

**§ 655.670**

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

(d) ETA, upon receipt of the Administrator's notice pursuant to paragraph (b) of this section:

(1) Shall, in the case of an attesting employer, suspend the employer's attestation, either in whole or in part, for the port or location at issue and for any other U.S. port, and shall not accept for filing any attestation submitted by the employer for a period of 12 months or for a shorter period if such is specified for that employer by the DHS; and

(2) Shall, if the Administrator's notice constitutes a conclusive determination (pursuant to § 655.670) that the prevailing practice at a particular U.S. port does not permit the use of alien crewmembers for the longshore activity(ies), thereafter accept no attestation under the prevailing practice exception on Form ETA 9033 from any employer for the performance of the activity(ies) at that port, and shall invalidate any current attestation under the prevailing practice exception on Form ETA 9033 for any employer for the performance of the activity(ies) at that port.

[60 FR 3969, 3977, Jan. 19, 1995, as amended at 71 FR 35520, June 21, 2006]

**§ 655.670 Federal Register notice of determination of prevailing practice.**

(a) Pursuant to § 655.625(b), the Administrator shall publish in the FEDERAL REGISTER a notice of the Administrator's determination of any investigation regarding the prevailing practice for the use of alien crewmembers for particular longshore activity(ies) in a particular U.S. port (whether under an attestation or under the automated vessel exception). Where the Administrator has determined that the prevailing practice in that U.S. port does not permit such use of alien crewmembers, and no timely request for a hearing is filed pursuant to § 655.630, the Administrator's determination shall be the conclusive determination for purposes of the Act and subparts F and G of this part; the DHS and ETA shall, upon notice from the Administrator, take the actions specified in § 655.665. Where the Administrator has determined that the prevailing practice in that U.S. port at the time of the investigation permits such use of alien

crewmembers, the Administrator shall, in any subsequent investigation, give that determination appropriate weight, unless the determination is reversed in proceedings under § 655.630 or § 655.655.

(b) Where an interested party, pursuant to § 655.630, requests a hearing on the Administrator's determination, the Administrator shall, upon the issuance of the decision of the administrative law judge, publish in the FEDERAL REGISTER a notice of the judge's decision as to the prevailing practice for the longshore activity(ies) and U.S. port at issue, if the administrative law judge:

(1) Reversed the determination of the Administrator published in the FEDERAL REGISTER pursuant to paragraph (a) of this section; or

(2) Determines that the prevailing practice for the particular activity in the port does not permit the use of alien crewmembers.

(c) If the administrative law judge determines that the prevailing practice in that port does not permit such use of alien crewmembers, the judge's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part (unless and until reversed by the Secretary on discretionary review pursuant to § 655.655). The DHS and ETA shall upon notice from the Administrator, take the actions specified in § 655.665.

(d) In the event that the Secretary, upon discretionary review pursuant to § 655.655, issues a decision that reverses the administrative law judge on a matter on which the Administrator has published notices in the FEDERAL REGISTER pursuant to paragraphs (a) and (b) of this section, the Administrator shall publish in the FEDERAL REGISTER a notice of the Secretary's decision and shall notify the DHS and ETA.

(1) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the prevailing practice for the longshore activity(ies) in the U.S. port at issue does not permit the use of alien crewmembers, the Secretary's decision shall be the conclusive determination for purposes of the Act and subparts F and G of this part. Upon notice from the Administrator, the DHS and ETA shall take the actions specified in § 655.665.

(2) Where the Secretary reverses the administrative law judge and determines that, contrary to the judge's decision, the use of alien crewmembers is permitted by the prevailing practice for the longshore activity(ies) in the U.S. port at issue, the judge's decision shall no longer have the conclusive effect specified in paragraph (b) of this section. Upon notice from the Administrator, the DHS and ETA shall cease the actions specified in § 655.665.

**§ 655.675 Non-applicability of the Equal Access to Justice Act.**

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

**Subpart H—Labor Condition Applications and Requirements for Employers Using Non-immigrants on H-1B Visas in Specialty Occupations and as Fashion Models, and Labor Attestation Requirements for Employers Using Non-immigrants on H-1B1 Visas in Specialty Occupations**

SOURCE: 59 FR 65659, 65676, Dec. 20, 1994, unless otherwise noted.

**§ 655.700 What statutory provisions govern the employment of H-1B and H-1B1 nonimmigrants and how do employers apply for an H-1B or H-1B1 visa?**

Under the H-1B1 visa, the Immigration and Nationality Act (INA), as amended, permits nonimmigrant professionals in specialty occupations from countries with which the U.S. has entered into certain agreements that are identified in section 214(g)(8)(A) of the INA to temporarily enter the U.S. for professional employment. Employers seeking to temporarily employ H-1B1 professionals must file a labor attestation with the Department of Labor in accordance with this subpart as set out in § 655.700(c)(3) and (d),

which identify the sections of this subpart H and of subpart I of this part that apply to the H-1B1 program, sections and subsections applicable only to the H-1B program, and how terminology is to be applied. Steps for receiving an H-1B1 visa and entering the U.S. on an H-1B1 visa after the attestation process is completed with the Department of Labor, which differ in some respects from the steps for H-1B visas, are the responsibility of the Department of State and the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (formerly the Immigration and Naturalization Service or INS) and are identified in regulations and procedures of those agencies. Consult the Department of State (<http://www.state.gov/>) and USCIS (<http://uscis.gov/>) websites and regulations for specific instructions regarding H-1B1 visas. Procedures described in this subpart H for obtaining a visa and entering the U.S. after the Department of Labor attestation process, including procedures in this section and § 655.705, apply only to H-1B nonimmigrants, not to H-1B1 nonimmigrants.

(a) *Statutory provisions regarding H-1B visas.* With respect to nonimmigrant workers entering the U.S. on H-1B visas, which are available to nonimmigrant aliens in specialty occupations or certain fashion models from any country, the INA, as amended, provides as follows:

(1) Establishes an annual ceiling (exclusive of spouses and children) on the number of foreign workers who may be issued H-1B visas—

- (i) 195,000 in fiscal year 2001;
- (ii) 195,000 in fiscal year 2002;
- (iii) 195,000 in fiscal year 2003; and
- (iv) 65,000 in each succeeding fiscal year;

(2) Defines the scope of eligible occupations for which nonimmigrants may be issued H-1B visas and specifies the qualifications that are required for entry as an H-1B nonimmigrant ;

(3) Requires an employer seeking to employ H-1B nonimmigrants to file a labor condition application (LCA) agreeing to various attestation requirements and have it certified by the Department of Labor (DOL) before a nonimmigrant may be provided H-1B