DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205–AB03

Wage and Hour Division

29 CFR Part 506

RIN 1215–AA90

Attestations by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports

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

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) and the Employment Standards Administration (ESA) of the Department of Labor (DOL or Department) are promulgating regulations to implement amendments to existing regulations governing the filing and enforcement of attestations by employers seeking to use alien crewmembers to perform longshore work in the U.S. The amendments relate to employers' use of alien crewmembers to perform longshore work at locations in the State of Alaska. Under the Immigration and Nationality Act, employers, in certain circumstances, are required to submit attestations to DOL in order to be allowed by the Immigration and Naturalization Service (INS) to use alien crewmembers to perform specified longshore activities at locations in the State of Alaska. The attestation process is administered by ETA, while complaints and investigations regarding the attestations are handled by ESA.

DATES: *Effective Date:* The final rule promulgated in this document is effective on October 7, 1996.

FOR FURTHER INFORMATION CONTACT: On 20 CFR part 655, subpart F, and 29 CFR part 506, subpart F, contact Flora T. Richardson, Chief, Division of Foreign Labor Certifications, U.S. Employment Service, Employment and Training Administration, Department of Labor, Room N–4456, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 219–5263 (this is not a toll-free number).

On 20 CFR part 655, subpart G, and 29 CFR part 506, subpart G, contact R. Thomas Shierling, Immigration Team, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration, Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 501–3884 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

The information collection requirements of the Form ETA 9033–A under the Alaska exception and contained in this rule have been submitted to the Office of Management and Budget (OMB) for clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control No. 1205–0352. The information collection requirements of the Form ETA 9033 under the prevailing practice exception, assigned OMB Control No. 1205–0309, remain unchanged by this rulemaking. The Form ETA 9033–A was published in the Federal Register with the interim final rule to implement the Alaska exception on January 19, 1995 (60 FR 3950). The Form ETA 9033 was published in the Federal Register with the final rule to implement the prevailing practice exception on September 8, 1992 (57 FR 40966).

The Employment and Training Administration estimates that employers will be submitting up to 350 attestations per year under the Alaska exception. The public reporting burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing information/data sources, gathering and maintaining the information/data needed, and completing and reviewing the attestation. It is likely that the burden will be considerably less in the second and subsequent years in which an employer submits an attestation.

II. Background

The Coast Guard Authorization Act of 1993, Pub. L. 103–206, 107 Stat. 2419 (Coast Guard Act), was enacted on December 20, 1993. Among other things, the Coast Guard Act amended section 258 of the Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*) which places limitations on the performance of longshore work by alien crewmembers in U.S. ports.

The loading and unloading of vessels in U.S. ports had traditionally been performed by U.S. longshore workers. However, until passage of the Immigration Act of 1990 (IMMACT '90), Pub. L. 101–649, 104 Stat. 4978, alien crewmembers had also been allowed by Immigration and Naturalization Service (INS) regulation to do this kind of work in U.S. ports because longshore work was considered to be within the scope of permitted employment for alien crewmembers. The IMMACT '90 limited this practice in order to provide greater protection to U.S. longshore workers.

Prior to the Coast Guard Act's enactment, section 258 of the INA permitted alien crewmembers admitted with D-visas to perform longshore work only in four specific instances: (a) Where the vessel's country of registration does not prohibit U.S. crewmembers from performing longshore work in that country's ports and nationals of a country which does not prohibit U.S. crewmembers from performing longshore work in that country's ports hold a majority of the ownership interest in the vessel; (b) where there is in effect in a local port one or more collective bargaining agreement(s), each covering at least thirty percent of the longshore workers at a particular port and each permitting the activity to be performed by alien crewmembers; (c) where there is no collective bargaining agreement covering at least thirty percent of the longshore workers and an attestation has been filed with the Department which states that the use of alien crewmembers to perform longshore work is permitted under the prevailing practice of the port, that the use of alien crewmembers is not during a strike or lockout, that such use is not intended or designed to influence the election of a collective bargaining representative, and that notice has been provided to longshore workers at the port; and (d) where the activity is performed with the use of automated self-unloading conveyor belts or vacuum-actuated systems; *provided that*, the Secretary of Labor (Secretary) has not found that an attestation is required because it was not the prevailing practice to utilize alien crewmembers to perform the activity or because the activity was performed during a strike or lockout or in order to influence the election of a collective bargaining representative. For this purpose, the term ''longshore work'' does not include the loading or unloading of hazardous cargo, as determined by the Secretary of Transportation, for safety and environmental protection and no attestations were or are necessary for the loading and unloading of such cargo.

