DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205–AB43

Labor Condition Application Requirements for Employers Seeking To Use Nonimmigrants on E–3 Visas in Specialty Occupations; Filing Procedures

AGENCY: Employment and Training Administration and Wage and Hour Division, Employment Standards Administration, Department of Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Department of Labor (the Department or DOL) is proposing to amend its regulations regarding the temporary employment of nonimmigrant foreign professionals to implement procedural requirements applicable to the new E–3 visa category. This new visa classification was established by title V of the REAL ID Act of 2005 (Division B) in the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, and applies to certain Australian nationals coming to the United States solely to perform services in specialty occupations. This Notice of Proposed Rulemaking (NPRM or proposed rule) clarifies the procedures that employers must follow in obtaining a DOL-certified labor condition application before seeking an E–3 visa for a foreign worker.

DATES: Interested persons are invited to submit written comments on this proposed rule on or before February 12, 2007.

ADDRESSES: You may submit comments, identified by RIN number 1205–AB43, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: E3.comments@dol.gov*. Include RIN number 1205–AB43 in the subject line of the message.
- *Mail:* U.S. Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210.
- *Hand Delivery/Courier:* 200 Constitution Avenue, NW., Room N–5641.

Please note that due to security concerns, postal mail delivery in Washington, DC may be delayed. Therefore, the Department encourages the public to submit comments via e-mail or Internet as indicated above.

Please also note that all comments received will be posted on the *www.regulations.gov* Web site. The *www.regulations.gov* Web site is the federal eRulemaking portal and all comments received will be available and accessible to the public. Therefore, the Department recommends that commenters safeguard their personal information such as social security numbers, personal addresses, telephone numbers, and e-mail addresses included in their comments as such may become easily available to the public via the *www.regulations.gov* Web site. If a comment is e-mailed directly to the Department's address without going through *www.regulations.gov*, the comment will have the sender's e-mail address attached to it and therefore, the email address and information contained therein may be posted online. It is the responsibility of the commenter to safeguard their information.

Instructions: All submissions must include the agency name and Regulatory Information Number (RIN 1205–AB43) for this rulemaking and must be received on or before the last day of the comment period. The Department will not open, read, or consider any comments received after that date. Also, the Department will not acknowledge receipt of any comments received.

All comments received will be posted on *www.regulations.gov* and may be posted without information redacted. The *www.regulations.gov* Web Site is a federal eRulemaking portal which is accessible to the public. Therefore, the Department is informing the public that personal information included in comments such as social security numbers, and personal addresses, phone numbers, and email address may be easily available to the public online. Also, if commenter's e-mail a comment directly to the Department's address without going through *www.regulations.gov,* the comment will have the sender's e-mail address attached to it and it may be posted.

Docket: All comments will be available for public inspection without change, including any personal information provided, between 8:30 a.m. and 5 p.m., at the Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210. Copies of the rule are available in alternative formats of large print and electronic file on computer disk, which may be obtained at the above-stated address. The rule is available on the Internet at the Web address *http://www.doleta.gov*.

FOR FURTHER INFORMATION CONTACT: William L. Carlson, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; Telephone: (202) 693–3010 (this is not a toll-free number).

For information regarding the E–3 enforcement process in 20 CFR part 655, subpart I, contact Diane Koplewski, Immigration Team Leader, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration (ESA), U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–3516, Washington, DC 20210; Telephone: (202) 693–0071 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

On May 11, 2005, title V of the REAL ID Act of 2005 (Division B) in the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (Pub. L. 109–13, § 501, 119 Stat. 231, 278 (2005)), amended section 101(a)(15)(E) of the Immigration and Nationality Act (Act or INA) (8 U.S.C. 1184 *et seq.*) to add a new nonimmigrant classification for aliens who enter the United States under a treaty with a foreign country of which the alien is a national. 8 U.S.C. 1101(a)(15)(E). Section 501 of title V of the REAL ID Act established reciprocal visas, known as the E–3 visa category, for Australian nationals who enter solely to perform services in specialty occupations in the United States. The definition of a specialty occupation for the E–3 visa program is the same as it is for the H–1B visa program. 8 U.S.C. 1184(i)(1); 20 CFR 655.715.

