.

Many commenters have fundamental misunderstandings of the nature of the reporting and disclosure requirements proposed in the NPRM. The Department has made every effort in the NPRM and in the Interim Final Rule to limit recordkeeping requirements to documents which are necessary for the Department to ensure compliance, and to documents which are already required by other statutes and regulations or would ordinarily be kept by a prudent businessperson. As a general matter, when reviewing the recordkeeping and disclosure obligations set forth in the regulations, employers should be aware that the regulations distinguish between a requirement to ''preserve'' or ''retain'' records if they otherwise exist, and a requirement to ''maintain'' records whether or not they already exist. A requirement that employers retain, for example, ''any'' documentation on a particular subject requires only that any such documents be retained if they otherwise exist, but does not require creation of any documents. In addition, the Department points out that where the regulations do not explicitly require public access, the records may be kept in the employer's files in any manner desired; they do not need to be segregated by labor condition application (LCA) or establishment and do not need to be segregated from the records of non-H–1B workers, provided they are promptly made available to the Department upon request in the conduct of an investigation. The Department considers it important to require that such records be maintained, as in other enforcement programs, so that in the event of an investigation, the Department is able to determine compliance or, in the event of violations, to determine the nature and extent of the violations. This can only be accomplished with adequate, accurate records since it is only the employer who is in a position to know and produce the most probative underlying facts. *See Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 687 (1946).

In addition, in the regulations, the Department has limited the documents that must be disclosed to the public to those which the Department has concluded are necessary for a member of the public to be able to determine the employer's obligations and the general contours of how it will comply with its attestation obligations. The regulations on public access files do not require that there be a separate public access file for each LCA or for each worker. Thus, for example, an employer might choose to keep a single public access file with one copy of each of the required documents which are applicable to all LCAs (such as the description of the employer's pay system), and separately clip together those documents which are specific to each LCA.

Nothing in the ACWIA suggests that it intends to deny the Department the usual authority to require recordkeeping as a means of ensuring compliance with an employer's statutory obligations. To the contrary, Section 212(n)(1) specifically requires employers to make the LCA ''and such accompanying documents as are necessary'' available for public examination. The Department believes that this provision clearly permits the Department to determine what documents must be created or retained by employers to support the LCA. In the absence of such records, the Department is unable to ascertain whether an employer in fact is in compliance or the extent of violations.

In an effort to fully educate the public regarding the H–1B program and its requirements (including paperwork), DOL intends to prepare and make available pamphlets, fact sheets and a small business compliance guide. Further compliance assistance material will be made available on the DOL website. See Section IV.B, below, for an extensive discussion of this public outreach effort. The following is a brief discussion of the paperwork requirements contained in the proposed rule, the public comments on those requirements, the DOL response and the paperwork requirements imposed by this interim final rule. A much more extensive discussion of the issues, including the paperwork requirements, is contained in Section IV of the preamble.

A. Labor Condition Application (§ 655.700)

The process of protecting U.S. workers begins with a requirement that employers file a labor condition application (LCA) (Form ETA 9035) with the Department. In this application the employer is required to attest: (1) That it will pay H–1B aliens prevailing wages or actual wages, whichever are greater—including, pursuant to the ACWIA, the requirement to pay for certain nonproductive time and to provide benefits on the same basis as they are provided to U.S. workers; (2) that it will provide working conditions that will not adversely affect the working conditions of U.S. workers similarly employed; (3) that there is no strike or lockout at the place of employment; and (4) that it has publicly notified the bargaining representative or, if there is no bargaining representative, the employees, by posting at the place of employment or by electronic notification—and will provide copies of the LCA to each H–1B nonimmigrant employed under the LCA. In addition, the employer must provide the information required in the application about the number of aliens sought, occupational classification, wage rate, the prevailing wage rate and the source of the wage rate, and period of employment. Pursuant to the ACWIA, additional attestation requirements become applicable to H–1B-dependent employers and willful violators after promulgation of these regulations. This form, currently approved by OMB under OMB No. 1205–0310, was revised in the NPRM to identify H–1B dependent employers and provide for their attestation to the new requirements. The ACWIA increased the number of H–1B nonimmigrants from 65,000 to 115,000 in fiscal years 1999 and 2000 and to 107,500 in fiscal year 2002. Besides the increase in LCAs filed for these additional workers, by regulation H–1B-dependent employers are required to file new LCAs if they wish to file petitions for new H–1B nonimmigrants or to seek extensions of status for existing workers. The Department estimated in the proposal that 249,500 LCAs are filed annually by 50,000 H–1B employers (dependent and nondependent). The only added LCA burden proposed in the NPRM was for H–1B-dependent employers and willful violators to indicate on the LCA their status and their agreement to the

additional attestation requirements. (The time required for an estimated 50 H–1B employers to make the mathematical calculation to determine if they must make the additional attestations required of an H–1B employer is separately set out in C. of this section, below.) Since it was estimated that only 50 H–1B employers will find it necessary to make this calculation, out of a total of 50,000 H–1B employers, the estimate of time necessary to complete the form remained at 1 hour. Total annual burden was estimated at 249,500 hours.

Since promulgation of the NPRM, the 2000 Amendments to the INA further increase the ceiling on the number of H–1B visas that may be issued annually for 2001, 2002 and 2003, to 195,000 annually, with an additional unspecified number who may be admitted if they will be employed by a school, a related non-profit entity, a State or local government research organization, or a nonprofit research organization.

Commenters generally objected to the one hour estimate for completing the LCA, pointing out that the revised LCA is four pages long, whereas the current LCA is only one page for an estimated burden of one and one-quarter hour per LCA.

OMB suggested asked whether the conditions in a, b and c in section 8 capture the requirements for H–1B dependent employers. They also suggested amending the end of the sentence following the second box to read ''* * * unless the exemption requirement in the NOTE below is met.''

A commenter stated that DOL had failed to consider that many employers will now be forced to file two LCAs where previously they only filed one. Several of its member employers who previously filed an LCA for multiple openings indicated that they may file separate LCAs for each opening rather than take the risk that of INS making a determination that one H–1B nonimmigrant is not exempt, thus invalidating the entire LCA.

As discussed in Section IV.B.4 below, the ETA Form 9035 has been amended to provide that every employer is required to indicate whether it is or is not H–1B-dependent or a willful violator. Since all employers are required to determine whether or not they are H–1B dependent—although for most employers, as discussed below, their status will be readily apparent and no actual computation will be necessary—the additional box for non-dependent employers should require no additional time. There is no other information required which is not contained on the current form other than to check a box indicating the agreement of H–1B-dependent employers and willful violators to the additional attestation requirements. The longer form is not due to the requirement to furnish additional information, but to the new format required for the FAXback, which is designed to decrease significantly the processing time. See Section IV.5, below. The Department also notes that the 1¼ hour estimate on the current ETA Form 9035 includes the 15 minutes estimated to file a complaint with the Wage and Hour Division

Upon review, the Department sees no reason to change its estimate of an average of one hour per form, including both reading the instructions and filling out the form (estimated to take no more than one-half hour per form), as well as taking the actions that are subsumed in filling out the form (obtain the prevailing wage and providing notice). Based upon current data, and considering the regulatory change deleting the necessity for filing a new LCA when an employer's corporate identity changes (*see* B. of this section, below) as well as the requirement that H–1B-dependent employers with current LCAs file new LCAs if they wish to file new H–1B petitions or requests for extension of status, DOL estimates that 637,000 LCAs will be submitted annually by 63,500 H–1B employers (dependent and nondependent). Total annual burden for the LCA is estimated to be 637,000 hours (637,000 LCAs × 1 hour).

B. Documentation of Corporate Identity (§ 655.760)

Currently, the regulatory requirement is that a new LCA must be filed when an employer's corporate identity changes and a new Employer Identification Number (EIN) is obtained. Under the proposed rule, an employer who merely changes corporate identity through acquisition or spin-off could merely document the change in the public file (including an express acknowledgment of all LCA obligations on the part of the successor entity), provided it satisfied the Internal Revenue Code definition of a single employer. The proposed regulation was designed to eliminate a burden on businesses to file a new LCA, while at the same time ensuring that the public is aware of the changes and that the employer will continue to follow its LCA obligations. It was estimated in the proposal that 500 H–1B employers would be required to file the subject documentation annually. It was estimated that the recording and filing of each such document would take 15 minutes for a total annual burden of 125 hours.

One commenter asked how DOL's rulemaking affected the INS interpretation that any ''material change in employment'' necessitates the filing of an amended petition. Another commenter asked what opinion an employer is to follow when current DOL opinion is that any change to an approved LCA requires an amendment to the H–1B petition and the view of INS is that a change in company name or EIN does not require a new LCA, just that the change be documented at the time of amendment or extension. Another commenter stated that the burden for this requirement is significantly higher than DOL estimated.

Upon reconsideration, DOL's Interim Final Rule provides that a new LCA will not be required merely because a corporate reorganization results in a change of corporate identity, regardless of whether there is a change in the EIN and regardless of whether the IRS definition of single employer is satisfied, provided that the successor entity, prior to the continued employment of the H–1B nonimmigrant, agrees to assume the predecessor entity's obligations and liabilities under the LCA. The agreement to comply with the LCA for the future and to any liability of the predecessor under the LCA must be documented with a memorandum in the public access file.

With these changes, and based on the Department's experience, it is now estimated that 1000 H–1B employers (an increase from the 500 employers estimated in the NPRM) will be required to file the documentation annually and that the recording and filing of each such document will take approximately 30 minutes for a total annual burden of 500 hours. The Department also estimates that employers who file this memorandum will file 10,000 fewer LCAs, for a net saving of 9,500 hours.

INS requirements for the filing of an amended petition are separate from DOL requirements for the filing of LCAs.

C. Determination of H–1B Dependency (§ 655.736)

An H–1B employer must calculate the ratio between its H–1B workers and the number of full-time equivalent employees (FTEs) to determine whether it meets the statutory definition of an H–1B-dependent employer (8 U.S.C. 1182 (n)(3)(A)). The NPRM provided that when it is a close question, the determination would ordinarily be made by examination of an employer's quarterly tax statement and last payroll (or last quarter of payrolls if more

representative) or other evidence as to average hours worked by part-time employees to aggregate their hours into FTEs, together with a count of the number of workers under H–1B petitions. Documentation of this determination would be required where non-dependent status is not readily apparent and a mathematical determination must be made. A copy of this determination would be placed in the public disclosure file. In addition, if an employer changed from dependent to non-dependent status, or vice-versa, a simple statement of the change in status would be placed in the public disclosure file. The NPRM explained that documentation of a determination of H–1B dependency where it is a close question is necessary to determine employer compliance with H–1B requirements, and to advise the public of an employer's status. It was estimated in the proposal that approximately 50 H–1B employers would need to make the determination with 25 employers who are found not to be dependent employers would be required to document this determination annually. The making and documentation of each such determination was estimated to take approximately 15 minutes, and occur at least twice annually for a total annual burden of 12.5 hours.

Several commenters expressed the view that the DOL burden estimate for this requirement was severely underestimated. They remarked that large employers who hire H–1B employees will have to create systems of verification of H–1B dependency and that the determination will be difficult where employees are located in multiple locations and departments and the data needed to make the determination are maintained in different databases. Some commenters questioned the connection DOL made between the use of blanket LCAs and the likelihood of H–1B dependency and how frequently the determination would need to be made. Some also commented that it appeared that whenever the determination is made, a copy of the calculation must be placed in the public access file, making it a requirement for all H–1B employers, not just those who are borderline H–1B dependent. OMB commented that the 15-minute burden for the dependency determination seemed low and asked if the estimate just includes the assurance (how it is written) or does it also include documentation of the assurance.

Having taken into consideration all of the comments pertaining to the determination of dependency status, DOL has decided modification these requirements is appropriate to achieve the purposes of the ACWIA and avoid unnecessary burden on employers. First, the Interim Final Rule provides that all employers must retain copies of the I–129 petitions or requests for extensions of status filed with INS. These documents are critical to several provisions in the regulations, including in particular the determination of dependency and the number of hours that must be compensated if employees are ''benched.'' The Department believes that prudent businessmen would retain copies of these documents in any event. (See also the discussion in D. of this section, below.)

The Interim Final Rule also significantly reduces the burden to employers in making the computations of dependency. The Rule will permit employers to use a ''snap shot'' test to determine if dependency status is readily apparent and requires a full computation only if the number of H–1B workers exceeds 15 percent of the total number of full-time workers of the employer. Furthermore, the Rule provides employers an option of considering all part-time workers to be one-half FTE, rather than make the full computation. If the full computation (where required because the dependency status is not readily apparent) indicates that the employer is not H–1B dependent, the employer must retain a copy of this computation. Further, the employer must retain a copy of the full computation in specified circumstances which the Department believes will very rarely occur. The full computation must be maintained if the employer changes status from dependent to non-dependent. If the employer uses the Internal Revenue Code single employer test to determine dependency, it must maintain records documenting what entities are included in the single employer, as well as the computation performed, showing the number of workers employed by each entity who is included in the calculation. Finally, if the employer includes workers who do not appear on the payroll, a record of the computation must be kept. The Department has concluded that the computations or summary of the computations need not be kept in the public access file.

Although DOL has made several changes to simplify the determination of dependency status and its documentation, upon reconsideration DOL has increased its estimate of burden from 15 to 30 minutes, thus increasing the annual burden for an estimated 25 employers who must make and document such calculations twice annually from 12.5 to 25 hours. The Department also estimates that no more than 5 percent of employers will be required to retain copies of H–1B petitions and extensions who do not currently retain these documents, for an average of 3 minutes per petition, and a total of 159 hours (3,175 employers × 3 minutes ÷ 60). Total annual burden for this item is estimated to be 184 hours.

D. List of Exempt H–1B Employees in Public Access File (§ 655.737(a)(1))

The ACWIA provisions regarding non-displacement and recruitment of U.S. workers do not apply where the LCA is used only for petitions for exempt H–1B workers. The NPRM provided that where the INS determines a worker is exempt, employers would be required to maintain a copy of such documentation in the public access file. Determinations as to whether or not H–1B workers meet the education requirements to be classified as exempt H–1B nonimmigrants would be made initially by the INS in the course of adjudicating the petitions filed on behalf of H–1B nonimmigrants by dependent employers. In the event of an investigation, it was anticipated that considerable weight would be given to the INS determination that H–1B nonimmigrants were exempt, based on the educational attainments of the workers, since INS has considerable experience in evaluating the educational qualifications of aliens. Retention of copies of such determinations would aid DOL in determining compliance with the H–1B requirements and provide the public with notice as well. It was estimated in the proposal that 28,125 such documents would need to be filed annually. Each such filing would take approximately one minute for an annual burden of approximately 468.8 hours.

One commenter indicated that the one minute to physically complete the form may be correct but that the estimate ignores the analysis and review required to determine if they are exempt. Another commenter asked what documentation must be copied and maintained in the file, *i.e.,* would INS issue a separate determination or would Form I–797, Notice of Approval of H–1B Petition suffice? They also believed it was unclear how DOL estimated only 28,125 documents would be filed annually when the number of H–1B petition approvals for the current fiscal year is 115,000.

On further consideration, because of privacy considerations, DOL has concluded that the H–1B petitions with the INS determinations of workers' exempt status need not be included in the public access file. However, DOL

believes the public should know which workers are not covered by the new attestation elements so they can challenge a determination of exempt status where they believe the basis for the exemption is invalid. Therefore, under the interim final rule employers will be required to include in their public access file a list of the H–1B nonimmigrants supported by any LCA attesting that it will be used only for exempt workers, or in the alternative, a statement that the employer employs only exempt H–1B workers. DOL estimates that each list or statement will take approximately 15 minutes and that 200 H–1B employers will prepare one such list or statement annually for a total burden of 50 hours.

E. Record of Assurance of Non-displacement of U.S. Workers at Second Employer's Worksite (§ 655.738(e))

Section 212(n)(F)(ii) of the INA, 8 U.S.C. 1182(n)(F)(ii), prohibits an H–1B-dependent employer from placing H–1B nonimmigrant with another employer unless the dependent employer makes a bona fide inquiry as to the secondary employer's intent regarding displacement of U.S. workers by H–1B workers. The proposed regulation would require an employer seeking to place an H–1B nonimmigrant with another employer to secure and retain either a written assurance from the second employer, a contemporaneous written record of the second employer's oral statements regarding non-displacement, or a prohibition in the contract between the H–1B employer and the second employer. Pursuant to the ACWIA, an H–1B employer may be debarred for a secondary displacement ''only if the Secretary of Labor found that such placing employer * * * knew or had reason to know of such displacement at the time of the placement of the nonimmigrant with the other employer.'' Congress clearly intended that the employer make a reasonable inquiry and give due regard to available information. In order to assure that the purposes of the statute are achieved, the Department developed a regulatory provision to require that the H–1B employer make a reasonable effort to inquire about potential secondary displacement and to document those inquiries. It was estimated that approximately 150 employers would place H–1B nonimmigrants with secondary employers where assurances are required. It was estimated that each such assurance will take approximately 5 minutes and each such employer would obtain such assurances 5 times annually for an annual burden of 62.5 hours.

Commenters stated that DOL grossly underestimated the amount of time necessary to persuade and obtain from the secondary employer the necessary assurances, create a verification form or revise a contract and the annual frequency of the assurances. Further, some commenters felt that DOL had failed to consider the additional burden on the secondary employer to document their compliance with the assurance.

The paperwork burden estimate, properly, does not include the time necessary to persuade a secondary employer to provide such an assurance but does include the development of the verification form or contract clause and its execution. DOL believes that once the form or contract clause is created, this form or contract clause will be used uniformly for subsequent assurances making the average burden per occurrence minimal. There is no burden on the secondary employer to document its compliance with the assurance, since it is solely the responsibility of the primary H–1B employer to comply with the attestation that no U.S. worker will be displaced by an H–1B worker. DOL estimates an average burden of 10 minutes per attestation or statement, and that 150 H–1B employers will document such assurance 5 times annually, for a total annual burden of 125 hours.

F. Offers of Employment to Displaced U.S. Workers (§ 655.738(e))

The ACWIA prohibits H–1B dependent employers and willful violators from hiring H–1B nonimmigrants if their doing so would displace similar U.S. workers from an essentially equivalent job in the same area of employment. The proposed regulations would require H–1B-dependent employers to keep certain documentation with respect to each former worker in the same locality and same occupation as any H–1B worker who left its employ in the period from 90 days before to 90 days after an employer's petition for an H–1B worker. For all such employees, the Department proposed that covered H–1B employers maintain the last-known mailing address, occupational title and job description, any documentation concerning the employee's experience and qualifications, and principal assignments. Further, the employer would be required to keep all documents concerning the departure of such employees and the terms of any offers of similar employment to such U.S. workers and responses to those offers. These records are necessary for the Department to determine whether the H–1B employer has displaced similar U.S. workers with H–1B nonimmigrants. The Department stated that no records need be created to comply with these requirements, since the Equal Employment Opportunity Commission (EEOC) already requires under its regulations that the records described above be maintained.

Commenters stated that they were unaware of the EEOC regulation that required this documentation and requested that DOL recite rather than just refer to the EEOC regulations.

As discussed in Section IV.F.8 below, commenters are generally correct that the EEOC regulation cited in the NPRM, 29 CFR 1620.14, does not establish a general requirement that employers create the records encompassed by the Department's displacement proposal. Rather, it requires an employer to preserve all personnel or employment records which the employer ''made or kept''. Furthermore, EEOC requires the preservation of the same or similar records under other statutes it administers, such as the Age Discrimination in Employment Act (ADEA). Under this Interim Final Regulation, DOL is not requiring employers to create any documents other than basic payroll information, with one noted exception. If the employer offers the U.S. worker another employment opportunity, and does not otherwise do so in writing, by the provisions of section 655.738(e)(1) of these regulations, the employer must document and retain the offer and the response to such offer.

It is estimated that 10 H–1B employers will make such offers of employment 5 times annually (50) and that 5 of those offers and responses would not otherwise be committed to writing without this paperwork requirement. Each such documentation is estimated to take 30 minutes for a total annual burden of 2.5 hours.

G. Documentation of U.S. Worker Recruitment (§ 655.739(i)

Pursuant to the ACWIA, H–1B-dependent employers are required to make good faith efforts to recruit U.S. workers before hiring H–1B workers. Under the proposed regulations, H–1B-dependent employers would be required to retain documentation of the recruiting methods used, including the places and dates of the advertisements and postings or other recruitment method used, the content of the advertisements or postings, and the compensation terms. Further, the employer would be required to retain any documentation concerning consideration of applications of U.S. workers, such as copies of applications

and related documents, rating forms, job offers, etc. The proposed rule also would require the employer to place either documentation or a simple list of the places and dates of the advertisements and postings of other recruitment methods used. Comments were requested regarding how employers should determine industry-wide standards and make this determination available for public disclosure. The documentation noted above is necessary for the Department of Labor to determine whether the employer has made a good faith effort to recruit U.S. workers and for the public to be aware of the recruiting methods used. It was estimated that annually 200 H–1B dependent employers would need to document their good faith efforts to recruit U.S. workers. The filing of such records was estimated to take approximately twenty minutes per employer for an annual burden of approximately 66.7 hours.

Commenters felt the burden for this item was underestimated, *i.e.,* that DOL should recognize that employers file more than one LCA each year and that DOL should recite rather than just refer to the EEOC regulation requiring this documentation.

As noted in F. above and as discussed at some length in Section IV.G.5 of the preamble, DOL believes that employers are required to preserve the records required under current EEOC requirements. With the exception of the list to be included in the public access file (and here too employers have the option of putting the actual records in the file), DOL is not requiring employers to create any documents, but rather to preserve those documents which are created or received. Further, DOL, upon further review, has determined that employers will not be required to maintain evidence of industry practice for recruitment. The only additional recordkeeping burden required by these regulation is that the public disclosure file contain a summary of the principal recruitment methods used and the time frames in which they were used. This recordkeeping requirement may be satisfied by creating a memorandum to the file or the filing of pertinent documents. It is estimated that 200 H–1B employers will file such documents or memorandum 5 times annually and that each recordkeeping will take 20 minutes, for an annual burden of approximately 333 hours.

H. Documentation of Fringe Benefits (§ 655.731(b))

Pursuant to the ACWIA, all employers of H–1B workers are required to offer benefits to H–1B workers on the same basis and under the same criteria as offered to similarly employed U.S. workers. The proposed regulations would require employers to retain copies of all fringe benefit plans and summary plan descriptions, including all rules regarding eligibility and benefits, evidence of what benefits are actually provided to individual workers and how costs are shared between employers and employees. These records are necessary for the Department to determine whether the H–1B nonimmigrants are offered the same fringe benefits as similarly employed U.S. workers. Copies of most fringe benefit programs are required to be maintained by Internal Revenue Service and Pension and Welfare Benefits Administration regulations; thus there would not ordinarily be an additional recordkeeping burden from these requirements. The Department estimated that 2,500 employers would spend approximately 15 minutes each documenting unwritten plans, for an annual burden of 625 hours.

The Department in the proposed rule also inquired as to whether it would be possible to require multinational employers to keep H–1B workers on ''home country'' benefit plans in lieu of those provided to U.S. workers and what records would need to be kept to demonstrate the value of the ''home-country'' benefits and those provided to U. S. workers.

A commenter said that DOL should recite, rather than just refer to the PWBA and IRS regulations. Another commenter stated it was unclear whether in fact these regulations governing retention of benefits information meet the DOL requirements for the H–1B program, since the DOL regulations require specific documentation of the comparative benefits offered and received by H–1B employees and their U.S. counterparts, including the need to determine the appropriate comparison group and then require the maintenance of all the information in the public inspection file for each H–1B worker. Another comment stated that DOL has failed to consider the additional burden of comparing fringe benefits offered by similar employers in the area which DOL is proposing to require. Commenters questioned the need for the documentation of fringe benefits to be placed in each public access file, with others suggesting more flexibility in how the documentation should be provided. One commenter suggested that employers be allowed to select equivalent but different valued benefits as long as employers can show that all similarly situated workers were offered the same array of benefits.

It is believed that almost all employers of H–1B workers would, absent the regulation, have already created an employee handbook or have a summary description plan required by ERISA regulations which would satisfy the H–1B regulatory requirement. The provision being considered to require a comparison of fringe benefits offered by similar employers in the area is not included in this interim final rule. DOL is not requiring that detailed records of fringe benefits be maintained in each public access file. These records may be kept in a master file or in any other manner the employer desires. The public access file need only contain a summary of the benefits offered to U.S. workers in the same occupation as H–1B workers, including a statement of how employees are differentiated, if at all. Ordinarily this would be satisfied with the employee handbook or summary description discussed above. Where an employer is providing home country benefits, the employer need only place a notation to that effect in the public access file.

There are an estimated 10 percent of H–1B employers, or 6,350 who provide fringe benefits, such as bonuses, vacations and holidays, not required by ERISA regulations to be documented. It is estimated to document these plans would take 15 minutes per employer, for an annual burden of 1,588 hours (6,350 × 15 minutes). It is further estimated that 25 percent of H–1B employers (15,875) are multinational employers and that a note to the file that these workers receive ''home country'' benefits would take 5 minutes per employer for an annual burden of 1,323 hours. The total estimated burden for this item is 2,911 hours.

I. Wage Recordkeeping Requirements Applicable to Employers of H–1B Nonimmigrants

The Department republished and asked for comment on several provisions of the December 20, 1994 Final Rule (59 FR 65646) which were published for notice and comment on October 31, 1995 (60 FR 55339). Existing regulations require all H–1B employers to document their actual wage system to be applied to the H–1B nonimmigrants and U.S. workers. They are also required to keep payroll records for non-FLSA exempt H–1B workers and other employees for the specific employment in question. The proposed rule would decrease the burden on employers of keeping hourly pay records for U.S. workers, requiring such records only if either the worker is not

paid on a salary basis, or the actual wage is stated as an hourly wage. For H–1B workers, such records must also be kept if the prevailing wage is expressed as an hourly rate. The statute requires that the employer pay H–1B nonimmigrants the higher of the actual or prevailing wage. The Department explained that in order to determine if the employer is paying the required wage, it must be able to ascertain the system an employer uses to determine the wages of non-H–1B workers. The Department also stated that it is essential to require the employer to maintain payroll records for the employer's employees in the specific employment in question at the place of employment to ensure that H–1B nonimmigrants are being paid at least the actual wage being paid to non-H–1B workers or the prevailing wage, whichever is higher. The Department estimated that approximately 50,000 employers employ H–1B nonimmigrants. The documentation would have to be done only one time for each employer. Hourly pay records would have to be prepared with respect to all affected employees each pay period. The Department estimated that the public burden wold be approximately 1 hour per employer per year to document the actual wage system for a total burden to the regulated community of 50,000 hours in a year.

The payroll recordkeeping requirements are virtually the same as those required by the Fair Labor Standards Act (FLSA) and any burden required is subsumed in the OMB Approval No. 1215–0017 for those regulations at 29 CFR Parts 516, except with respect to records of hours worked for exempt employees. There would be no burden for U.S. workers since as a practical matter, hours worked records would be required for U.S. workers only if they are not exempt from FLSA, or if they are exempt but paid on an hourly basis (certain computer professionals), and therefore would keep hourly records in any event. The Department estimates that 55,000 H–1B workers will be paid on a salary basis. Hours worked records would be required for these workers only if the prevailing wage is expressed as an hourly rate—estimated to 17 percent of all cases. The Department estimated a burden of 2.5 hours per worker per year, for 9,350 workers and a total of 23,375 hours.

Several commenters stated that DOL had grossly underestimated the burden of documenting the objective wage system. Some indicated that it was ludicrous to estimate that the documentation is done only once, since wage systems continually change, documentation will need be done, at a minimum, each time a new LCA is prepared and employers do not hire H–1B nonimmigrants only for one position in the organization. Thus, DOL must calculate how many different job categories are filled by H–1B nonimmigrants on average for each employer to estimate how many times the burden of documenting the objective wage system occurs annually. Further, the documentation must be sufficiently detailed to allow a third party to determine the actual wage, making the burden higher than estimated. Some commented that the proposed regulation requires the actual wage be determined and documented anew for each H–B hire, along with periodic adjustments to the actual wage system.

The Department has deleted the provisions suggesting that the employer's wage system must be objective, as well as the statement that it must be described in the public disclosure file with detail sufficient for a third party to determine the actual wage rate for an H–1B nonimmigrant. As stated above, the requirement that a description of the actual wage system be included in the public access file is already contained in the regulations at section 655.760(a)(3). Therefore these regulations create no additional burden for this requirement.

Some commenters stated that while DOL estimated that only 17 percent of the prevailing wages provided to employers by State Employment Security Agencies (SESAs) are expressed as hourly rates, their experience was that SESAs regularly provides employers and attorneys with the prevailing wage stated as an hourly rate.

With respect to the concern expressed that SESA more frequently issues hourly rates, the modification to section 655.731(a)(2) in the interim final rule will provide that employer shall convert the prevailing wage determination into the form which accurately reflects the wages which it will pay.

The Department has also concluded that a revision of the regulation is appropriate to remove the requirement that the employer keep hourly wage records for its full-time H–1B employees paid on a salary basis. The regulation continues to require employers to keep hours worked records for employees who are not paid on a salary basis and for part-time H–1B workers, regardless of how paid. The additional burden of keeping records for salaried H–1B workers who are exempt from the FLSA is estimated at 2.5 hours per worker for 10,500 workers (1.5 percent of total H–1B workers), for a total annual burden of 26,250 hours.

J. Information Form Alleging H–1B Violations

The ACWIA requires DOL to develop a procedure so that a person, other than an aggrieved party, can provide, in writing on a form developed by DOL, information alleging H–1B program violations. The Department proposes that a single form be used by any party alleging violations, to the Wage and Hour Division of the U.S. Department of Labor, whether a complainant or another source. The H–1B Nonimmigrant Information Form, WH–4, is included in this Interim Final Rule for public review and comment. It is estimated that 200 such responses will be received annually and that each response will take approximately 20 minutes, for a total burden of 67 hours.

Total Annual Hours Burden for all Information Collections—667,423 Hours

Retention of Records: The current regulations provide at section 655.760 that copies of the LCAs and its documentation are to be kept for a period of one year beyond the end of the period of employment specified on the LCA or one year from the date the LCA was withdrawn, except that if an enforcement action is commenced, these records must be kept until the enforcement procedure is completed as set forth in part 655, subpart I. The payroll records for the H–1B employees and others employees in the same occupational classification must be retained for a period of three years from the date(s) of the creation of the record(s), except that if an enforcement proceeding is commenced, all payroll records shall be retained until the enforcement proceeding is completed. These record retention requirements have been approved by OMB under OMB No. 1205–0310.

After consideration of comments raised in response to the NPRM, the Department has clarified the record retention requirements to provide that where there is no enforcement action, the employer shall retain required records for a period of one year beyond the last date on which any H–1B nonimmigrant is employed under the labor condition application or, if no nonimmigrants were employed under the labor condition application, one year from the date the labor condition application expired or was withdrawn.

H–1B employers may be from a wide variety of industries. Salaries for employers and/or their employees who perform the reporting and

recordkeeping functions required by this regulation may range from several hundred dollars to several hundred thousand dollars where the corporate executive office of a large company performs some or all of these functions themselves. Absent specific wage data regarding such employers and employees, respondent costs were estimated in the proposed rule at $25 an hour. Total annual respondent hour costs for all information collections were estimated to be $8,105,887.50 ($25.00 × 324,235.5 hours).

Some commenters questioned the $25 per hour estimate for respondent costs, indicating that in order to comply with the information requirements, H–1B employers must employ high-level compensation professionals and human resource professionals. The Department recognizes that some employers may employ highly-paid professionals to advise them on how to comply with the H–1B program requirements. However, it is believed that such a need will be short-lived and that once a system is in place, compliance can be maintained without this highly paid professional assistance. The $25 an hour respondent cost is an average cost, which recognizes higher initial cost to effect compliance, as well as the low cost of performing the clerical filing functions. Further, as noted above, in addition to the guidance provided in this regulation and its preamble, the Department intends to provide non-technical guidance printed material and information in electronic format which should greatly assist employers and employees in understanding the H–1B program requirements. Total annual respondent hour costs for all information collections are estimated at $16,685,575 ($25.00 × 667,423).

The paperwork requirements discussed above will not become effective until OMB has reviewed and approved these requirements and assigned an OMB approval number.