The Department published final regulations in the Federal Register on September 8, 1992 (57 FR 40966), to implement the prevailing practice exception under IMMACT '90. The fishing industry and the carriers worked together to comply with the law by

filing the necessary attestations to qualify under the prevailing practice exception. The International Longshore and Warehousemen's Union responded to protect the jurisdiction of U.S. longshore workers by filing complaints pursuant to the attestations and seeking cease and desist orders to halt the performance of longshore work by the carrier's alien crewmembers.

The basic problem was that the prevailing practice exception was apparently designed for established port areas. A lack of flexibility in the remote areas of Alaska where the longshore work needed to be performed, in some cases, prevented carriers from complying with Departmental regulations. As a result, even where there were no U.S. longshore workers available for the particular employment, employers in some of these remote areas were prohibited from performing the necessary longshore work, resulting in potential adverse impacts on the Alaskan fishing industry including the loss of American jobs. In order to remedy the situation, Congress consulted with representatives of the longshoremen's unions and the carriers and enacted special provisions recognizing the unique character of Alaskan ports.

The Coast Guard Act amended the INA by establishing a new Alaska exception to the general prohibition on the performance of longshore work by alien crewmembers in U.S. ports. The Alaska exception provides that the prohibition does not apply where the longshore work is to be performed at a particular location in the State of Alaska and an attestation with accompanying documentation has been filed by the employer with the Department of Labor. The INA provides, however, that longshore work consisting of the use of an automated self-unloading conveyor belt or vacuum-actuated system on a vessel shall continue to be governed by section 258(c) of the INA (8 U.S.C. 1288(c)), even at locations in the State of Alaska. If, however, it is determined that an attestation is required for longshore work at locations in the State of Alaska consisting of the use of automated equipment, *i.e.*, because the Administrator has determined, pursuant to a complaint, that it is not the prevailing practice to use alien crewmembers to perform the longshore activity(ies) through the use of the automated equipment, or was during a strike or lockout or intended to influence an election of a bargaining representative for workers in the local port, or if the Administrator issues a cease and desist order against use of the automated equipment without such attestation, the required attestation shall be filed by the employer under the Alaska exception and not under the prevailing practice exception. The amended INA provides that the prevailing practice exception no longer applies in case of longshore work to be performed at a particular location in the State of Alaska. As a result, U.S. ports in the State of Alaska which were previously listed in Appendix A, ''U.S. Seaports,'' were removed from the Appendix in the interim final rule.

The Alaska exception is intended to provide a preference for hiring United States longshoremen over the employer's alien crewmembers. The employer must attest that, before using alien crewmen to perform the activity specified in the attestation, the employer will make a bona fide request for and employ United States longshore workers who are qualified and available in sufficient numbers from contract stevedoring companies and private dock operators. The employer must also provide notice of filing the attestation to such contract stevedoring companies and private dock operators, and to labor organizations recognized as exclusive bargaining representatives of United States longshore workers. Finally, the employer must attest that the use of alien crewmembers to perform longshore work is not intended or designed to influence the election of a bargaining representative for workers in the State of Alaska.

III. Analysis of Comments on the Interim Final Rule

Comments regarding the January 19, 1995, interim final rule were received from 3 entities; a member of the general public through a U.S. Senator; a law firm; and a Federal government agency. None of the 3 comments received concerned the same issue so each will be discussed in turn.