The E–3 visa classification applies only to nationals of the Commonwealth of Australia and is limited to 10,500 initial visas annually. 8 U.S.C. 1184(g)(11)(A)–1184(g)(11)(B). Spouses and children do not count against the numerical limitation nor are they required to possess the nationality of the principal. 8 U.S.C. 1184(g)(11)(C). The sponsoring employer must present a labor condition application (LCA) attesting to the wages and working conditions certified by the Department

of Labor (Department or DOL) to the Department of State (DOS) Consular Officer at the time of visa application. 8 U.S.C. 1101(a)(15)(E)(iii), 1182(t)(1); *see also* 22 CFR 41.51.

An employer seeking to employ aliens on an E–3 visa to work in a specialty occupation in the United States must file a labor attestation under section 212(t) of the Immigration and Nationality Act, 8 U.S.C. 1182(t), with the Employment and Training Administration (ETA) of DOL. This requirement is the same requirement applicable to employers seeking to employ Chilean or Singaporean nationals on nonimmigrant H–1B1 worker visas as professionals in specialty occupations under 8 U.S.C. 1182(t). The labor attestation requirements in INA section 212(t) for H–1B1, and now E–3, parallel the labor condition application requirements in section 212(n) of the INA, 8 U.S.C. 1182(n), for nonimmigrant H–1B visas that permit employers to hire foreign professionals in specialty occupations.

Since most of the requirements in section 212(n) and section 212(t) are similar, the Department extended its H–1B regulations—with certain exceptions as required by the H–1B1 statute—to the H–1B1 program through an Interim Final Rule published on November 23, 2004, at 69 FR 68222. The H–1B1 Interim Final Rule was adopted with one change in a Final Rule published in the **Federal Register** on June 30, 2006 at 71 FR 37802. In this NPRM, the Department seeks to extend the H–1B regulations to the E–3 program.

II. Statutory Requirements

An employer who wishes to employ a professional who is a national of the Commonwealth of Australia in the United States under the E–3 visa program must submit a labor condition application to DOL that includes elements required of an employer under the existing H–1B and H–1B1 visa programs. INA section 212(t)(1), 212(n)(1); 8 U.S.C. 1182(t)(1), 1182(n)(1). As required under the H–1B and H–1B1 programs, the E–3 employer must attest that:

- It is offering the nonimmigrant, and will pay during the period of authorized employment, wages that are at least the actual wage level paid to other employees with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of intended employment, whichever is greater;
- It will provide working conditions for the nonimmigrant that will not adversely affect working conditions for similarly employed workers;
- There is no strike or lockout in the course of a labor dispute in the occupational classification at the worksite; and
- It has provided notice of its filing of a labor attestation to its employees' bargaining representative for the occupational classification affected or, if there is no bargaining representative, has provided notice to its employees in the affected occupational classification by physical posting or other means.

As required in the H–1B and H–1B1 programs, the Department may review E–3 labor attestations only for completeness and obvious inaccuracies. Unless a filing is incomplete or obviously inaccurate, the Secretary of Labor must certify the E–3 filing within seven days of filing. INA section 212(t)(2)(C); 8 U.S.C. 1182(t)(2)(C). The maximum period for which an E–3 labor attestation will be certified is two years from the employment start date as indicated on the LCA. This certification period is consistent with the Department of Homeland Security's (DHS) regulation for admission of treaty traders and investors for a maximum period of two years and Department of State's practice. *See* 8 CFR § 214.2(e)(19)–(20); *see also* U.S. Dep't of State, 2005 Foreign Affairs Manual 9 (Issued at 9 FAM 41.51, N16.9, ''Validity of Issued Visa''). An employer must file a new E–3 labor condition application to renew an attestation beyond the initial two-year period.

After the DOL attestation process is completed, DHS' United States Citizenship and Immigration Services and DOS are responsible for processing the individual E–3 visa requests. DOS issued a Final Rule for the E–3 program at 22 CFR 41.51(c) on September 2, 2005. 70 FR 52292. Under that process, a petition to DHS is not necessary for initial E–3 visa requests. Instead, a foreign worker who is seeking an E–3 visa and is not currently in the United States must present the necessary evidence for classification directly to the Consular Officer at the time of visa application. 22 CFR 41.51(c).

As with labor condition applications for H–1B and H–1B1 nonimmigrants, the Secretary of Labor must compile a list by employer and occupational classification of all labor attestations filed regarding E–3 nonimmigrants. The list identifies the wage rate, number of alien professionals sought, period of intended employment, and date of need for each attestation. INA section 212(t)(2)(B); 8 U.S.C. 1182(t)(2)(B). The Department must make the list available for public inspection in Washington, DC.