II. Background

On November 29, 1990, the Immigration and Nationality Act was amended by the Immigration Act of 1990 (IMMACT 90) (Pub. L. 101–649, 104 Stat. 4978) to create the ''H–1B visa program'' for the temporary employment in the United States (U.S.) of nonimmigrants in ''specialty occupations'' and as ''fashion models of distinguished merit and ability.'' The H–1B provisions of the INA were amended on December 12, 1991, by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA) (Pub. L. 102–232, 105 Stat. 1733). Further amendments were made to the H–1B provisions of the INA on October 21, 1998, by enactment of the American Competitiveness and Workforce Improvement Act (ACWIA) (Title IV of Pub. L. 105–277, 112 Stat. 2681). In addition, the H–1B provisions of the INA were amended in October, 2000 by enactment of the American Competitiveness in the Twenty-first Century Act of 2000 (Pub. L. 106–313, 114 Stat. 1251, October 17, 2000), the Immigration and Nationality Act—Amendments (Pub. L. 106–311, 114 Stat. 1247, October 17, 2000), and section 401 of the Visa Waiver Permanent Program Act (Pub. L. 106–396, 114 Stat. 1637, October 30, 2000) (collectively, the October 2000 Amendments).

These cumulative amendments of the INA assigned certain responsibility to the Department of Labor (Department or DOL) for implementing several provisions of the Act relating to the temporary employment of certain nonimmigrants. The H–1B provisions of the INA govern the temporary entry of foreign ''professionals'' to work in ''specialty occupations'' in the United States under H–1B visas. 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184(c). The H–1B category of specialty occupations consists of occupations requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a Bachelor's or higher degree in the specific specialty as a minimum for entry into the occupation in the United States. 8 U.S.C. 1184(i)(1). In addition, an H–1B nonimmigrant in a specialty occupation must possess full State licensure to practice in the occupation (if required), completion of the required degree, or experience equivalent to the degree and recognition of expertise in the specialty. 8 U.S.C. 1184(i)(2). The category of ''fashion model'' requires that the nonimmigrant be of distinguished merit and ability. 8 U.S.C. 1101(a)(15)(H)(i)(b).

A. Changes Made by the ACWIA and the October 2000 Amendments

The ACWIA made numerous significant changes in the H–1B provisions. One was the temporary increase in the maximum number of H–1B visas over the three fiscal years following ACWIA's enactment: For fiscal years 1999 and 2000, the cap would be 115,000; for fiscal year 2001, the cap would be 107,500; and for fiscal year 2002 (and thereafter), the cap would return to the original 65,000. Another significant change was the imposition of additional attestation requirements for certain employers to provide better protections to U.S. workers. The additional attestation requirements apply to ''H–1B-dependent employers'' and to employers who have been found to have committed a willful failure or misrepresentation with respect to the H–1B requirements (hereafter referred to as ''willful violators''). H–1B-dependent employers and willful violators must attest that they: (1) Have not displaced and will not displace a U.S. worker within the period beginning 90 days before and ending 90 days after the filing of an H–1B petition; (2) will not place an H–1B worker with another employer with indicia of an employment relationship without making an inquiry to assure displacement has not and will not take place within the period beginning 90 days before and ending 90 days after the placement; and (3) have taken good faith steps to recruit U.S. workers for the job for which the H–1B workers are sought, and will offer the job to any equally or better qualified U.S. worker. The recruitment provision does not apply to an LCA for an H–1B worker who is ''exceptional,'' an ''outstanding professor or researcher,'' or a ''multinational manager or executive'' within the meaning of section 203(b)(1) of the INA. The ACWIA specified that both the displacement and recruitment/hiring protections become effective upon the date of the Department's final regulation and apply only to LCAs filed before October 1, 2001. An H–1B-dependent employer or willful violator filing an LCA which will be used only for ''exempt'' H–1B workers is not required to comply with the new attestation requirements for that LCA.

The ACWIA also instituted a filing fee of $500, to be collected by INS, for initial petitions and first extensions filed on or after December 1, 1998, and before October 1, 2001. Institutions of higher education and related or affiliated nonprofit entities, nonprofit research organizations, and Governmental research organizations are exempt from the new fee. The fees are to be used for job training, low-income scholarships, and program administration/enforcement.

The ACWIA included other generally applicable worker protections, specifically: whistleblower protection, prohibitions against reimbursement of the $500 filing fee and against penalizing an H–1B worker who terminates employment prior to a date agreed with the employer, and a requirement that the employer pay wages during nonproductive time if such time is not due to reasons occasioned by the worker. The ACWIA

also required employers to offer H–1B workers fringe benefits on the same basis and in accordance with the same criteria as U.S. workers.

The ACWIA specified new civil money penalties ranging from $1,000 to $35,000 per violation, along with debarment. New investigative procedures were created, authorizing the Department to conduct ''random'' investigations of willful violators during the five-year period after the finding of such violation, and establishing an alternative investigation protocol based on information indicating potential violations obtained from sources other than aggrieved parties. Enforcement of the requirement that employers hire U.S. workers if they are equally or better qualified than the H–1B workers is carried out by the Attorney General through arbitration.

The ACWIA mandated a particular method of computation of the local prevailing wage for purposes of the requirements of the H–1B program and the permanent immigrant worker program with respect to employees of institutions of higher education and related or affiliated nonprofit entities, nonprofit research organizations, and Governmental research organizations. Under the ACWIA provision, the prevailing wage level is to take into account only employees at such institutions and organizations.

The ACWIA became law on October 21, 1998. With one exception, its provisions took effect at that time, and apply both to existing LCAs and to LCAs filed in the future. Pursuant to section 412(d) of the ACWIA and section 212(n)(1)(E)(ii) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(E)(ii), the special attestation provisions regarding displacement and recruitment are applicable only to LCAs filed by H–1B-dependent employers and willful violators on or after the date this Interim Final Rule becomes effective and until October 21, 2001.

In addition, section 415(b) of the ACWIA provided that the amendments to section 212(p) of the INA, 8 U.S.C. 1182(p)—relating to computing the prevailing wage level for employees of an institution of higher education or a related or affiliated nonprofit entity, for employees of a nonprofit research organization or Governmental research organization, or for professional athletes—apply to prevailing wage computations for LCAs filed before October 21, 1998, ''but only to the extent that the computation is subject to an administrative or judicial determination that is not final as of such date.'' Therefore, the regulations in parts 655 and 656 to implement section 212(p) apply retroactively to any prevailing wage determinations thereunder which were not final as of October 21, 1998.

Two other ACWIA's provisions contained temporal qualifications, relating to the Department's authority to conduct random investigations and other source investigations (INA, sections 212(n)(2)(F), 212(n)(2)(G), respectively). The Act specified that the Department's authority, pursuant to section 212(n)(2)(F) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(2)(F), to conduct random investigations of employers who have committed a willful failure to meet a condition of their LCAs or who have made a willful misrepresentation of material fact applies only where such a finding has been made by the Secretary on or after October 21, 1998. The Act also specified that the Department's authority, pursuant to section 212(n)(2)(G), 8 U.S.C. 1182(n)(2)(G), to conduct investigations based on credible information from a source other than an aggrieved person would ''sunset,'' *i.e.*, expire, on September 30, 2001.

The October 2000 Amendments made substantial increases in the numbers of H–1B visas available for the employment of nonimmigrants: 195,000 each year for fiscal years 2001, 2002, and 2003 (with the number thereafter to revert to the original 65,000 per fiscal year); an unspecified additional number for fiscal year 1999 to cover nonimmigrants issued visas above the authorized number for that year; an unspecified additional number for fiscal year 2000 to cover petitions filed before September 1, 2000; and an unlimited number for nonimmigrants employed by institutions of higher education, by their related or affiliated nonprofit entities, by nonprofit research organizations, or by governmental research organizations (*i.e.*, visas for employees of such entities are not counted against the annual limits). The Amendments extended the effective periods for two ACWIA provisions: The additional attestation elements for H–1B-dependent employers and willful violator employers were extended until October 1, 2003; the Department's authority to conduct investigations based on sources other than aggrieved parties was extended through September 30, 2003. In addition, the Amendments created a ''portability'' option for H–1B nonimmigrants, by authorizing their change of employers (from one H–1B employer to another) ''upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant'' (*i.e.*, eliminating the need to await the INS adjudication of the petition). Further, the Amendments authorized the extension of H–1B status for nonimmigrants in cases of delayed INS adjudications of petitions for employment-based immigration or applications for adjustment of status for permanent residence; the extensions of H–1B status are to be made by the INS in one-year increments. The Amendments doubled the ACWIA-created petition fee (from $500 to $1,000) and extended the effective period of the fee provision to October 1, 2003. The Amendments broadened the ACWIA's exemption of certain employers from payment of the filing fee (to include nonprofit entities engaging in established curriculum-related clinical training of students registered at such institutions). In addition, the Amendments made some changes in the ACWIA allocations of fee monies for various training programs, increased the ACWIA allocation of fee monies to the INS for processing of LCAs, and reduced the ACWIA allocation of fee monies to the Department for processing and enforcement of LCAs (*i.e.*, reduced from 6 percent to 5 percent, to be divided equally between processing and enforcement). Finally, the Amendments directed that an amended H–1B petition was not required to be filed by an employer that was involved in a corporate restructuring, where the nonimmigrant's terms and conditions of employment remained the same.

The Department notes that the ACWIA was the product of extensive negotiations between the Administration and the House and the Senate. See 144 Cong. Rec. H8584 (Sept. 24, 1998); 144. Cong. Rec. S10877 (Sept. 24, 1998). Earlier in the year both the House and the Senate had issued very different bills to address the H–1B program (*see* S. Rep. No. 105–186, 105th Cong., 2d Sess. (1998); H.R. Rep. No. 105–657, 105th Cong., 2d Sess. (1998)). The resulting legislation was a compromise, and there was no conference committee report or joint statement by the negotiators that would provide clear legislative history as to its intent. Although Senator Abraham and Congressman Lamar Smith, as well as other individual Congressman, made remarks in the *Congressional Record*, their views as to the meaning and effect of the legislation are dramatically different.

The Department further notes that the October 2000 Amendments were also the product of extensive negotiations, but that there is very little legislative history concerning the limited

provisions that were actually enacted by Congress.

Keeping in mind the difficulty with construing legislation under these circumstances, the Department has—in the Preamble of this Interim Final Rule—cited to the legislative history of ACWIA in both the House and the Senate, and to the extensive remarks of both Senator Abraham and Congressman Smith.

B. Summary of Comments on the January 5, 1999 NPRM

To obtain public input to assist in the development of interim final regulations, the Department published a Notice of Proposed Rulemaking (NPRM) and invited public comment in the **Federal Register** on January 5, 1999. The NPRM also stated that the Department was re-publishing for notice and further comment certain provisions of the Final Rule promulgated in December 1994. These provisions had been proposed for comment on October 31, 1995, during the pendency of the litigation in *National Association of Manufacturers* v. *Reich,* 1996 WL 420868 (D.D.C. 1996) (NAM), which resulted in an injunction against the Department's enforcement of some of the provisions on Administrative Procedure Act (APA) procedural grounds. In addition, the Department sought comment on a number of interpretive issues arising under the existing regulations, set forth in proposed Appendix B. The thirty-day comment period set forth in the January 5, 1999 NPRM was extended until February 19, 1999.

The Department has, in this Interim Final Rule, carefully considered comments received in response to the October 31, 1995 Proposed Rule in conjunction with the comments received in response to the January 5, 1999 NPRM. The 1995 Proposed Rule elicited comments from 13 commenters, including one from a trade association, one from an association representing immigration attorneys, one from an association representing firms which provide international personnel to American businesses, five from information technology companies, one from an accounting and auditing firm, two from universities and two from law firms. The proposals which then elicited the greatest number of comments concerned the actual wage system (Appendix A), workplace notice, the 90-day short-term placement option for H–1B workers who move to worksite(s) not covered by LCA(s), and the use of the Government *per diem* schedule for travel expenses for those workers. All but two of these commenters objected to the Department's proposal that the actual wage be based on a system utilizing objective criteria. Seven of the commenters objected to the Department's proposals on the posting of notices at worksites not controlled by the employer, while eight of the commenters objected to the Department's proposals with regard to the 90-day option. Five of the commenters objected to the use of the Government *per diem* schedule for reimbursement of travel expenses under this option.

The Department received 92 comments in response to the January 5, 1999 NPRM, including comments which were received late but which were included in the rulemaking record and fully considered. The commenters included individuals, a union, employee associations, lawyers or law firms, businesses, trade and business associations, educational and research facilities and associations, U.S. Government agencies, and Members of Congress (one comment from two Senators and one comment signed by 23 Members of Congress (hereafter referred to as ''Congressional commenters'')).

The proposals eliciting the greatest numbers of comments were those regarding non-productive time (or ''benching''), the information required on the LCA regarding the employer's status as H–1B-dependent, recruitment, displacement, and the posting of notices. Individual commenters were critical of the H–1B program generally, describing it as particularly detrimental to the job security of older Americans, and sought more guidance from the Department with regard to procedures which American workers may follow to prove displacement. These commenters also urged the Department to strictly enforce the ACWIA ''no benching'' provisions; include a requirement that all employers check the H–1B dependency box on Form ETA 9035, with the imposition of heavy fines for noncompliance; and require the physical posting of all notices at the place of employment or worksite.

The union and employee association commenters generally endorsed the Department's proposed regulations. Educational and research facilities primarily addressed and supported the Department's proposals regarding determination of prevailing wages for employees of those institutions. These commenters also urged the Department and the INS to be consistent in their application of the definitions contained in the regulatory provisions.

Two associations, one representing the interests of immigration lawyers and the other representing the interests of firms which provide international personnel to American businesses, commented on virtually every proposal made by the Department in the NPRM. Lawyers and law firms particularly addressed the proposal that all fees and costs connected with the filing of the LCA and H–1B petition, including attorney and INS fees, are to be borne by the employer. The Department's proposal addressing the timing of the H–1B dependency determination also drew a strong response from commenters representing business interests. Senator Abraham, one of the ACWIA's Congressional sponsors, submitted his October 21, 1998 *Congressional Record* remarks to be included in the rulemaking record. Senator Abraham, along with Senator Bob Graham, further commented on a number of NPRM provisions they believed to be inconsistent with Congressional intent. The Department also received a letter signed by 23 Congressmen and Senators, including Senators Abraham and Graham. These commenters expressed concerns on a number of provisions, including proposed paperwork requirements, the requirement that the actual wage be based on an objective system, and the 90-day short-term placement option.

III. General Issues Applicable to the Rule

In the review of the comments and the development of this rule, the Department realized that there are a number of general issues which affect the entire rule. The following discussion addresses these issues.

A. The Administrative Procedure Act

On January 5, 1999, the Department of Labor published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (64 FR 628). The Department published the NPRM to obtain public comment and assistance in the development of regulations to implement changes made to the INA by the ACWIA, and to provide an additional opportunity for comment on certain provisions which were previously published for comment as a Proposed Rule in 1995 (60 FR 55339). In addition, the Department sought comments on various interpretations of the existing regulations, published as proposed Appendix B.

The Department's NPRM set forth specific regulatory language for comment on some, but not all, of the issues arising from the provisions of the ACWIA. For those issues with no specific regulatory language, the Department identified concerns, and set out its proposed approach to addressing

them or described alternative approaches. The Department sought comment on all of these issues and proposals.

The Department was mindful of Congress' intent that the ACWIA implementing regulations be promulgated in a ''timely manner;'' the legislation allowed a public comment period of ''not less than 30 days.'' Accordingly, the Department set a 30-day comment period, to close on February 4, 1999. Upon petition by the American Council on International Personnel (ACIP), the Department extended the comment period another 15 days, until February 19, 1999. After consideration of the comments received, the Department now issues this Interim Final Rule and invites further comment on the regulatory provisions set forth in Part IV.A through N of this preamble and the accompanying regulatory text. After reviewing any comments received, the Department will issue a Final Rule.

The Department received 13 comments on its regulatory process.

The comments focused primarily on the length of the comment period and the NPRM's lack of regulatory text on various issues. Nine commenters generally objected to the length of the comment period in combination with the lack of regulatory text, variously contending that the requirements of the Administrative Procedure Act (APA) were violated in that the bulk of the proposals together with the lack of regulatory text, definitions, and clear explanations prohibited meaningful comment even within the extended period allowed. The American Immigration Lawyers Association (AILA) recommended that the Department withdraw the NPRM and issue an Advance Notice of Proposed Rulemaking (ANPR). ACIP and Senators Abraham and Graham suggested that the Department publish a proposed rule with request for comment prior to implementing an interim final or final rule. ACIP also expressed concern about the inclusion of the outstanding issues in the 1995 NPRM in the proposed rule. In the alternative, ACIP and the American Council on Education (ACE) requested the Department to defer enforcement of the interim final rule during an employer education period of at least 60 days following its promulgation.

The Department has concluded that the delay inherent in the publication of an ANPRM or a new NPRM with full regulatory text would not be warranted. The new attestation requirements for H–1B-dependent employers and willful violators created by the ACWIA do not take effect until these regulations are promulgated and will terminate on October 1, 2003 (with the extended ''sunset'' date specified by the October 2000 Amendments). Congress specifically allowed a comment period of 30 days. The Department obliged commenters by extending this period an additional 15 days. The analysis of the comments and the preparation of this Interim Final Rule have been a complex and time-consuming process. The Department is of the view that there should be no further delay of key ACWIA provisions. The Department is now providing an additional opportunity for comment on the provisions of the Interim Final Rule. Also, the Department seeks comments on additional proposals presented for the first time; these proposals are not included in the Interim Final Rule but are presented for comment for possible inclusion in the Final Rule.

The Department is of the view that the procedure followed on this Rule is in full compliance with the notice and comment provisions of the APA. The APA requires that an agency include in its notice of proposed rulemaking ''either the terms or substance of the proposed rule or a description of the subjects and issues involved.'' 5 U.S.C. 553(b)(3); *see Kooritzky* v. *Reich,* 17 F.3d 1509, 1513 (D.C. Cir. 1994). Furthermore, the agency must give ''interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments.'' 5 U.S.C. 553(c). Thus, under the plain language of the APA, the absence of complete regulatory text in the NPRM does not compromise the Department's compliance with the notice and comment requirements of the APA.

The lengthy and detailed preamble to the NPRM, setting forth the Department's proposals and concerns on each of the issues, struck a balance between the need to promulgate regulations expeditiously (created by the ACWIA provision that its new attestation requirements would not take effect until regulations are issued and will terminate on October 1, 2001 (now extended until October 1, 2003), as well as the need to give regulatory guidance with regard to those ACWIA provisions which took effect immediately), and the opportunity to provide meaningful public comments. Certainly the public has a right to have a sufficient description of the subjects and issues involved to offer meaningful comment. The Department believes that it has fully accommodated this need with its detailed discussion in the NPRM preamble. Furthermore, in addition to describing the provisions it proposed to promulgate where regulatory text was not included in the NPRM, the Department discussed and sought comments on numerous additional alternatives it was considering, in an attempt to ensure that there would be no surprises to the public if, after a review of the comments, it determined that an alternative was appropriate for the Interim Final Rule. The NPRM preamble is sufficiently detailed to ''inform the reader, who is not an expert in the subject area, of the basis and purpose for the * * * proposal[s].'' Federal Register Act, 44 U.S.C. 1501–1511 and regulations thereunder, 1 CFR 1812(a).

The Department has carefully considered the request for a delay in enforcement for 60 days after the effective date of the regulations. The Department notes that the new law was extensively negotiated with stakeholders for nearly a year before it was enacted, that stakeholders have been aware of the Department's proposed approach to the issues for more than a year, that a number of the provisions will be in effect for only a limited period of time, and that several provisions that are the subject of this rulemaking relate to applications of the law that have been in effect for nearly a decade and have been addressed in prior rulemaking. Furthermore, the Department plans to undertake extensive education efforts, as discussed below. The Department has therefore concluded that it is inappropriate to administratively declare a period in which civil money penalties and debarment would not be imposed. However, we would point out that in all cases the Department's enforcement and the penalties imposed take into consideration the full circumstances of any violations found, within the constraints of the statutory requirements. See INA, section 212(n)(2)(C), 8 U.S.C. 1182(n)(2)(C), and § 655.810 of this Rule. Furthermore, with regard to the recordkeeping requirements in particular, as discussed in IV.M.5 below, the Department will issue CMP assessments for violations only where it finds that the violation impedes the ability of the Administrator to determine whether a violation of the H–1B requirements has occurred, or the ability of members of the public to have information needed to file a complaint or information regarding alleged violations of the Act.

Finally, the Department notes that the changes to the method of making prevailing wage determinations for academic institutions and related nonprofit entities, nonprofit research organizations, and Governmental research organizations, set forth at

§§ 655.731(a)(2) and 656.40, are effective immediately and apply retroactively to all LCAs filed on or after October 21, 1998, as well as to all LCAs filed earlier to the extent that the prevailing wage determination was subject to an administrative or judicial determination that was not final as of October 21, 1998. Pursuant to 5 U.S.C. 553(d), the Department finds good cause to make these provisions effective immediately in light of the statutory provisions at Section 415(b) of the ACWIA, expressly making the changes in the prevailing wage determinations apply retroactively.

B. Dissemination of Information to the Public

A significant concern expressed by a large number of commenters is the need to ensure that both U.S. and H–1B workers, as well as employers, are well-informed about their rights and obligations under the H–1B program in general, and the new provisions of the ACWIA in particular. The Department appreciates the importance of such education and intends to undertake active efforts to educate the public about the H–1B program. Specifically, the Department intends to prepare and make available pamphlets, fact sheets and a small business compliance guide in both written and electronic formats. These resources will explain the obligations of employers, the rights of H–1B and U.S. workers, and the roles of the Department of Labor and the other government agencies involved in the program (the INS, the Departments of Justice and State). The resources will also reference materials available from these agencies that bear on the employment of H–1B nonimmigrants. The Department also plans to work with the INS and the State Department to develop a pamphlet to be provided to visa applicants and posted electronically that will explain rights and responsibilities under the H–1B program.

The electronic compliance material will be available through the Department's web page at *http://www.dol.gov,* which will provide electronic links to other sources of information that bear on the employment of nonimmigrants. From the home page, the material will be accessible either by going to DOL Agencies: Employment Standards Administration, Wage and Hour Division (WHD), then to Laws and Regulations, and then to Compliance Assistance Information: Wage and Hour Division, or by going directly to *http://www2.dol.gov/dol/esa/public/regs/compliance/whd/whdcomp.htm.*

The Department also intends to add an ''H–1B Advisor'' to its Internet ''Employment Laws Assistance for Workers and Small Businesses'' (ELAWS) system (located at the bottom of the home page). The H–1B ELAWS Advisor will be an interactive program that helps employers, employees, and other interested parties determine their H–1B rights and responsibilities, 24 hours-a-day, 7 days-a-week. The Advisor imitates the interaction an individual may have with a DOL expert—it asks questions, provides information, and directs the user to the appropriate resolution based on the responses given.

This information may also be obtained from the Wage and Hour Division's national and local offices. Mail requests should be addressed to the Wage and Hour Division Immigration Team, Room S–3510, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone requests should be made of the Wage and Hour Division Immigration Team at (202) 693–0071.

The addresses and phone numbers for Wage-Hour's district offices may be found on the Department's website at *http://www.dol.gov/dol/esa/public/contacts/whd/america2.htm,* and in the Federal government section of local telephone directories. Additionally, the Interim Final Rule refers to three electronic resources: America's Job Bank, O*NET, and the Occupational Outlook Handbook . The job bank may be accessed at *http://www.ajb.dni.us.* The O*NET may be downloaded for free or ordered through the Government Printing Office, which can be reached through the Department's weblink at *http://www.doleta.gov/programs/onet.* The Occupational Outlook Handbook, published by the Department/s Bureau of Labor Statistics, may be found at *http://stats.bls.gov/ocohome.htm.*

Finally, the Department will continue its practice of making available speakers for groups affected by the Department's administration of the H–1B program. The Department will also furnish information and copies of its resource materials to both employee and industry organizations to facilitate distribution to their member organizations.

IV. Discussion of Provisions of Interim Final Rule and Comments

Issues arising under the Proposed Rule, including the Department's response to comments thereon are discussed below. For the convenience of the public, the numbering in this part of the Preamble remains the same as in the Proposed Rule unless otherwise indicated.

The Department notes that, in a few instances, it is requesting comments in the Interim Final Rule on a regulation or an approach to a regulation on which it has not previously sought comment. These provisions are not included in the Interim Final Rule, but rather will be considered when the Department promulgates the Final Rule after review of any comments. These issues are highlighted in the preamble.

The Department also notes that the new regulatory text published here generally includes all of the surrounding regulatory text in order to provide context to the reader. However, the only provisions which are open for comment are the issues discussed in the Preamble.

Further, the Department notes that the Interim Final Rule includes changes in the regulations to implement the October 2000 Amendments. These matters are discussed in the appropriate sections of the Preamble, and comments on the provisions are invited.

The Department has been working with the INS to coordinate our respective rulemaking efforts under the Act and to achieve consistency in the implementation of the ACWIA provisions and the October 2000 Amendments.

A. What Constitutes an ''Employer'' for Purposes of the ACWIA Provisions? (§ 655.736(b) and § 655.730(e))

Section 212(n)(3)(C)(ii) of the INA as amended by the ACWIA directs that ''any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as a single employer'' for purposes of defining an ''H–1B–-dependent employer.'' These provisions, found at 26 U.S.C. 414(b), (c), (m) and (o), concern the circumstances in which ostensibly separate businesses are treated by the Internal Revenue Code (IRC) as a single employer for purposes of pension and other deferred compensation plans.

Section 414(b), (c), and (m) of the IRC, respectively, define ''controlled group of corporations,'' ''partnerships, proprietorships, etc., which are under common control,'' and ''affiliated service group.'' Section 414(o) provides that the Department of the Treasury may issue regulations addressing other business arrangements, including employee leasing, in which a group of employees are treated as employed by the same employer. However, the Department of the Treasury has not issued any regulations under this provision; therefore Section 414(o) will not be taken into account in determining who is treated as a single

employer for ACWIA purposes unless regulations are issued by the Department of the Treasury during the period the H–1B-dependency provisions of the ACWIA are effective.

Section 414(b) of the IRC provides that all employees within a ''controlled group of corporations'' (within the meaning of section 1563(a) of the Code, determined without regard to sections 1563(a)(4) and (e)(3)(C)) are treated as employed by a single employer. Under section 1563(a) and the related Treasury regulations, a controlled group of corporations is a parent-subsidiary-controlled group, a brother-sister-controlled group, or a combined group. 26 U.S.C. 1563(a); 26 CFR 1.414(b)–1(a). A parent-subsidiary is, generally, one or more chains of corporations connected through stock ownership with a common parent corporation where at least 80 percent of the stock (by voting rights or value) of each subsidiary corporation is owned by one or more of the other corporations (either another subsidiary or the parent corporation), and the common parent corporation owns at least 80 percent of the stock of at least one subsidiary. In general terms, a brother-sister controlled group is a group of corporations in which five or fewer persons (individuals, estates or trusts) own 80 percent or more of the stock of the corporations and certain other ownership criteria are satisfied. A combined group is a group of three or more corporations, each of which is a member of a parent-subsidiary controlled group or a brother-sister controlled group and one of which is a common parent corporation of a parent-subsidiary controlled group and is also included in a brother-sister controlled group.

Section 414(c) of the IRC and the related Treasury regulations state that all employees of trades or businesses (whether or not incorporated) that are under common control are treated as employed by a single employer. 26 U.S.C. 414(c); 26 CFR 1.414(c)–2. Trades or businesses include sole proprietorships, partnerships, estates, trusts and corporations. Trades or businesses are under common control if they are included in a parent-subsidiary group of trades or businesses, a brother-sister group of trades or businesses, or a combined group of trades or businesses. Generally, the standards for determining whether trades or businesses are under common control are similar to the standards that apply to controlled groups of corporations. However, for these purposes, pursuant to 26 CFR 1.414(c)–2(b)(2), ownership of at least an 80 percent interest in the profits or capital interest of a partnership or the actuarial value of a trust or estate constitutes a controlling interest in a trade or business.

Section 414(m) of the IRC provides that all employees of the members of an ''affiliated service group'' are treated as employed by a single employer. 26 U.S.C. 414(m). In general terms, an affiliated service group is a group consisting of a service organization (the ''first organization''), such as a health care organization, a law firm or an accounting firm, and one or more of the following: (a) A second service organization that is a shareholder or partner in the first organization and that regularly performs services for the first organization (or is regularly associated with the first organization in performing services for third persons), or (b) any other organization if (i) a significant portion of the second organization's business is the performance of services for the first organization (or an organization described in clause (a) of this sentence or for both) of a type historically performed in such service field by employees, and (ii) ten percent or more of the interest in the second organization is held by persons who are highly compensated employees of the first organization (or an organization described in clause (a) of this sentence). IRS has issued proposed regulations at 52 FR 32502 (Aug. 27, 1987), which may be consulted to ascertain IRS's interpretation of these provisions.

In the event of an H–1B investigation involving the issue of what entity or entities constitute a single employer for purposes of the ACWIA dependency provisions, an employer will be required to provide documentation necessary to enable the Department to apply these IRC provisions. The Department emphasizes that if an employer wishes to use the definitions in section 414(b), (c) or (m) of the IRC, it will be the employer's burden to establish that it meets the requirements of the IRC and the regulations thereunder.

In the NPRM, the Department stated that it was considering the effect and implications of adopting this single definition of ''employer,'' as set forth in these IRC sections for all purposes under this program, to the extent it may serve to accommodate business activities and facilitate administration and enforcement of the H–1B program. Specifically, the Department sought comment on the consequences of a regulation which would provide that where an ''employer'' files an LCA and thereafter undergoes some change of structure (*e.g.,* buy-out by a successor corporation; corporate restructuring or ''spin-off'' of subsidiaries), the employer for LCA purposes would be the entity which satisfies the IRC definition of a single employer. The Department sought comment on whether and how it may be able to modify its current position that a new LCA must be filed when the employer's corporate identity changes and a new Employer Identification Number (EIN) is obtained. Thus, the Department raised the possibility an employer which changes its corporate identity through acquisition or spin-off would be allowed to forego the filing of new LCAs if it documented this change in its public access file, provided that it satisfies the IRC definition of a single employer and that the documentation includes an express acknowledgment of all LCA obligations on the part of the ''new'' entity. The Department also sought comments on whether another approach should be used to address corporate restructuring.

The Department received 17 comments on its proposals with regard to defining an employer for purposes of the H–1B program.

ACIP, AILA and the Information Technology Association of America (ITAA) strongly opposed using the relatively broad IRC definition of ''single employer'' for any purpose other than determining whether an employer is H–1B-dependent as provided in the ACWIA. These organizations generally asserted that there was no basis to infer that Congress intended to expand this extraordinarily broad definition to the entire H–1B law and that expanded use of this definition would not facilitate corporate concerns in administering an employer's obligations in the H–1B program.

AILA further asserted that the IRC ''single employer'' concept is designed to prevent the avoidance of employee benefit requirements through the use of separate organizations, employee leasing, or other arrangements. Therefore, AILA observed, to prevent discrimination in employee benefits in favor of highly compensated employees, the ''single employer'' encompasses all entities that are related by financial interest (ownership or transactional). In contrast, AILA averred, the H–1B program seeks to protect U.S. workers and, to promote this purpose, an ''employer,'' at a minimum, should have an employment relationship with respect to covered workers, as defined by the ability to hire, fire, pay and other indications of control. Thus, AILA concludes, to depart from the longstanding definition of ''employer'' in the H–1B program, without explicit statutory authority, would be improper.

Nine commenters (AILA, Cowan & Miller, ITAA, Rubin & Dornbaum, the

Small Business Survival Committee (SBSC), the U.S. Chamber of Commerce, White Consolidated Industries, Network Appliance, and the Fred Hutchinson Cancer Research Center (FHCRC)) stated their view that extending the use of the definition of ''single employer'' would serve no useful purpose in facilitating corporate restructuring and efficient H–1B administration. In fact, they asserted, broader application would have the opposite effect by requiring multi-entity corporations to coordinate many functions among the various entities, including benefits, wages, movement of H–1B employees among the entities, lay-offs, and other purposes, every time an H–1B worker is hired, promoted, or moved. The Chamber of Commerce, however, suggested that if a single employer analysis is required outside the H–1B-dependent employer context, the Department should adopt the four-factor test developed by the National Labor Relations Board and approved by the Supreme Court in single employer labor law cases, rather than the analyses required by IRC Section 414.