A law firm submitted a comment on behalf of certain foreign carriers involved in longshore operations in Alaska. The firm's comment concerned the reporting and recordkeeping burden of the Department's Attestation by Employers Using Alien Crewmembers for Longshore Activities at Locations in the State of Alaska (Form ETA 9033–A).

The firm proposed that the Form ETA 9033–A be amended to allow employers to file attestations with multiple validity periods and to further amend the attestation to add a new box ''(e)'' to Item 8, to be entitled ''Supplemental Attestation.'' If adopted, in the event of a change in circumstances, an existing attestation would be photocopied, box ''(e)'' checked, and a narrative description of the changed circumstances attached, rather than the employer having to file a new attestation.

With regard to the first suggestion, section 258(d)(4) of the INA (8 U.S.C. 1288) provides that ''attestations filed under [the Alaska exception] shall expire at the end of the 1-year period beginning on the date the employer anticipates the longshore work to begin, as specified in the attestations filed with the Secretary of Labor.'' We believe that this statutory provision would preclude the Department from incorporating the suggested change. Further, ETA, the agency which will process such attestations, indicates that allowing multiple validity periods to apply to a single attestation would be extremely burdensome to administer. In the interim final rule, and continued here in the final rule, the regulations provided that an employer may file a single attestation for multiple locations in the State of Alaska, unlike attestations under the prevailing practice exception which are filed for a particular port. The Department believes this provision is a reasonable accommodation to employers of alien crewmembers and feels the suggested change would render this accommodation unpalatable.

The Department also opposes the second proposed change. First, it is not clear what a ''change in circumstances'' means. The Department believes that the example provided by the commenter, which concerned the opening of a new dock or facility in a new location, should necessitate filing of a new attestation by the employer. The fourth attestation element under the INA, provision of notice, is based upon actions taken by an employer to comply with the terms of the attestation on or before the date the attestation is filed. Therefore, if a new private dock opened in a new location, an employer should be required to submit a new attestation, attesting that notice of filing has been provided to the operator of the new private dock. The requirement that an employer provide notice of filing and request confirmation of coverage under the Longshore and Harbor Workers' Compensation Act is the only pre-filing requirement contained in the regulation, the other three attestation elements being prospective in nature. Since an employer must provide the required notice to the operator of the new private dock, whether the suggestion is adopted or not, we believe that the burden incurred by filing a new attestation, as compared to filing an amendment to an existing attestation with a narrative description of the change, is a nominal one. It should be noted that, as a matter of enforcement policy, an employer will

not be required to submit a new attestation in the event that a new private dock opened in a previously disclosed location. In that event, an employer will be considered to be in compliance as long as the required notice is provided to the operator of the new private dock and such is properly documented by the employer.

The second comment, filed by a member of the general public through the office of U.S. Senator Ted Stevens (R–AK), concerned longshore work performed by Greek and Russian vessels operating in the Aleutian Islands off Alaska under the reciprocity exception. See 8 U.S.C. 1288(e). The Department has no role in administering the reciprocity exception, which allows employers to use alien crewmembers to perform longshore activities in U.S. ports if the vessel is registered in a country which by law, regulation, or in practice does not prohibit such activity by crewmembers aboard U.S. vessels, and nationals of such a country own a majority of the ownership interest in the vessel.

The final comment received was from the Chief Counsel for Advocacy, Small Business Administration, who expressed concern that the regulations governing the Alaska exception may indeed have a significant economic impact on a substantial number of small businesses, contrary to the Department's certification under 5 U.S.C. 605(b). Further, the Chief Counsel questioned the Department's authority to publish the regulation as an interim final rule without a prior notice of proposed rulemaking.

As described above, due to a lack of flexibility in the remote areas of Alaska under the pre-existing ''prevailing practice exception'' to the general prohibition, representatives of the longshoremen's unions and the carriers, working in concert with the Alaskan Congressional delegation, enacted special provisions recognizing the unique character of Alaskan sea ports. The statute was a direct result of these negotiations between the affected parties. Departmental officials worked closely with all relevant parties in drafting the rule, both union and carrier representatives, including meeting on two separate occasions to discuss implementation of the statutory provisions.