Enforcement provisions for E–3 labor condition applications are based on the requirements of the H–1B1 visa program. *See* INA section 212(t)(3); 8 U.S.C. 1182(t)(3). The Department will receive, investigate, and make determinations on complaints filed by any aggrieved person or organization regarding the failure of an employer to meet the terms of its attestations. DOL is also authorized to conduct random investigations for a period of up to five years of any employer found by DOL to have committed a willful failure to meet a required attestation or to have made a willful misrepresentation of a material fact in an attestation. 8 U.S.C. 1182(t)(3)(E). Penalties for failure to meet conditions of the E–3 labor attestations are the same as those under the H–1B1 program. Enforcement of E–3 labor attestations is handled by the Wage and Hour Division, Employment Standards Administration (ESA), of DOL.

III. Overview of Regulatory Changes

As summarized in section II above, the Act requires the Department to align the E–3 visa program with the requirements of the H–1B and H–1B1 program. Therefore, this proposed rule will amend the H–1B and H–1B1 regulations in 20 CFR part 655, subparts H and I, and extend those subparts' procedures, with limited exceptions based upon statutory requirements, to temporary entry and employment under E–3 visas as follows.

The Department is proposing in § 655.0(d) to include the new E–3 visa category in the scope and purpose of the regulation. This paragraph would be expanded to state that the labor condition application process applies to three categories of nonimmigrants in the United States.

The Department also proposes to add § 655.700(c)(3) to address the process for filing labor condition applications under the E–3 visa category. DOL's statutory responsibilities regarding the E–3 program took effect on the enactment date of the Emergency Supplemental Appropriations Act on May 11, 2005. Pub.L. 109–13, Div. B, § 103(d), 119 Stat. 231, 308 (May 11, 2005). Subsequently, on July 19, 2005, the Department published E–3 application procedures as a Notice in the **Federal Register** at 70 FR 41430. Therefore, E–3 attestations filed on or after July 19, 2005, but prior to this proposed rule's effective date, will be handled according to the statutory terms and the processing procedures that the Department has established.

Existing § 655.700(c)(4) outlines the Department's protocol for accepting and certifying H–1B1 visa LCAs between the effective date of the legislation (January 1, 2004) and the date the Department published the Interim Final Rule (November 23, 2004). Those LCAs filed on or after January 1, 2004, but before November 23, 2004, were processed under the H–1B1 statutory provisions and the processing procedures previously published on the Department's Web site. Any LCAs received on or after November 23, 2004, were processed according to the requirements of the Interim Final Rule.

The Department proposes to amend § 655.700 paragraphs (d)(1) and (d)(2) to include the E–3 visa category.

The Department proposes to amend § 655.700(d)(3) to require employers seeking to employ nonimmigrant professionals temporarily under E–3 visas to file labor attestations with the Department, which has been amended to include ETA Form 9035E (electronic).

The Department proposes to amend § 655.700(d)(4) to extend the employer responsibilities under the H–1B1 program to E–3. In addition, § 655.700(d)(1), which lists certain H–1B regulations that are not applicable to the H–1B1 program, is proposed to be amended to also exclude E–3. Among the exclusions listed in paragraph (d)(1) are the special attestations related to ''H–1B-dependent employers'' and ''willful violators'' of the H–1B rules. Currently, these provisions only apply to H–1B nonimmigrant program and do not apply to the H–1B1 program. The Department proposes to amend § 655.700 to also exclude the E–3 nonimmigrant program from the listed H–1B provisions. These changes are consistent with the statutory requirement to align the E–3 program with the H–1B1 program.

The Department proposes amending §§ 655.705, 655.715, 655.730 and 655.740 to include references to the new E–3 visa category.

In § 655.750(a), the reference to entering multiple periods of intended employment on Forms 9035 and 9035E is proposed to be removed. Although the language has appeared in the regulations, the forms, including the new Internet version, historically have not included opportunities for submitting such information. In addition, it has not been the practice of employers filing LCAs to include multiple periods of intended employment on the written forms.

Section 655.750(a) is proposed to be amended to specify the maximum validity period for approved E–3 LCAs. The Department addressed the validity period in 1994 when it adopted the current H–1B regulations. At that time, the Department decided to adopt a three-year period for H–1B visa holders because it was consistent with the Immigration and Naturalization Services' admission period for such workers. 59 FR 65646, 65648–65649 (December 20, 1994). The same rationale applies to the maximum validity period for approved E–3 LCAs, which we have set at two years to correspond to the U.S. Citizenship and Immigration Service's admission period.