ITAA sought clarification on the calculation of H–1B dependency given the ACWIA's definition of ''employer.'' For instance, ITAA noted, a controlled group could consist of parent A and subsidiaries B, C and D. If subsidiary B were to file an LCA, would the H–1B dependency calculation be made using all employees of A, B, C, and D, or only the employees of B? The Department believes that, under the IRC definition of ''controlled group,'' all of the employees of A, B, C, and D would be included in the dependency calculation if any of the subsidiaries or the parent company filed the LCA.

Many employers and their representatives supported the Department's proposal to modify its current requirement for filing of a new LCA upon a change in the EIN. AILA, ACIP, Intel Corporation (Intel), ITAA and the Society for Human Resource Management (SHRM) urged a rule that a new or amended LCA and H–1B petition not be required upon an acquisition, merger, spin-off, transfer or other corporate reorganization regardless of whether there is a change in the EIN. ACIP further urged that no new or amended LCA and H–1B petition be required whether or not the new entity meets the IRC definition of ''single employer.'' Essentially, these groups endorsed a position that they stated is similar to the I–9 provisions of the INA, 8 CFR 274a.2(b)(1)(viii)(A)(6) & (7), whereby the new employer has the option of assuming the immigration-related liabilities of the old employer regardless of whether the employer assumes any other liabilities in the transaction. Similarly, AILA suggested application of established successor-in-interest rules. Two other commenters (Kirkpatrick & Lockhart, Jose E. Latour and Associates (Latour)) also urged consistency between INS and DOL rules.

ACIP elaborated on this issue, suggesting that continued corporate compliance responsibility in the event of restructuring could be accomplished via a simple memorandum placed in the public access file, rather than a new LCA, except where there is a material change in the worker's job duties or the worker is relocated to a site not covered by an LCA, or the new entity hires a new H–1B worker. ACIP stated that an employer should not be able to use positions on the previous entity's LCA to hire a new H–1B nonimmigrant.

The AFL–CIO opposed the Department's proposed modification to the current LCA filing requirements because, in its view, it could create the substantial risk that employers, through acquisition or spin-off, could in fact create an H–1B-dependent workforce and yet avoid the concomitant recruitment and non-displacement obligations of H–1B-dependent employers. The AFL–CIO pointed out that the governing IRS regulations use the ''common control'' test to determine whether a parent-subsidiary group of corporations or brother-sister trades or business satisfy the Code's definition of single employer. The AFL–CIO suggested that under the Department's proposal, a non-H–1B-dependent corporation that has filed an LCA, but has yet to hire any H–1B workers under that application, could create an H–1B-dependent subsidiary corporation that meets the ''common control'' test, but avoid filing a new LCA. The parent could then acquire the requested or remaining number of H–1B workers on its outstanding LCA, and place them in the subsidiary workforce without applying any of the new attestation requirements for H–1B-dependent employers.

The Department believes that the AFL–CIO's legitimate concerns are related to the statutory definition of ''dependent employer'' and not to the proposal to eliminate the requirement to file a new LCA when an employer, as defined by the ACWIA, undergoes a change in corporate structure. Thus, given the scenario presented by the AFL–CIO, under the ACWIA-imposed definition of ''employer'' the parent corporation and its subsidiaries (if they meet the ''common control test'') are a ''single employer'' whose entire, combined work force is assessed to determine dependency. Under the IRC definition, the H–1B employees of the ''subsidiary'' are considered part of the larger work force of the ''parent'' corporation, which then may or may not be a dependent employer required to comply with the ACWIA attestation requirements.

Based on a careful review of all the comments submitted on this issue, the Department agrees that the use of the IRC definition of ''employer'' should be limited to determining H–1B-dependent employer status, as set forth in section 212(n)(3)(C)(ii). The IRC rules do not appear useful to facilitate the resolution of issues involving changes in corporate status.

However, as urged by the commenters, the Department has concluded that it is appropriate to change its current requirement that a new LCA (and, as a result, a new H–1B petition) be filed when corporate identity changes result in a change in the employer's EIN number. In the past, the Department has taken the position that a new LCA must be filed to assure continued compliance responsibility by the ''new'' employer—a corporate entity other than the one that filed the LCA in the first place. The Department understands, however, that when a corporate identity changes, it is common for the H–1B worker(s) to continue to perform the same job duties in the same location for the new, restructured entity, and for the new entity to assume the obligations of the previous entity. In such circumstances, where the obligations are assumed and there is no real change in the H–1B worker's job and his/her ''new'' employer's responsibilities, filing a new LCA and H–1B petition solely because of the change in corporate structure would be an unnecessary and burdensome exercise for the employer, the State Employment Service Agency (SESA) responsible for a prevailing wage determination, the Department in reviewing the LCA, and the INS in adjudicating the H–1B petition.

Further support for the Department's position is found in the October 2000 Amendments, in which Congress specified:

> An amended H–1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner.

Section 314(c)(10) of the INA, 8 U.S.C. 1184(c)(10), as enacted by section 401 of

the Visa Waiver Permanent Program Act. While this new INA provision is directed to the INA's processing and adjudication of petitions, we consider it to be instructive as to Congress' intent that a restructured ''new'' corporate employer be authorized to continue the employment of existing H–1B nonimmigrants on the same terms and conditions as the ''original'' employer.

Therefore, the Department's Interim Final Rule, at § 655.730(e), provides that a new LCA will not be required merely because a corporate reorganization results in a change in corporate identity, regardless of whether there is a change in the EIN, provided that the new employing entity, prior to the continued employment of the H–1B nonimmigrant, agrees to assume the predecessor entity's obligations and liabilities under the LCA. The agreement to comply with the LCA for the future and assumption of liability for any past violations must be documented with a memorandum in the public access file, specifically identifying the affected LCAs and the EIN of the new employing entity, and describing the new employing entity's actual wage system (see IV.O.3, below). In addition, the employer will be required to retain in its records a list of the name and job title of each H–1B worker transferred to the new employer. It should be noted that the employer's status as a new employing entity which is not required to file a new LCA is not determined by traditional principles of successorship (although we anticipate that the new entity will commonly be a successor employer), but rather by the new entity's agreement to undertake the obligations and liabilities of the predecessor under the LCA. This position is consistent with the assumption of liability under the INA, 8 CFR 274a.2(b)(1)(viii)(A)(6) and (7), whereby a new employer may either assume liability for the old I–9 forms or prepare new ones, and provides the employer with flexibility to deal with the circumstances surrounding the particular corporate reorganization. These principles apply whether the reorganization is as a result of an acquisition, merger, sale of stock or assets (''spin-off''), or similar change in corporate structure. The Department cautions that an employer which undergoes a change in structure and EIN, but chooses not to insert the required memorandum in the public access file, is required to file new LCAs.

A new LCA (and H–1B petition) will be required if the H–1B worker changes jobs or where the new entity/employer seeks to hire a new H–1B worker or to extend an existing H–1B petition. Thus the ''new'' employer may not utilize H–1B ''slots'' left over from the previous entity's LCA for a worker hired after a reorganization or restructuring. The Department also understands that where there is a material change in duties (whether or not there is a change in occupation), INS may require the filing of a new H–1B petition.

The Department emphasizes that a change in a corporation's H–1B-dependency status as a result of a change in the corporate structure would have no effect on the employer's obligations with respect to its current H-1B workers. In other words, a corporation which was H–1B-dependent, and as a result of a change in structure becomes non-dependent, would be required to continue to comply with the secondary displacement attestation unless it chooses to file a new LCA and H–1B petition(s) for any H–1B worker(s) employed pursuant to the ''dependent'' LCA. Similarly, a non-dependent corporation which becomes dependent as a result of corporate restructuring would not be required to comply with the H–1B-dependent employer obligations for H–1B workers employed pursuant to a pre-existing LCA, provided the employer has assumed the obligations and liabilities of that LCA. Furthermore, as discussed, a new LCA (attesting to the newly acquired H–1B-dependent or non-dependent status) would have to be filed for all future H–1B petitions and extensions of status.

B. What Is an H–1B Dependent Employer or a Willful Violator? (§ 655.736(a) and (f))

The ACWIA requires non-displacement and recruitment attestations by ''H-1B dependent employers'' and by employers found, after the date of ACWIA's enactment, to have committed a willful violation or a misrepresentation of a material fact on an LCA during the five-year period preceding the filing of an LCA.

The ACWIA definition of ''H–1B-dependent employer'' provides a formula for comparing the number of H–1B nonimmigrants employed to the total number of full-time equivalent employees (FTEs) in the employer's workforce. The Act provides that an H–1B-dependent employer is one that employs in the United States:

- 25 or fewer FTEs, and more than seven H–1B nonimmigrants; or
- At least 26 but not more than 50 FTEs, and more than 12 H–1B nonimmigrants; or,
- At least 51 FTEs, and H–1B nonimmigrants in a number that is equal to at least 15 percent of the number of such FTEs.

Thus, the H–1B-dependency formula for all employers uses two dissimilar numbers: the number of H–1B nonimmigrants employed (a ''head count'' of all H–1B workers, both full-time and part-time) and the number of FTEs (including both H–1B workers and other employees). For larger employers (*i.e.,* those with 51 or more FTEs), the computation is made with the number of H–1B workers as the numerator and the number of FTEs as the denominator; if the ratio is greater than 15 percent, then the employer is H–1B-dependent.

The structure and application of this statutory definition was addressed by one commenter (Tata Consultancy Services (TCS)), which urged the Department to focus on the perceived purpose rather than the language of the statutory test. TCS described itself as the largest and oldest software consulting and development firm in Asia, employing some 12,000 workers hired and trained in India, and conducting business in the U.S. through contracts to provide services both at client locations and at TCS locations. TCS expressed concern that ''the Act and the Department's proposals literally include TCS as an H–1B dependent employer, since the number of TCS employees on H–1B visas is more than 15 percent of TCS' employees in the United States.'' While acknowledging that it is an H–1B-dependent employer under the literal language of the statute (and thus subject to the additional attestation obligations for such employers), TCS urged the Department to issue a regulation which focused not on the express statutory provision but rather on the intention of Congress to impose the new obligations on ''job shops.'' In TCS's view, its own operation should not be included in the definition of H–1B-dependent employer because its operation does not constitute a ''job shop,'' which it defines as companies which ''seek only to make money from the temporary placement of foreign personnel with respect to whom the job shoppers have no real employer/employee relationship.''

The Department has considered the TCS suggestion but has concluded that the regulation must reflect the express language of the ACWIA definition. There being no ambiguity in this provision, the Department has no authority to promulgate a regulation defining a ''job shop'' and substituting that definition for the mathematical computation prescribed in the statutory definition of ''H–1B-dependent employer.''

The ACWIA specifies that ''exempt H–1B nonimmigrants'' are not to be included in the employer's determination of its H–1B dependency

status during a certain period after enactment of the Act (*i.e.,* six months from the date of enactment (thus, until April 21, 1999), or until the date of the Department's final rule on this provision is issued (thus, the date of this Interim Final Rule)).

None of the comments on the H–1B-dependent employer issues addressed the limited exclusion of ''exempt'' H–1B workers from the determination of H–1B-dependency. The prescribed period for this limited exclusion expires with the issuance of this Rule, and all ''exempt'' H–1B workers are henceforth to be included in the employer's determination of H–1B-dependency status. Therefore, the Department has determined that it is not necessary or appropriate to include in this section of the regulation any language concerning this now moot limited exclusion for ''exempt'' H–1B workers.

As stated above, the new non-displacement provisions and recruitment requirements contained in the ACWIA also apply to employers found, after the date of ACWIA's enactment, to have committed a willful violation or misrepresentation during the five-year period preceding the filing of an LCA. Section 655.736(f) of the Rule provides that an employer who is a ''willful violator'' is one who is found in either a Department of Labor proceeding pursuant to these regulations, or a Department of Justice proceeding pursuant to section 212(n)(5) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(5), to have committed either a willful failure to comply with the requirements of Section 212(n) or a misrepresentation of material fact during the five-year period preceding the filing of the LCA in question. Furthermore, the final decision in the proceeding finding willful violation or a misrepresentation must have been entered on or after the date of enactment of the ACWIA. ''Willful failure'' is defined in accordance with the existing regulations at § 655.805(b).

The following discussion addresses the other matters raised in the NPRM and in the comments, including the meaning of ''FTE,'' the manner and time of determining H–1B-dependency status, documentation of the determination, and the designation(s) to be made on the LCA regarding an employer's status as an H–1B-dependent employer or a willful violator.

1. What Is a ''Full-Time Equivalent Employee''? (§ 655.736(a)(2))

The ACWIA definition of ''H–1B-dependent employer'' includes the term ''full-time equivalent employees'' (FTEs) as a critical part of the calculation to determine an employer's H–1B-dependency status. The term is not defined in the Act.

The NPRM explained that the Department considered various interpretations of the term ''full-time equivalent,'' some of which would significantly increase an employer's paperwork burden. The NPRM recognized that an employer's FTEs would include only its employees (both H–1B nonimmigrants and U.S. workers) and would not include *bona fide* consultants and independent contractors who do not meet the employment relationship test under the common law. The NPRM also recognized that the determination of the number of FTEs would need to include consideration of both the employer's full-time employees and its part-time employees (if any).

The Department pointed out that one possible approach to the FTE determination—presumably the most burdensome approach, from the employer's perspective—would be to maintain records of all hours of work by all employees (both hourly-paid and salaried workers, both full-time and part-time workers) during a certain period of time (*e.g.,* a year, a work week), and to divide that total by a number of hours constituting a full-time employee standard.

The Department proposed a less onerous approach, in which FTEs could be determined in a two-step process. First, the number of employees would be determined through the employer's quarterly tax statement (or similar document) (assuming there is no issue as to whether all employees are listed on the tax statement). Second, the employer would count its full-time workers using some standard threshold; each full-time worker would constitute one FTE. The employer's standard for full-time employment would be accepted, provided it was no less than 35 hours per week (or, where the employer has no standard, 40 hours per week). Third, the employer would aggregate its part-time employees into FTEs by identifying the workers' average number of hours of work per week, then aggregating these average weekly hours, and finally dividing that total by the employer's standard for full-time employment. The aggregation of the average hours of the part-time workers into FTEs would be made through an examination of the last payroll (or the payrolls over the previous quarter if the last payroll is not representative) or through other evidence as to average hours worked by part-time employees (such as evidence of their standard work schedule).

Thirteen commenters responded to the Department's proposal and offered alternatives for determining FTEs.

Four commenters addressed issues concerning the identification of ''employees.'' Three commenters (ACIP, AILA, SHRM) expressed concern at what they viewed as the NPRM's inappropriate inclusion of consultant and contractor personnel in the determination of FTEs based on ''indicia of an employment relationship'' with the employer. The commenters asserted that this approach was inconsistent with the statute, that the determination of FTEs should include only those persons whom the employer considered to be its employees, and that the application of an ''indicia'' test to all personnel including consultants and contractors would be burdensome. ACIP stated that the application of the test would be inconsistent with the NPRM proposal that FTEs be calculated by examining the employer's quarterly tax statements to determine the number of employees on the payroll; ACIP noted that consultants and contractors would not appear on these tax statements. The commenters suggested that the identification of ''employees'' for purposes of the determination of FTEs should be a simple head count of workers on the employer's payroll (*i.e.,* persons identified by the employer on these records as its employees).

On the related matter of the proposed sources of information as to the number of employees—the employer's payrolls and tax statements—the AFL–CIO recommended that the FTE determination use an average of the number of employees shown on the employer's last three quarterly tax returns, and not the last quarterly return and the last payroll period, because this averaging process would prevent employers from timing the filing of LCAs to coincide with a greater ratio of FTEs to H–1B workers so as to avoid H–1B-dependency status.

It appears to the Department that some commenters' assertions regarding ''indicia of employment'' are based on a misapprehension of one aspect of the proposal. The NPRM did not propose that an ''indicia of employment'' test would be applied in this context; the ''indicia'' test was created in the ACWIA for purposes of the secondary displacement prohibition. The NPRM stated that the common law test of ''employment relationship'' would be used in identifying the persons to be included as ''employees'' in the FTE computation, and that *bona fide* consultants and independent contractors would be excluded from the count. The Department is of the view

that it is not necessary for the employer to do a detailed analysis of application of the common law test to every worker in order to identify ''employees'' for purposes of FTE determinations. Instead, as indicated in the NPRM and supported by the commenters, the employer's existing identifications of workers as ''employees'' (as opposed to consultants or contractor personnel) will ordinarily be sufficient for this purpose and no additional analysis will be needed.

Thus, the Interim Final Rule, at § 655.736(a)(2)(i), provides that the determination of FTEs is to include those persons who are consistently treated by the employer as ''employees'' for all purposes, including payroll records and Internal Revenue Service statements. The determination of FTEs is not to include those persons who are consistently treated by the employer as consultants or independent contractors for all such purposes, and for whom the employer fills out IRS Form 1099, provided there is no issue as to whether this treatment is *bona fide.* For any persons who are not consistently treated as either employees or consultants/contractors, the facts and circumstances must be examined in accordance with the common law test for an employment relationship with the employer. The common law test is the required standard for this analysis, since the Act does not prescribe a standard and, as a matter of law, the common law test applies. See, *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318 (1992); *Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730 (1989). The Department notes that all H–1B workers are necessarily employees within the meaning of the INA, and therefore must be included in both the numerator and the denominator of the dependency determination.

Similarly, the Department is of the view that it is not necessary for an employer to compute an average number of ''employees'' based on a series of quarterly tax statements. The Department agrees with the AFL–CIO that it would be desirable to foreclose the possibility of potential abuse of the program by employers who have significant fluctuations in the numbers of ''employees'' and who might time their LCA submissions based on tax statements with ''employee'' numbers supporting non-H–1B-dependency status. However, the Department has concluded that the imposition of an averaging/computation burden on all employers would be an inappropriate means of foreclosing the possibility of an unknown—but presumably very small—number of abusive filings. The Department cautions that, where it appears that an employer has manipulated its employment numbers to avoid dependency just prior to filing LCAs or H–1B petitions, the Department will examine the situation closely and utilize an employer's normal payroll. Further, with regard to the use of quarterly tax statements, the Interim Final Rule also clarifies that after determining which workers are ''employees,'' it will be necessary in determining FTEs to separate those employees who are part-time, do a separate FTE determination for those workers, and then add those FTEs to the number of full-time workers to determine total FTEs.

One commenter (ITAA) objected to the Department's proposal to count all H–1B nonimmigrants (both full-time and part-time) in the numerator of the equation to calculate H–1B-dependency. ITAA suggested that, for fairness and mathematical accuracy, the regulation should be written so that part-time H–1B workers are counted in the numerator in the same manner as part-time employees are counted in the denominator. Similarly, AILA argued that whether the regulation uses a simple head count or a calculation of FTE taking into consideration part-time hours, there should be consistency in counting workers for both the numerator and the denominator.

The Department has considered these suggestions, but has concluded that they cannot be accepted because the statutory language requires the difference in counting as described in the NPRM. The ACWIA prescribes the computation of ''full-time equivalent employees'' for the entire workforce, and explicitly requires that the number of FTEs be compared to the number of ''H–1B-nonimmigrants'' (with no distinctions as to full-time or part-time status).

Nine commenters addressed the matter of determining what constitutes a full-time worker for purposes of computing the employer's FTEs. Three commenters (AILA, Hammond & Associates (Hammond), and Latour) recommended that ''full-time'' be determined by individual employers consistent with their standards and business practices. Five commenters (ACIP, Intel Corporation (Intel), Kirkpatrick & Lockhart (Kirkpatrick), Rapidigm Immigration Services (Rapidigm), and American Occupational Therapy Association (AOTA)) supported the NPRM proposal that the employer should use its payroll and tax records to count the number of workers it employs on a full-time basis, using some standard. However, these comments differed with regard to the appropriate benchmark for full-time hours (*e.g.,* 35 hours per week, 32 hours or more per week, 21 hours or more per week). Two commenters (AILA and Hammond) asserted that employers may be able to document that full-time work is a figure less than the 35 hours per week suggested in the NPRM. Two commenters (AOTA and American Physical Therapy Association (APTA)) suggested that the Department set a numerical standard for part-time employment and that all employees with hours above that standard be considered full-time.

After fully considering the comments, the Department has concluded that the NPRM proposed definition of full-time will be adopted since it provides considerable flexibility for employers while incorporating a reasonable and appropriate baseline standard. Thus, the Interim Final Rule, at § 655.736(a)(2)(iii)(A), provides that the employer may use its own standard for full-time employment, which the Department will accept provided that the standard is no less than 35 hours of work per week. The Department believes that this is a reasonable approach, that it is easily understood and applied, and that 35 hours as the minimum for full-time employment is a well-established labor standard, utilized by the Bureau of Labor Statistics for survey purposes. See, *e.g.,* the definitions of the terms utilized in U.S. Bureau of Labor Statistics, Employment and Earnings. This standard is the equivalent of seven hours of work per day, five days per week, with non-working time for lunch each day. The Rule also provides that, where the employer has no standard for full-time employment, the Department in an enforcement action will use the standard of 40 hours of work per week (the Fair Labor Standards Act standard).

Four commenters (ITAA, ACIP, AILA and SHRM) expressed concerns as to the need for and the methodology of aggregating part-time workers into FTEs for purposes of determining the employer's H–1B-dependency status. ACIP and SHRM suggested that no such aggregation or ''conversion'' should be required, and stated that the method proposed by the Department was burdensome, complex and unworkable. ITAA stated that the proposal would be burdensome because many part-time workers are salaried with no records of hours of work. AILA considered the proposed method to be burdensome, and offered its own proposed formula for calculation of FTEs—each full-time worker, each FLSA-exempt worker, and each part-time worker working more

than 20 hours per week would equal one FTE; part-time workers who work fewer than 20 hours per week and are not FLSA-exempt would be aggregated through an average of hours as proposed in the NPRM.

The Department recognizes that, for some employers, the aggregation of part-time workers into FTEs may be somewhat burdensome. However, in light of the clear statutory language, the Department is unable to dispense with the concept of ''full-time equivalent employees,'' which is not a mere head-count of workers in the workforce (number of employees) but instead is a calculation of the number of full-time workers needed to perform the total work done by the total workforce (number of ''equivalents'' of full-time workers). Congress explicitly prescribed the use of the FTE concept at three points in the ACWIA, and must be presumed to have used the concept with an understanding of its established meaning. The concept of ''full-time equivalent employees'' is well-known to Congress. For example, Congress considers FTEs each year in the enactment of the appropriations of operating funds for the Federal agencies, which submit their budget requests based on the Office of Management and Budget definition of FTEs:

''* * * the total number of regular straight-time hours (*i.e.,* not including overtime or holiday hours) worked by employees divided by the number of compensable hours applicable to each fiscal year. Annual leave, sick leave, compensatory time off and other approved leave categories are considered to be ''hours worked'' for purposes of defining full-time equivalent employment that is reported in the personnel summary.''

Office of Management and Budget, Circular No. A–11 (1998), p. 31. As stated in the NPRM, the Department considered but rejected the comprehensive computation that would be required under the OMB definition (*i.e.,* totaling all hours worked by all workers, and dividing by the normal standard of hours of work for a full-time worker); this approach could be extremely burdensome to employers. But the Department recognizes that some computation of FTEs—including a computation regarding part-time workers—was mandated by the ACWIA and must be reflected in the dependency computation.

In an effort to minimize the burden to employers, as suggested by SHRM and other commenters, the Department has modified its proposed method for the aggregation or conversion of part-time workers into FTEs. The Interim Final Rule, at § 655.736(a)(2)(iii)(B), provides the employer a choice between two methods. First, the employer may count each part-time worker (*i.e.,* each employee working less than a full-time schedule) as one-half of an FTE. This method requires no records of hours of work and no complex calculations; the employer simply counts the number of part-time workers and divides by two to arrive at the number of FTEs represented by its part-time workers. In the alternative, the employer may total the hours worked by all the part-time workers in a work week and divide that total by the standard hours for full-time employment (*e.g.,* 40 hours). The Department notes that the use of this alternative does not require the employer to have hours-worked records for its part-time workers; rather, the employer may use any reasonable method of approximating the average hours worked by its part-time workers, such as their standard work schedule.

One commenter (AILA) suggested that the regulations enable employers to avoid any complicated calculation whatsoever where it is ''readily apparent'' that an employer is not H–1B dependent based on the make-up of its work force. AILA stated that an employer should be allowed a ''safe harbor'' when a quick, simple and straightforward calculation shows non-dependency. It suggested a calculation: the number of H–1B workers would be divided by the number of full-time employees; if the result is less than 15 percent, no further or detailed computation would be necessary, but if the result is greater than 15 percent, the employer would calculate its FTEs to determine its H–1B-dependency status. Rapidigm and ACIP agreed that a test should be provided for ''readily apparent'' status.

The Department agrees with the suggestion that there should be a simple method for determining whether the employer's status as either H–1B-dependent or non-dependent is ''readily apparent.'' The NPRM stated the Department's belief that, for most employers, dependency status would be ''readily apparent'' and, therefore, they would not need to make a calculation of their FTEs in order to be able to attest to their status. The Department, in § 655.736(c)(1) and (2) of this Interim Final Rule, is adopting a provision which requires no computations by the employer with ''readily apparent'' status, and is also adopting the AILA-recommended 15 percent ''snap shot'' test as the means for an employer with borderline status to determine whether it must engage in the full computation of the number of FTEs in its work force in order to determine its H–1B-dependency status. The ''snap shot'' test allows small employers (*i.e.,* those with 50 or fewer employees in the U.S.) to simply compare their work forces to the definition for H–1B-dependent employer, counting all employees rather than computing FTEs. If such an employer appears to be H–1B-dependent based on the snap shot test, then the employer which believes itself to be non-dependent should make a complete computation. The snap shot test provides that large employers (*i.e.* those with 51 or more employees in the U.S.) may make a quick appraisal of the proportion of H–1B nonimmigrants in their work force. Where the number of H–1B workers divided by the number of full-time employees is greater than 0.15, any employer which has reason to believe it may not be H–1B-dependent (for example, because of the number of part-time workers in its work force), must calculate its FTEs. The employer whose ''snap shot'' clearly shows it is not H–1B-dependent, as well as any employer which admits it is dependent, may file its LCA(s) reflecting that status (as described in the following discussion), without engaging in further computations. In the event of an enforcement action, the employer may be required to verify its ''snap shot'' results and its H–1B-dependency status through available records (as discussed in IV.B.3 below).

2. When Must an Employer Determine H–1B Dependency? (§ 655.736(g))

The ACWIA definition of ''H–1B-dependent employer'' and the new LCA attestation elements that are required of such an employer do not clearly define the timing of the dependency determination. The questions therefore arise: When must a new LCA be filed and what obligations, if any, does an employer have if its dependency status changes?

The Department, in the NPRM, expressed concern that if H–1B-dependent employers are permitted to continue to use LCAs certified before this Rule is effective, they could avoid any application of the law's new attestation provisions (which are applicable only to LCAs filed after the issuance of this Rule and before October 1, 2003 (the ''sunset'' date as extended by the October 2000 Amendments). An LCA is ordinarily valid for up to three years from its date of certification by ETA and can provide for numerous H–1B nonimmigrants to be hired during that period. Thus an employer could use a previously-certified LCA to bridge the entire period during which the new LCA attestation elements would be required. H–1B-dependent employers could, in effect, disregard all of the new

worker protection provisions, with the potential effect of nullifying these provisions.

The Department proposed that, by operation of the regulation, any current LCA(s) would become invalid for an employer that is or becomes H–1B-dependent, for purposes of any future H–1B petitions (including extensions). The employer's previously certified LCA(s) would continue to be valid, however, and the obligations under that LCA(s) would continue with respect to any petitions filed before the effective date of these regulations (*i.e.,* pending petitions would not be affected). Thus, the Department proposed that the regulation would require that all H–1B-dependent employers with existing LCAs file new LCAs if they wish to petition for any new H–1B nonimmigrants or seek extensions of any existing H–1B visas on or after the effective date of the Rule. Likewise, the Department proposed that the regulation would require all non-dependent employers that experience a change of status (becoming H–1B-dependent) to file new LCAs if they wish to petition for new H–1B nonimmigrants or seek extension of existing H–1B visas after the date they become H–1B-dependent. The proposal contemplated that non-H–1B-dependent employers whose status remained unchanged would not be required to file new LCAs.

The NPRM discussed the timing and frequency of employers' determinations of their H–1B-dependency or non-dependency status. The Department recognized that the make-up of an employer's workforce—and, thus, its H–1B-dependency status—could change significantly over time. The Department therefore suggested that an employer's status would need to be redetermined at appropriate times, and reflected in the employer's actions, in order for the new LCA obligations to be appropriately implemented. The Department proposed that an employer would be required to make a determination of its status not just prior to or on the effective date of the regulation, but also when it files any new LCA or H–1B petition (including extensions) after that date. Thus a non-dependent employer (*i.e.,* one which is not H–1B-dependent on the effective date of the Interim Final Rule or at the time an LCA is filed) would have a continuing obligation to ensure that, if it later becomes dependent and wishes to file new H–1B petitions (or seek extensions), it takes steps necessary to comply with the requirements of the law and the regulation. The NPRM further stated that an employer which is H–1B-dependent and files an LCA indicating that status, but later becomes non-dependent, would not be required to comply with the attestation elements applicable to dependent employers with respect to any H–1B workers during any period in which it is not dependent.

The Department also described alternative approaches to the proposed timing of dependency determinations, such as having the dependency update determined on a set, regular basis (*e.g.,* each calendar quarter) or limiting the LCA's validity period to some period shorter than the current three years (*e.g.,* 90 or 180 days), with a new dependency status determination made in connection with each new LCA.

The NPRM explained that the Department believed that, as a practical matter, the continuing obligation of the non-dependent employer to ensure that its dependency status has not changed would not place an undue burden on employers. For most program users, their status as non-dependent would be readily apparent and they would have no obligations to perform the full computations or to file new LCAs. (*See* discussion of ''readily apparent'' status in IV.B.1, above).

The statements by Senator Abraham and Congressman Smith in the *Congressional Record* are silent regarding the effect of the ACWIA provisions on existing LCAs. Both Senator Abraham and Congressman Smith simply state, regarding the effective date, that the provisions are effective on the date the Secretary issues final regulations to carry them out. 144 Cong. Rec. S12752 (Oct. 21, 1998); 144 Cong. Rec. E2325 (Nov. 14, 1998).

Sixteen commenters responded to various aspects of these NRPM proposals.

Eleven commenters addressed the Department's proposal to invalidate the LCAs of H–1B-dependent employers for purposes of petitions for new or extended visas. Four commenters (Senators Abraham and Graham, AILA, ITAA, and Baton Rouge International, Inc. (BRI)) challenged the Department's authority to invalidate LCAs already in effect. Senator Abraham stated that Congress specified in ACWIA that the new attestation requirements would apply only to LCAs filed on or after the date of the Department's final regulations. Three of these commenters (BRI, AILA and ITAA) also asserted that the proposed rule would be invalid as retroactive rulemaking.

An attorney (Hammond) acknowledged the Department's reasons for its proposal as legitimate and did not challenge the Department's authority to invalidate existing LCAs; but questioned the proposal because of the paperwork and processing burden on the Department and the INS. Hammond recommended that, instead of invalidating the previously-certified LCA, the Department and INS should require an affidavit, mirroring the dependent employer attestations, on any new petitions filed using ''old'' LCA forms. Hammond further recommended that the proposed invalidation of existing LCAs be phased in over a six-month period. Another attorney (Latour) acknowledged that while the proposal was burdensome, there seemed to be no attractive alternative to requiring H–1B-dependent employers with existing LCAs to file new LCAs for the purpose of filing new H–1B nonimmigrant petitions. Another commenter (Simmons, Ungar, Helbush, Steinburg & Bright (Simmons, Ungar)) also recommended a phase-in period and suggested a three- to six-month window for filing new LCAs; this commenter expressed concern that the requirement of immediate new LCAs would lead to significant disruptions in ongoing critical projects.

The Department has carefully considered the views of the commenters who asserted that the proposed rule would be contrary to the meaning of the statute or invalid as retroactive rulemaking, but disagrees with their conclusions. To the contrary, the proposed rule is not inconsistent with the language of the ACWIA. The Act makes the new attestation elements apply to ''an application filed on or after the date final regulations are first promulgated to carry out this [provision], and before October 1, 200[3]'' (the ''sunset'' date having been extended from 2001 until 2003 by the October 2000 Amendments). The ACWIA is silent regarding the timing of the employer's determination of its dependency status or the effect of the ACWIA on previously certified LCAs, leaving a gap to be filled by these rules. *See Chevron* v. *Natural Resources Development Council,* 467 U.S. 837, 842–43 (1984). The proposed rule would require an employer to make that determination when and if it seeks access to new H–1B workers or wishes to extend their stay in the United States; if the employer then determines it is H–1B-dependent, it would be required to file a new LCA. Under the ACWIA language, such new LCAs would be subject to the new attestation elements.

