

**COMMENTS OF**

**THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION**

**TO**

**THE INTERIM FINAL RULE**

**ISSUED BY THE U.S. DEPARTMENT OF LABOR**

**REGARDING THE H-1B PROGRAM**

**65 FEDERAL REGISTER 80110 (DECEMBER 20, 2000)**

The American Immigration Lawyers Association (AILA) is a bar association of almost 7,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization, the promotion of reforms and the facilitation of justice in the field. AILA's members are well acquainted with the H-1B program, having significant experience representing and educating both the employers who have need of essential international personnel and the employees who meet that need. The members of our association represent large and small businesses, academic institutions, research facilities, and government entities who employ foreign nationals. AILA is thus uniquely qualified to comment on the interim final rule.

## **I. DOL'S COMPLIANCE WITH GOVERNING LAWS**

On January 5, 1999, the Department of Labor published a Notice of Proposed Rulemaking ("NPRM") which would implement statutory changes in the H-1B program made to the Immigration and Nationality Act ("INA") by the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA") (Title IV, Pub. L. 105-277). The ACWIA, as amended by the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21") (Pub. L. 106-313), among other things, temporarily increases the maximum number of H-1B visas permitted each year, and temporarily continues the new attestations required by ACWIA, until October 2003.

The Interim Final Rule implements many of the provisions found in the ACWIA. The regulation also purports to republish (in most cases, in changed form) other provisions that have been the subject of legal or factual dispute in the long history of the rulemaking process by the Department of Labor ("DOL") for this nonimmigrant visa category.

AILA is concerned, that in its desire to put interim final rules in place before the change in Administration, DOL has sacrificed the careful consideration and process that are its obligation to Congress and the public pursuant to the Administrative Procedure Act ("APA"). We are also deeply troubled that the regulation was put into effect before a workable system for receiving and processing labor condition applications ("LCAs") under the new rule was in place. For the reasons described in more detail below, we ask that the Department reconsider the many ill-advised and *ultra vires* provisions of this IFR, and act quickly to amend this regulation and rectify those errors.

### **A. Adequate Notice and Comment Opportunity Was Not Provided.**

An NPRM must state "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. section 553(b)(3). The NPRM "must describe the range being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on." *Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

A final rule may differ from the NPRM, but it must be a "logical outgrowth" of the NPRM. *Horsehead Resource Dev. Co. v. Browner*, 16 F.3d 1246, 1267 (D.C. Cir. 1994). "A final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commenters with their first occasion to offer new and different criticisms which the agency might find convincing." *Fertilizer Institute v. EPA*, 935 F.2d. 1303, 1311 (D.C. Cir. 1991). Thus, substantial deviation between the manner in which an issued is addressed in an NPRM and its ultimate resolution in a final rule violates the APA.

The IFR differs substantively from the proposed rule and, as discussed throughout this comment in greater detail. For example, DOL has for the first time in the IFR announced that it will treat fringe benefits as wages for enforcement purposes, thus introducing a new remedy that could not have been anticipated from the NPRM, has imposed a 90-limit on the multinational benefits rule, has assumed jurisdiction over displacement allegations, and has granted itself the authority to unilaterally extend the time limit on the conduct of investigations. None of these items were logical outgrowths of information contained in the NPRM.

**B. In Many Areas DOL Has Exceeded Its Obligations or Imposed Burdens on Employers That Are *Ultra Vires*.**

DOL exceeds its implementing authority by imposing burdens not contemplated by the statute in several key areas. "[S]tatutes granting power to administrative agencies should be strictly construed as conferring only those powers granted expressly or by necessary implication." *Walker v. Luther*, 830 F.2d 1208, 1211 (2d. Cir. 1987). An agency cannot add to the statute "something which is not there" through regulation. *United States v. Calamaro*, 354 U.S. 351, 359 (1957). In other words, a regulation cannot amend or add to a statute. See *California Cosmetology Commission v. Riley*, 871 F. Supp. 1263, 1270 (C.D. Cal 1994). DOL's requirements in these areas, discussed in more detail throughout this comment, are nothing short of *ultra vires*. For example, the substantive and documentary burdens imposed on dependent employers subject to the recruitment attestation are simply not required by the statute. Similarly, DOL's attempt to regulate travel by personnel goes well beyond any authority granted by Congress. The provisions noted in the comment, and in previous comments regarding earlier incarnations of this regulation, should be withdrawn and re-couched to fall within proper parameters for DOL to address.