The proposed rule also addresses the maximum validity period for a nonimmigrant who begins employment before the LCA is certified, as is authorized by the portability provision at section 214(n) of the INA, 8 U.S.C. 1184(n). Under the proposed rule, the maximum validity period for the E–3 LCA is two years, which begins on the employment date listed on the approved LCA. The E–3 LCA validity period is unaffected by an employee's change in employers. Therefore, the portability of a nonimmigrant has no impact on the E–3 LCA maximum validity period.

In § 655.750(b)(2), a process for withdrawing E–3 labor condition applications has also been proposed consistent with statutory requirements.

Subpart I of this Part is proposed to be revised to include the new E–3 visa category in the heading.

As specified above, this NPRM also includes technical and clarifying amendments to subparts H and I of 20 CFR Part 655, primarily to include the new E–3 visa category. Therefore, consistent with the labor condition application process under the H–1B and H–1B1 programs, employers filing under the E–3 program may file applications electronically at *http://www.foreignlaborcert.doleta.gov*. Under appropriate circumstances, employers may mail applications to: Manager, Temporary Programs, U.S. Department of Labor, ETA/OFLC, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210.

IV. Administrative Information

Executive Order 12866—Regulatory Planning and Review: We have determined that this rule is not an ''economically significant regulatory action'' within the meaning of Executive Order 12866. The procedures for filing a labor attestation under the new E–3 visa category on behalf of nonimmigrant professionals from Australia will not have an economic impact of $100 million or more. Employers seeking to employ E–3 nonimmigrant professionals will continue to use the same procedures and forms presently required for the H–1B and H–1B1 nonimmigrant programs. E–3 visas will be subject to annual numerical limits. Although this NPRM is not economically significant as defined by Executive Order 12866, it is a significant rule and has therefore been reviewed by the Office of Management and Budget (OMB). This NPRM is considered otherwise significant because it implements a new program and must be closely coordinated with other Federal agencies that are also responsible for implementing the E–3 program, such as the Departments of State and of Homeland Security.

Regulatory Flexibility Analysis: We have notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification under the Regulatory Flexibility Act (RFA) at 5 U.S.C. 605(b), that this NPRM would not have a significant economic impact on a substantial number of small entities.

This rule would implement statutory provisions enacted by Congress that narrowly extend the scope of DOL's existing H–1B and H–1B1 programs to include similar labor attestation filing requirements for the temporary entry of nonimmigrant Australian professionals under the new E–3 visa classification. Employers seeking to hire these E–3 nonimmigrant professionals will use the same procedures and forms presently required for H–1B and H–1B1 nonimmigrant professionals. In addition, E–3 visas will be subject to an annual numerical limit of 10,500 per fiscal year.

Based on E–3 filing data for fiscal year 2005 (FY 2005), the Department estimates that in the upcoming year employers will file approximately 833 attestations with the Department under the E–3 program. According to the definition of ''small business'' under the Small Business Administration Act, the majority of employers filing in FY 2005 are not categorized as small businesses. Under the Small Business Administration Act, a small business is one that is ''independently owned and operated and which is not dominant in its field of operation.'' Further, the definition varies from industry to industry to the extent necessary to properly reflect industry size differences.

The Department determined its size standard analysis based on 13 CFR Part 121 that describes the size standards. In terms of the size standards, although some employers will file multiple attestations with the Department in a year the Department does not anticipate a significant expansion in filings in this

program because the E–3 visa category is subject to annual numerical limits. The Department further relied on the FY 2005 data of the major industries that applied for E–3 temporary visas with the Department to form its analysis.

The Department determined that the following industries predominate in the E–3 program: (1) Healthcare and Social Assistance industry (attestations filed for Medical Residents, Chiropractors, Physical Therapists, Acupuncturists, Dentists, Physicians, Veterinarians, Psychiatrists, Mental Health Counselors, and Medical Lab Technicians); (2) Educational industry (attestations filed for Teachers, Professors, and Tutors); (3) Finance and Insurance industry (attestations filed for Accountants, Business Analysts, Financial Analysts and Investor Analysts); and (4) Professional, Scientific and Technological Industry (attestations filed for Computer Programmers, Technicians, Information and Support Specialists, Software Engineers, and Systems and Program Analysts). The Department has reviewed the data from each of these industries as described below to determine that there is no significant impact on small businesses.