Given the significance of the new attestation requirements in the ACWIA, we believe it is reasonable for the Department to avoid the nullification of these requirements by issuing regulations which require employers to make dependency determinations if they choose to file new H–1B petitions

or apply to extend existing visas after the effective date of these regulations. *B–West Imports, Inc.* v. *U.S.,* 880 F. Supp. 853, 863 (Ct. Int'l Trade 1995), aff'd, 75 F.3d 633 (Fed. Cir. 1996). In this connection, the Department notes that it has reviewed LCAs filed since the effective date of the ACWIA, and found that many employers filed LCAs for numerous H–1B workers. A list of the 20 users in each region which filed LCAs for the greatest number of aliens in the period October 1, 1998 through May 31, 1999, showed the average number of workers per LCA ranging from one worker per LCA to more than 500 per LCA. Out of the top 20 users in Region I (Boston), for example, only three employers averaged less than 10 workers per LCA, while eight averaged 50 or more per LCA, of whom four averaged 100 or more. This data supports the Department's view that—given the limited time these recruitment and non-displacement obligations will be in effect and the three-year validity period of the LCAs—this requirement is necessary to effectuate the worker protection provisions applicable to H–1B-dependent employers and willful violators.

It is also the Department's view that the regulation would not be invalid as retroactive rulemaking. The rule does not create a new obligation, impose a new duty or attach a new disability with respect to transactions already taken. *See, Landgraf* v. *USI Film Products,* 511 U.S. 244, 269 (1994). The regulation does not change the standards or consequences, or require adjustments or corrections, for completed transactions. The H–1B visas under previously certified LCAs remain valid and in effect, and the prevailing wage and other obligations under that LCA continue to apply to those visas. New LCAs are required only for H–1B-dependent employers and willful violators filing new H–1B petitions or applications for extension of existing visas. *See Association of Accredited Cosmetology Schools* v. *Alexander,* 979 F.2d 859, 865 (D.C. Cir. 1992). Nor does the rule impair vested rights. *See Landgraf* v. *USI Film Products,* 511 U.S. at 269–71. Furthermore, the LCA itself is only the first step by an employer in applying for H–1B visas, and for workers in seeking to enter the United States. Even after the LCA is certified, the employer has no vested right to hire H–1B nonimmigrants; the nonimmigrant in turn has no vested right, once the petition is granted, to obtain a visa or to enter the country. *Joseph* v. *Landon,* 679 F.2d 113, 115 (7th Cir. 1982). See *Pine Tree Medical Associates* v. *Secretary of Health and Human Services,* 127 F.3d 118, 122 (1st Cir. 1997).

The Department wishes to emphasize that an LCA certified prior to this Rule will continue in effect for the vast majority of program users who are not H–1B-dependent. Furthermore, such LCAs will remain in effect for H–1B-dependent employers and willful violators except that they may not be used to support new H–1B petitions or applications for extension of status. Thus, for example, the prevailing wage rate and obligation under the ''old'' LCA would remain in effect even for H–1B-dependent employers and willful violators with respect to any H–1B workers supported by the ''old'' LCA. A new LCA (and new wage rate) would be necessary only where an H–1B-dependent employer wants to petition for new workers or request extensions for existing workers (who would typically require a new LCA in any event).

The Department has also considered the suggestion by some commenters that the requirement of new LCAs be phased in over some period of weeks or months following the issuance of this rule. However, the Department is confined by the ACWIA language prescribing that the obligations are effective for LCAs that are filed on or after the date this rule is promulgated. Further, the Department is aware that the new attestation elements will be effective only with respect to LCAs that are filed during a relatively short period (*i.e.,* until October 1, 2003, the ''sunset'' date as extended by the October 2000 Amendments). We have, therefore, concluded that it would be contrary to the language and purposes of the legislation to provide an additional phase-in period which would have the effect of restricting an already limited period for the application of the new attestation elements. The Department notes that employers have already had considerable time to prepare for the ACWIA provisions since their enactment on October 21, 1998, and the publication of the NPRM on January 5, 1999.

The Department understands that INS plans to modify its petition form to obtain information about a petitioner's H–1B-dependency status, and in its adjudication of H–1B petitions, will review LCAs filed by dependent employers to ensure that the LCA reflects the employer's status as set forth on the petition. Thus, it is the Department's expectation that if a dependent employer seeks to support an H–1B petition with an LCA which does not identify itself as H–1B-dependent and attest to the new attestation elements for dependent employers, INS will advise the employer that it must obtain a new LCA.

Nine commenters addressed the Department's proposal concerning the timing or frequency of the employer's determination of its H–1B dependency status.

One commenter (AILA) supported the Department's proposal that the dependency determination be made each time an LCA is used by the employer in support of an H–1B petition. Four commenters (AFL–CIO, AOTA, APTA, and AILA) supported requiring that employers determine dependency when filing an LCA.

Five commenters (Intel, Computec International Resources (Computec), ACIP, SemiConductor Industry Association (SIA), and ITAA) objected to the Department's proposal requiring employers to make dependency determinations when filing an LCA or H–1B petition; they viewed the requirement as unrealistic and burdensome. SIA and ITAA suggested annual dependency determinations. ACIP suggested that determinations be made annually or at the time there is a large increase in H–1B staff. Intel and Computec suggested that dependency be determined on a quarterly basis, and Intel stated its view that an employer's dependency will not change from one filing to another.

Having considered the varying views of the commenters, the Department has concluded that the proposed approach is appropriate in that it achieves the purposes of the Act while not imposing an unreasonable burden. No employer will be required to make a determination of its dependency status unless it wishes to file petitions for new workers or to seek extension on the visas of existing workers (*i.e.,* the determination is required only when an employer seeks access to H–1B workers, on either new visas or extended visas—which typically require a new LCA in any event). The Department believes that the vast majority of the employers using the H–1B program are non-dependent and that for both dependent and non-dependent employers, their status would be readily apparent (see discussion of ''snap shot'' determination in IV.B.1, above). Further, the Department anticipates that the status of most employers would be unlikely to change, whether that status be dependent or non-dependent. At the same time, however, the Department considers the new attestation provisions to be important and believes the purposes of these provisions cannot be satisfied if an employer is permitted to continue to use an LCA for non-

dependent employers if its status changes.

Three commenters responded to the Department's alternative suggestion that the validity period of an LCA might be shortened from the current rule's maximum period of three years. The AFL-CIO recommended that the LCA validity period be shortened to six months. AOTA recommended a quarterly (three-month) filing requirement. BRI opposed the reduction of the LCA validity period, asserting that quarterly or semi-annual LCAs would overburden and backlog administering agencies.

The Department considered the comments pertaining to the possibility of reducing the validity period of the LCA. However, we see no advantage that would outweigh the significant increase in the burden on employers and government agencies due to the repeated submissions of new LCAs upon the expiration of short-lived LCAs. Therefore, the Interim Final Rule does not make any reduction of the LCA validity period of three years.

After consideration of all these comments, the Interim Final Rule, at § 655.736(c) and (g), adopts the proposal that H–1B-dependent employers be required to file a new LCA if they wish to file new H–1B petitions, or extensions of status, after the effective date of the regulations. In addition, if a non-dependent employer becomes dependent after the effective date of the regulations and wishes to file new H–1B petitions or extensions of status, it must file a new LCA attesting that it is dependent and agreeing to the new attestation requirements for H–1B-dependent employers. Thus an employer must consider and attest to its dependency status each time it files a new LCA; similarly, as discussed below, an employer seeking to file a new H–1B petition, or seeking an extension of status, must use an LCA in support of the petition that accurately attests as to its dependency status at the time it files the petition. An H–1B employer that changes its status to non-dependent but wishes to petition for additional H–1B nonimmigrants or extensions of stay using an approved ''dependent'' LCA continues to be bound by the dependent-employer attestation requirements unless it files a new LCA attesting to its non-dependency.

3. What Kind of Records are Required Concerning the H–1B Dependency Determination? (§ 655.736(d))

The Department, in the NPRM, discussed the issue of what records, if any, the employer would be required to create and retain concerning its dependency determination(s). The Department proposed that documentation be created and retained only when an employer's non-dependent status is not readily apparent. On the other hand, the Department also proposed that if the employer's dependency status is ''readily apparent'' (either dependent or not dependent), no records would need to be made or retained. The Department sought comments on whether there should be an explicit standard for when the employer's status is ''readily apparent.'' (See discussion of ''snap shot'' determination in IV.B.1, above). Further, the Department proposed that if the employer's dependency status changes, the employer should retain records in the public access file reflecting the change and, if the change of status is from dependent to non-dependent, the public access file must show the underlying computation. Finally, the Department requested comments on the feasibility and appropriateness of the regulation specifying that no records are required if the dependency determination could be made from publicly available records and, if so, what public records are generally available for this purpose.

The Department received 13 comments on these proposals.

Kirkpatrick & Lockhart, Latour and AOTA supported the NPRM proposals. The AFL-CIO, Rubin & Dornbaum, and White Consolidated Industries suggested that all employers be required to document not only their status but also the underlying mathematical computations. AILA stated that the Department should not require recordkeeping of the calculation by any employer, but especially it should not require non-dependent employers to retain dependency documentation and keep it in public access files. Intel and ACE agreed with the proposal that no record needs to be kept where the employer's non-dependent status is readily apparent. ITAA suggested that the regulation should prescribe a bright line test to show when employers are required to create and maintain records, and that no records at all should be required of employers that concede that they are H–1B-dependent. ACIP suggested that the Department should advise employers how long they are to keep records and should allow employers five working days to produce their dependency status records in the event of an investigation. Rapidigm suggested that the records used to make the dependency determination should be made accessible to the Department on a quarterly basis. Computec suggested that an employer be required to keep dependency records in only one location (apparently based on the misunderstanding that public access files must be maintained in numerous locations).

Having taken into consideration all of the commenters' varied views pertaining to the creation and retention of documentation regarding the determination of dependency status, the Department has concluded that modification of the proposal is appropriate to achieve the purposes of the ACWIA while avoiding unnecessary burdens on employers. The Department first notes that for the vast majority of employers using the H–1B program, their dependency status (either non-dependent or H–1B-dependent) will be obvious and stable and they, therefore, will have no documentation burden; a small number of employers with ''borderline'' status or changing status will be required to document their determinations of status and/or their changes of status, but the documentation burden will be minimal.

The Interim Final Rule requires that employers determine their dependency status the first time after the Rule is in effect that they file an LCA or an H–1B petition or extension under an existing LCA. Employers may use the ''snap shot'' test to determine if their dependency status is readily apparent, but must do the full computation if the number of H–1B workers divided by the number of full-time workers in their workforce is more than 0.15, and must retain a copy of the full computation if they then conclude that they are not H–1B-dependent. The regulations do not require that an employer do the computation, but do require that the employer consider its status, each time thereafter that an LCA or H–1B petition is filed; the employer must attest as to its status on each LCA, and may not use a non-dependent LCA to support new H–1B petitions or requests for extensions if its status changes from non-dependent to dependent. Furthermore, we understand that employers will be required to indicate their status on each H–1B petition or extension filed with INS. Thus it is important that employers remain cognizant of their dependency and do a recheck of their dependency status if the make-up of their work force changes sufficiently that their status might possibly change.

If an employer changes status from dependent to non-dependent, the employer will be required to retain a copy of the full computation of its status. The Interim Final Rule also requires a recheck of dependency (whether the ''snap shot'' test or the full

computation) if there is a change in corporate status, as discussed in IV.A, above. In addition, the Rule provides that if an employer utilizes the IRC single-employer test to determine dependency, it must maintain records documenting what entities are included in the single employer, as well as the computation performed (whether the ''snap shot'' or full computation), showing the number of workers employed by each entity who are included in the numerator and denominator of the equation. It is important that such employer retain copies of the records necessary to support the computation or be able to provide such records in the event of an investigation, since the records may not all be under its control. Finally, if an employer includes workers in its computation who do not appear as employees on its payroll, the employer must keep a record of its computation (whether the ''snap shot'' or the full computation) and be able to substantiate its determination that the workers are its employees.

The Department has concluded that it is not necessary, however, to include either the computations or a summary of the computations in the public access file. The Department believes that the notation on the LCAs as to dependency status constitutes the information necessary for the public. In addition, the Interim Final Rule, at § 655.736(d)(7), requires the employer to include a notation in the public access file listing any other entities which are considered to be part of a ''single employer'' for purposes of the dependency determination. Further, all employers are required to retain copies of H–1B petitions and requests for extensions filed with INS and to make petitions and payroll records available to the Department in the event of an investigation.

The current regulation contains guidance that meets the concerns of some commenters pertaining to location of public access files and the length of time that records must be retained. Section 655.760(a) directs the employer to make a public access file available in either of two locations (its principal place of business in the U.S. or at the worksite) and describes the required contents of the file. The regulation does not mandate a separate file for each H–1B worker or for each LCA. If the employer maintains one public access file for all of its LCAs, documentation specific to an LCA should be attached to the respective LCAs in the file; where documentation is common to all LCAs, only one document need be retained in the file. The record retention period is set forth in § 655.760(c), which has been clarified to require that records be retained for one year beyond the last date on which any H–1B nonimmigrant is employed under the LCA or, if no nonimmigrants were employed under the LCA, one year from the date the LCA expired or was withdrawn. The regulation further requires that payroll records be retained for a period of three years from the date(s) of the creation of the record(s). If there is an enforcement action, records shall be retained until the enforcement proceeding is completed.

With respect to the suggestion that the regulations allow employers five working days to produce records as to dependency status, the Department believes that such a provision in the regulations is unnecessary. Wage-Hour district offices commonly make appointments with employers before an investigation commences, thereby allowing employers time to produce necessary records. For employers who are required to make and retain computations of their dependency status, the Department would anticipate that the computations would be provided promptly to Wage-Hour. Wage-Hour will allow employers reasonable time to gather back-up documentation needed to support the computation, or for Wage-Hour to make the computation if none has been made by the employer, taking into consideration the fact that the statute provides that the investigation is to be completed within 30 days.

4. What Information Will Be Required on the LCA Regarding an Employer's Status as H–1B Dependent? (§ 655.736(e))

The Department proposed in the NPRM that the revised attestation form (LCA), at a minimum, would require that every employer which is H–1B-dependent at the time it files an LCA, affirmatively acknowledge its status and obligations by checking a box on the LCA attesting to its dependency and its compliance with the additional attestation requirements concerning non-displacement and recruitment of U.S. workers. With respect to an employer which is not H–1B-dependent at the time it files an LCA, the NPRM set out three alternatives for the LCA form:

1. The employer would expressly attest that it is not H–1B-dependent and that if it later becomes dependent, it will comply with the additional attestation requirements; or

2. The employer would not have to attest that it is not dependent, but the LCA would clearly state—and by signing the form the employer would agree—that the employer is required to comply with the additional attestation requirements if it does become dependent; or

3. The employer would not have to attest that it is not dependent, but the LCA would clearly state that it could not be used in support of any H–1B petition filed after the employer became dependent.

The NPRM included a draft revision of the LCA form, which included a ''box'' for the employer's acknowledgment of H–1B-dependent status but no ''box'' regarding non-dependent status. The draft also included a ''box'' for the employer to indicate that the LCA would be used only for ''exempt'' H–1B workers, as well as a ''box'' for the employer's acknowledgment of a finding of a willful violation or misrepresentation of material fact.

Thirty-two commenters, including 20 members of the general public, responded to the Department's proposals. The majority of commenters endorsed the ''check box'' approach for the LCA and favored the use of an LCA form which clearly reflects the employer's status and obligations. For example, Intel stated that ''[b]y checking a box, it will clearly be evident whether an employer is dependent or non-dependent.'' The majority of commenters (each of the 20 individuals, the AFL–CIO, Kirkpatrick & Lockhart, Latour, the Institute of Electrical and Electronics Engineers (IEEE), and the American Engineering Association (AEA)) suggested that all employers be required explicitly to attest to their status as dependent or non-dependent when filing LCAs. Three commenters (APTA, ITAA, and Cooley Godward) endorsed NPRM proposed alternative 2. BRI favored either option 1 or option 2. ITAA suggested that non-dependent employers should not be required to check any boxes, but should be given separate LCA forms. AILA suggested that an employer intending to use the LCA only for ''exempt'' H–1B workers should be allowed to check a single box indicating that intention and not be required to take any action with regard to determining H–1B-dependency or marking any boxes on the LCA as to dependency status. Several other commenters supported the proposal that the LCA should have a method by which the employer could explicitly designate that the LCA will be used exclusively for exempt H–1B workers. Two commenters (Intel) recommended that employers check one of three boxes, but suggested different approaches than those offered in the NPRM. Intel

suggested that employers be given three ''boxes'': (1) Non-dependent; (2) Dependent filing for exempt workers; and (3) Dependent filing for non-exempt workers. AILA suggested three different ''boxes'': (1) The LCA is used only for exempt workers and no additional attestations are made; (2) The employer is non-dependent and no additional attestations are required; and (3) The employer is H–1B-dependent, the workers sought are non-exempt, and the employer makes the additional attestations. ACIP suggested that separate LCAs be developed: one for non-dependent employers and dependent employers hiring exempt workers, and another for dependent employers and willful violators. With regard to the employer's history concerning finding(s) of willful violations or misrepresentations of material fact, the IEEE urged that there be an additional ''box'' by which the employer could attest to the absence of such finding(s) (the draft form having only a ''box'' to show that there was such a finding).

The Department has reviewed all of the comments and has determined that the proposed regulation and LCA revision will be modified along the lines recommended by Intel. In light of the strong views of the majority of the commenters, the LCA will require that every employer mark a ''box'' to explicitly designate its status as either H–1B dependent or non-dependent. The LCA will also provide a ''box'' by which an H–1B-dependent employer can designate that it will use the LCA only for exempt workers. It is our understanding that if the latter ''box'' is marked, the INS will examine each petition supported by the LCA to determine whether the beneficiary is ''exempt'' (see discussion in IV.C, below). After careful consideration, the Department has concluded that it would not be appropriate or feasible to allow all employers to mark only a ''box'' for exempt workers and then make no further determinations or designations as to dependent status as suggested by AILA and ITAA, because such an approach would impose an unreasonable administrative burden on the INS in examining the exempt status of workers employed by the vast majority of employers which are non-dependent. The Department believes that the burden of determining dependent status under the Interim Final Rule is minimal, especially for the vast majority of employers whose status is readily apparent, and that it is not unreasonable to require such employers to attest as to their non-dependent status.

In the event that an employer's dependency status changes (either to dependent or to non-dependent) after the LCA is filed and the LCA therefore no longer accurately reflects that status, a new LCA designating the new status would have to be filed if the employer wants to seek access to H–1B workers through either new petitions or requests for extensions (see discussion in IV.B.2, above). Similarly, an employer which attests that it will use an LCA only for exempt workers may not use the LCA for non-exempt workers. However, the LCA will provide that in the event an employer violates these provisions—by utilizing an LCA attesting that it is non-dependent when in fact it is dependent, or by utilizing an LCA for non-exempt workers where it has attested that it will only be used for exempt workers—the employer will be bound by the attestation requirements for dependent employers.

5. What Changes Are Being Implemented on the Labor Condition Application Form and the Department's Processing Procedures? (§ 655.720 and § 655.730)

In the NPRM, the Department provided advance public notice of an anticipated change in the existing system for processing LCAs. Such applications were previously required to be submitted by U.S. mail, FAX, or private carrier, to one of 10 ETA regional offices, as delineated in § 655.720. Since March of 1999, the Department has been operating a pilot program involving the automated processing of LCAs. Although the Department encountered a number of technical problems throughout the operation of the national pilot, we believe that these problems have been resolved. Despite these temporary setbacks, the program thus far has generally proven to be successful. Therefore, the Department intends to fully implement the automated processing of all LCAs submitted by employers of H–1B nonimmigrants.

The transition to the automated system will occur on February 5, 2001, the date on which the relevant sections of this Rule (§§ 655.720 and 655.721) become applicable as stated in the DATES provision of this Preamble. Because the new system requires ETA to create appropriate software, obtain necessary hardware (including telephone lines, scanners, and other facilities), and obtain and train new staff, as well as conduct field trials to verify the reliability of the system once it is in place, the Department has concluded that it will not be feasible for the system to be operable before February 5, 2001. This delay in the applicability of the new system will also enable ETA to process all ''old'' LCAs which may be in queue in the current system (including the current FAX-back system) on the effective date of the Interim Final Rule. During the interval between the effective date of the Interim Final Rule (January 19, 2001) and the applicability date of the new system (February 5, 2001), LCAs will not be accepted by FAX but must, instead, be submitted in hard copy. The Department recognizes that this hard copy filing will be an inconvenience to employers, but we anticipate that this short-term inconvenience will be fully offset by the increased efficiency and reliability of the automated system which will be available after February 5, 2001.

On the effective date of this Interim Final Rule, January 19, 2001, the revised version of Form ETA 9035 will become the sole form for use by employers and their attorneys; thereafter, prior versions of the Form ETA 9035 will not be accepted for processing. The redesigned Form ETA 9035 is being published as an appendix to this Rule. Note that Form ETA 9035 no longer contains the full statements of the attestations required by the Act and the regulations. Rather, these statements, together with the instructions for filling out the form, are contained in the new cover pages, Form ETA 9035CP, and incorporated by reference in Form ETA 9035. The employer, through its designated official, is required to read the attestation statements set forth in the cover pages and indicate on the Form ETA 9035 its concurrence with the statements in Form ETA 9035CP.

The revised form is to be completed with a program that will be made available for download from the Department's World Wide Web site at *http://ows.doleta.gov.* For those employers who are unable to or choose not to use the form-fill program to complete the form, a blank hard copy of the form will also be available from any ETA regional office. The hard-copy forms may still be typewritten or completed by hand.

During the interim period as described above, the LCA may be submitted in hard copy by U.S. mail or private carrier. After February 5, 2001, the LCA may be submitted in hard copy by U.S. mail to the ETA Application Processing Center at the P.O. Box address identified in § 655.720(b) of the Interim Final Rule; delivery by private carrier will no longer be allowed because such carriers cannot deliver

items to U.S. Post Office boxes such as the address of the Processing Center. Alternatively, after the automated processing system becomes applicable on February 5, 2001, the LCA may be submitted by FAX transmission to a toll-free 1–800 number (1–800–397–0478), which will route incoming FAXes to an automated servicing center.

The automated processing system will electronically scan the incoming facsimile, extract the information contained in the application, record the information in a database, and make the appropriate determination to certify or to reject the application. LCAs that are mailed to ETA will be electronically scanned and entered into the automated processing system. As under the current manually-operated system, the application will be certified and FAXed (or mailed) back to the submitter if the appropriate boxes are checked, the required information is provided on the form, and the form has been signed and dated by the employer. If the form is incomplete or contains obvious inaccuracies, it will be rejected and sent back to the submitter with an addendum that identifies the deficiencies in the application.

At the present time, the ETA Web Site at *http://ows.doleta.gov* lists the submission date of the LCAs that the computer is currently processing. If the employer has submitted an LCA and has not received a response after a reasonable period of time has elapsed (*e.g.,* seven working days), it is suggested that the employer check the ETA Web Site, and if it indicates a current processing date which is later than the date on which the employer submitted the LCA, either re-submit the application (if using the automated system after February 5, 2001, re-FAXing to the 1–800 number identified above) or call the information number listed on the Web Site. The employer should not, however, submit unnecessary duplicates of an original application (*e.g.,* by FAXing the application to the LCAFAX system and also mailing a hard copy of the application, or by re-FAXing the application before seven days have passed). The Department will provide user support in the form of a help line for employers to call to verify that the system is up and running, and to obtain other information such as the date of receipt of LCAs that are currently being processed by ETA staff designated for the H–1B program. However, given the architecture of the LCAFAX system, it will be technologically infeasible for ETA to verify receipt of a particular LCA.

The Department received 10 comments on the proposed form and automated processing system. Most commenters generally favored the Department's proposal but expressed the desire that it be thoroughly tested before being implemented on a nationwide basis. We believe that the system has had an extensive pilot test. In Fiscal Year 2000 alone (October 1, 1999 through September 30, 2000), the Department processed nearly 300,000 applications using the automated system. Since the inception of the system in March of 1999, each of the two nodes of the system has processed over 200,000 applications. While a number of technical problems have been encountered, the Department is confident that the system should be fully implemented.

Six commenters were critical of the Department for not producing a version of the form-fill program that will run on the Apple Macintosh operating system. The program that was utilized during the pilot test was a Windows-based program that ran only on computers with a Windows operating system. These commenters urged the Department to develop a version of the program that will run on Macintosh computers or, alternatively, to use a platform-neutral format such as Adobe Acrobat. The Department agrees with these commenters and has developed a program to be used to complete the form in a platform-neutral format, Adobe Acrobat. This software will be widely distributed and, as previously stated, will be available for download from multiple locations on the World Wide Web.

One commenter (ACIP) expressed concern that since much of the print on the form is in such a small font, the form may be rendered illegible in the FAX transmission process from the attorney to the employer to the automated processing system.

The Department is aware of this potential problem and has identified technologies that would allow the form to be transmitted via electronic mail which will be included as part of the program. Under this scenario, after the employer's attorney or agent completes the form using the program, the form could then be e-mailed to the employer and printed out for the employer's signature and subsequent FAX transmittal to the automated processing system. Thus, the form FAXed by the employer to the Department would still be an original document. The pilot test has shown that documents other than an original (*e.g.,* a FAX of a FAX) are often unable to be read properly by the system and their submission usually results in either a rejection of the application or a notification that the form was not able to be read by the automated system.

Intel and ACIP stated that the proposed four-page form is impractical to ''post'' to satisfy the employer's obligation of notice to workers. These commenters suggested that the form be redesigned so that all of the information that is required to be contained in the notice (set forth at § 655.734(a)(1)(ii)) appear on the same page.

The Department does not believe this to be practical, given the amount of information that is required to be contained in the notice and the amount of space taken up by those items on the form. However, the Department has modified the proposed LCA form, compressing it to three pages rather than four pages as proposed. The Department is exploring technologies that would allow an employer, in addition to printing the pages of the form itself, print a separate page with those data elements from the form that are required to be contained in the notice. The employer will have a choice of posting the three-page form or another notice containing the required information. Should the Department's efforts to modify the software to enable an employer to print a one-page posting addendum with the requisite data elements from the form prove successful, posting the addendum would also satisfy the notice requirement. The Department notes, however, that the employer is required by the current regulations at § 655.734(a)(2) to provide the entire certified LCA to the H–1B workers no later than when they report to work.

One commenter (ACIP) inquired as to whether the pages of the form may be stapled together or whether the pages must be posted side-by-side. The Department believes that a posting consisting of the pages stapled together would satisfy the notice requirement, provided of course that it is done in such a fashion as to permit interested parties to readily view each page of the form.

Another commenter expressed concern that the proposed form would not permit an employer readily to take advantage of the new provision which permits an employer to satisfy the notice requirement electronically. Notwithstanding the fact that the form itself does not need to be posted electronically—only certain data contained therein—the Department has also identified technologies that allow an employer to directly notify its employees by sending a copy of the application by electronic mail to

similarly employed employees at the place of employment.

The Department has also made a slight modification to the proposed form to allow employers to continue to have the option of expressing the rate of pay as a pay range. This option was omitted from the draft form which appeared with the proposed rule published in the **Federal Register** on January 5, 1999 (64 FR 673). Since 1992, the H–1B regulations have provided that ''[w]here a range of wages is paid by the employer * * *, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.'' (57 FR 1316) This provision, now at § 655.731(a)(2)(vi), remains in effect. Thus, the LCA form that appears with this Interim Final Rule has been modified accordingly.

Several commenters expressed concern that the Department would not devote adequate resources, including personnel and infrastructure, to support the automated processing system. The Department notes that the new system will be supported by the monies allocated to the Department to reduce the processing time of LCAs as part of the $1,000 fee imposed upon employers of H–1B nonimmigrants (*i.e.*, the $500 fee enacted by ACWIA, increased to $1,000 by the October 2000 Amendments). The Department believes that with the supplemental resources it receives as part of that fee account, it will be able to operate the program in an efficient and timely manner, once the system becomes applicable.

The regulations have been modified at §§ 655.720 and 655.730 to reflect the changes in the processing of the LCA, and to require that the revised Form 9035 be either FAXed to the 1–800 number identified above or transmitted by U.S. mail to the ETA Application Processing Center at the address specified in the regulation and on the Form. Revised § 655.720, along with new § 655.721, becomes applicable on February 5, 2001.

The Department cautions employers that the changes being made in the LCA form and the LCA filing and processing system do not modify the substantive obligations of employers concerning their attestations (*e.g.*, wages, notices, strike/lockout) or the necessity for obtaining ETA certification of the LCA prior to employment of the nonimmigrant. In our view, a ''new'' employer which hires an H–1B nonimmigrant from another H–1B employer, pursuant to the October 2000 Amendments' ''portability'' provision, must have a certified LCA to support the visa petition when it is filed and the nonimmigrant begins work

C. What H–1B Workers Would Be ''Exempt H–1B Nonimmigrants''? (§ 655.737)

The ACWIA relieves H–1B-dependent employers and willful violators from the additional attestation elements if the LCA is used only for ''exempt'' H–1B nonimmigrants. In the words of Senator Abraham, ''* * * employers required to include the new statements on their applications are excused from doing so on applications that are filed only on behalf of 'exempt' H–1B nonimmigrants.'' (144 Cong. Rec. S12751 (Oct. 21, 1998)). See also the statement by Congressman Smith, 144 Cong. Rec. E2325 (Nov. 12, 1998).

In addition, for a limited time after the ACWIA's enactment, neither the numerator nor the denominator of the ratio of H–1B nonimmigrants to full-time equivalent workers, used to determine H–1B dependency, was to include ''exempt'' H–1B workers. Because that time will have expired with the promulgation of this Rule, this provision no longer has effect and it is not incorporated in the regulations.

The ACWIA establishes two tests for whether an H–1B nonimmigrant is ''exempt.'' The H–1B nonimmigrant must either (1) ''receive[] wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000,'' or (2) ''ha[ve] attained a master's or higher degree (or its equivalent) in a specialty related to the intended employment''.

In introducing the topic of exempt status, the NPRM noted that the statutory language seems clear. A dependent employer or willful violator is required to attest and comply with the new attestation elements unless the only H–1B nonimmigrants employed pursuant to the LCA are exempt workers. It was the Department's reading of this ACWIA language that if a covered employer used an LCA in support of any nonexempt worker, that employer would be obligated to comply with the new attestations with respect to all H–1B nonimmigrants hired pursuant to that LCA, exempt as well as nonexempt. However, the NPRM noted that the employer would be free to file separate LCAs for its exempt and nonexempt workers. (**Note:** because this issue is closely related to IV.C.4 (''Should the LCA be Modified to Identify Whether it Will be Used in Support of Exempt and/or Nonexempt H–1B Nonimmigrants?''), below, the comments and discussion on this issue will be included in IV.C.4.)

The NPRM also specified that initial determinations of workers' exempt status will be made by INS while adjudicating petitions filed on their behalf by their prospective employers. The Department proposed that copies of the approved H–1B petition, with the INS determination as to exempt status, should appear in the employer's public access file. The Department stated that, in the event of an investigation, considerable weight would be given to the INS determinations of exempt status based on educational attainment. However, if the exemption was claimed based on earnings, the employer would be expected to document that the exempt H–1B nonimmigrant actually received sufficient pay to satisfy the statutory wage ''floor'' of $60,000.

Six commenters responded to these proposals.

The proposal that INS initially determine exempt status when it adjudicates petitions evoked a mixed response. Senators Abraham and Graham stated that the ACWIA does not grant either INS or DOL the authority to prevent approval of a visa on the basis of whether or not an individual qualifies as ''exempt.'' Similarly, AILA questioned the authority of DOL to delegate this review to INS and expressed concern that INS lacks the resources to make timely assessments of this issue; AILA stated that such review is contrary to the nature of the LCA as an employer attestation document, and that a worker's status should be reviewed only pursuant to a DOL investigation. AILA further suggested that DOL should accept an employer's reasonable determination of exempt status, or at a minimum should not assess penalties if the employer's reasonable determination is in error.

Conversely, ACIP, ITAA and Rapidigm agreed that the INS should make the exempt determination and suggested that its determination of educational relevance should be dispositive; ACIP pointed out that employers should first have an opportunity to challenge rejected claims. BRI questioned how INS can make an ''initial'' determination of the exemption status since employers must make the determination at the time the LCA is filed.

