

§ 655.805 What violations may the Administrator investigate?

(a) The Administrator, through investigation, shall determine whether an H-1B employer has—

(1) Filed a labor condition application with ETA which misrepresents a material fact (Note to paragraph (a)(1): Federal criminal statutes provide penalties of up to \$10,000 and/or imprisonment of up to five years for knowing and willful submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. 1546);

(2) Failed to pay wages (including benefits provided as compensation for services), as required under § 655.731 (including payment of wages for certain nonproductive time);

(3) Failed to provide working conditions as required under § 655.732;

(4) Filed a labor condition application for H-1B nonimmigrants during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment, as prohibited by § 655.733;

(5) Failed to provide notice of the filing of the labor condition application, as required in § 655.734;

(6) Failed to specify accurately on the labor condition application the number of workers sought, the occupational classification in which the H-1B nonimmigrant(s) will be employed, or the wage rate and conditions under which the H-1B nonimmigrant(s) will be employed;

(7) Displaced a U.S. worker (including displacement of a U.S. worker employed by a secondary employer at the worksite where an H-1B worker is placed), as prohibited by § 655.738 (if applicable);

(8) Failed to make the required displacement inquiry of another employer at a worksite where H-1B nonimmigrant(s) were placed, as set forth in § 655.738 (if applicable);

(9) Failed to recruit in good faith, as required by § 655.739 (if applicable);

(10) Displaced a U.S. worker in the course of committing a willful violation of any of the conditions in paragraphs (a)(2) through (9) of this section, or willful misrepresentation of a material fact on a labor condition application;

(11) Required or accepted from an H-1B nonimmigrant payment or remittance of the additional \$500/\$1,000 fee incurred in filing an H-1B petition with the DHS, as prohibited by § 655.731(c)(10)(ii);

(12) Required or attempted to require an H-1B nonimmigrant to pay a penalty for ceasing employment prior to an agreed upon date, as prohibited by § 655.731(c)(10)(i);

(13) Discriminated against an employee for protected conduct, as prohibited by § 655.801;

(14) Failed to make available for public examination the application and necessary document(s) at the employer's principal place of business or worksite, as required by § 655.760(a);

(15) Failed to maintain documentation, as required by this part; and

(16) Failed otherwise to comply in any other manner with the provisions of this subpart I or subpart H of this part.

(b) The determination letter setting forth the investigation findings (see § 655.815) shall specify if the violations were found to be substantial or willful. Penalties may be assessed and disqualification ordered for violation of the provisions in paragraphs (a)(5), (6), or (9) of this section only if the violation was found to be substantial or willful. The penalties may be assessed and disqualification ordered for violation of the provisions in paragraphs (a)(2) or (3) of this section only if the violation was found to be willful, but the Secretary may order payment of back wages (including benefits) due for such violation whether or not the violation was willful.

(c) For purposes of this part, “*willful failure*” means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to sections 212(n)(1)(A)(i) or (ii), or 212(t)(1)(A)(i) or (ii) of the INA, or §§ 655.731 or 655.732. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).

(d) The provisions of this part become applicable upon the date that the employer's LCA is certified pursuant to §§ 655.740 and 655.750, or upon the date employment commences pursuant to section 214(m) of the INA, whichever is

earlier. The employer's submission and signature on the LCA (whether Form ETA 9035 or Form ETA 9035E) each constitutes the employer's representation that the statements on the LCA are accurate and its acknowledgment and acceptance of the obligations of the program. The employer's acceptance of these obligations is re-affirmed by the employer's submission of the petition (Form I-129) to the DHS, supported by the LCA. See 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies that the employer will comply with the terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay. If the period of employment specified in the LCA expires or the employer withdraws the application in accordance with § 655.750(b), the provisions of this part will no longer apply with respect to such application, except as provided in § 655.750(b)(3) and (4).

[65 FR 80233, Dec. 20, 2000, as amended at 66 FR 63302, Dec. 5, 2001; 69 FR 68229, Nov. 23, 2004]

§ 655.806 Who may file a complaint and how is it processed?

(a) Any aggrieved party, as defined in § 655.715, may file a complaint alleging a violation described in § 655.805(a). The procedures for filing a complaint by an aggrieved party and its processing by the Administrator are set forth in this section. The procedures for filing and processing information alleging violations from persons or organizations that are not aggrieved parties are set forth in § 655.807. With regard to complaints filed by any aggrieved person or organization—

(1) No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint.

(2) The complaint shall set forth sufficient facts for the Administrator to determine whether there is reasonable cause to believe that a violation as described in § 655.805 has been committed, and therefore that an investigation is warranted. This determination shall be made within 10 days of the date that the complaint is received by a Wage and Hour Division official. If the Ad-

ministrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall so notify the complainant, who may submit a new complaint, with such additional information as may be necessary. No hearing or appeal pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted.

(3) If the Administrator determines that an investigation on a complaint is warranted, the complaint shall be accepted for filing; an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing. The time for the investigation may be increased with the consent of the employer and the complainant, or if, for reasons outside of the control of the Administrator, the Administrator needs additional time to obtain information needed from the employer or other sources to determine whether a violation has occurred. No hearing or appeal pursuant to this subpart shall be available regarding the Administrator's determination that an investigation on a complaint is warranted.

(4) In the event that the Administrator seeks a prevailing wage determination from ETA pursuant to § 655.731(d), or advice as to prevailing working conditions from ETA pursuant to § 655.732(c)(2), the 30-day investigation period shall be suspended from the date of the Administrator's request to the date of the Administrator's receipt of the wage determination (or, in the event that the employer challenges the wage determination through the Employment Service complaint system, to the date of the completion of such complaint process).

(5) A complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA. This jurisdictional bar does not affect the scope of the remedies which may be assessed by