In the United States, there are 708,000 Professional, Scientific and Technological small businesses. In FY 2005, 68 attestations were filed with the Department for positions in the Professional, Scientific and Technological industry. Using this data, we estimate the number of different (or non-duplicated) employers who will file the expected 68 applications with the Department, represents approximately 0.010% of all Professional, Scientific and Technological small businesses.

In the United States, there are 65,933 Educational small businesses. In FY 2005, 43 attestations were filed with the Department for positions in the Education industry. Using this data, we estimate the number of different (or non-duplicated) employers who will file the expected 43 applications with the Department, represents approximately 0.065% of all Educational small businesses.

In the United States, there are 560,083 Healthcare and Social Assistance small businesses. In FY 2005, 33 attestations were filed with the Department for positions in the Healthcare and Social Assistance industry. Using this data, we estimate the number of different (or non-duplicated) employers who will file the expected 33 applications with the Department, represents approximately 0.006% of all Healthcare and Social Assistance small businesses.

In the United States, there are 259,846 Finance and Insurance small businesses. In FY 2005, 26 attestations were filed with the Department for positions in the Finance and Insurance industry. Using this data, we estimate the number of different (or non-duplicated) employers who will file the expected 26 applications with the Department, represents approximately 0.010% of all Finance and Insurance small businesses. For the reasons stated above, DOL does not believe this proposed rule will impact a substantial number of small entities.

Moreover, the Department of Labor does not believe this proposed rule would have a significant economic impact on small businesses. First, the Department does not require employers to submit a filing fee for the H–1B1 program, which is consistent with past practice. Therefore, under this NPRM, an employer would submit an E–3 visa application to the Department at no cost. Second, the Department estimates that it takes less than thirty minutes to complete Form ETA 9035E or Form ETA 9035. Given that the Department did not add fields to the OMB approved forms, no additional time is required to prepare and submit the forms. Therefore, under this NPRM, an employer would spend the same amount of time preparing and submitting Form ETA 9035E or Form ETA 9035 for the H–1B1 program as the employer would for application under the H–1B program. In sum, the attestation and filing activities under this NPRM are no different from those required under the existing H–1B program and this NPRM establishes no additional economic burden on small entities.

Unfunded Mandates Reform Act of 1995: This NPRM would not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996: This NPRM is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996 (SBREFA). The standards for determining whether a rule is a major rule as defined by section 804 of SBREFA are similar to those used to determine whether a rule is an ''economically significant regulatory action'' within the meaning of Executive Order 12866. Further, because the Department certified that this rule is not an economically significant rule under Executive Order 12866, we certify also that it is not a major rule under SBREFA. Therefore, this NPRM would not result in an annual effect on the economy of $100 million or more; cause a major increase in costs or prices; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132—Federalism: This proposed rule will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government as described by Executive Order 13132. Therefore, the Department has determined that this proposed rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

Assessment of Federal Regulations and Policies on Families: This NPRM does not affect family well-being.

Paperwork Reduction Act: Forms and information collection requirements related to the Department's E–3, H–1B, and H–1B1 programs under 20 CFR part 655, subpart H, are approved currently under OMB control number 1205–0310 (expiration date November 30, 2008). This NPRM does not include a substantive or material modification of that collection of information. Existing H–1B/H–1B1 paperwork forms and filing procedures will be used by potential employers of an additional category of foreign temporary workers—nationals from Australia. Because E–3 visas will be subject to annual numerical limits, the Department does not anticipate a substantial increase in filings under 20 CFR part 655, subpart H.

Catalog of Federal Domestic Assistance Number: This program is listed in the *Catalog of Federal Domestic Assistance* at Number 17.252, ''Attestations by Employers Using Non-Immigrant Aliens in Specialty Occupations.''

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Australia, Chile, Employment, Forest and forest products, Health professions, Immigration, Labor, Longshore work, Migrant labor, Penalties, Reporting requirements, Singapore, Students, Wages.