It is the Department's understanding that INS will examine the exempt status of any nonimmigrant whose petition is accompanied by an LCA that indicates that it is to be used exclusively for exempt workers. This INS review will not be pursuant to a delegation from DOL. Rather, INS has advised that it considers this review to be an appropriate adjunct to its role in

adjudicating the admissibility of the individual workers, since an LCA for exempt workers cannot validly be used for a worker unless the worker is in fact exempt. INS will not deny a petition on the basis that the worker is not exempt; however, it will require that the information on the accompanying LCA correspond with the characteristics of the worker for whom the petition was submitted. Thus, just as INS verifies that the worker's occupation and the LCA occupation correspond, it will verify that the worker is exempt where the employer has attested that the LCA will be used only to support exempt workers. If INS initially determines that a worker is nonexempt, the employer will be given an opportunity either to submit additional documentation in support of the worker's exempt status or to submit an LCA with no claim of exemption.

The Department anticipates that in most cases, INS will need to do no more than review the stated wage level to ensure that it would equal at least $60,000 per year. Only where the wage standard would not be met will it be necessary for INS to review a worker's educational qualifications. As discussed in IV.C.2 and IV.C.3, below, the Department believes that this determination too can be easily made in most cases, and therefore that INS review of valid exemptions should not ordinarily delay approval of a petition.

The Department in an investigation will ensure that a worker whom an employer attested will be paid more than $60,000 per year has in fact received the required compensation. Only if the employer had so attested and the earnings floor has not been satisfied will the Department determine whether the worker is exempt based on educational attainment (including the field of study). However, where the employer did not attest that a worker would be paid more than $60,000 per year but instead makes its claim of exemption based only on educational attainment, and INS has determined that an H–1B worker is exempt based on the evidence submitted to it of educational attainment, that INS determination will be conclusive unless the Department finds that the INS determination was based on false information.

The Department notes that this ''up front'' review by INS should generally avoid the situation which could arise in DOL enforcement if an employer erroneously determined a worker is exempt based on educational attainment, but DOL later determines the worker is not in fact exempt. In such situations, the employer would face possible penalties for misrepresentation and failure to perform the required attestation elements. DOL cannot agree with AILA's suggestion that the special attestation protections for U.S. workers would not apply where an employer has made a reasonable but erroneous determination as to exempt status. Furthermore, the Department believes that penalties are a particularly important remedy since, as a practical matter, it will often be impossible to cure such violations after the fact. Nor does the Act provide any relief from debarment for a failure to perform the attestation elements regarding displacement of U.S. workers. Debarment and other penalties may be imposed for recruitment violations, however, only where such violations are ''substantial.'' The circumstances regarding the exemption determination, as well as the facts regarding the recruitment performed by the employer, will be taken into consideration in determining whether a recruitment violation is ''substantial.'' The circumstances will also be taken into consideration in assessing civil money penalties and in determining whether an employer has made a misrepresentation in its attestation that the LCA will only be used for exempt workers.

With regard to BRI's question of how INS can make an ''initial'' determination when the employer has already done so on the LCA, the Department clarifies that the term ''initial'' is used to distinguish between determinations made by the INS at adjudication and the occasional determination which might occur during Departmental investigation. It is of course necessary for the employer to make its own similar assessment as to the worker's exempt status prior to submitting the LCA and the worker's petition.

Rapidigm commented that exempt H–1B nonimmigrants should not be included in the ratio in making the dependency determination. The Department notes that the statute imposes a time limit upon the period in which exempt H–1B nonimmigrants are excluded from the ratio (*i.e.,* six months after ACWIA enactment or the effective date of these regulations). Since that time limit has now expired, the determination of H–1B-dependency now must include exempt workers.

Finally, ITAA disagreed with the proposed requirement that employers maintain a copy of the H–1B petitions with the INS determinations of workers' exempt status in the public access file. On further consideration, the Department agrees that because of privacy considerations, these documents need not be included in the public access file. However, the Department believes that it is important for the public to know which workers are supported by an LCA for exempt workers, so that the public will know which workers are not covered by the new attestation elements, and be able to challenge exemption determinations where there is reason to believe the basis for the exemption is invalid. Therefore, employers will be required to include in their public access file a list of the H–1B nonimmigrants supported by an LCA attesting that it will be used only for exempt workers, or in the alternative, a simple statement that the employer employs only exempt H–1B workers. Furthermore, employers will need to retain H–1B petitions and any evidence regarding workers' exempt status (*i.e.,* pay records and evidence related to educational attainment) so that they may be provided to DOL in the event of an investigation.

1. How Would the $60,000 Annual Rate be Determined? (§ 655.737(c))

The ACWIA provides that H–1B nonimmigrants will qualify as ''exempt'' if they receive wages (including cash bonuses and similar compensation) at an annual rate of at least $60,000. Those who receive this level of compensation will qualify as ''exempt'' without satisfying the alternative, educational standard.

In the NPRM, the Department proposed that, to ensure this standard is met, it should be interpreted consistently with the existing DOL regulations for determining if an employer has satisfied its other wage obligations under the H–1B program (20 CFR 655.731(c)(3)). Future (*i.e.,* unpaid but to-be-paid) cash bonuses and similar compensation would be ''counted'' toward the required wage if their payment is assured, but not if they are conditional or contingent on some event such as the employer's annual profits, unless the employer guarantees that the nonimmigrant will receive compensation of at least $60,000 per year in the event the bonus contingency is not met. The Department also proposed that bonuses and compensation are to be paid ''cash in hand, free and clear, when due,'' meaning that they must have readily determinable market value, be readily convertible to cash tender, and be received by the worker when due. The bonuses and compensation for purposes of this ACWIA requirement must be received by the worker within the year for which the employer wants to ''count'' the compensation.

In addition, the Department interpreted the statutory language

''receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000'' to mean that the worker actually receives at least $60,000 compensation in each year. Therefore, the NPRM provided that an H–1B nonimmigrant who, because of part-time employment, receives less than $60,000 in compensation in a year would not qualify as exempt on the basis of compensation, even if his or her hourly wage, projected to a full-time work schedule, would exceed $60,000 in a year.

Ten commenters responded to the Department's proposals on this issue.

The AFL–CIO stated that exempt workers must receive $60,000 in wages annually as an entitlement. The AEA stated that exempt workers should receive $60,000 or higher without including any benefits or bonuses. APTA and AOTA stated that an exempt worker must receive wages equal to at least $60,000, which must not include other employee benefits, such as health insurance, retirement plans, and life insurance.

Senators Abraham and Graham and ACIP contended that the statutory language ''at an annual rate equal to'' requires the Department to permit part-time workers and workers who work only part of the year to be considered exempt if their rate of pay, extrapolated to full-year, full-time work would meet the $60,000 threshold. Latour noted that in the information technology industry, some of the most highly compensated and distinguished experts work part-time for several employers, and therefore suggested that the Department allow the $60,000 minimum compensation to be computed on an hourly, weekly, or other basis. The National Association of Computer Consultant Businesses (NACCB) expressed concern about nonimmigrants who terminate during the year, and therefore suggested the Department interpret the statutory provision to allow a worker to receive $1,200 in wages per week.

The Department concurs in the view expressed by employee representatives that fringe benefits in the nature of health insurance, pension, and life insurance, are not similar to cash bonuses and are not wages within the meaning of the definition of ''exempt H–1B nonimmigrant.'' Therefore benefits will not count toward the required $60,000 level under the Interim Final Rule.

The Department does not concur, however, with the view that the $60,000 minimum compensation requirement may be prorated for part-time employees. Congressman Smith, in describing the legislation prior to its enactment, stated that the additional attestation requirements will apply to H–1B-dependent employers petitioning for H–1B nonimmigrants without masters degrees who ''plan to pay the H–1Bs less than $60,000 a year.'' 144 Cong. Rec. H8584 (Sept. 24, 1998). Later statements in the *Congressional Record* by both principal sponsors of the ACWIA also describe the annual wage standard as firm. Senator Abraham stated: ''An 'exempt' H–1B nonimmigrant is defined * * * as one whose wages, including cash bonuses and other similar compensation, are equal to at least $60,000. * * *'' (144 Cong. Rec. S12751 (Oct. 21, 1998)). Similarly, Congressman Smith stated: ''An 'exempt' H–1B nonimmigrant is defined * * * as one whose annual wages, including cash bonuses and other similar compensation, will be equal to at least $60,000 (and will remain at such level for the duration of his or her employment while under an H–1B visa).'' (144 Cong. Rec. E2325 (Nov. 12, 1998); see also E2324). These statements underscore the statutory objective of ensuring that only highly compensated H–1B workers are exempted on the basis of their compensation. If the workers are not, in fact, highly compensated (*i.e.*, if they do not actually receive wages of $60,000), then this objective is not achieved. Furthermore, allowing a *pro rata* of the $60,000 compensation would necessitate that the employer be able to demonstrate that the part-time worker received an appropriate ''share'' of the annual compensation, based on the portion of a full-time year's work that he/she performed. The Department considered allowing an employer to claim the exemption for workers who would be employed part-time by more than one employer and would earn combined wages of at least $60,000 per year. However, the Department concluded that this approach would not be feasible since an employer would not be able to ensure effectively that workers did in fact receive the statutory wage level of $60,000 and since such an exception could not be effectively administered. The Department notes that part-time employees could still qualify as exempt based on their education, notwithstanding their relatively lower annual compensation.

However, it is the Department's view that H–1B workers who are hired at compensation of at least $60,000 per year, but who are employed for less than a year, will satisfy the statutory requirement if they receive at least $5,000 for each month worked. For example, a worker who resigned after three months would be required to have been paid at least $15,000. Similarly, if the Administrator conducted an investigation and found that a worker had not yet worked a year, the Administrator would determine whether the worker had been paid $5,000 per month, including any unpaid, guaranteed bonuses or similar compensation.

ITAA concurred with the Department's view that unconditional, noncontingent bonuses or other payments may be counted toward the $60,000 compensation to qualify for the exemption. AEA opposed inclusion of bonuses at all, expressing concern that some employers might pay a very low wage and promise a bonus at the end of the year, but never pay the bonus unless ''caught'' before the end of the year. BRI suggested that the Department should allow an annual bonus to be paid on a specified date, contingent only upon compliance with the contract.

Since the ACWIA expressly permits inclusion of cash bonuses, the Department does not believe it has the discretion to exclude them from the required minimum compensation, as suggested by AEA. With regard to the bonus described by BRI, the Department is of the view that such a bonus would be in compliance only where the employer ensures that a worker who terminates employment before the end of the year in fact receives $60,000, prorated for the amount of time worked. An employer's remedy against the worker in such a case of early termination may be afforded by state law relating to the recovery of liquidated damages under the contract, as discussed in IV.J, below.

2. How Would the ''Equivalent'' of a Master's or Higher Degree be Determined? (§ 655.737(d)(1))

Also defined as ''exempt'' for purposes of the additional attestations are H–1B nonimmigrants who have ''attained a master's or higher degree (or its equivalent) in a specialty related to the intended employment.'' The Department proposed to define ''or its equivalent'' to mean a foreign academic degree equivalent to a master's degree or higher degree earned in the United States, and not to allow equivalency to be established through work experience.

The Department received ten comments on this proposal.

The AFL–CIO and AOTA agreed with the Department's interpretation limiting this prong of the exemption to nonimmigrants with a foreign academic degree equivalent to a U.S. master's or

higher degree, with no substitution of work experience. AOTA observed that the occupational therapy profession is moving toward a master level education requirement for entry to the profession, and believes it is reasonable for foreign workers to meet the same education and training as U.S. workers. Because a master's degree will be the benchmark for the physical therapist profession after January 1, 2002, APTA would go even further and require that a nonimmigrant have a doctorate degree to qualify for the exemption. ACIP also agreed with the Department's proposal that an exempt H–1B worker must hold a U.S. master's degree or its foreign academic equivalent.

Other trade associations and employers who commented on this issue generally disagreed with this interpretation. Six commenters (AILA, BRI, ITAA, Rapidigm, TCS, Satyam) contended that the Department's position is inconsistent with statutory language and current INS regulations. AILA asserted that the ACWIA's use of the phrase ''master's degree or equivalent'' rather than ''master's or equivalent foreign degree'' supports the well-established INS procedure of allowing equivalencies to be established through either degree equivalence or work experience in its adjudication of whether an applicant has the equivalent of a bachelor's degree for H–1B admission and whether an applicant has the equivalent of a master's degree for certain second preference employment admissions. Rapidigm and Satyam stated that different ''equivalency'' standards for H–1B admission and exempt status should not apply to the same pool of immigrants. TCS expressed concern that the Department's interpretation would lead to inquiries into the quality of education in foreign countries, rather than the level of education as contemplated by ACWIA; TCS contended further that since all foreign master's degrees are already incorporated under the term master's degree, the ACWIA phrase ''its equivalent'' must refer to something else.

Additionally, this Department requested the views of the U.S. Department of Education regarding this element of the ACWIA. The Department of Education, through its Office of Educational Research and Development, responded to this Department's inquiry.

The Office of Education Research and Improvement (OERI) expressed the general view that ''possession of a master's degree or its equivalent'' referred to master's degrees awarded by accredited United States institutions or degrees granted by foreign academic institutions, which as measured by educators within the United States, are at least equivalent to master's degrees awarded by accredited United States institutions. With regard to nonimmigrants possessing a United States degree, the OERI suggested a three-prong inquiry: (1) Was the awarding institution accredited at the time of the award by an association recognized by the Secretary of Education or is/was the institution a *bona fide* member of the Council on Higher Education Accreditation; (2) was the program of study for which the degree was awarded either included in the Classification of Instructional Program or incorporated by reference from an international program classification; and (3) is/was the program of study related to an occupation classified in the Standard Occupational Classification or an international occupation classification.

The OERI expressed the view that basically the same inquiry should take place where the academic credentials are granted by a foreign educational institution. The OERI recommended that the inquiry begin by determining whether the awarding institution is/was a recognized institution under the laws and policies governing accreditation in the institution's country. It suggested that the second and third prongs of the test could be met by applying the guidelines, recommendations, and practices of the National Council on the Evaluation of Foreign Educational Credentials, a group managed by the American Association of Collegiate Registrars and Admissions Officers. The OERI explained that these standards are utilized by U.S. educators in assessing the *bona fides* of a foreign degree or a program of study abroad and determining their equivalence to U.S. degrees and standards.

The Department is of the view that Congress intended exempt status to apply only to highly qualified employees. The Department therefore believes that Congress did not intend to substitute work experience for education, but rather required the attainment of an advanced academic degree (or the alternative $60,000 wage standard) for dependent employers and willful violators who may hire H–1B nonimmigrants without complying with the new attestation elements. In introducing the ACWIA on the floor, Congressman Smith explained: ''[T]he compromise eases requirements on companies when they are petitioning for workers who have advanced degrees. * * * The point I want to make is that the term 'or its equivalent' refers only to an equivalent foreign degree. Any amount of on-the-job experience does not qualify as the equivalent of an advanced degree.'' 144 Cong. Rec. H8584 (Sept. 24, 1998).

The commenters are correct in noting that the INS regulations they have cited, governing minimal qualifications for H–1B admission, do recognize work experience in lieu of an academic degree. However, the ACWIA employs the phrase ''or its equivalent'' in a subparagraph distinguishing minimally qualified ''nonexempt'' H–1B nonimmigrants from better qualified ''exempt'' workers. ''A master's or higher degree (or its equivalent)'' is one of two higher thresholds provided to draw this distinction. If the educational standard could be satisfied by relevant work experience alone, the wage threshold would serve no independent purpose. The added value of the $60,000 threshold is that it exempts well-compensated workers even if they have not attained a master's or higher degree, or have done so in a specialty not related to their intended employment. The ''work equivalency'' interpretation advocated by employers and their representatives blurs this clear statutory distinction between exempt and nonexempt nonimmigrants.

Moreover, it is the Department's view that its interpretation is fully consistent with the plain language of the statute, especially when contrasted with the language in section 214(i) of the INA, 8 U.S.C. 1184(i), which explicitly authorizes work experience in lieu of a bachelor's degree for admission as an H–1B nonimmigrant. The ACWIA exempts all H–1B nonimmigrants who have attained a master's or higher degree (or its equivalent) in a specialty related to their intended employment—with no suggestion that this requirement can be satisfied with work experience. The Department does not believe it is relevant that the INS regulations concerning admission of immigrants under the second preference employment category treat certain work experience as equivalent to a master's degree. Not only are those regulations unrelated to the H–1B nonimmigrant program, but the statutory language in section 203(b)(2)(A) of the INA, 8 U.S.C. 1153(b)(2)(A), is clearly distinguishable, granting preference to ''qualified immigrants who are members of the professions holding advanced degrees or their equivalent.'' Unlike the specific term ''master's degree'' cited in the ACWIA, the generic term ''advanced degree'' encompasses all post-graduate academic credentials. Consequently, the expression ''advanced degrees or their equivalent'' would seem to be without

meaning if not interpreted to include work experience.

The phrase ''or its equivalent'' in the ACWIA is not without meaning under the Department's interpretation. In fact, it is not uncommon for the titles of foreign degrees to differ from those used within the U.S. educational system, or for the same title to have different educational requirements. Differences in academic nomenclature can create significant confusion for government programs and universities that deal with persons educated abroad. The existence of credential evaluation services and academic guidelines for admission of foreign students to colleges and universities are indications that degree equivalency is not always readily apparent.

There is, however, a readily available source of information concerning degree equivalence. The National Council on the Evaluation of Foreign Educational Credentials (NCEFEC) and the American Association of Collegiate Registrars and Admissions Officers (AACRAO) have developed specific guidance for most countries regarding which education and training credentials are considered to be reasonably similar to corresponding U.S. credentials. AACRAO published these guidelines in 1994 in a publication entitled Foreign Educational Credentials Required for Consideration of Admission to Universities and Colleges in the United States (4th ed), which is widely used by admissions offices and credential evaluation services. These guidelines reflect the prevailing opinion and considered judgment of experienced foreign student admissions officers in U.S. colleges and universities. The Department will use this publication as a guide for determining degree equivalence. The AACRAO publication is available for a fee of $30 and can be obtained by contacting AACRAO Distribution Center, P.O. Box 231, Annapolis Junction, MD 20701, or through their website, *www.aacrao.com/pubsale/grade.html.*

The AACRAO guidelines explain that a Ph.D. entry level document—*i.e.,* the diploma or degree required for entry at the Ph.D. level (equivalent to a U.S. master's degree)—''represents a minimum of one full-time year of study beyond a bachelor's equivalent. The study must also be viewed as advanced as opposed to supplemental.'' For example, post-graduate training to earn a teacher's certificate is considered supplemental rather than advanced, and would not be equivalent to a master's degree. Where documents with the same name are awarded at more than one level, the publication includes parenthetical guidance such as ''earned after a three-year program.''

Because the AACRAO publication identifies academic prerequisites for entry into various levels of U.S. education, it must be used carefully. Three columns of information are provided for each country of origin: level of entry into the U.S. educational system; foreign certificates, diplomas or degrees required for admission at this level; and necessary supporting documentation. The first column displays the levels at which students are normally admitted into U.S. undergraduate or graduate programs. Within the graduate tier, the three levels of admission shown are Master, Ph.D., and Unclassified/Special. Persons entering Ph.D. programs would possess degrees equivalent to a U.S. master's, as set forth in the second column. Persons in the category ''Unclassified/Special'' would ordinarily possess degrees equivalent to a U.S. doctorate (Ph.D.), as set forth in the second column. (Persons whose credentials correspond to the entry ''Master'' currently have the equivalent of a U.S. bachelor's degree, qualifying them to begin master's level study.)

The Department seeks comments on whether it should incorporate the AACRAO publication in the Final Rule for use in determining whether a degree an H–1B nonimmigrant has obtained from a foreign educational institution is equivalent to a U.S. master's degree. In the alternative, employers would be able to present evidence of degree equivalence from a credential evaluation service where there is no foreign degree listed as equivalent to a U.S. master's, or where a worker obtained a degree in the past, and the terminology in the foreign country has changed.

As recommended by the OERI of the Department of Education, the Interim Final Rule requires that the institution from which the worker obtained its degree be recognized or accredited under the law of the country. The Interim Final Rule further provides that where an employer claims an H–1B nonimmigrant is exempt based upon educational attainment (rather than wages), the employer will be required to provide, upon request of INS or DOL, evidence that the worker has received the degree in question, as well as a transcript of the courses taken and grades earned.

3. How Is ''a Specialty Related to the Intended Employment'' Defined? (§ 655.737(d)(2))

The ACWIA specifies that the H–1B nonimmigrant who holds a master's or higher degree (or an equivalent degree) qualifies as ''exempt'' only if that degree is in ''a specialty related to the intended employment.'' The Department proposed that in order for the nonimmigrant's degree specialty to be sufficiently ''related'' to the intended employment to qualify for exempt status, that specialty must be generally accepted in the industry or occupation as an appropriate or necessary credential or skill for the person who undertakes the employment in question. Furthermore, the Department stated that it would give considerable weight to INS determinations concerning the academic credentials of H–1B nonimmigrants who are claimed to be ''exempt'' on this basis.

Six commenters responded to the Department's proposals on this issue.

AILA asserted that there is no statutory authority for the ''appropriate or necessary'' standard and that these terms are very different in that ''related'' does not mean ''necessary.'' AILA suggested that an employer should be able to determine what specialty degrees it considers to be ''appropriate'' and that it should be able to establish the relationship by a variety of means, such as through specific course work, or by showing that it is a standard company requirement and that all others in the same position have the same credentials.

ACIP acknowledged the statutory requirement that the master's degree or equivalent be in a field relevant to the occupation and suggested that due deference be given to an employer's determination that a degree is relevant. ACIP observed that employers are better placed than the government to track evolving occupations, job duties, and degrees. Other commenters (Kirkpatrick & Lockhart, Latour, TCS) went further and urged the Department to defer to an employer's good faith determination of what fields of study are related to the employment in question. One commenter noted that only one quarter of information technology professionals possess a computer science, computer engineering, or MIS degree.

The AFL–CIO suggested that the Department utilize the new North American Industrial Classification System (NAICS) in making the determination that a specialty is related to the employment; it stated that the NAICS includes job qualifications by occupational classification, formulated by the Bureau of Labor Statistics with the input of labor and business.

In addition, two law firms (Kirkpatrick & Lockhart and Latour) expressed the view that DOL should not judge the relevance of the alien's

educational background to their job if that alien is receiving $60,000 or more per year.

The Department agrees that a worker may qualify as exempt by meeting either the salary or educational standard, and is not required to qualify under both tests. However, where the compensation level is not met, the Department cannot simply disregard the statutory requirement that the individual hold a master's or equivalent degree in a specialty related to the intended employment, nor can it automatically defer to an employer's judgment, as some commenters seemed to suggest. The Department considers it appropriate to provide guidance as to the meaning of the statutory requirement. As Congressman Smith stated, ''It is also important to note that the degree must be in a specialty which has a legitimate, commonly accepted connection to the employment for which the H–1B nonimmigrant is to be hired.'' (144 Cong. Rec. E2325 (Nov. 12, 1998)). The Department believes that its proposed standard—that the degree be generally accepted in the industry or occupation as an appropriate or necessary skill or credential—is an appropriate articulation of this requirement, and this standard is adopted in the Interim Final Rule. The Department does not intend to imply that a master's degree in a specific field must be a prerequisite for employment in the occupation in order for a worker to meet the ''related'' requirement for the exemption. On the other hand, the employer's statement of relevance cannot be accepted without substantiation since the employer would have little incentive to consider the relevance of the field in which a master's degree was earned if the occupation does not normally require a master's degree. For example, many employers seeking a systems analyst require a bachelor's degree in computer science, information science, computer information systems, or data processing, but not an advanced degree. In contrast, computer scientist jobs in research laboratories or academic institutions generally require a Ph.D. or at least a master's degree in computer science or engineering. U.S. Bureau of Labor Statistics, 1998–99 Occupational Outlook Handbook. The Department does agree, however, that a field not ordinarily considered relevant to an occupation could be related to a specific job. For example, a master's degree in public health could be a related field for a computer specialist in the health industry.

The Department concurs with the AFL–CIO proposal that an objective standard is appropriate as a guide in determining whether a field is related to an occupation. However, it is the Department's view that the NAICS is not appropriate since it spells out industrial rather than occupational codes. The Department believes that there are two occupational data systems that provide information better suited to the related field inquiry: the U.S. Bureau of Labor Statistics Occupational Outlook Handbook, and 0*NET 98.

The Occupational Outlook Handbook is a well-recognized source of job and career information. Revised every two years, the Handbook describes for about 250 of the most common occupations, what workers do on each job, their working conditions, earnings, and other pertinent information. For each job, the Handbook identifies the training, education, and licensing requirement for the occupation, if any, as well as the educational background desired by employers and the common educational background of persons in the occupation. The Handbook can be purchased from the Government Printing Office in paper, hard cover, and CD–ROM format. Groups of related jobs covered in the Handbook are available for purchase as individual reprints. The Handbook also can be accessed free of charge on the Bureau of Labor Statistics' website, at *http://stats.bls.gov/ocohome.htm.* The Handbook's easy-to-use electronic version can be accessed by specific jobs or occupational clusters.

O*NET 98 was recently developed by the Labor Department, with the input of both labor and business. This user-friendly electronic data system, designed to replace and expand upon the Dictionary of Occupational Titles (DOT), links various occupational classifications to one another and to the Department of Education's Classification of Instructional Programs (CIP). For each of the over 1,100 occupations in this system, an O*NET 98 occupational profile lists the principal fields of study appropriate to that occupation under the heading ''instructional programs.'' O*NET 98 can be purchased on CD–ROM or diskette from the Government Printing Office and can also be downloaded free of charge from the Department's website at *www.doleta.gov/programs/onet.* In addition, like the Occupational Outlook Handbook, O*NET 98 can be accessed over the Internet at any public library.

The Handbook and O*NET 98, in the Department's view, provide useful, objective guidelines for determining whether a specific academic discipline is related to the occupation, i.e., whether a degree in the field is generally accepted in the industry or occupation as an appropriate or necessary skill or credential. The Department will therefore utilize these sources as guides. The Department also will consider other industry studies obtained by employers or the opinions, solicited by the employer, from a bona fide credentialing organization attesting that a nonimmigrant's academic specialty is generally accepted by the pertinent industry or occupation as appropriate or necessary for the employment in question. Employers are encouraged to rely on these sources in determining whether a master's degree (or its equivalent) is in a field related to the job in question.

The Department also seeks comment on whether the Final Rule should incorporate the Occupational Outlook Handbook and O*NET as the primary sources for determining fields of study related to specified occupations. The Department realizes, however, that there may be other instances where a master's degree in a specialty that is not identified in either of these sources still may be recognized by the industry or occupation in question as related to the employment in question. The Department proposes that if an employer chooses not to rely on O*NET or the Occupational Outlook Handbook, or these sources fail to establish the required relationship, an employer seeking to establish such relationship could obtain a report by a credentialing organization that a degree in the field is recognized by the industry or occupation as an appropriate or necessary skill or credential. The Department seeks comment on whether this is an appropriate task for credentialing services, and whether there are other recognized sources of information which can and should be utilized for this purpose—in addition to, or in place of, the sources cited.

4. Should the LCA Be Modified to Identify Whether it Will Be Used in Support of Exempt and/or Non-Exempt H–1B Nonimmigrants? (§ 655.737)

As discussed above, the ACWIA provides that ''[a]n application is not described in this clause [i.e., is not subject to the new attestation requirements] if the only H–1B nonimmigrants sought in the application are exempt nonimmigrants.'' The Department therefore proposed that a dependent employer or willful violator would be required to attest and comply with the new attestation elements unless the only H–1B nonimmigrants employed pursuant to the LCA are exempt workers. If a covered employer used an LCA in support of any nonexempt worker, that employer would be obligated to comply

with the new attestations with respect to all H–1B nonimmigrants hired pursuant to that LCA, exempt as well as nonexempt.

The NPRM stated that the Department considered proposing that employers file separate LCAs for their exempt and nonexempt H–1B workers. However, the Department noted that two different workers might very well both be qualified for the same occupation, but one might be exempt and another nonexempt. Therefore the Department preliminarily concluded that it was not appropriate to restrict an employer's freedom to utilize an LCA for both exempt and nonexempt workers, provided that the employer in such circumstances complied with the additional attestation requirements for all of the H–1B nonimmigrants under the LCA. The Department noted in the NPRM that an H–1B-dependent employer or willful violator would be free to file separate LCAs for its exempt and non-exempt workers, thereby obviating the requirement of complying with the new attestation elements for its exempt workers. Furthermore, the NPRM provided that a dependent employer or willful violator who planned to utilize an LCA only for exempt workers would be required to so attest on the LCA.

Five commenters responded to this proposal.

The AFL–CIO strongly agreed that when exempt and nonexempt H–1B workers are included on the same LCA, the new attestations should apply to both. In its view, it would be illogical for a single document to impose different obligations on the employer with respect to different nonimmigrants supported by the same document. TCS, on the other hand, stated that while it does not itself use a single LCA for multiple workers, DOL should not take away an appropriate exemption when the LCA of an exempt worker also includes nonexempt workers. Rapidigm questioned why dependent employers should be required to submit two LCAs where, under the same circumstances, other employers are permitted to submit just one. BRI suggested that employers have one LCA and check a box to indicate that they will comply with the attestations for nonexempt workers only. ITAA expressed concern that DOL will not be able to handle the increased workload from multiple LCAs.

It is the Department's view that the unambiguous language of the statute relieves dependent employers and willful violators from the special attestation requirements only if the LCA is used only for exempt H–1B nonimmigrants. The Department points out that such employers are not required to submit separate LCAs for exempt and non-exempt workers. However, the Department notes that if an employer attests that an LCA will only be used for exempt employees, but the LCA in fact is used for both exempt and nonexempt workers notwithstanding the employer's attestation, the employer is required to comply (from the beginning of the LCA's effective period) with the special requirements with respect to all workers on the LCA (both exempt and nonexempt).

With regard to concern about the Department's ability to handle the additional volume of LCAs associated with separate applications for exempt and nonexempt workers, the Department estimates that this requirement will affect not more than 150 to 250 employers, with a midpoint of 250. Furthermore, the Department has instituted a new FAX-back system for processing and certifying LCAs, which will help streamline the process.

There were only two comments on the narrow issue of what form the revised LCA should take. The AFL–CIO stated that employers should indicate on the face of the LCA whether or not it will be used in support of H–1B petitions for exempt H–1B workers. BRI suggested that a box should be provided on the LCA which the employer could check, agreeing to comply with the attestations for non-exempt workers only; a separate written statement regarding the worker's exempt status would then be filed with INS.

As noted above, the Department will permit dependent employers and willful violators to utilize one LCA for both exempt and nonexempt workers, but the employer taking this course will be obliged to comply with the new attestation elements for all workers under the LCA. Therefore the Department does not consider it necessary to require such employers to indicate on the form that it will be used for nonexempt workers. However, the language on the LCA form is modified to make it clear that if an employer checks the box attesting that it will only use the LCA for exempt workers, the employer will not be permitted to use the LCA for nonexempt workers. This will permit the employer, the public, and the workers, as well as DOL, to know whether the additional attestation elements apply with respect to the workers under an LCA, and will permit INS to know whether the worker's exempt status must be verified. The LCA form is further modified to state that if an employer utilizes the LCA for a nonexempt worker in violation of its attestation, the employer will have been required to comply with the new attestation elements with respect to all H–1B nonimmigrants supported by the LCA.

D. What Requirements Apply Regarding No ''Displacement'' of U.S. Workers Under the ACWIA? (§ 655.738)

Section 212(n)(1)(E) and (F) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(E) and (F), imposes requirements upon H–1B-dependent employers and employers who have been found to have willfully violated their H–1B obligations that are designed to protect certain U.S. workers from being ''displaced'' by H–1B workers. As noted in the NPRM, such an employer is prohibited from displacing a U.S. worker who is ''employed by the [H–1B-dependent] employer'' and from displacing a U.S. worker who is employed by some other employer at whose worksite the H–1B dependent employer places an H–1B worker (where there are ''indicia of employment'' between the H–1B worker and the other employer). Thus, the prohibition may apply to the dependent employer's own workforce (primary displacement) or to the workforce of another employer with whom the dependent employer does business (secondary displacement). With respect to the dependent employer's own workforce, the prohibition applies during a period beginning 90 days before and ending 90 days after the date of the filing of an H–1B petition on behalf of the H–1B worker. With respect to a customer's workforce, the prohibition applies during a period beginning 90 days before and ending 90 days after the placement of the H–1B worker. As discussed at IV.C, above, the displacement prohibitions do not apply to LCAs that are used only to support the employment of ''exempt'' H–1B workers. See Section 212(n)(1)(E)(ii).

