

## § 655.502

## 20 CFR Ch. V (4–1–08 Edition)

Administration's Wage and Hour Division shall be responsible for investigating and resolving any complaints filed concerning such attestations.

(b) *Employer attestation responsibilities.*

(1) Each employer seeking to use alien crewmembers for longshore work at a local U.S. port pursuant to the prevailing practice exception or where an attestation is required under the automated vessel exception for longshore work to be performed at locations other than in the State of Alaska shall, as the first step, submit an attestation on Form ETA 9033, as described in § 655.510 of this part, to ETA at the address set forth at § 655.510(b) of this part. If ETA accepts the attestation for filing, pursuant to § 655.510 of this part, ETA shall return the cover form of the accepted attestation to the employer, and, at the same time, shall provide notice of the filing to the United States Citizenship and Immigration Services of the Department of Homeland Security (DHS) office having jurisdiction over the port where longshore work will be performed.

(2) Each employer seeking to use alien crewmembers for longshore work at a particular location in the State of Alaska pursuant to the Alaska exception or where an attestation is required under the automated vessel exception for longshore work to be performed at a particular location in Alaska shall submit, as a first step, an attestation on Form ETA 9033-A, as described in § 655.533 of this part, to ETA at the address of the Seattle regional office as set forth at § 655.532 of this part. The address appears in the instructions to Form ETA 9033-A. ETA shall return the cover form of the accepted attestation to the employer, and, at the same time, shall provide notice of the filing to the DHS office having jurisdiction over the location where longshore work will be performed.

(c) *Complaints.* Complaints concerning misrepresentation in the attestation, failure of the employer to carry out the terms of the attestation, or complaints that an employer is required to file an attestation under the automated vessel exception, may be filed with the Wage and Hour Division, according to the procedures set forth in subpart G of this part. Complaints of

“misrepresentation” may include assertions that an employer has attested to the use of alien crewmembers only for a particular activity of longshore work and has thereafter used such alien crewmembers for another activity of longshore work. If the Division determines that the complaint presents reasonable cause to warrant an investigation, the Division shall then investigate, and, where appropriate, after an opportunity for a hearing, assess sanctions and penalties. Subpart G of this part further provides that interested parties may obtain an administrative law judge hearing on the Division's determination after an investigation and may seek the Secretary's review of the administrative law judge's decision. Subpart G of this part also provides that a complainant may request that the Wage and Hour Administrator issue a cease and desist order in the case of either alleged violation(s) of an attestation or longshore work by alien crewmember(s) employed by an employer allegedly not qualified for the claimed automated vessel exception. Upon the receipt of such a request, the Division shall notify the employer, provide an opportunity for a response and an informal meeting, and then rule on the request, which shall be granted if the preponderance of the evidence submitted supports the complainant's position.

[60 FR 3956, 3976, Jan. 19, 1995, as amended at 71 FR 35521, June 21, 2006]

### § 655.502 Definitions.

For the purposes of subparts F and G of this part:

*Accepted for filing* means that a properly completed attestation on Form ETA 9033, including accompanying documentation for each of the requirements in § 655.510 (d) through (f) of this part, or a properly completed attestation on Form ETA 9033-A, including accompanying documentation for the requirement in § 655.537 of this part in the case of an attestation under the Alaska exception, submitted by the employer or its designated agent or representative has been received and filed by the Employment and Training Administration of the Department of Labor (DOL). (Unacceptable attestations under the

prevailing practice exception are described at §655.510(g)(2) of this part. Unacceptable attestations under the Alaska exception are described at §655.538(b) of this part.)

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

*Activity* means any activity relating to loading cargo; unloading cargo; operation of cargo-related equipment; or handling of mooring lines on the dock when a vessel is made fast or let go.

*Administrative law judge* means an official appointed pursuant to 5 U.S.C. 3105.

*Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, or such authorized representatives as may be designated to perform any of the functions of the Administrator under subparts F and G of this part.

*Administrator, Office of Foreign Labor Certification (OFLC Administrator)* means the primary official of the Office of Foreign Labor Certification (OFLC Administrator), or the OFLC Administrator's designee.