Accordingly, we propose that 20 CFR part 655, Code of Federal Regulations, be amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The authority citation for part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m), (n), and (t), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 323, Pub. L. 103–206, 107 Stat. 2149; Title IV, Pub. L. 105–277, 112 Stat. 2681; Pub. L. 106–95, 113 Stat. 1312 (8 U.S.C. 1182 note); and 8 CFR 213.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C Issued Under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B Issued Under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E Issued Under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G Issued Under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I Issued Under 8 U.S.C. 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i)(b) and (b1), 1182(n), 1182(t), and 1184; 29 U.S.C. 49 *et seq.*; sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and Title IV, Pub. L. 105–277, 112 Stat. 2681.

Subparts J and K Issued Under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 Note).

Subparts L and M Issued Under 8 U.S.C. 1101(a)(15)(H)(i)(c), 1182(m), and 1184; and 29 U.S.C. 49 *et seq.*

2. Revise § 655.0(d) to read as follows:

§ 655.0 Scope and purpose of Part.

* * * * *

(d) *Subparts H and I of this Part.* Subpart H of this part sets forth the process by which employers can file labor condition applications (LCAs) with, and the requirements for obtaining approval from, the Department of Labor to temporarily employ the following three categories of nonimmigrants in the United States: H–1B visas for temporary employment in specialty occupations or as fashion models of distinguished merit and ability; H–1B1 visas for temporary employment in specialty occupations of nonimmigrant professionals from countries with which the United States has entered into certain agreements identified in section 214(g)(8)(A) of the INA; and E–3 visas for nationals of the Commonwealth of Australia for temporary employment in a specialty occupation. Subpart I of this part establishes the enforcement provisions that apply to the H–1B, H–1B1 and E–3 visa programs.

* * * * *

3. Revise the heading of subpart H to read as follows:

Subpart H—Labor Condition Applications and Requirements for Employers Seeking To Employ Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models, and Requirements for Employers Seeking To Employ Nonimmigrants on H–1B1 and E–3 Visas in Specialty Occupations

4. Amend § 655.700 by revising the section heading and introductory text, paragraphs (c)(3), (d)(1), (d)(2), (d)(3), (d)(4)(i) and (d)(4)(ii), and adding new paragraph (c)(4) to read as follows:

§ 655.700 What statutory provisions govern the employment of H–1B, H–1B1, and E–3 nonimmigrants and how do employers apply for H–1B, H–1B1, and E–3 visas?

Under the E–3 visa program, the Immigration and Nationality Act (INA), as amended, permits certain nonimmigrant treaty aliens to be admitted to the United States solely to perform services in a specialty occupation (INA section 101(a)(15)(E)(iii)). Under the H–1B1 visa program, the INA permits nonimmigrant professionals in specialty occupations from countries with which the United States has entered into certain agreements that are identified in section 214(g)(8)(A) of the INA to temporarily enter the United States for employment in a specialty occupation. Employers seeking to employ nonimmigrant workers in specialty occupations under H–1B, H–1B1 or E–3 visas must file a labor condition application with the Department of Labor as described in § 655.730(c) and (d). Certain 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 § 655.705, apply only to H–1B nonimmigrants. The procedures for receiving an E–3 or H–1B1 visa and entering the U.S. on an E–3 or H–1B1 visa after the attestation process is certified by the Department of Labor, are identified in the regulations and procedures of the Department of State and the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security. Consult the Department of State (*http://www.state.gov/*) and USCIS (*http://uscis.gov/*) Web sites and regulations for specific instructions regarding the E–3 and H–1B1 visas.

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(c) * * *

(3) *E–3 visas:* Subject to paragraph (d) of this section, this subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the E–3 visa classification in specialty occupations under INA section 101(a)(15)(E)(iii) (8 U.S.C. 1101(a)(15)(E)(iii)). This paragraph (c)(3) applies to labor condition applications filed on or after (*this will be the date of publication of the final rule in the* ***Federal Register***). E–3 labor condition applications filed prior to that date but on or after May 11, 2005 (i.e., the effective date of the statute), will be processed according to the E–3 statutory terms and the E–3 processing procedures published on July 19, 2005 in the **Federal Register** at 74 FR 41434.