In introducing the compromise ACWIA bill to the Senate, Senator Abraham explained:

''[T]his legislation provides three types of layoff protection for American workers.

''Let me add that throughout the process of working on this legislation, we have been very mindful of the concerns people have that somehow these H–1B temporary workers might end up filling a position where an American worker could have filled the slot. Our goal is to make sure that does not happen, and we have built protections into this agreement which we and the administration feel will accomplish that objective.

''First, any company with 15% or more of its workforce in the United States on H–1B visas must attest that it will not lay off an American employee in the same job 90 days

or less before or after the filing of a petition for an H–1B professional.

''Second, an H–1B dependent company acting as a contractor must attest that it also will not place an H–1B professional in another company to fill the same job held by a laid off American 90 days before or after the date of placement.

''Third, any employer, whether H–1B dependent or not, will face severe penalties for committing a willful violation of H–1B rules, underpaying an individual on an H–1B visa, and replacing an American worker. That company will be debarred for 3 years from all employment immigration programs and fined $35,000 for each violation.''

144 Cong. Rec. 10878 (Sept. 24, 1998). (**Note:** the third type of layoff protection, discussed in IV.M.5, below, applies enhanced penalties for willful violations of any of the attestation provisions, by both H–1B-dependent and non-dependent employers, where a U.S. worker is displaced in the course of the violations. See Section 212(n)(2)(C)(iii) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(2)(C)(iii).)

The Department received virtually identical requests from several individuals that the Department provide additional information to U.S. workers so that they could better understand their rights; these individuals expressed their concern that H–1B workers might be used to replace older U.S. workers. As discussed in III.B, above, the Department plans extensive education activities in an effort to ensure that both U.S. and H–1B workers are aware of the provisions of the H–1B program as modified by the ACWIA. The Department acknowledges the concern among older workers that their employment may be placed at risk through the potential hire of younger H–1B workers, who may be willing to perform the same work at a reduced level of pay and benefits. Although the ACWIA may operate to reduce this possibility by requiring that H–1B workers be employed at no less than the higher of the prevailing wage or the actual wage paid by the employer for the work in question, the concerns of U.S. workers in this regard are more directly addressed by the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, which is administered by the Equal Employment Opportunity Commission (EEOC). The Department suggests that workers or employers with particular concerns regarding possible instances of age discrimination should contact their local EEOC office.

The Department also notes that section 417 of the ACWIA directs the National Science Foundation to contract with the National Academy of Sciences to conduct a study to assess the status of older workers in the information technology field, including ''the relationship between rates of advancement, promotion, and compensation to experience, skill level, education, and age.'' See ACWIA, Section 417(b). The National Science Foundation also has been charged with conducting a study and preparing a report to assess labor market needs for workers with high technology skills during the next ten years. See ACWIA, Section 418(a) . The ACWIA further directs the Executive Branch to bring to the attention of Congress any reliable economic study that suggests that the increase in the number of H–1B workers effected by the ACWIA ''has had an impact on any national economic indicator, such as the level of inflation or unemployment, that warrants action by the Congress.'' See ACWIA, Section 418(b). Both of these reports were required to be submitted to Congress no later than October 1, 2000. NAS, through the Computer Science and Telecommunications Board, National Research Council, has invited submission of ''white papers'' and has scheduled a series of meetings to discuss and receive input for a single study addressing both sets of issues. Further information about this study, and the means by which members of the public may furnish input, can be found at *http://www4.nationalacademies.org/cpsma/ITWPublic2.nsf.*

1. What Constitutes ''Employed by the Employer,'' for Purposes of Prohibiting a Covered Employer from Displacing U.S. Workers in Its Own Workforce? (§ 655.715)

The ACWIA displacement protections only apply to U.S. workers ''employed by the employer'' and to U.S. workers ''employed by the other employer'' where the H–1B worker is placed at another employer's worksite and there are indicia of employment. See Section 212(n)(2)(E)(i) and (F) of the INA as amended by ACWIA, 8 U.S.C. 1182(n)(2)(E)(i) and (F). The ACWIA contains no definition of the phrase ''employed by the employer.'' The Department stated its view in the NPRM that where Congress has not specified a legal standard for identifying the existence of an employment relationship, the Supreme Court requires the application of ''common law'' standards, as held in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318 (1992); *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989). Noting the Supreme Court's teaching that the common-law test contains ''no shorthand formula or magic phrase that can be applied to find the answer, * * * [and requiring that] all 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 Department proposed regulatory language setting out 16 factors (adapted from EEOC Policy Guidance on Contingent Workers, Notice No. 915.002 (Dec. 3, 1997)) that would indicate the existence of an employment relationship under the common law test. The NPRM sought comments regarding the proposed test and alternative formulations of the common law or other tests for determining whether an employment relationship exists, such as the test under the FLSA and the test used in the federal tax context.

The Department received nine comments on its proposal.

The NACCB agreed that, in light of the absence of a statutory standard for determining the existence of an employment relationship, the common law standard should be used. It also observed that the common law test used under the Internal Revenue Code should be the same as the common law test set forth in the NPRM and should provide consistent results. The NACCB opposed application of the Fair Labor Standards Act test. The AFL-CIO also agreed that the common law test was appropriate and stated that this determination should be based on objective criteria. It urged the Department to prevent employers from hiding behind artificial titles and job descriptions; it also noted its belief that many individuals deemed independent contractors (or employees of a staffing firm) are actually common law employees.

Four commenters (AILA, ITAA, Latour, Chamber of Commerce) rejected the common law test as unnecessary, failing to reflect contemporary realities within the regulated community, or lacking predictability. ITAA also asserted that the ACWIA did not signal a departure from the definitions of an ''employer'' under the current regulations of this Department (20 CFR 655.715) and the INS (8 CFR 214.2(h)(4), 274a.1(g)). Three of these commenters recommended using the standards set forth by the Internal Revenue Service, noting that these standards are already used by the industry and would eliminate confusion and promote predictability. BRI and Baumann recommended that the Department eliminate ''skill'' as a factor because it is essentially a requirement of the H–1B program. Senators Abraham and Graham expressed the view that the proposed test was ''unnecessarily complicated and subjective'' and

suggested that ''[t]he Department's regulation should follow the statute and our intent by using [as a sole factor whether] 'the worker is considered an employee of the firm or the client for tax purposes, *i.e.,* the entity withholds federal, state, and Social Security taxes.''' Similarly, AILA suggested that any worker who is classified as an independent contractor for tax and benefit purposes should not be considered an employee. The Chamber of Commerce commented that if the Department lists the common-law factors, it should use the list in the Supreme Court opinions, not the somewhat longer list of factors utilized by EEOC.

After careful consideration of the comments, the Department has concluded that it should utilize the common law standards for determining whether a United States worker is employed by a dependent employer—the status that invokes the statute's protection against displacement. As noted in the NPRM, the Department believes that it is required by Supreme Court precedent to apply the common law test for employment relationship in the absence of plain statutory language directing the use of a different test. None of the comments submitted persuade the Department that it may craft a different test under the ACWIA.

Upon reflection, however, the Department has concluded that the regulation should not include a detailed list of prescribed factors. The Department believes that the factors identified in the NPRM provide a useful framework, based on the common law, for distinguishing between employees and independent contractors. Nevertheless, to avoid any potential misunderstanding that the factors on the list are exclusive or that factors not listed are less deserving of consideration, the Department has decided that no list of factors should be included in the Interim Final Rule. The Interim Final Rule reiterates that the common-law test requires an assessment of all the factors bearing on the employment relationship, with the right to control the means and manner of work being the key determinant but with no one factor controlling.

Some commenters expressed a concern that there is tension between the NPRM's formulation and the IRS test. However, the Department has not been persuaded that such a tension exists between these tests, which are both drawn from the common law multifactor analysis. The NPRM list of factors is quite similar to the factors identified in IRS Rev. Rul. 87–41, 1987—Cum. Bull. 296, 298–99. As noted in the NPRM, the proposed list of factors for determining whether an employment relationship exists was drawn from a framework developed by the EEOC for its policies on contingent workers. And as the EEOC recognized, its framework was derived from non-exclusive lists of factors in *Darden* and the other sources for the common law test cited by the Supreme Court in *Darden: Reid*, the IRS ruling, and the Restatement (Second) of Agency 220(2) (1958).

Each of these sources for the common law test recognizes ''the right to control'' as the key determinant in ascertaining the existence of an employment relationship. As stated by the EEOC: ''The worker is a covered employee * * * if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself.'' Similarly, the IRS Revenue Ruling states: ''[G]enerally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is to be accomplished. * * * It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.'' See also the Supreme Court in the *Darden* and *Reid* and Section 220(1) Restatement (Second) of Agency. Thus, an employer that properly applies any formulation of the common law test, grounded upon the cited authorities, should obtain the same conclusion regarding an individual's employment status.

In the Department's view, the EEOC's approach (in EEOC Policy Guidance on Contingent Workers, Notice No. 915.002, Dec. 3, 1997) provides an especially useful model for identifying particular factors that can be applied in the context of H–1B employment, particularly where workers are placed at third-party employer worksites. The EEOC established the list as guidance for ascertaining an individual's employment status in the analogous context of staffing firm workers, *i.e.,* workers who are ''placed in job assignments by temporary employment agencies, contract firms, and other firms that hire workers and place them in job assignments with the firms' clients.'' As such, the list is oriented towards individuals providing services, and it provides a focus that facilitates a differentiation among individuals who may possess attributes of both employees and independent contractors. This focus, the Department believes, makes the EEOC formulation useful for resolving employee status questions in the H–1B environment, with its mix of individuals working at a facility operated by one employer, but who may be self-employed or employees of another employer(s). Employers may wish to consider other sources in determining employee status, including IRS materials. The IRS, for instance, has identified the following factors that may be helpful in determining employee status in the H–1B context: the firm or the client provides training to the worker so that the worker may perform services in a particular manner or method; the worker performs services for only one firm at a time; and the worker has been personally selected to perform the job by the client or firm. See IRS Rev. Rul. 87–41, 1987–Cum. Bull. 296, 298–99.

The Department is not persuaded that Congress evinced any intention that tax law principles should be applied by employers or this Department in determining employee status for purposes of the H–1B program. The statute evinces only that the common law test be applied, not any particular formulation of the test. The Department disagrees with the further suggestion that the IRS formulation of the common law test should be the preferred method for making employee status determinations. Such use could pose some problems in administering the H–1B program. While the IRS has developed a list of factors that it will consider in making employee independent contractor decisions, Congress, for an extended period of time, has limited that agency's interpretation and application of its common law-based test. Congress has imposed significant statutory limitations upon the IRS in collecting taxes from employers who fail to withhold taxes from individuals whom employers claim to be independent contractors. See, *e.g.,* Section 530 of Pub. L. 95–600, as amended, 26 U.S.C. 3401 note, discussed in *Hospital Resource Personnel, Inc.* v. *United States,* 68 F.3d 421 (11th Cir. 1995). Section 530(b) also prohibits the IRS from issuing any regulations or Revenue Rulings that would further clarify the employment status of individuals for purposes of the employment taxes. Consequently, the Department cannot be confident that an employer's treatment of a worker as an independent contractor or an employee for tax purposes accords with the common law test. Accordingly, the Department does not consider an

employer's designation of a worker's status for tax purposes to be controlling on the matter of that worker's status for purposes of the H–1B program. The fact that an employer has treated a worker as an independent contractor for tax purposes, without protest by the IRS, will not excuse an employer's non-compliance with its H–1B obligations toward that worker as an employee if the common law test shows the worker to be an employee.

The Department is not persuaded that the factor relating to a worker's level of skill or expertise should be eliminated from the common law test. While the Department agrees with the observation that the occupations for which H–1B workers are sought require more advanced skills than those required for many other jobs, it remains true that a worker's advanced skill is one of the factors weighing against an employment relationship and must be examined in determining whether a worker who may have been displaced was an employee or an independent contractor.

Finally, the Department notes that although this test is most important in the context of displacement, the common law test applies in any situation under the H–1B program where the question of employment relationship may arise (see the discussion in IV.B.1, above, regarding application of the formula for determining whether an employer is H–1B-dependent). The Interim Final Rule states, however, that every H–1B nonimmigrant is by definition an employee of the petitioning employer since only employees are granted entry/status as H–1B nonimmigrants.

2. What Constitute ''Indicia of an Employment Relationship,'' for Purposes of the Prohibition on Secondary Displacement of U.S. Workers at Worksites Where the Sponsoring Employer Places H–1B Workers? (§ 655.738(d)(2)(ii))

Section 212(n)(1)(F)(ii) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(F)(ii), prohibits the displacement of U.S. workers employed by another (''secondary'') employer, if an H–1B-dependent employer or willful violator intends or seeks to place its own H–1B workers with that other employer in a situation where, among other things, there are ''indicia of an employment relationship between the nonimmigrant and such other employer.''

In his *Congressional Record* statement, Senator Abraham characterized the secondary placement provision as applying ''where the H–1B worker would essentially be functioning as an employee of the other employer.'' Senator Abraham further stated that the requirement that there be ''indicia of employment'' is ''intended to operate similarly to the provisions in the Internal Revenue Code in determining whether or not an individual is an employee.'' 144 Cong. Rec. S12751 (Oct. 21, 1998).

In the NPRM, the Department stated its view that this protection would be invoked where the relationship between the business receiving the services of the H–1B individual possesses some, but not all, of the attributes of an employment relationship. Thus, the Department proposed as a test for this relationship a list of factors that it derived from the common law test which the Department had proposed for ''primary displacement'' (discussed above in IV.D.1). The Department identified nine factors it believed to be most useful in determining whether the H–1B worker and the business at which he or she has been placed by the primary employer possess the requisite ''indicia of an employment relationship.'' The Department requested comments on its proposed test and any alternative formulations for determining secondary displacement coverage.

Several commenters responded to the proposal on this issue. Two employee organizations (AOTA, APTA) generally endorsed the Department's proposal, but sought assurances that the Department will hold recruitment/staffing firms to the same standard as other employers. One individual (Miano) urged that workers on H–1B visas should be considered employees of a company if they work at that company's facility and take direction from the company's management. Rapidigm asked the Department to explain how it settled on the factors it identified in the proposal.

Senators Abraham and Graham and three representatives of employers (AILA, ITAA, Latour) asserted that the legislative history of the ACWIA notes that ''indicia of employment'' was meant to operate in a manner similar to IRS provisions and that the focus of the regulations should be on that test. Senators Abraham and Graham continued: ''[O]ur intent was simple * * *. Anyone without [a contract directly with the putative employer], whether an independent contractor, or an employee of a third-party employer, would not be 'employed by the employer.' '' The Chamber of Commerce reiterated its opposition to application of common law standards, but urged that if the Department does adopt these standards, both the quantity and quality of common law factors sufficient to establish ''indicia of an employment relationship'' should be substantially the same as those necessary to establish the ''employed by the employer requirement.'' The Chamber of Commerce also requested that the Department strike from the list of the ''indicia'' factors that ''the client can discharge the worker from providing services to the client'' because this factor, it asserts, places an unnecessary burden on typical contracting and subcontracting business arrangements, under which a client retains the right to insist that a worker be removed from the client's jobsite. TCS expressed concern that the Department's proposal may improperly lead to the result that its consultants will be seen as meeting the ''indicia'' nexus. In this regard, it stated that the Department fails to mention what TCS believes to be the most important criterion—who pays, assigns, and trains the individual at issue, and who possesses ultimate control over him—and does not indicate how various factors are to be weighed. AILA and ACIP expressed concern that a worker supplied by another company will often be subject to the controls identified by the Department as ''indicia.'' ACIP contended that the Department may be misinterpreting the common law, asserting that a client-firm's typical control of hours, location, access, etc. should not turn an individual into the client's employee—a relationship that should be rare, not commonplace. Both groups also suggested that this test will operate contrary to settled subcontracting practices.

The Department has carefully considered these comments. As explained previously, the Department is not persuaded by the suggestion that it could use anything other than the common law test for an employment relationship as the starting point for interpreting the ''indicia of an employment relationship.'' The Department proposed a subset of the common law factors, which, in its view, are relevant and useful in determining the relationship between the H–1B worker and the client business, as distinct from those factors of the test that simply focus on whether an individual is self-employed.

The Department sees no merit to the suggestion that Congress intended the use of the ''employment relationship'' test to determine the ACWIA-specific relationship between an H–1B worker and the secondary employer, which, in the language of the statute, possesses ''indicia of an employment relationship.'' If Congress had wanted to use the same test for both purposes, it could have done so by using the same

language as it did for the relationship between a U.S. worker and his or her employer. That congress chose different language is a strong indication that it had a different intention than suggested by the commenters.

Furthermore, how the employee is treated for IRS purposes is simply not pertinent, and is contrary to the clear intent of the provision. IRS is concerned only with the entity which is paying the worker—in this case necessarily the H–1B employer, not the secondary employer. Thus 26 U.S.C. 3401(d) defines ''employer'' for purposes of payroll deductions as ''the person for whom an individual performs or performed any service, of whatever nature,'' except that if that person does not have control of payment of wages, the person having such control is the employer. Regulations which followed the IRS approach would thus have the result of nullifying the secondary placement protections of the ACWIA.

Finally, reading the provision as requiring less than a full employment relationship is congruent with the purpose of the statute to assist U.S. workers in retaining their employment where their jobs may be threatened by the actual or potential placement of H–1B workers. Congressman Smith commented that the legislation is intended to address the problems posed by ''job shops.'' In his introduction of the compromise ACWIA bill to the House of Representatives, he stated:

> ''The employers most prone to abusing the H–1B program are called job contractors or job shops * * *. They are in business to contract their H–1Bs out to other companies. The companies to which the H–1Bs are contracted benefit by paying wages to the foreign workers often well below what comparable Americans would receive. Also, they do not have to shoulder the obligations of being the legally recognized employers; the job shops remain the official employers.''

144 Cong. Rec. H8584 (Sept. 24, 1998). Senator Abraham also stressed the importance of the layoff protections of the bill, ''very mindful of the concerns people have that somehow these H–1B temporary workers might end up filling a position where an American worker could have filled the slot. Our goal is to make sure that does not happen.'' 144 Cong. Rec. S10878 (Sept. 24, 1998). There is certainly no suggestion in Senator Abraham's explanation of this provision that it should be narrowly construed: ''An H–1B dependent company acting as a contractor must attest that it also will not place an H–1B professional in another company to fill the same job held by a laid off American 90 days before or after the date of placement.'' *Ibid.*

In the NPRM, the Department did not indicate the point at which the relationship between a customer and an H–1B worker would trigger the displacement obligation. In this regard, the Department stated that it had considered, but rejected, an approach that would require the presence of at least some unspecified number of factors as a litmus test. No commenter expressed disagreement with this decision.

Upon review, the Department has decided that, as with the test of employment relationship, the single most important consideration will be whether the customer has the right to control when, where, and how the worker performs the job, *i.e.,* the manner or method by which the particular duties of the job are to be performed. Thus, the presence of this element alone suggests that the relationship between the customer and the H–1B worker approaches that of employee to employer. Although a consideration, the displacement obligation would not be triggered simply because the H–1B worker performed duties on the customer's premises.

The Department disagrees with the suggestion that the approach it proposed is likely to upset usual contracting relationships. The triggering of the secondary displacement liability of the H–1B employer does not itself mean that there is an employment relationship between the secondary employer and the H–1B worker. The fact that the placing employer ordinarily will control important aspects of the relationship, such as the pay, assignment, and training of the H–1B worker, does not mean that the relationship between the worker and the employer's client will not bear sufficient ''indicia of employment'' for the secondary displacement provisions of the ACWIA to apply. However, these provisions apply to the primary employer, which becomes liable under the terms of its LCA—not to the secondary employer, which incurs no liability under the ACWIA for the displacement.

The Department is unpersuaded that it should eliminate any of the criteria it proposed as ''indicia.'' Contrary to the suggestion of some commenters, it is fully consistent with the purposes of the Act that the proposed test may result frequently in a conclusion that the secondary displacement prohibition is applicable.

3. What Constitutes an ''Essentially Equivalent Job,'' for Purposes of the Non-Displacement provisions of the ACWIA? (§ 655.738(b)(2))

Section 212(n)(4)(B) of the INA as amended by the ACWIA provides that displacement occurs if the employer ''lays off the [U.S.] worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.'' The area of employment is defined as ''the area within normal commuting distance of the worksite or physical location where the work of the H–1B nonimmigrant is, or will be, performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.''

Congressman Smith explained that Congress intended to prevent covered employers from replacing or displacing American workers with H–1B workers. In his words:

> ''Congress ma[de] clear that the prohibition is directed to circumstances in which a covered employer hires H–1B workers with similar qualifications to those of laid off American workers in similar jobs.
>
> ''This language should not be interpreted as prohibiting and preventing only a one-for-one replacement of a particular laid off American worker; such an interpretation would be an overly rigid reading and a mischaracterization of Congressional intent. The focus of the provision is on the placement of H–1B workers in the kinds of jobs previously held by American workers. If an American worker was laid off from a job and the employer then hires an alien (on an H–1B visa) with sufficiently similar skills and experience to perform a sufficiently similar job, a prohibited displacement has taken place. This is a violation of the attestation regardless of whether the replacement was intentional or unintentional, or whether it was done in bad faith or not.''

144 Cong. Rec. E2324 (Nov. 12, 1998). He also noted that a dependent employer or willful violator is prohibited from ''concealing a lay off/displacement by making a modest or cosmetic change in job duties and responsibilities [or] * * * by some other subterfuge or pretense.''

On the other hand, Senator Abraham remarked:

> ''The reason for the change from ['specific employment opportunity'] is that it was thought desirable to include within the scope

of this prohibition situations where an employer sought to evade this prohibition by laying off a U.S. worker, making a trivial change in the job responsibilities, and then hiring the H–1B worker for a 'different'' job' * * *. For similar reasons, especially given the nature of the jobs in question, the geographical reach of the prohibition was extended so as potentially to cover other worksites within normal commuting distance of the worksite where the H–1B is employed. This was to cover the eventuality that an employer might try to evade this prohibition by laying off a U.S. worker, hiring an H–1B worker to do that person's job, but assigning the H–1B worker to a different worksite very close by in order to conceal what was going on.''

144 Cong. Rec. S12750 (Oct. 21, 1998).

Senator Abraham contrasted the provision in the ACWIA with the original definition in the House, which did not contain the phrase ''from a job that is essentially the equivalent of the job for which the [H–1B worker] is being sought.'' Senator Abraham stated that ''[t]hat phrase was added to make clear that this provision is not intended to be a generalized prohibition on layoffs by covered employers seeking to bring in covered H–1Bs, but rather a prohibition on a covered employer's replacing a particular laid-off U.S. worker with a particular covered H–1B.''

In the NPRM, the Department explained that the comparison required to determine whether an unlawful displacement has taken place involves: a comparison first of the job held by the H–1B worker with the job held by the U.S. worker to determine if the jobs involve essentially the same responsibilities; a comparison of the U.S. worker with the H–1B worker to determine if they have substantially equivalent qualifications and experience; and a determination of the areas of employment, which must be the same for each worker in question.

The Department proposed that when comparing the job responsibilities component of the provision, the focus should be on the core elements of the job, such as supervisory duties, design and engineering functions, or budget and financial accountability, and on whether both workers are capable of performing those duties. The Department further proposed that peripheral, non-essential duties that could be tailored to the particular abilities of the individual workers would not be determinative. The Department suggested that it might be useful to apply the standards under the Equal Pay Act (''EPA'') (29 U.S.C. 206(d)(1)) for determining the essential equivalence of jobs. See 29 CFR 1620.13 *et seq.* In this regard, the Department noted that the EPA standards focus on actual job duties and responsibilities, rather than a comparison of sometimes artificial job titles and position descriptions. The Department noted its concern that the protection for U.S. workers could be thwarted if essential equivalence required a match of insubstantial aspects of jobs.

As to the qualifications and experience of the workers, the Department proposed that the comparison be confined to matters which are normal and customary for the job, and which are necessary for its successful performance. In this regard, the Department proposed that although it would be appropriate to compare the relative qualification of the H–1B and U.S. workers by virtue of their education, skills, and experience, it would be inappropriate to compare their relative ages or their ethnic identities, or whether they are exactly alike in their educational background and work experiences. As an illustration, the Department stated its view that unlawful displacement could occur where an H–1B worker is ''overqualified'' for the job under comparison.

With regard to ''area of employment,'' the NPRM noted that the definition is much the same as the Department's regulatory definition at § 655.715 (see IV.P.5, below).

The Department received five comments on its proposals on this issue.

The AFL–CIO stated that the Department recognized that employers might seek to hide behind ''artificial job titles and position descriptions,'' and that the comparison is between the U.S. worker's and the H–1B worker's qualifications for the job in question. The AFL–CIO stated that the Department must continue to rely on objective criteria such as the North American Classifications (NAICS), ''rather than the employer's self-serving declarations . . . of 'intangible' qualifications, such as being a 'team player,' * * *''

Senators Abraham and Graham took issue with the Department's use of the EPA standard for a ''job'' which, they contended, takes the Department beyond the one-for-one displacement definition provided by the statute for determining whether an H–1B nonimmigrant displaced a U.S. worker in the same job. They stated that the EPA applies a ''substantially similar''definition, which, in their opinion, is much broader than the ACWIA's ''essentially equivalent'' jobs standard. ITAA requested the Department to adopt a narrow reading of the displacement prohibition, suggesting that the Department's proposal improperly attempted to put in place an approach that had been rejected during the legislative process. ACE urged the Department to reconsider its plan to ''strip away'' the relevant information about job responsibilities; it suggested that the Department, instead, should require that comparisons take into account the context and the actual, specific requirements and skills of a particular job.

AILA took issue with the ''core elements'' approach as too broad and too difficult for an employer to apply. For example, AILA contended that under the ''core responsibilities'' analysis, a software engineer for a telecommunications project would appear to have the same core responsibilities as a software engineer for administrative functions, although the positions are very different and require different expertise and knowledge. On the other hand, AILA stated that the essential equivalence analysis of the EPA is more in keeping with legislative intent. AILA proposed a test that would compare the employer's existing job requirements and duties to those of the H–1B employee.

AILA also stated its approval of the Department's proposals on ''substantially equivalent'' and ''area of intended employment.''

The Department continues to believe the distinction between core and peripheral elements of a job is important. The Department believes that its reference to the ''core elements'' of the job may have been misunderstood. The Department did not mean to imply, for example, that if each job required design and engineering functions, for example, there would be a match of core elements of the job, but rather that the design and engineering functions of a job such as software engineer are core rather than peripheral elements. The Department would agree with AILA that a job as software engineer for telecommunications would not ordinarily be similar to a job as software engineer for administrative matters—assuming the employer does not treat the job of ''software engineer'' as fungible and move workers from one project to another without regard to its content.

The Department finds no merit to the suggestion, in effect, that the Department's interpretation of the phrase ''essentially equivalent'' is not based on the language of the ACWIA, but on an approach that was discarded during the legislative process. The Department believes that its interpretation of this term is well-grounded in the specific language of the ACWIA. The Department is not

persuaded that the ACWIA's displacement provisions only operate on a ''one-to-one'' basis. Where the workforce in question is small, it is quite possible that the comparison will be so focused, but in other situations a wider inquiry will have to be undertaken. For example, where an employer, through reorganization, eliminates an entire department with several employees and staffs this function with one or more H–1B workers, any U.S. worker(s) in that Department who occupies(d) an essentially equivalent job as that filled or to be filled by the H–1B worker(s) would be protected against displacement. The Department will also look closely at situations where a U.S. worker is laid off and his/her job is filled by a U.S. worker colleague whose own job is then filled by an H–1B nonimmigrant; the Department would seek to determine whether the first U.S. worker was, in fact, the subject of a prohibited displacement.

The Department also continues to believe that the regulations implementing the EPA provide a useful source of standards for assessing the ''essential equivalence'' of jobs. Neither the EPA nor the ACWIA requires that the jobs under comparison be identical as a condition for invoking their provisions. Although the two statutes have operative language that differ in their specifics, each requires a determination of ''equivalence'' if an employee is to secure its protection. Thus, the EPA, at 29 U.S.C. 216(d)(2), provides: ''[No employee shall receive less pay than an employee of another gender] for equal work on jobs the performance of which requires equal skill, effort and responsibility under similar working conditions.'' This compares with the ACWIA, at Section 212(n)(4)(B), which provides: ''[A U.S. worker is displaced] from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the [H–1B worker or workers] is or are sought,'' *i.e.,* the job ''involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.'' With regard to each statute, the regulatory challenge is to determine the point at which two arguably different jobs that share some but not all characteristics become essentially alike for the purpose of the required statutory comparison. See also the Department's regulations under the Family and Medical Leave Act, 29 U.S.C. 825.115(a), which use the same concept in defining ''equivalent position.'' On the other hand, it is not the Department's intention to adopt wholesale the EPA regulations, but rather to adapt those provisions which it considers relevant and appropriate in satisfying the analogous but somewhat different statutory test under the ACWIA. Significantly, under neither statute did Congress require an identity of jobs as a condition to invoke the statutory protection afforded workers.

As noted in the NPRM, it is important that the comparison of the job filled by an H–1B worker and the job held by a U.S. worker take into account the actual duties of the jobs. See 29 CFR 1620.13(e), 1620.14(a). U.S. workers would receive little protection if the comparison were to be made simply by job titles or position descriptions that easily can be tailored to disguise jobs, which in their actual performance, are essentially alike. The same concerns require that the comparison take into account the most significant components (*i.e.,* core elements) of the jobs—so that a U.S. worker does not lose the Act's protection where the differences between the job and the workers themselves are insubstantial, peripheral, or reflect discrimination against U.S. workers. See 29 CFR 1620.14(a).

As under the EPA, the jobs will be viewed as different if the skill required to perform the job the U.S. worker was holding is substantially different than that required to perform the job of the H–1B worker. This does not end the inquiry, however, because the ACWIA requires in addition the comparison of the experience and qualifications of the workers, considering the experience, training, education, and ability of the workers as measured against the actual performance requirements of the jobs. Thus an inquiry must first be made into whether both workers possess the minimum qualifications for the job. Unlike the EPA, however, the comparison includes not only the experience and qualifications required to perform the job, but also experience and qualifications which are directly relevant in that they would materially affect a worker's relative ability to perform the job better or more efficiently. Furthermore, the statutory standard requires only that the workers' qualifications and experience be ''substantially equivalent;'' certainly no two workers would have identical experience and qualifications. For example, the Department would consider a bachelor's degree from one accredited university to be substantially equivalent to a bachelor's degree another accredited university. Similarly, the Department would consider 15 years of experience to be substantially equivalent to 10 years of experience. Finally, a worker's qualifications or experience that are not needed or useful in performing the specific requirements of the job are not relevant to the comparison. For example, the Department would not ordinarily consider experience or a degree in an unrelated field to be relevant.

As suggested in the NPRM, the Department's Interim Final Rule utilizes the current definition of ''area of intended employment'' at § 655.715 to define ''same area of performance.''

4. How Does the ACWIA Distinguish Between a Prohibited ''Layoff'' and a Permissible Termination of an Employment Relationship? (§ 655.738(b)(1))

The ACWIA's non-displacement prohibition applies only to a ''layoff'' as that term is defined by the ACWIA. Section 212(n)(4)(D)(i) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(4)(D)(i), states that a ''layoff'' means ''to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, [or] voluntary retirement.'' Furthermore, where loss of employment is caused by ''the expiration of a grant or contract (other than a temporary employment contract entered into in order to evade [the displacement provisions of the ACWIA],'' it is not a layoff within the meaning of the ACWIA.

Congressman Smith and Senator Abraham both stated that Congress intended that the expiration of a temporary employment contract would be treated as a layoff if an employer enters into such a contract with the intent of evading the displacement prohibition. 144 Cong. Rec. E2324 (Nov. 12, 1998); 144 Cong. Rec. S12750 (Oct. 21, 1998).

The Department explained in the NPRM that it would closely scrutinize any situation where there is some question regarding the voluntariness of the resignation or retirement of a U.S. worker. The Department also proposed that it would look to well-established principles concerning the ''constructive discharge'' of workers who are pressured to leave employment.