Specific language in the statute prohibited employers from filing attestations for locations in the State of Alaska under the pre-existing prevailing practice exception, resulting in an adverse impact on the Alaskan fishing industry and potential loss of jobs and revenue for both U.S. workers and employers. Further, some employers may have been encouraged by economic exigencies to utilize foreign crewmembers in longshore work illegally or to reflag their vessels to qualify for the ''reciprocity exception.'' Either of these actions by shippers would have diminished employment opportunities for Alaskan workers seeking longshore work, contrary to the purposes of the Coast Guard Act. The Department received evidence from union representatives that delay in implementing the Alaska exception would indeed have had an adverse impact on the employment opportunities of Alaskan workers seeking longshore work. Consequently, at the time, the Department, for good cause, determined that the potential harm made it impracticable and contrary to the public interest to delay implementation by publishing the rule as a proposed rule.

The Department believes the program and the regulations will in fact have a positive economic impact on small businesses such as contract stevedoring companies. These firms will benefit from an increase in their business opportunities which would not occur but for the Department's regulations to implement the Alaska exception. The purpose of the Alaska exception is to insure that, to the extent possible, U.S. contract stevedoring companies and private dock operators, some of which may be small businesses, are given a chance to compete for jobs which would otherwise go to foreign nationals. The only burden imposed by the regulations will fall upon foreign shippers who seek to employ alien workers in longshore work on foreign-flagged vessels which are registered in countries that do not afford similar work opportunities for U.S. longshoremen.

Finally, it is noted that other than the Chief Counsel's letter and despite the fact that the Department notified all relevant parties of the publication of the interim final rule in the Federal Register, the two comments described above were the only others received, neither of which concerned the economic impact of the rule on small businesses.

This is a new program and we believe that the paperwork burden will be reduced in subsequent years due to increased familiarity with the provisions contained in the regulations. The Department is very concerned about the reporting and record keeping burden on the regulated community, including small businesses, and is fully committed to reducing this burden where appropriate. In the instant case, however, we believe that the reporting and record keeping requirements under the Alaska exception and contained herein are required to maintain the program's integrity and to effectively carry out the Secretary's responsibilities in protecting the wages and working conditions of U.S. workers under the INA.

The regulations for the attestation program for employers using alien crewmembers for longshore work in the United States are published at 20 CFR part 655, subparts F and G, and 29 CFR part 506, subparts F and G, 60 FR 3950 (January 19, 1995).

Regulatory Impact and Administrative Procedure

E.O. 12866

In accordance with Executive Order 12866, the Department of Labor has determined that this is not a significant regulatory action as defined in section 3(f) of the Order.

Regulatory Flexibility Act

The Department of Labor has notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule does not have a significant economic impact on a substantial number of small entities.

Catalog of Federal Domestic Assistance Number

This program is not listed in the *Catalog of Federal Domestic Assistance.*

List Of Subjects

20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Crewmembers, Employment, Enforcement, Fashion Models, Forest and Forest products, Guam, Health professions, Immigration, Labor, Longshore work, Migrant labor, Nurse, Penalties, Registered nurse, Reporting and recordkeeping requirements, Specialty occupation, Students, Wages.

29 CFR Part 506

Administrative practice and procedures, Aliens, Crewmembers, Employment, Enforcement, Immigration, Labor, Longshore work, Penalties, Reporting and recordkeeping requirements.

Adoption of the Joint Final Rule

Accordingly, the interim final rule amending 20 CFR part 655, subparts F and G, and 29 CFR part 506, subparts F and G, which was published at 60 FR 3950 on January 19, 1995, is adopted as a final rule without change.

Authority: 8 U.S.C. 1288(c) and (d).

Signed at Washington, DC, this 23rd day of August, 1996.

Robert B. Reich,

Secretary of Labor.

[FR Doc. 96–22510 Filed 9–4–96; 8:45 am]

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