(4) *H–1B1 visas:* Subject to paragraph (d) of this section, subparts H and I of this part apply to all employers seeking to employ foreign workers under the H–1B1 visa classification in specialty occupations described in INA section 101(a)(15)(H)(i)(b1) (8 U.S.C. 1101(a)(15)(H)(i)(b1)), under the U.S.-Chile and U.S.-Singapore Free Trade Agreements as long as the Agreements are in effect. (INA section 214(g)(8)(A) (8 U.S.C. 1184(g)(8)(A)). This paragraph (c)(4) applies to H–1B1 labor condition applications filed on or after November 23, 2004. Further, H–1B1 labor condition applications filed prior to that date but on or after January 1, 2004, the effective date of the H–1B1 program, will be handled according to the H–1B1 statutory terms and the H–1B1 processing procedures as described in paragraph (d)(3) of this section.

(d) *Nonimmigrant on E–3 or H–1B1 visas*—(1) *Exclusions.* The following sections in this subpart and in subpart I of this part do not apply to E–3 and H–1B1 nonimmigrants, but apply only to H–1B nonimmigrants: §§ 655.700(a), (b), (c)(1) and (2); 655.705(b) and (c); 655.710(b); 655.730(d)(5) and (e)(3); 655.736; 655.737; 655.738; 655.739; 655.760(a)(8), (9) and (10); and 655.805(a)(7), (8) and (9). Further, any of the following references in subparts H or I of this part, whether in the excluded sections listed above or elsewhere, do not apply to E–3 and H–1B1 nonimmigrants, but apply only to H–1B nonimmigrants: references to fashion models of distinguished merit and ability (H–1B, but not H–1B1 and E–3 visas, are available to such fashion models); references to a petition process before the DHS (the petition process applies only to H–1B, but not to initial H–1B1 and E–3 visas); references to additional attestation obligations of H–1B-dependent employers and employers

found to have willfully violated the H–1B program requirements (these provisions do not apply to the H–1B1 and E–3 programs); and references in § 655.750(a) or elsewhere in this part to the provision in INA section 214(n) (formerly INA section 214(m)) regarding increased portability of H–1B status (by the statutory terms, the portability provision is inapplicable to H–1B1 and E–3 nonimmigrants).

(2) *Terminology.* For purposes of subparts H and I of this part, except in those sections identified in paragraph (d)(1) of this section as inapplicable to E–3 and H–1B1 nonimmigrants and as otherwise excluded:

(i) The term ''H–1B'' includes ''E–3'' and ''H–1B1'' (INA section 101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1)); and

(ii) The term ''labor condition application'' or ''LCA'' includes a labor attestation made under section 212(t)(1) of the INA for an E–3 or H–1B1 nonimmigrant professional classified under INA section 101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1).

(3) *Filing procedures for E–3 and H–1B1 labor attestations.* Employers seeking to employ an E–3 or H–1B1 nonimmigrant must submit a completed ETA Form 9035 or ETA Form 9035E (electronic) to DOL in the manner prescribed in §§ 655.720 and 655.730. Employers must indicate on the form whether the labor condition application is for an ''E–3 Australia,'' ''H–1B1 Chile'' or ''H–1B1 Singapore'' nonimmigrant. Any changes in the procedures and instructions for submitting labor condition applications will be provided in a notice published in the **Federal Register** and posted on the ETA Web site at *http://www.foreignlaborcert.doleta.gov*.

(4) *Employer's responsibilities regarding E–3 and H–1B1 labor attestation.* Each employer seeking an E–3 or H–1B1 nonimmigrant in a specialty occupation has several responsibilities, as described more fully in subparts H and I of this part, including the following:

(i) By submitting a signed and completed LCA, the employer makes certain representations and agrees to several attestations regarding the employer's responsibilities, including the wages, working conditions, and benefits to be provided to the E–3 or H–1B1 nonimmigrant. These attestations are specifically identified and incorporated in the LCA, and are fully described on Form ETA 9035CP (cover pages).

(ii) The employer reaffirms its acceptance of all of the attestation obligations by transmitting the certified labor attestation to the nonimmigrant, the Department of State, and/or the USCIS according to the procedures of those agencies.

* * * * *

5. Amend § 655.705 as follows:

a. Revise the section heading to read as set forth below.

b. Amend paragraph (c), by removing the phrase ''employer responsibilities under the H–1B1 program'' and adding in lieu thereof the phrase ''employer's responsibilities under the H–1B1 and E–3 programs''.

§ 655.705 What Federal agencies are involved in the H–1B, H–1B1, and E–3 programs, and what are the responsibilities of those agencies and of employers?