In the NPRM, the Department stated its view that the statutory exception where the U.S. worker's loss of employment is caused by the expiration of a grant or contract was meant to address the common situation where scientists and other academic personnel

are expressly hired to work under a contract or grant from another institution. Thus, the Department proposed that where the funding is lost, and the worker is not replaced because of this loss, no layoff would occur within the meaning of the ACWIA. The Department similarly proposed that where a staffing firm or other commercial firm hires an employee expressly to work on a specific project under a contract with another business entity, it may choose, in appropriate circumstances, to discontinue his or her employment without violating the ACWIA.

By way of illustration, the Department described a situation where no displacement violation occurs—the contract project ends and is not renewed, and the employer does not have a practice of then moving its employees to work under other contracts, or placing its employees on a call back list or its equivalent, but instead terminates the relationship for lack of work. The Department distinguished the preceding situation from one where a staffing firm places employees at other businesses, does not hire employees for a specific client or contract, and ordinarily moves its employees to perform work under other contracts. The Department proposed that in this latter situation, the Department might find a displacement if the employer terminates U.S. workers and hires H–1B workers to perform essentially the same job under a different contract or on a different project. The NPRM also noted the Department's intention to closely scrutinize situations where it appears that a particular contract, including commercial contracts and grants as well as employment contracts, has been used to evade the dependent employer's obligation not to displace U.S. workers.

The Department received several comments on this issue.

AOTA and the AFL–CIO generally supported the Department's approach. The AFL–CIO endorsed the Department's recognition of constructive discharge. The Chamber of Commerce, AILA and ACIP pointed out that the Department's proposal fails to mention that the ACWIA expressly excludes from ''layoff'' any discharge for inadequate performance, violation of workplace rules, or cause.

The Department acknowledges its oversight in failing to paraphrase the introductory clause to the ACWIA's definition of ''lays off'' in the NPRM discussion of this point. This clause lists those personnel actions, such as a discharge for poor performance or cause, that should not be mistakenly considered as a ''layoff.'' The omission of this language from the NPRM was not intended to signal that this part of the definition was insignificant—only that this portion of the statute did not seem to require any regulatory explication. The Interim Final Rule, however, contains a complete statement of the statute's layoff provision, including the statutory exceptions.

AOTA stated that the Department should scrutinize arrangements that may appear to be limited to the duration of a contract or grant; in its view, this would prevent staffing firms from falsely claiming that it had hired a person specifically for the contract in question. The AFL–CIO suggested that employers who claim that a U.S. worker was not laid off due to expiration of contract or grant must document that they have not engaged in a pattern or practice of denying workers assignment to other projects. Two commenters (Kirkpatrick & Lockhart, Latour) noted that the Department correctly recognized that the expiration of a contract leading to the termination of employment is not a ''layoff'' for ACWIA purposes.

Senators Abraham and Graham and ITAA stated that there should be no distinction between academic and other situations involving the expiration of a contract or grant. They expressed disagreement that it would be a layoff where a staffing firm deviates from its practice of continuing the employment of a worker after the expiration of a contract and fails to continue the employment of a U.S. worker. ITAA also objected to what it viewed to be an apparent presumption by the Department that temporary contracts ordinarily would be used to evade the displacement prohibition. The NACCB asserted that the distinction between employers that usually transfer employees from contract to contract and those that do not have that practice is impractical and unworkable in the information-technology staffing industry. It also provided examples of situations that it believed would be problematic under the Department's proposal. BRI expressed concern that the Department's approach would fail to account for situations where a particular worker was not qualified for positions under other contracts held by the employer.

The Department does not presume that temporary contracts ordinarily will be used to evade the statute's displacement obligations. The Department also does not hold the view that Congress believed that employment contracts tied to the life of a grant or contract were solely a creature of academia. While one of the examples discussed in the NPRM concerned the use of such academic contracts, the NPRM also discussed the applicability of the provision to staffing firms, whose contracts typically are with more commercially-oriented businesses.

As the NPRM suggested, the Department recognizes that the employment of workers on a contract or grant basis could pose some problematic issues. The comments received confirmed the Department's view. While the statute recognizes that a layoff typically will not occur where ''a worker's loss of employment * * * [is caused by] the expiration of a grant or contract,'' it expressly distinguishes this situation from an unlawful ''temporary employment contract entered into in order to evade a [displacement] condition.'' Section 212(n)(4)(D)(i)(I). The Department intends to look closely at such contracts to ensure that employers do not attempt to evade the statutory obligations.

Upon further review of this matter and consideration of the comments received, the Department has decided to continue the approach described in the NPRM. The Department, however, believes it appropriate that the totality of the circumstances be considered to determine whether a layoff has occurred. In many situations, the Department expects that it will be obvious whether a layoff has occurred (*e.g.,* where a worker has voluntarily retired). In other cases, it will be unnecessary to resolve the question of whether the loss of the job was because of the expiration of a contract or grant because the jobs are clearly not equivalent.

In the more difficult cases, a determination of whether the expiration of a grant or contract caused the loss of employment such that a layoff did not occur will require an examination of the practice of the employer (in cases of primary displacement) or the customer (where secondary displacement is at issue) insofar as it bears on the following questions: whether the U.S. worker's job, in fact, was tied to the life of a particular contract or grant; whether the employer has a practice, either as a general matter or with respect to the employee in question, to continue the individual, without interruption in his employment on other contracts or grants; whether the employer has a practice, again either as a general matter or with respect to the employee in question, that the employee will be called back when a contract for which he or she is qualified becomes available; whether the employer departed from its usual practice insofar as the hire or

placement of the H–1B worker is concerned; whether the reason for the departure from the practice was for a reason unrelated to the employment of the H–1B worker; whether there is any evidence to suggest that the employer intended to evade its displacement obligations; and the employer's previous history of compliance with its displacement and other H–1B obligations. This analysis will be used by the Department to determine whether it is the expiration of the contract or grant which has caused the termination of the employee or some other consideration such as the hiring of the H–1B worker.

The Department notes that where an employer has a practice of continuing employees on different projects or grants where work is available, but of laying workers off if there is no work available that fits the worker's skills and later offering the worker work under a new contract when one becomes available, the Department would expect the employer to contact the U.S. worker and offer the position prior to petitioning for an H–1B worker for the position. The Department will closely examine such situations to determine if the U.S. worker has been unlawfully displaced, and if not, if the employer's failure to contact such former employees is a recruiting violation.

5. What Constitutes ''a Similar Employment Opportunity'' for a U.S. Worker, Which—if Offered—Would Not Constitute a Prohibited ''Layoff'' or Displacement of the Worker?

Section 212(n)(4)(D)(i)(II) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(4)(D)(i)(II), provides that, even where an H–1B worker is placed in a job formerly held by a U.S. worker, no ''displacement'' or ''layoff'' is considered to have occurred if the U.S. worker was first offered but refused ''a similar employment opportunity with the same employer.''

As stated by Congressman Smith: ''The intent of Congress is that the 'similar employment opportunity with the same employer at equivalent or higher compensation and benefits' would be a meaningful offer.'' 144 Cong. Rec. E2324 (Nov. 12, 1998). Senator Abraham stated that it ''is the intent of Congress that the determination of similarity take into account factors such as level of authority and responsibility to the previous job, level within the overall organization, and other similar factors, but that it not include the location of the job opportunity.'' 144 Cong. Rec. S12750 (October 21, 1998).

In the NPRM, the Department described this provision as allowing a dependent employer an affirmative defense to its displacement of a U.S. worker if the employer can establish that it offered a *bona fide* transfer opportunity to the worker. The Department proposed that the U.S. worker would need to be offered not simply another job with a similar title, but that the offered position also carry with it attributes such as a similar level of authority and responsibility within the organization, a similar opportunity for advancement within the organization, similar tenure, and a similar work schedule.

Four commenters responded to this proposal.

The AFL–CIO asserted that by using the term ''employment opportunity'' rather than ''job'' or ''position,'' Congress intended that working conditions, such as schedules, worksite location, level of authority and discretion, and potential to advance, be factors that determine the similarity of opportunity, and that the term does not simply reflect a comparison of compensation and benefits. One commenter (Latour) urged the Department to be sensitive to the geographic needs of employers in administering this section of the ACWIA, noting that U.S. workers often are less willing to go to some localities than H–1B workers.

Most of the factors listed by the AFL–CIO are included in the Interim Final Rule. The Department notes that, apart from the economic comparison proposed by the Department, as discussed in the next section, no commenter objected to the other illustrative factors proposed by the Department in measuring ''similar employment opportunity.'' AILA stated that it agreed that the factors listed by the Department in the NPRM are appropriate for determining the similarity of an employment opportunity offer. The AFL–CIO identified as an additional factor, ''the level of * * * discretion'' of the two positions, which, it asserted, should be taken into account. This factor, the Department believes, is inherent in any comparison between two jobs, and it has specifically included this factor in the Interim Final Rule.

The Department has not included ''worksite location'' as an additional factor, as had been suggested by the AFL–CIO. The intended meaning of this term is not clear to the Department. To the extent it is intended to require a comparison of the relative costs of living in the areas of the jobs—a consideration discussed in the next section of the Preamble—the Department's proposal already accommodated the suggestion. If the AFL–CIO is suggesting that an employer should not be able to offer a job in a different geographic location, the Department disagrees with this suggestion. Although the ACWIA's language does not foreclose an interpretation that would require an offered position to be within the same geographic area in order to satisfy the test of ''similarity,'' the Department believes that this would unnecessarily limit an employer's ability to restructure its operations in order to ensure that no U.S. workers are displaced by an H–1B worker. Although the Department has not included worksite location as an explicit consideration in evaluating similarity of the employment opportunity, the Department notes that the offer of a similar employment opportunity must be *bona fide.* The Department would not consider an offer to be *bona fide* if all of the facts and circumstances indicate it is designed to be rejected by the employee and therefore is a subterfuge for a layoff.

6. What Constitutes ''Equivalent or Higher Compensation and Benefits'' for a U.S. Worker, for Purposes of the Other Job Offer to That Worker so as to Not Constitute a Prohibited ''Layoff'' or Displacement? (§ 655.738(b)(1)(iv)(C))

Section 212(n)(4)(D)(i)(II) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(4)(D)(i)(II), provides that no prohibited ''layoff'' of a discharged U.S. worker occurs if the U.S. worker is offered another employment opportunity with the same employer ''at equivalent or higher compensation and benefits than the position from which the employee was discharged.''

Congressman Smith stated: ''It is Congress'' intent that an employer should not be able to evade attestation by making an offer of an alternative employment opportunity without considerations such as relocation expenses and cost of living differentials if the alternative position was in a different geographical location.'' 144 Cong. Rec. E2324 (Nov. 12, 1998). Senator Abraham stated that ''the determination of similarity * * * [does] not include the location of the job opportunity.'' 144 Cong. Rec. S12750 (Oct. 21, 1998).

In the NPRM, the Department proposed that an ''opportunity'' could not be considered to provide ''equivalent or higher compensation and benefits,'' if that ''opportunity'' would provide the worker a lower disposable income, or would require the worker to incur expenses that drive down his financial standing. The Department also noted that Congress, by specifying ''equivalent or higher'' pay and benefits,

must have intended that the U.S. worker be offered a positive, rather than negative, ''employment opportunity.''

The Department also proposed that, ''[a]ssuming the regulations provide that a 'similar employment opportunity' may include a transfer to another commuting area,'' that opportunity must take into consideration matters such as cost of living differentials and relocation expenses (*e.g.,* a New York City ''opportunity'' offered to a worker ''laid off'' in Kansas City). The Department also noted that it was considering whether it would be appropriate for this purpose to use principles adapted from regulations defining equivalent compensation and benefits under the Equal Pay Act and the Family and Medical Leave Act. See 29 CFR 1620; 29 CFR 825.215(c).

The Department received five comments on this issue and its proposals.

The AFL–CIO agreed with the Department's proposal, noting that a position resulting in an actual loss of ''real wages'' for a U.S. worker should not be considered equivalent compensation and benefits. The AFL–CIO also observed that a change of employment that results in higher dependent care costs for an employee has the same consequences of decreasing real wages as cost-of-living and relocation expenses.

AILA, ITAA, the Chamber of Commerce, and Senators Abraham and Graham, on the other hand, contended that the Department's proposal that the cost of living and relocation costs should be considered in determining whether the offered job offers the employee ''equivalent or higher compensation and benefits'' is without support in the ACWIA, and that ''similarity'' should not take into account the geographic location of a job opportunity. The Chamber of Commerce noted that COLAs and other expenses will not necessarily increase with an offer of similar employment, such as where the position offered to the U.S. worker is located in an area with lower costs than the position from which he has been or will be laid off.

The Department believes that whether an employment opportunity provides equivalent or higher compensation and benefits requires consideration of the costs associated with the location of the jobs, *i.e.*, if the employment opportunity takes into consideration both the cost of living and any costs expenditures necessary to relocate to another location. The Department believes this accords with the most natural meaning of the provision. The Department does not believe that an employment opportunity can be *bona fide* if it does not take into consideration these costs which would erode compensation under the job offer.

The Department disagrees with the argument that Congress, by prescribing a geographical condition in section 212(n)(4)(B) for determining if a job offer would provide ''equivalent or higher compensation'' of the job offered to a U.S. worker, but not in section 212(n)(4)(D)(i)(II), evinced an intention that the jobs' locations are to be disregarded in making this latter comparison. The Department notes that the two provisions measure different aspects of the employer's displacement obligation. The first provision defines the universe of jobs which should be compared to determine if a displacement has taken place as those within the same geographical area. The second provision compares the equivalency of jobs which the U.S. worker occupies and is offered. The Department certainly does not believe that where the statutory language in one provision explicitly restricts the comparison to the same locality and in another provision it is silent, it follows that the cost of relocation and the cost of living cannot be taken into consideration in determining the equivalency of compensation between two positions in different localities. In fact, the Department believes that a more appropriate inference would be that Congress intended no such limitation.

The Department, in determining whether a *bona fide* job offer was made, does not intend to second-guess an employer's reasonable good-faith efforts to achieve economic comparability. Ordinarily this could be achieved if the job offer takes into account cost of living adjustments between localities and relocation costs which the employer ordinarily provides. If such cost of living adjustments are not ordinarily provided by the employer, the Department would accept an adjustment based on any published index of pay differentials or cost of living, or use of the adjustments provided by the Federal Government to its employees. In this regard, the Department agrees with the observation by the Chamber of Commerce that if the transfer is to an area with a less expensive cost of living, an employer may offer a position at a reduced rate of pay, provided this accords with the employer's normal policy.

AILA urged the Department not to adopt the EPA and the FMLA standards for equivalency. AILA objected to the use of the FMLA standard on the basis that it requires ''virtual identity,'' rather than the ACWIA's test of ''substantial equivalence.'' With regard to the possible use of the EPA regulations, AILA stated that its use would be inappropriate because ''substantial equivalence'' would be defeated whenever a job offered was located in another geographic area. AILA, instead, requested that ''equivalent or higher'' be determined on a case-by-case basis, in light of all circumstances of the job offer.

The Department notes that AILA has misstated the relevant ACWIA standard, which is ''equivalent or higher compensation and benefits,'' not ''substantial equivalence.'' The Department continues to believe that both EPA and FMLA regulations provide a proper basis for making the comparison of compensation and benefits, although the FMLA regulations are somewhat less useful since they provide less detailed guidance in making an economic comparison of jobs. Accordingly, the Interim Final Rule is based on the following principles drawn from the EPA regulations, 29 CFR 1620.10: Wages include:

> ''all payments made to [or on behalf of] an employee as remuneration for employment [*e.g.*,] all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name. Fringe benefits are deemed to be remuneration for employment. * * * Thus, vacation and holiday pay, and premium payments for work on Saturdays, Sundays, holidays, regular days of rest or other days or hours in excess or outside of the employee's regular days or hours of work are deemed remuneration for employment * * *.''

Consistent with 29 CFR 1620.11(a), ''fringe benefits'' include, *e.g.*, such benefits as medical, hospital, accident, life insurance and retirement benefits; profit sharing and bonus plans; leave; and other such benefit programs.

While the Department's interpretation allows for an inclusive definition of compensation and benefits, the Department expects that since the comparison will involve jobs with the same business, the benefit components of the employee's compensation often will be the same, leaving the cost of living differential as the sole or primary variable in most situations. As discussed above, the regulations specifically allow the job opportunity to be in a different locality, provided there is an adjustment for cost of living, and relocation costs are paid.

7. What Is Required of an H–1B–Dependent Employer or Willful Violator Which Seeks to Place H–1B Workers at a Secondary Employer's Worksite? (§ 655.738(d))

Section 212(n)(1)(F) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(F), requires that H–1B-dependent employers and willful violators not place any H–1B worker at another employer's worksite ''unless the [H–1B] employer has inquired of the other employer as to whether, and has no knowledge that * * * the other employer has displaced or intends to displace a United States worker employed by the other employer'' within the period beginning 90 days before and continuing until 90 days after the H–1B worker's placement at that worksite. This requirement applies where there are ''indicia of an employment relationship'' between the H–1B worker and the customer-client of the dependent employer. section 212(n)(1)(G)(ii) further provides: ''The [LCA] application form shall include a clear statement explaining the liability under subparagraph (F) of a placing employer if the other employer * * * displaces a United States worker. * * *'' Additionally, section 212(n)(2)(E) provides that where an H–1B-dependent employer places a non-exempt H–1B worker with another employer in accordance with section 212(n)(1)(F) (*i.e.*, after having made the required inquiry), ''such displacement shall be considered * * * a failure, by the placing employer, to meet a condition specified [in an LCA]. However, the employer may not be debarred unless the Secretary finds that the placing employer ''knew or had reason to know of such displacement at the time of the placement,'' or the employer has been sanctioned ''based upon a previous placement of an H–1B nonimmigrant with the same other employer.''

In explaining these provisions and their interrelationships Congressman Smith stated: ''* * * [T]he legislation prohibits a covered employer in certain circumstances from placing an H–1B nonimmigrant with another employer where the 'other' employer has or will displace an American worker. * * * Congress intends that the employer make a reasonable inquiry and give due regard to available information. Simply making a pro forma inquiry would not insulate a covered employer from liability should the 'other' employer displace an American worker from a job sufficiently similar to the one which would be performed by an H–1B worker. That is one of the reasons why subsection 412(a)(2) of the legislation requires that the employer be notified through a clear statement on the labor condition application (LCA) regarding the scope of a covered employer's liability with respect to a lay off by a secondary employer. Through the LCA form, the Department of Labor will make clear to covered employers their obligation to exercise due diligence in ascertaining whether the placement of H–1B nonimmigrants may correspond with the lay off or displacement of American workers in similar jobs. Some of the most egregious cases involving the abuse of the H–1B visa program have involved American workers being retained only long enough to train their H–1B replacements under contract with a different employer. * * *''

144 Cong. Rec. E2324 (Nov. 12, 1998).

Similar statements were made by Senator Abraham:

In particular, the covered employer must promise to inquire whether the other employer will be using the H–1B worker to displace a U.S. worker whom the other employer had laid off or intends to lay off within 90 days of the placement of the H–1B worker. The covered employer must also state that it has no knowledge that the other employer has done so or intends to do so.

144 Cong. Rec. S12751 (Oct. 21, 1998).

Congressman Smith and Senator Abraham agreed that an employer who makes the required inquiries remains liable if the other employer displaces U.S. workers notwithstanding the inquiry made. Thus Congressman Smith stated:

''If the other employer has displaced an American worker (under the definitions used in this legislation) during the 90 days before or after the placement, the attesting employer is liable as if it had violated the attestation.

''In all instances, the sanction may be an administrative remedy (including civil monetary penalties and 'make-whole' remedies to the American worker affected). The attesting employer can only receive a debarment, however, if it is found to have known or to have had reason to know of the secondary displacement at the time of the placement of the H–1B worker with the other employer, or if the attesting employer was previously sanctioned for a secondary displacement under 212(n)(2)(E) for placing an H–1B nonimmigrant with the same other employer. If an employer has conducted the required inquiry prior to any placement with a ''secondary'' employer, and has no information or reason to know of that employer's past or intended displacement of U.S. workers, then the attesting employer should ordinarily be presumed not to have willfully violated the secondary displacement attestation. Congress anticipates that the Department of Labor, in promulgating and enforcing regulations, would require a reasonable level of inquiry.''

144 Cong. Rec. E2327 (Nov. 12, 1998).

Similarly, Senator Abraham stated:

''Making the required inquiries will not insulate a covered employer from liability should the secondary employer with which the covered employer is placing the covered H–1B worker turn out to have displaced a U.S. worker from the job that it has contracted with the covered employer to have the H–1B worker fill. That is why subsection 412(a)(2) of this legislation adds a new requirement to section 212(n)(1) that the application contain a clear statement regarding the scope of a covered employer's liability with respect to a layoff by a secondary employer with whom the covered employer places a covered H–1B worker. * * * If the other employer has displaced a U.S. worker (under the definitions used in this legislation) during the 90 days before or after the placement, the attesting employer is liable as if it had violated the attestation. The sanction is a $1,000 civil penalty per violation and a possible debarment. The attesting employer can only receive a debarment, however, if it is found to have known or to have had reason to know of the displacement at the time of the placement with the other employer, or if the attesting employer was previously sanctioned under 212(n)(2)(E) for placing an H–1B nonimmigrant with the same employer. If an employer has conducted the inquiry that it is required to attest that it has conducted before any such placement, and (as that attestation requires) acquired no knowledge of displacement of a U.S. worker in the course of that inquiry, it should ordinarily be presumed not to have known or have reason to know of a displacement unless there is an affirmative showing that it did have such knowledge or reason to know.''

144 Cong. Rec. S12750, S12751 (Oct. 21, 1998).

In order to achieve the purposes of this provision, the Department proposed to develop a regulatory provision which requires that the H–1B employer make a reasonable effort to inquire about potential secondary displacement. The NPRM set out a non-exclusive list of methods that could be used by an employer to demonstrate its efforts to assure compliance with its inquiry obligation. The methods suggested included obtaining a written assurance from the secondary employer that it does not intend to displace a similarly-employed U.S. worker during the 90-day period before or after the placement of the H–1B worker; a written memorialization of such a verbal assurance; or the inclusion of a non-displacement clause in a contract with the secondary employer. The NPRM noted that the Department had read the language and structure of the statutory provisions to reflect an intention that a dependent employer must take pro-active steps to determine whether the placement of H–1B workers would correspond with the layoff of similarly-employed U.S. workers. The NPRM proposed that an employer, even with the receipt of a ''no displacement'' assurance, should not be able to ignore other information, coming to its attention before placement of the H–1B worker, that calls into question the original assurance. The Department

proposed that in such circumstances the dependent employer would be expected to recontact its customer and obtain credible assurances that layoffs have not occurred or are planned during the relevant statutory time frame.

Several commenters responded to the Department's proposals on this issue.

One commenter (TCS) generally agreed with the Department's approach, urging the Department to clarify that usually all that will be required of a dependent employer is to make the layoff inquiry with its customer and to memorialize the customer's response. ITAA stated that it found helpful the Department's identification of a variety of methods by which an employer may satisfy its inquiry obligation.

The AFL–CIO asserted that a refusal by a secondary employer to respond to the staffing firm's inquiry should result in the disqualification of that LCA. ACE and IEEE stated their belief that the Department's proposal puts an unfair burden on the placing employer and that, at the very least, the secondary employer should share liability for violation of the displacement provision. The IEEE expressed particular concerns regarding the effect of the Department's approach on smaller businesses. Two other commenters (BRI and Cooley Godward) asserted that the NPRM neglected to address the treatment of primary employers who, despite reasonable efforts, receive no or an inadequate response from the secondary employer. BRI requested that the final regulation address a ''reasonable minimal effort'' threshold.

AILA, Rapidigm, and Satyam contended that getting written assurances from secondary employers will jeopardize negotiations and placement of H–1B workers. Rubin & Dornbaum and White Consolidated Industries, on the other hand, stated that although only H–1B-dependent employers and willful violators need obtain assurances, the effect of that requirement is to impose a paperwork requirement on the secondary employer.

AILA asserted that the proposal, in effect, required a dependent employer to conduct an ''interrogation'' of its customer regarding its layoff plans in order to satisfy its non-displacement obligation, and stated that the proposal lacked ''an articulable point at which the H–1B employer is deemed to have made sufficient, reasonable efforts.'' AILA requested that the Department allow flexibility to ascertain whether there is a realistic possibility of displacement, such as where the H–1B worker is only providing services for a special project or on a short-term basis.

The Department has given careful consideration to the divergent comments received on this proposal. The expressed concern regarding the impact which the inquiry will have upon the dependent employer's ability to place H–1B workers, in the Department's view, is misplaced. The obligation has been imposed by Congress as a condition for the employment of H–1B workers by H–1B-dependent employers and willful violators. While a dependent employer has discretion as to how it will meet this obligation, it must make the inquiry in every case where there will be indicia of an employment relationship (see IV.D.2, above).

The Department is not persuaded that its proposal imposes any undue burden on dependent employers or their customers. The Department believes that the statute contemplates due diligence in the inquiry, taking into consideration the circumstances of the case, rather than just a *pro forma* inquiry. Ordinarily, if the customer provides the assurance and there is no reason to suspect to the contrary—as where the project is only for a short-term, to satisfy a special need—an employer would need only make the relevant inquiry of its customer and memorialize the customer's intention not to displace any U.S. workers. The Department does not believe that the nature of the inquiry creates a significant burden in those instances where there is no reason to believe that a displacement may be contemplated. On the other hand, if the employer has any reason to believe the secondary employer may displace its employees—as where the H–1B workers will be performing services that the secondary employer performed with its own work force in the past—a greater inquiry may be necessary. The Department notes that the employer is not constrained by the Department's examples; it can choose an alternative means to assure itself that there will not be displacement and to minimize its potential liability, such as by an indemnity clause, as suggested by IEEE.

Furthermore, the Department has no reason to believe that the customer would have difficulty in answering the inquiry, especially where no layoffs are contemplated. If a customer balks at providing the lay-off information—an unlikely circumstance given the customer's demonstrated operational needs—the ACWIA does not allow the dependent employer to place an H–1B worker with that customer.

The Department disagrees with ACIP's contention that the Department's proposal effectively dictates contract terms through regulation and as such imposes an unauthorized and unwarranted burden. So long as the dependent employer meets its inquiry obligation and it does not have reason to believe there may be displacement, it is free to structure its contractual arrangements with its customers as it chooses.

The AFL–CIO commented that the Department had set ''an incredibly low bar'' for employers to meet this obligation, urging that the inquiry requirements should be supplemented by imputing knowledge of public facts about the actions and intentions of secondary employers to the H–1B-dependent employer. On the other hand, ITAA expressed concern that an employer would be held accountable for any public information relative to a layoff that might call into question a customer's assurance that it had no layoff plans—even where the information is buried in a local newspaper outside the area where the placing employer is based.

The Department disagrees with the suggestion that it should impute to the employer any public knowledge that layoffs by the customer had or would occur. With regard to this matter, the statute sets up a reasonableness standard. Although the H–1B employer is liable for civil money penalties and other appropriate remedies in every case where a displacement violation occurs, the ACWIA limits the imposition of the debarment sanction to circumstances where the H–1B employer ''knew or had reason to know of such displacement at the time of placement of the nonimmigrant with the other employer.'' Section 212(n)(2)(E)(i). Such a determination obviously will depend upon the particular circumstances presented, including the nature of the inquiry conducted by the employer. The Department established no presumptions about the employer's knowledge of public information, including newspaper articles. On the other hand, the employer cannot put its head in the sand and feign ignorance or disregard information that comes to its attention through the press or otherwise. As the proposal stated, ''[Where a] placing H–1B employer [receives information] such as newspaper reports of relevant layoffs by the secondary employer * * * the [placing] employer would be expected to recontact the secondary employer and receive credible assurances that no layoffs are planned or have occurred in the applicable time frame.''

ACIP asserted that the secondary employer might be unwilling to assist the placing employer if the latter were

investigated by the Department. It suggested that the receiving employer should be allowed to participate as an intervener in an enforcement proceeding involving an alleged displacement violation. The Department notes that pursuant to 20 CFR 655.815, service of the Administrator's determination is made on known interested parties, and that any interested party may request a hearing or participate in the proceeding (20 CFR 655.820). The Department believes that the secondary employer who has allegedly displaced a U.S. worker would generally qualify as an interested party even though it is not directly liable under the ACWIA. See also the rules of practice of the Office of Administrative Law Judges, which provide a right to participate in a proceeding where the ALJ determines that ''the final decision could directly and adversely affect [the applicants for participation] * * *, and if they may contribute materially to the disposition of the proceedings and their interest is not adequately represented by existing parties.'' 29 CFR 18.10(b).

ITAA requested a ''safe harbor'' provision for employers who make a demonstrated (*i.e.,* written agreement with secondary employer) good-faith effort to ascertain that no layoffs have occurred or will occur. ACIP and AILA urged the Department to include regulatory language to the effect that good faith efforts to cure violations should preclude sanctions.

The Department's discretion in this area is limited. The ACWIA imposes strict liability upon a dependent employer where a U.S. worker is displaced by a secondary employer. Section 212(n)(2)(E) specifically provides: ''If an H–1B-dependent employer places a non-exempt H–1B worker with another employer * * *, such displacement shall be considered * * * a failure by the placing employer, to meet a condition [of its LCA].'' At the same time, the ACWIA's three-tier penalty provisions require consideration of a violator's culpability which should minimize the liability of a dependent employer who has acted in good faith to comply with its displacement obligation. Additionally, the Department notes that the regulatory provisions applicable to the assessment of civil money penalties consider an employer's ''good faith'' as a factor affecting the level of the penalty assessed. See 20 CFR 655.810(b).

8. What Documentation Will be Required of Employers About the ACWIA's Non-Displacement Provisions? (§ 655.738(e))

In order to assure compliance with the ACWIA's non-displacement provisions, the Department proposed to require that an H–1B-dependent employer or willful violator retain certain documentation with respect to any U.S. workers (in the same locality and same occupation as any H–1B nonimmigrants it hired) who left its employ in the period 90 days before or after the employer's petition for the H–1B worker(s), and for any employees with respect to whom the employer took any action in the 180-day period to cause the employee's termination. The NPRM proposed that for all such employees, these documents must include: The employee's name, last-known mailing address, occupational title and job description; any documentation concerning the employee's experience, qualifications, and principal assignments; notification by the employer regarding termination and the employee's response; job evaluations; and information regarding offers of similar employment and the employee's response. The Department noted its belief that these records are required to be retained by EEOC regulations, 29 CFR 1602.14, therefore their retention would not present an additional burden on employers.

The Department received four comments on this proposal.

ITAA stated that it does not object to any documentation retention already mandated. It stressed the distinction between maintaining records already created and creating records. Senators Abraham and Graham asserted that the ACWIA imposes no requirement of maintaining records of job offers made to departing employees as proposed by the Department. Two commenters (AILA, Chamber of Commerce) stated their belief that the proposal imposes new record creation and retention burdens, disagreeing with the Department's assessment that the EEOC already requires the retention of such documents. The Chamber of Commerce stated that this burden will unduly impact upon small businesses that normally do not maintain such records.

The Department notes that pursuant to § 655.731(b), employers are already required to maintain basic payroll information for all employees in the specific employment at the place of employment, including name, home address, and occupation. This information is also required by other statutes such as the Fair Labor Standards Act and the Equal Pay Act. See 29 CFR 516.2; 29 CFR 1620.32. The Department does not believe that any prudent business person would fail to have such information.

The commenters correctly recognized that the EEOC regulation cited in the NPRM, 29 CFR 1602.14, does not establish a general requirement that employers create the records encompassed by the Department's displacement proposal. Section 1602.14 instead, requires the preservation of records, for purposes of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA), where the employer chooses to make or keep personnel records, including situations where an employee is involuntarily terminated, or a discrimination charge is filed against the employer. As noted, § 1602.14 does not require an employer to create any records, but rather requires an employer to preserve all personnel or employment records which the employer ''made or kept.'' The Department believes that every prudent employer would ''make or keep'' the described records relating to the circumstances in which employees leave their employ. Once made or kept (*i.e.,* where records received from others are not immediately discarded), EEOC regulations require that these records be preserved.

Furthermore, the EEOC does require the preservation of the same or similar records under other statutes it administers, whether or not they would otherwise be kept. Under the Age Discrimination in Employment Act (ADEA), for example, there is an obligation to retain certain records and an obligation to retain broad categories of personnel documents which an employer ''in the regular course of his business, makes, obtains, or uses.'' 29 CFR 1627.3. In particular, employers are required to retain any and all documents it makes, obtains, or uses regarding ''[p]romotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee, * * *.''