*Attestation* means documents submitted by an employer attesting to and providing accompanying documentation to show that, under the prevailing practice exception, the use of alien crewmembers for a particular activity of longshore work at a particular U.S. port is the prevailing practice, and is not during a strike or lockout nor intended to influence an election of a bargaining representative for workers; and that notice of the attestation has been provided to the bargaining representative, or, where there is none, to the longshore workers at the local port. Under the Alaska exception, such documents shall show that, before using alien crewmen to perform longshore work, the employer will make bona fide requests for dispatch of United States longshore workers who are qualified and available in sufficient numbers and that the employer will employ all such United States longshore workers in response to such a request for dispatch; that the use of alien crewmembers is not intended or designed to influence an election of a bargaining representative for workers

in the State of Alaska; and that notice of the attestation has been provided to labor organizations recognized as exclusive bargaining representatives of United States longshore workers, contract stevedoring companies, and operators of private docks at which the employer will use longshore workers.

*Attesting employer* means an employer who has filed an attestation.

*Attorney General* means the chief official of the U.S. Department of Justice or the Attorney General's designee.

*Automated vessel* means a vessel equipped with an automated self-unloading conveyor belt or vacuum-actuated system which is utilized for loading or unloading cargo between the vessel and the dock.

*Certifying Officer (CO)* means a Department of Labor official, or the CO's designee, who makes determinations about whether or not to grant applications for labor certification. The National Certifying Officer, which is the OFLC Administrator, makes such determinations in the national office of the OFLC.

*Chief Administrative Law Judge* means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

*Contract stevedoring company* means a stevedoring company which is licensed to do business in the State of Alaska and which meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932).

*Crewmember* means any non-immigrant alien admitted to the United States to perform services under sec. 101(a)(15)(D)(i) of the Act (8 U.S.C. 1101(a)(15)(D)(i)).

*Date of filing* means the date an attestation is accepted for filing by ETA.

*Department* and *DOL* mean the United States Department of Labor.

*Department of Homeland Security (DHS) through the United States Citizenship and Immigration Services (USCIS)* makes the determination under the Act on whether an employer of alien crewmembers may use such crewmembers for longshore work at a U.S. port.

§ 655.510

20 CFR Ch. V (4-1-08 Edition)

*Division* means the Wage and Hour Division of the Employment Standards Administration, DOL.

*Employer* means a person, firm, corporation, or other association or organization, which suffers or permits, or proposes to suffer or permit, alien crewmembers to perform longshore work at a port within the U.S. For purposes of §§ 655.530 through 655.541, which govern the performance of longshore activities by alien crewmembers under the Alaska exception, “employer” includes any agent or representative designated by the employer.

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

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

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

*Longshore work* means any activity (except safety and environmental protection work as described in sec. 258(b)(2) of the Act) relating to the loading or unloading of cargo, the operation of cargo related equipment (whether or not integral to the vessel), or the handling of mooring lines on the dock when the vessel is made fast or let go, in the United States or the coastal waters thereof.

*Longshore worker* means a U.S. worker who performs longshore work.

*Office of Foreign Labor Certification (OFLC)* means the organizational component within the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the INA concerning alien workers seeking admission to the United States in order to work under the Immigration and Nationality Act, as amended.

*Port* means a geographic area, either on a seacoast, lake, river or any other navigable body of water, which contains one or more publicly or privately owned terminals, piers, docks, or maritime facilities, which is commonly

thought of as a port by other government maritime-related agencies, such as the Maritime Administration. U.S. ports include, but are not limited to, those listed in Appendix A to this subpart.

*Qualified and available in sufficient numbers* means the full complement of qualified longshore workers needed to perform the longshore activity, as determined by industry standards in the State of Alaska, including safety considerations.

*Secretary* means the Secretary of Labor or the Secretary’s designee.

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

*Unanticipated emergency* means an unexpected and unavoidable situation, such as one involving severe weather conditions, natural disaster, or mechanical breakdown, where cargo must be immediately loaded on, or unloaded from, a vessel.

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

*United States (U.S.) worker* means a worker who is a U.S. citizen, a U.S. national, a permanent resident alien, or any other worker legally permitted to work indefinitely in the United States.

[60 FR 3956, 3976, Jan. 19, 1995, as amended at 71 FR 35520, June 21, 2006]

**§ 655.510 Employer attestations.**

(a) *Who may submit attestations?* An employer (or the employer’s designated U.S. agent or representative) seeking to employ alien crewmembers for a particular activity of longshore work under the prevailing practice exception shall submit an attestation, provided there is not in effect in the local port any collective bargaining agreement covering at least 30 percent of the longshore workers. An attestation is required for each port at which the employer intends to use alien crewmembers for longshore work. The attestation shall include: A completed Form ETA 9033, which shall be signed by the employer (or the employer’s designated agent or representative); and