* * * * *

6. Amend § 655.715 as follows:

a. Amend paragraph (1) in definition of *Specialty Occupation* by removing the phrase ''For purposes of the H–1B (not including H–1B1) program'' and adding in lieu therof the phrase ''For purposes of the E–3 and H–1B programs (but not the H–1B1 program)''.

b. Revise the definition of *Employer* to read as follows:

§ 655.715 Definitions.

* * * * *

Employer means a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H–1B, H–1B1 or E–3 nonimmigrants and/or U.S. worker(s). In the case of an H–1B nonimmigrant (not including E–3 and H–1B1 nonimmigrants), the person, firm, contractor, or other association or organization in the United States that files a petition with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant. In the case of an E–3 and H–1B1 nonimmigrant, the person, firm, contractor, or other association or organization in the United States that files an LCA with the Department of Labor on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant.

* * * * *

7. Amend § 655.720(a) by removing the phrase ''regarding H–1B and H–1B1 nonimmigrants'' and by adding in lieu thereof the phrase ''regarding H–1B, H–1B1 and E–3 nonimmigrants''.

8. Amend § 655.730 as follows:

a. Revise the introductory text to read as set forth below.

b. In paragraph (c)(4)(vii), remove the parenthetical phrase ''(and not applications regarding H–1B1 nonimmigrants) and add in lieu thereof the parenthetical phrase ''(and not application regarding H–1B1 and E–3 nonimmigrants)''.

c. In paragraph (c)(5), remove the sentence ''Separate LCAs must be filed for H–1B and H–1B1 nonimmigrants.'' and add in lieu thereof the sentence ''Separate LCAs must be filed for H–1B, H–1B1, and E–3 nonimmigrants.''

d. In paragraph (d)(5), remove the parenthetical phrase ''(and not regarding H–1B1 nonimmigrants)'' and add in lieu thereof the parenthetical phrase ''(and not applications regarding H–1B1 or E–3 nonimmigrants).

§ 655.730 What is the process for filing a labor condition application?

This section applies to the filing of labor condition applications for H–1B, H–1B1, and E–3 nonimmigrants.

* * * * *

9. Amend § 655.740(a)(2)(ii) by removing the phrase ''disqualified from employing H–1B nonimmigrants under section 212(n)(2) of the INA or from employing H–1B1 nonimmigrants under 212(t)(3) of the INA'' and adding in lieu thereof the phrase ''disqualified from employing H–1B nonimmigrants under section 212(n)(2) of the INA or from employing H–1B1 or E–3 nonimmigrants under section 212(t)(3) of the INA.''

10. In § 655.750, paragraphs (a) and (b)(2) are revised to read as follows:

§ 655.750 What is the validity period of the labor condition application?

(a) *Validity of certified labor condition applications.* A labor condition application (LCA) certified under § 655.740 is valid for the period of employment indicated by the authorized DOL official on Form ETA 9035E or ETA 9035. The validity period of a labor condition application will not begin before the application is certified and the period of authorized employment begins. If the approved application is the initial LCA issued for the nonimmigrant, the period of authorized employment must not exceed 3 years for a labor condition application issued on behalf of an H–1B or H–1B1 nonimmigrant and must not exceed 2 years for a labor condition application issued on behalf of an E–3 nonimmigrant. If a nonimmigrant is employed before the LCA is certified, the period of authorized employment in the aggregate is based on the first date of employment and ends:

(1) In the case of an H–1B or H–1B1 LCA, on the latest date indicated or three years after the employment start

date under the LCA, whichever comes first; or

(2) In the case of an E–3 LCA, on the latest date indicated or two years after the employment start date under the LCA, whichever comes first.

(b) * * *

(2) Requests for withdrawals must be in writing and must be sent to ETA, Office of Foreign Labor Certification. ETA will publish the mailing address, and any future mailing address changes, in the **Federal Register**, and will also post the address on the DOL Web site at *http://www.foreignlaborcert.doleta.gov.*

* * * * *

11. Amend § 655.760(b) by removing the phrase ''H–1B1 nonimmigrants'' and adding in lieu thereof the phrase ''regarding H–1B1 and E–3 nonimmigrants.''

12. Revise the heading of subpart I to read as follows:

Subpart I—Enforcement of H–1B Labor Condition Applications and H–1B1 and E–3 Labor Attestations

Signed in Washington, DC, this 3rd day of January, 2007.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration, Labor.

Paul DeCamp,

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[FR Doc. 07–44 Filed 1–11–07; 8:45 am]

BILLING CODE 4510–30–P