Against this regulatory backdrop, it is clear that employers already are required by the EEOC, pursuant to Title VII and the ADEA, to retain (*i.e.,* preserve) the personnel documents that are encompassed by the Department's proposal for documenting an employer's displacement compliance. The Department repeats that it is not requiring employers to create any documents other than basic payroll information.

The Interim Final Rule provides that, for the purposes of meeting the

ACWIA's displacement requirements, a dependent employer or willful violator is required to preserve the following documents with respect to any U.S. worker(s) (in the same area of employment and occupation as any H–1B nonimmigrants) who left its employ in the period 90 days before or after the employer's petition for the H–1B nonimmigrant(s), and for any U.S. worker(s) with respect to whom the employer took any action during that 180-day period to cause the employee's termination (*e.g.,* a notice of termination): any documentation concerning the employee's experience, qualifications, and principal assignments; notification by the employer or the employee regarding the termination of employment and any response thereto; and job evaluations. The Department explains that the employer is not required to create any such records, if they do not exist.

In addition, if the employer offers the U.S. worker another employment opportunity, the employer shall maintain a record of the offer, including the position offered and terms of compensation and benefits, and the employee's response thereto. The Department believes that most employers would make such offers in writing, but recognizes that there may be a small burden to the employer in keeping a record if the employee response is not in writing. The Interim Final Rule continues the practice under the current regulations of applying a uniform period for retaining documentation required by this part. See § 655.760(c).

The Department wishes to clarify, as it has with regard to other documentation proposals in this part, that an employer is not required to retain these records in any particular form so long as they are maintained and retrievable upon this Department's request in accordance with the requirements of 29 CFR 516.1(a) (setting forth recordkeeping requirements under the FLSA, including the EPA). The Department also wants to make clear that such records need not be kept in the employer's LCA public access file.

As discussed in IV.D.7, the Interim Final Rule also requires employers to document their inquiry to secondary employers and any response. This inquiry may be done in any manner the employer deems appropriate under the circumstances. However, if the inquiry and response were not in writing, the employer will be required to keep a written memorandum detailing the substance of the conversation, the date of the communication, and the names of the individuals involved in the conversation.

E. What Requirements Does the ACWIA Impose Regarding Recruitment of U.S. Workers, and Which Employers are Subject to Those Requirements? (§ 655.739)

Section 212(n)(1)(G)(i)(I) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(G)(i)(I), requires that an H–1B-dependent employer or an employer found by DOL to have committed willful H–1B violations take ''good faith steps to recruit, in the United States using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H–1B nonimmigrants * * *, United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought.'' The Department is charged with enforcing the recruitment obligation, while the Attorney General administers a special arbitration process to address complaints regarding an H–1B employer's companion obligation to ''offer the job to any United States worker who applies and is equally or better qualified for the job for which the nonimmigrant or nonimmigrants is or are sought.'' The ACWIA further provides that ''nothing in subparagraph (G) [the new attestation element] shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved so long as such criteria are not applied in a discriminatory manner.''

The recruitment requirement does not apply where the LCA solely involves ''exempt'' H–1B workers (see Section 212(n)((1)(E)(ii)). In addition, the recruitment requirement does not apply to an application filed on behalf of an H–1B worker described in Section 203(b)(1)(A),(B), or (C) of the INA. Section 203(b)(1) establishes the first preference among employment-based immigrants to the United States. This group includes aliens with extraordinary ability, aliens who are outstanding professors and researchers, and aliens who have been employed by multinational corporations as executives or managers who will enter the U.S. to continue to provide executive or managerial services to the same employer or to its subsidiary or affiliate.

The Department noted in the NPRM that the literal language of the recruitment provision would require recruitment efforts be undertaken before an LCA is filed (''prior to filing the application—[the employer] has taken good faith steps to recruit''). The Department noted that this language appears to have been based on a presumption that employers file LCAs for individual workers at the time that need arises (see, *e.g.,* the statements by both Senator Abraham and Congressman Smith that an employer must state that it has taken good faith steps to recruit U.S. workers ''for the job or which it is seeking the H–1B worker'' (144 Cong. Rec. S12751 (Oct. 21,1998); 144 Cong. Rec. E2324 (Nov. 12, 1998))—a presumption that is contrary to the actual, longstanding practice of many employers in the H–1B program. Under the Department's regulations, §§ 655.730, .750, an LCA is in effect for three years and an employer is permitted to file an LCA for multiple positions so that it may use the LCA, during the three-year period it is in effect, to support future H–1B petitions when the actual need for employment arises. Many employers avail themselves of this procedure.

In light of this common practice (which had not been at issue in crafting the ACWIA), the Department set forth its view that it would not be reasonable to assume that Congress intended to require a separate LCA for each worker; nor was it reasonable to assume that Congress intended that the employer would already have recruited in good faith for every position it would fill over the three-year life of the LCA, and offered a job to every equally or better qualified U.S. worker who applied for each such position. The Department observed that this would be virtually impossible since employers would not yet have identified every job opportunity which would arise in the future.

Thus, the Department proposed that ''the 'good faith' recruitment attestation must be read, interpreted, and applied to mean that the employer promises—and agrees to be held accountable—that it has, or will recruit with respect to any job opportunity for which the application is used, whether that recruitment occurs before or after the application is filed (if the application is to be used in support of multiple petitions for future workers).'' The Department invited comments on this approach and any alternative approaches to appropriately balance employers' good faith recruitment obligations in the context of the statutory language.

The Department received no comments on this proposal from the employer community. The AFL–CIO, on the other hand, objected to this proposal, stating, in effect, that Congress intended that the good faith recruitment requirement be satisfied as a precondition to filing an LCA, not

merely a promise of future compliance with this obligation. The AFL–CIO contends that the three-year validity period of the LCA is in direct conflict with the worker protection requirements of the ACWIA, and suggests that the goal of protecting workers would be best served by a six-month validity period.

The Department disagrees with this view, noting that the AFL–CIO's interpretation would upset a long-settled practice that has promoted the efficient processing of LCAs, a goal which the ACWIA was not intended to impede. Furthermore, the House Report on H.R. 3736, whose language on recruitment is very similar to that in ACWIA as enacted, and is identical with respect to the timing of the recruitment, states that the bill ''endeavors to protect American workers by ensuring that companies at least make an attempt to locate qualified American workers before petitioning for foreign workers under the H–1B program.'' H.R. Rep. No.105–657, 105th Cong., 2d Sess. 47 (1998) (emphasis added). In the absence of any suggestion that Congress intended this result, the Department is unpersuaded that Congress intended the recruitment provision to be applied literally. Without drastically reducing the effective period of the LCA or limiting the LCA to a single job opportunity, the Department believes that it would be virtually impossible for major users of the program—namely the H–1B-dependent employers to whom the provision applies—to comply with the AFL–CIO's construction of the Act.

The Department received one comment that addressed the ''first preference'' exception to the recruitment obligation. The commenter (Cooley Godward) expressed the concern that an employer's utilization of this provision may prove problematic because determinations of ''first preference'' status require discretionary judgments, typically exercised by the INS, which if applied incorrectly by an employer, could subject the employer to sanctions for violating its recruitment obligation. Cooley Godward recommended that the Department promulgate a regulation that would protect employers who have made a reasonable good faith determination that an employee would qualify for first preference immigration status.

The Department agrees that such determinations might be problematic in some rare cases. The Department believes that it is likely that H–1B nonimmigrants who would meet the first-preference criteria would also be ''exempt H–1B nonimmigrants'' for purposes of LCA designations and obligations. The Department will consult with the INS if the issue of ''first preference'' status arises, and will take into account the employer's good faith efforts in any assessment of appropriate remedies.

1. How Are ''Industry-wide Standards'' for Recruitment To Be Identified? (§ 655.739(e))

The INA, at section 212(n)(1)(G)(i)(I), requires a dependent employer to attest that it ''has taken good-faith steps to recruit in the United States using procedures that meet industry-wide standards * * * United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought.''

In discussing the meaning of this provision, Congressman Smith stated:

> ''Congress intends for an employer to at least use industry-wide recruiting practices (unless the employer's own recruitment practices are more successful in attracting American workers), and, in particular, to use those recruitment strategies by which employers in an industry have successfully recruited American workers. The Department of Labor, in defining and determining whether certain recruitment practices meet the statutory requirements, should consider the views of major industry associations, employee organizations, and other interest groups.''

144 Cong. Rec. E2324 (Nov. 12, 1998). Senator Abraham stated, on the other hand, that this provision ''allows employers to use normal recruiting practices standard to similar employers in their industry in the United States; it is not meant to require employers to comply with any specific recruitment regimen or practice, or to confer any authority on DOL to establish such regimens by regulation or guideline.'' 144 Cong. Rec. S12751 (Oct. 21, 1998).

Consistent with these statements, the Department stated in the NPRM that ''[t]he statute does not require employers to comply with any specific recruitment regimen or practice, [and the Department does not] believe it is authorized to prescribe any explicit regimen.'' The Department also proposed that the benchmark ''industry-wide standards'' requires the employer's recruitment efforts be ''at a level and through methods and media which are normal, common or prevailing in an industry * * * including at least the medium most prevalently used in the industry and shown to have been successfully used by employers in an industry * * * to recruit U.S. workers.'' The Department explained that ''industry-wide standards'' does not refer to the lowest common denominator among employers in a particular industry, *i.e.,* the minimum or least effective recruitment methods used by companies in an industry to recruit U.S. workers. The Department solicited the views of major industry associations, employee organizations and other interest groups concerning successful recruitment practices and strategies.

The NPRM identified a number of recruitment methods recognized as appropriate for recruiting U.S. workers (*e.g.,* advertising in publications of general interest, advertising in trade and professional journals, advertising on Internet sites such as the Department's own ''America's Job Bank,'' use of public and private employment agencies, including ''headhunters,'' outreach to educational and trade institutions, job fairs, and development and selection from among the employer's own workforce). The Department further stated its expectation that good faith recruitment ordinarily will involve several of these methods, ''both passive (where potential applicants find their way to an employer's job announcements, such as to advertisements in the publications and the Internet) and active (where the employer takes proactive steps to identify and get information about its job openings into the hands of potential applicants, such as through job fairs, outreach at universities, use of ''headhunters,'' and providing training to incumbent employees in the organization).''

The NPRM requested comment on a proposed presumption of good faith recruitment where the employer in good faith used a mix of prescribed recruiting methods (at least three, one or two of which are active). This presumption would be available to employers who did not want to go to the trouble of demonstrating that their recruitment methods meet the standards for their industry.

Under the proposal, an employer would not have to avail itself of the presumption, but good faith recruitment, at a minimum, would need to involve ''advertising in relevant and appropriate print media or the Internet (where common in the industry), in publications and at facilities commonly used by the industry * * *, as well as solicitation of U.S. workers within an employer's organization.'' The Department also expressed the view that there should be a general recognition that good faith recruitment must ''involve some active methods of solicitation, rather than just passive methods such as posting job announcements at the employer's worksite(s) or on its Internet web page.''

Finally, the Department proposed that employers utilize recruitment methods

that are used by employers competing for the same potential workers, *e.g.,* a hospital, university, or software development firm would be required to use the standards developed by the health care, academic, or information technology industries for the occupations targeted for recruitment. Similarly, a staffing firm seeking to place workers at other employers' worksites would be required to utilize the standards of the industry in which it seeks to place workers, not the standards that exist within the staffing firm's own industry.

Thirty-two commenters, including 21 individuals, responded to the Department's proposals relating to ''industry-wide standards.''

The individuals were consistent in urging the Department to strengthen recruitment requirements. They generally urged that, at a minimum, posting job openings in major publications, trade journals, state employment service offices, and local colleges be a prerequisite to the issuance of H–1B visas for particular workers. Many of these individuals also urged a requirement that a company expend a minimum amount, such as $1,000, on advertising a position as a precondition to petitioning for an H–1B nonimmigrant.

APTA, AOTA and IEEE supported the Department's proposals. AOTA stated its belief that it is especially important to require employers to undertake several methods of active recruitment, and that those methods comport with those undertaken by the specific industry. IEEE agreed specifically with the requirement that employers be held accountable for recruiting for each job they fill under an LCA and with the Department's listed methods of recruitment and standards for good faith steps.

The AFL–CIO opposed the idea of a presumption, noting that it is wrong to assume that some arbitrary combination of recruitment methods will equate with the ''industry-wide standards.'' In this regard, the AFL–CIO suggested that for some industries, including the information technology industry, no form of passive recruiting should be considered to meet the industry-wide standard.

The AFL–CIO endorsed the Department's proposal that employers must conform their recruitment practices to those used within the industry for which the workers are sought. It stated that staffing firms must conform to the methods used by the industry in which they are seeking to place workers, not the methods used by employers within the staffing industry.

Senators Abraham and Graham, ACIP, AILA, and TCS contended that the Department's proposed presumption represented an attempt to prescribe a specific regimen, contrary to the statute's intent to allow employers to use recruiting practices similar to other employers in the industry. The common thread through employer, trade association, and attorney comments was that there is no single template for recruitment to fit all situations, and that recruitment procedures vary by industry, size, geographic location, and market conditions. One commenter (Simmons) asserted that the Department's recruitment proposal will set up an infrastructure that some small employers and foreign-based employers will be unable to meet.

A number of commenters responded to the Department's proposal that an employer use a combination of approaches, some of which must be proactive. The IEEE agreed with the Department's approach, stating that this approach would ensure a ''fair and level playing field'' for all applicants by requiring that employers utilize methods that do not skew the process against U.S. workers or otherwise put them at a disadvantage in competing against H–1B workers for positions covered by an LCA. One commenter (Hammond), though expressing the view that the statutory requirement that an employer utilize an industry-wide standard did not need any detailed regulations, indicated its approval of the Department's recognition that an employer cannot use the least common denominator within its industry, but must instead use methods that are normal, common, or prevailing in the industry. Intel (although stating that it is not a dependent employer itself) commended the Department for listing many of the recruitment methods used in the information technology industry today, but suggested changing the terms from ''active'' and ''passive'' to ''on-going'' recruitment and ''targeted'' recruitment to better describe recruitment practices. Similarly, ACIP commented that employers commonly undertake both ''on-going'' and ''targeted'' recruitment.

The Department continues to be of the view that some guidance is appropriate to assist employers in determining industry-wide standards. The Department sees no merit in the suggestion that an employer should be able to use any legitimate process utilized by employers in the industry. The statute requires that an industry-wide standard be utilized. There likely will be considerable variance among the methods used by different employers within the same industry. An employer who selects a method that falls short of the standard will not satisfy the statutory requirement. Such an interpretation of the statute (allowing use of any single practice used within its industry, even if it is the least common denominator, to pass muster) would allow an employer's recruiting practice to be self-validating, thereby frustrating statutory intent as well as its plain meaning.

The Department therefore has decided to go forward with its proposal to list the most common recruiting methods, and stating its expectation that good faith recruitment ordinarily will involve several of these methods, both passive and active. In this connection, the Department finds helpful the distinction between ongoing recruitment efforts to find candidates for ''generic'' positions always in short supply as contrasted with its targeted recruitment for a particular opening. However, the Department believes the active/passive distinction is a different standard and is more useful in guiding an employer's compliance with its recruitment obligations. The Department continues to believe that ''industry-wide standards'' cannot reflect the lowest common denominator. Rather, they must include methods that are normal, common or prevailing in the industry—defined as those employers competing for the same potential workers—including the methods which have been most effective at recruiting U.S. workers.

In view of the comments regarding the Department's proposed presumption, however, the Interim Final Rule does not include any presumptive level of recruitment that constitutes good faith recruitment. Employers will be expected to demonstrate in the event of an investigation, that their recruitment was consistent with industry-wide standards.

The rule requires that employers at a minimum recruit both internally—among their own work force and workers whose employment recently terminated because of expiration of a contract or grant—and externally—among U.S. workers elsewhere in the economy. The Department believes that such practices are the norm in all industries. Furthermore, given employers' testimony at Congressional hearings regarding widespread shortages of workers, the Department is confident that active recruitment is also the norm, and the rule will require some active recruitment (either internally, such as by training other employees, or externally). Employers are cautioned that disproportionate recruitment

through some sources, such as college campuses, can have the unintended effect of discriminating against older workers. The Department also encourages employers to recruit among underrepresented populations (*e.g.,* minorities, persons with disabilities) and in rural areas.

Several comments were received regarding the particular methods of solicitation utilized by employers. Intel, among other commenters, noted a dramatic shift away from the use of traditional methods such as print advertisements to other methods such as electronic media and specialized contacts. The IEEE, while agreeing with the Department's approach, encouraged the Department to consider imposing a requirement that employers make greater utilization of Intranet and Internet publication of job openings. Others (AFL–CIO, Malyanker) expressed the view that the utility of the Internet is overstated. Another commenter (Satyam) noted that the use of the Internet for recruitment is common, but stated that its review of the NPRM left it with the impression that it is disfavored by DOL.

The Department did not intend to leave the impression that it does not favor the Internet. As the NPRM recognizes, recruitment within the industries for which H–1B workers are sought—especially the information technology industry—often involves the use of electronic media. The Department encourages the use of this method in industries where it has proven effective and where it has the potential to attract the widest relevant audience. The Department notes that this method has shown itself to be inexpensive and expeditious (and in the case of services such as America's Job Bank, this method is free and accessible by any personal computer with an Internet connection). At the same time, as some commenters have noted, the effectiveness of electronic advertising is sometimes overrated and, in any event, it is not a substitute for active methods of recruitment, which can be better targeted to U.S. workers who are qualified for a particular position.

AILA and Rapidigm contend that the Department's proposal is more stringent than the reduction-in-recruitment (RIR) guidelines established under GAL 1–97 (Oct. 1, 1996) (recently published for comment at 64 FR 23984 (May 4, 1999)) for the permanent program for occupations in which there is little or no availability.

The Department notes that the ACWIA establishes a specific recruitment requirement that employers recruit in accordance with industry-wide standards. Furthermore, unlike the H–1B program, the recruitment efforts and accompanying documentation of industry practice for each RIR application under the permanent program are reviewed by the State agency and ETA Regional Office, which base their determinations on local labor market conditions. Because under the H–1B program recruitment efforts by H–1B-dependent employers and willful violators will be reviewed only in the event of an investigation, the Department believes that an explication of the industry-wide requirement is appropriate in these rules.

It should be noted, however, that the Department has not suggested that an employer is required to undertake separate recruitment efforts for every position listed on the LCA. In a particular situation, an employer may reasonably decide to solicit for all similar positions listed on an LCA(s) at the same time, particularly where the employer plans to hire for the positions at or about the same time. Similarly, as commenters pointed out, employers which regularly experience large numbers of vacancies may undertake ongoing recruitment. The Department will not second-guess an employer's good faith, reasonable decision in such circumstances, provided it accords with the relevant ''industry-wide standards'' applicable to the employer.

Finally, with regard to the comments by numerous individuals, the Department believes there is no statutory support for measuring an employer's recruitment efforts by the amount of money expended by the employer. Accordingly, the Department is not persuaded that there is merit to the suggestion that an employer must make a threshold showing that it has incurred solicitation expenses at or above some prescribed amount.

2. What Constitute ''Good Faith Steps'' in Recruitment? (§ 655.739(h))

In the NPRM, the Department expressed the view that good faith recruitment requires employers to ''maintain a fair and level playing field for all applicants,'' and to ''be able to show that they have not skewed their recruitment process against U.S. workers.'' The Department stated its belief that the ''good faith'' recruitment obligation encompasses the pre-selection treatment of the applicants, not merely the steps taken by an employer to communicate job openings and solicit applicants. The Department indicated that, where an employer's recruitment efforts have been demonstrably unsuccessful, it would examine closely the entire recruitment process. This examination would include the pre-selection treatment of applicants, ''to insure that U.S. workers are given a fair chance for consideration for a job, rather than being ignored or rejected through some tailored screening process based on an employer's preferences or prejudices with respect to the makeup of its workforce.'' The NPRM proposed that an employer would not meet its good faith recruitment obligation if, for example, it only interviewed H–1B applicants or used different staff to screen or interview the H–1B applicants than the staff used for U.S. workers. The NPRM also stated that the Department would not second-guess work-related screening criteria or the hiring decision regarding any particular applicant (the latter assigned by the ACWIA to the Attorney General). The Department did not propose any specific regimen or practice for the pre-selection treatment of applications and applicants. However, the Department considered whether to craft a presumption of good faith recruitment based on an employer's hiring of a significant number of U.S. workers and, thereby, accomplishing a significant reduction in the ratio of H–1B workers to U.S. workers in the employer's workforce. The Department indicated that it would refer any potential violation of U.S. employment laws to the appropriate enforcement agency.

As stated by Representative Smith:

> ''Any 'good faith' recruitment effort, as required by this legislation, must include fair, adequate and equal consideration of all American applicants. The Act requires that the job must be offered to any American applicant equally or better qualified than a nonimmigrant. Congress recognizes that 'good faith' recruitment does not end upon receipt of applications, but rather must include the treatment of the applicants. In evaluating this treatment, the Department should consider the process and criteria for screening applicants, as well as the steps taken to recruit for the position and obtain those applicants. . . . Employers who consistently fail to find American workers to fill positions should receive the Department's special attention in this context of 'good faith' recruitment.''

144 Cong. Rec. E2324, 2325 (Nov. 12, 1998). Regarding the interface with the Attorney General's enforcement of the ''failure to select'' requirement, Congressman Smith stated:

> ''[The Act] also contains a savings clause that states that the provision should not be construed to affect the authority of the Secretary or the Attorney General with respect to 'any other violations.' This savings clause means that while the Secretary is not authorized to remedy a violation of (1)(G)(i)(II) regarding an individual American

worker, the Secretary retains the broad authority to investigate and take appropriate steps regarding the employer's 'good faith' recruitment efforts, including 'good faith' consideration of American applicants.

144 Cong. Rec. E2325 (Nov. 12, 1998).

Senator Abraham cautioned:

''[The Act] does not contemplate, for example, recharacterizing a 'failure to select' complaint as a 'failure to recruit in good faith' and then using the enforcement regime for the latter category of violations to pursue what in fact is a 'failure to select' complaint.''

144 Cong. Rec. S12754 (Oct. 21, 1998).

The Department received generally supportive comments from AOTA, APTA, IEEE, and the AFL-CIO. The AFL-CIO stated that the proposal represents ''a very important step in protecting the rights of U.S. job applicants by clearly stating that 'good faith steps' in recruiting also include fair pre-selection treatment of job applicants.'' It also stated that the Department's approach does not intrude upon the Department of Justice's duty to arbitrate wrongful selection cases because the proposal deals only with pre-selection treatment that necessarily precedes a selection decision. IEEE stated its agreement with the Department that employers are required to maintain a fair and level playing field for all job applicants, and that employers must be able to show that their recruitment and selection processes have not been skewed so as to disadvantage U.S. workers.

Several commenters opposed parts of the proposal. AILA and ACIP stated their view that the proposal violated the ACWIA's clear mandate that the Department not interfere with the enforcement of the ''selection'' aspects of an employer's recruitment practice. AILA observed that the statute specifically sets up a separate remedial mechanism for alleged violations of the ''selection'' portion of the recruitment attestation, while including a savings clause that states that this provision does not restrict either the Department's or the Attorney General's enforcement authorities with respect to other violations.

Several commenters opposed the proposed presumption based on an employer's success in hiring U.S. workers. The AFL-CIO stated that employer hiring of an arbitrary number of U.S. workers in no way establishes that an employer did not discriminate against others. Senators Abraham and Graham recognized that scrutiny of an employer's recruitment process may be proper in an investigation, but opposed the proposed presumption. Senators Abraham and Graham and AILA urged the Department to remember that the premise of the legislation was that at least in some cases recruitment had been demonstrably unsuccessful. ACIP, TCS, BRI and SBSC objected to the proposal that successful recruitment would be equated with good faith recruitment. Some commenters noted that the positions sought by LCAs often may be filled only from a small labor pool and that the filing of the LCA reflects the relative scarcity of U.S. workers for the job(s) involved.

After review of the comments, the Department no longer believes that it would be useful to create a presumption that an employer has met its recruitment obligation by demonstrating its ''success'' in recruiting U.S. workers. Apparently, there is a strong concern that a negative presumption will arise that any dependent employer who is unable to demonstrate success—a situation which the commenters believe to be commonplace—will be presumed not to have acted in good faith. This was not the Department's intention. The Department, however, believes that this misperception may persist and could divert the focus away from the statutory test—an employer's adherence to industry-wide standards in meetings its recruitment obligations. For this reason, the Department's Interim Final Rule does not establish ''successful recruitment'' as a basis for a presumption of compliance. However, in its enforcement, the Department intends to look particularly carefully at the recruitment practices of employers who have not had success in hiring U.S. workers.

In the Department's view, its proposal is faithful to the statute's provision charging the Attorney General, not the Secretary, with overseeing the mechanism designed to resolve a particular U.S. worker's allegations that the dependent employer failed to offer him a position for which an H–1B worker was sought. The NPRM explicitly recognizes the concern that the Department should not supplant the specific statutory mechanism by which a U.S. worker can adjudicate his or her complaint that an H–1B worker was unlawfully hired for a position for which the U.S. worker was qualified and should have been hired pursuant to Section 212(n)(1)(G)(i)(II) of the ACWIA. However, at the same time, the Department believes that an employer cannot engage in good faith recruitment if it does not give good faith consideration to U.S. applicants. The Department believes it entirely appropriate to consider the process and methods by which an employer screens applicants for a position in order to ensure that U.S. workers receive the protections accorded them under the ACWIA. As noted in the NPRM, the Department has no intention of second-guessing work-related screening criteria used by an employer or intruding upon the role provided for the Attorney General with respect to any hiring decision involving a particular applicant.

Nothing in the Department's proposal suggested that the Department was interpreting the ACWIA in a way that would require a departure from the way in which employers customarily recruit workers for positions with their companies. The Department recognizes, as Senator Abraham also observed, that a multitude of legitimate factors, objective and subjective, go into recruiting and hiring decisions. As discussed in greater detail in the following section of the Preamble, the Department's inquiry will be limited to ensuring that an employer's recruitment efforts meet the statutory standard, *i.e.,* that they are based on ''legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.'' See Section 212(n)(1)(G)(ii).

Finally, Senators Abraham and Graham and the Congressional commenters stated that there may be legitimate business reasons for a company to use different personnel to interview H–1B applicants than U.S. workers, such as where the employer lacks personnel who speak the language of an applicant, or where the company recruits specialists from other countries who are familiar with the foreign culture.

The Department agrees that there may be circumstances in which using different staff to interview U.S. and H–1B workers may be appropriate. In these situations, however, it is important, in the Department's view, that the personnel who interview the H–1B applicants not have a more effective say in the recruitment/hiring process than the personnel interviewing U.S. applicants. A U.S. worker's ability to compete for the position covered by the LCA should not be adversely affected by the status of the interviewer within the company or its recruitment/selection process. Furthermore, it is important that U.S. workers not be interviewed by employees or agents who have a financial interest in hiring H–1B nonimmigrants rather than U.S. workers.

3 & 4. How are ''Legitimate Selection Criteria Relevant to the Job that are Normal or Customary to the Type of Job Involved'' to be Identified and Documented? What Actions Would Constitute a Prohibited ''Discriminatory Manner'' of Recruitment? (§ 655.739(f) and (g))

Section 212(n)(1) of the INA as amended by the ACWIA provides that ''nothing in subparagraph (G) [of Section 212(n)(1), which establishes the dependent employer's recruitment obligation] shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.''

In explaining this provision, Senator Abraham stated:

''The purpose of this language is to make clear that an employer may use ordinary selection criteria in evaluating the relative qualifications of an H–1B worker and a U.S. worker. It is intended to emphasize that the obligation to hire a U.S. worker who is 'equally or better qualified' is not intended to substitute someone else's judgment for the employer's regarding the employer's hiring needs. * * *. Moreover, its judgment as to what qualifications are relevant to a particular job is entitled to very significant deference. * * *. It is not intended to allow an employer to impose spurious hiring criteria with the intent of discriminating against U.S. applicants in favor of H–1Bs and thereby subvert employer obligations to hire an equally or better qualified U.S. worker.''

144 Cong. Rec. S12750 (Oct. 21, 1998).

Congressman Smith explained:

''The employer's recruitment and selection criteria therefore must be relevant to the job (not merely preferred by the employer), must be normal and customary (in the relevant industry) for that type of job, and must be applied in a non-discriminatory manner. Just because an employer in good faith believes that its selection criteria meet such standards does not necessarily mean that they in fact do. Any criteria that would, in itself, violate U.S. law can clearly not be applied, including criteria based on race, sex, age, or national origin. The employer cannot impose spurious hiring criteria that discriminate against American applicants in favor of H–1Bs, thereby subverting employer obligations to hire an equally or better qualified American worker.''

144 Cong. Rec. E2324 (Nov. 12, 1998).

In the NPRM, at Section E.3., the Department noted that employers are authorized to apply criteria that are legitimate (excluding any criterion which itself would be violative of any applicable law); relevant to the job; and normal or customary to the type of job involved—rather than the preferences of a particular employer.

The Department suggested the North American Industrial Classification System as one means of showing a match between the employer's criteria and the accepted practices for a job. In essence, the Department stated that employers cannot impose spurious criteria that discriminate against U.S. workers in favor of H–1B workers. The Department also proposed that in evaluating an employer's ''good faith'' in the pre-selection treatment of applicants it would limit its scrutiny of screening criteria to these factors. The Department proposed to issue a rule encapsulating the requirement that an employer conduct its recruitment ''on a fair and level playing field for all applicants without skewing the recruitment process against U.S. workers.'' The Department proposed that the rule would apprize employers that hiring criteria proscribed by applicable discrimination laws cannot be used in solicitation or screening processes, nor may employers apply such processes in a disparate manner.

As earlier noted, the Department's overall recruitment proposals generally received the support of the AFL–CIO, APTA, AOTA, and IEEE. Additionally, Intel specifically endorsed this aspect of the Department's proposal, stating: ''Legitimate selection criteria should be based on the 'core' requirements to the position [involved], which varies by position and the specific project.'' Intel continued: ''We agree with [the Department] that the selection criteria be legitimate, relevant to the job, and be normal and customary to the type of job involved.''

A general theme in many comments was that the Department should not define legitimate hiring criteria in advance, but rather should make determinations only in the context of individual enforcement cases.

AILA expressed the view that the statute does not intend the ''legitimate selection criteria'' provision as an affirmative requirement for employers, but rather as a savings clause where the Department or the Attorney General, in enforcement, believes that the employer's enforcement criteria were not ''legitimate'' or ''relevant,'' or were applied in a discriminatory manner. AILA further stated its view that the Department's entire proposal with regard to selection criteria is beyond its statutory authority. ACIP expressed its concern about the Department's reference to the NAICS, which it stated was unnecessary micromanagement and would be difficult for employers to use since it is not yet available to employers. Latour and Kirkpatrick & Lockhart commented that subjective factors cannot be removed from the hiring process, including considerations such as personality, attitude, and other intangible issues.

Miano, on the other hand, stated that it is important that H–1B nonimmigrants meet all the qualifications posted in the recruiting notices. In an apparent reference to employer recruitment prior to petitioning for immigrant workers under the permanent program, Miano observed that employers often advertise with more requirements than anyone can meet and then lower the requirements to bring in the foreign worker.

The Department has no intention of specifying which hiring criteria are legitimate and which are not. The Department's Interim Final Rule, like the proposal, simply makes plain that the statutory obligation of dependent employers and willful violators is to base their recruitment and selection decisions on criteria that are legitimate, relevant, and normal to the type of job involved. Nor does the Department intend to undertake any elaborate scrutiny of selection criteria in its enforcement. The Department's review of the process, as the Interim Final Rule provides, is designed to ensure that U.S. workers are not subject to criteria that deny them a fair opportunity, as fashioned by the ACWIA, to compete for jobs for which nonimmigrant workers are being sought.

The Department, however, has eliminated its reference to the North American Industrial Classification System as one means of showing a match between the employer's criteria and the accepted practices for a job. Upon review, the Department has determined that the online service ''O*NET,'' an enhanced version of the Dictionary of Occupational Titles, and the U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, will serve better than NAICS as a means by which an employer may choose to demonstrate the nexus between its recruitment/screening criteria and accepted practices for the job in question. As explained in IV.C.3 above (which addresses ''exempt workers'' under the ACWIA), both O*NET and the Occupational Outlook Handbook are readily available on the Internet. The Department wishes to stress, however, that both O*NET and the Handbook are being suggested only as tools to employers, and to the Department in its enforcement. Employers are not required to use these tools. Although these sources represent a statement by the Department of common qualifications for the occupations listed, they are not intended to be definitive

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