**C. DOL Treats Its Obligations to Minimize Public Burdens with Contempt.**

Paperwork Reduction Act and Executive Order 12866

The Paperwork Reduction Act ("PRA"), 44 U.S.C. section 3501 et seq., requires a government agency to make an accurate estimate of the burden the agency's regulations are likely to impose on the public. The agency must consider why particular information is necessary in order to implement a legislative provision, and require the minimum information necessary to carry out its mandate. If the agency fails to comply with the

provisions of the PRA, the Office of Management and Budget (“OMB”) has the duty to require compliance before it may approve the collection of the information. Similarly, Presidential Executive Order 12866 (issued September 30, 1993, published at 58 Fed. Reg. 51735, Oct. 4, 1993) instructs federal agencies to minimize the burden on the public, including the business community, to the maximum extent feasible when regulations implementing legislation are promulgated.

Far from minimizing the burden on the public or requiring the minimum information necessary to carry out its mandate, the Department has legislated a veritable explosion of gratuitous burdens, the benefits of which are dubious at best and, to the extent they exist at all, are far outweighed by the enormous public cost of compliance. Despite ample contrary evidence, DOL severely underestimates the burden on H-1B employers that will result from the implementation of the interim final rule and has, as a result, failed to satisfy the requirements of the PRA or Executive Order 12866. DOL has done so by underestimating the number of H-1B dependent employers, ignoring the burden on *all* H-1B employers (not just those who are dependent) that arises from the agency’s new regulatory provisions, and grossly underestimating the respondent costs of implementing the regulations. Indeed, if the PRA were a labor condition application, the degree to which DOL has willfully ignored evidence of the errors in its burden estimates would result in its debarment for making material misrepresentations.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis, describing the anticipated impact of the proposed rule on small entities. DOL has noted that available data and analyses indicate that most of the businesses in the industries in which H-1B workers likely would be employed would meet the Small Business Administration’s definition of “small.” Nevertheless, the Department concluded that the economic impact of the rule would not be significant, based on the argument that most of the new compliance obligations addressed in this rulemaking apply only to a small subset of the full universe of employers that participate in the H-1B program, namely, those that meet the new definition of “H-1B dependent employer” and those found to have committed willful violations or misrepresentations (“willful violators”).

Two problems are raised by DOL’s conclusion here. First, DOL’s own estimates of how many employers are H-1B dependent or willful violators are internally contradictory and unreliable. Second, and more significantly, by dismissing the impact of the regulations on all H-1B employers, DOL severely underestimates the additional burden on small entities. The rules will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, because of the burdens imposed on them by the many hours of paperwork to which *all* H-1B employers—not just H-1B dependent employers and willful violators—are subjected.

**D. DOL Has Made an Incorrect Estimate of the Number of H-1B Dependent Employers.**

The Department estimates that no more than 50 U.S. employers nationwide will be burdened by the proposed rules due to their status as an H-1B dependent employer or a willful violator. First, this estimate is inconsistent with DOL's estimate of dependent employers in the section regarding the Regulatory Flexibility Act (see above discussion), where DOL states that the number of dependent employers will be approximately 200. DOL must address and explain this discrepancy. Furthermore, a close review of DOL's assessment, however, reveals that there is absolutely no logical connection between DOL's premises and its conclusion, and that its estimate is nothing more than a random number unsupported by any reliable data.

DOL previously expressly admitted that there are no data available to determine precisely how many "H-1B dependent" employers will exist under the rule. NPRM, 64 Fed. Reg. at 658. Nevertheless, DOL sets the "upper limit" of H-1B dependent employers at 1,425. It then concludes, without making any logical connection, that "[r]ealistically, we estimate the actual number of H-1B-dependent employers and willful violators under the rule to be no more than from between 100 and 200 employers" *Id.* at 659. The IFR further confirms that there is no data available to make an accurate determination.

AILA cannot overemphasize the need for accuracy in estimating the number of H-1B dependent employers, as this count is used by DOL to determine the time burden created on H-1B dependent employers by specific regulatory provisions, and is offered as the DOL's justification (albeit an inaccurate one) of how the remaining H-1B employer population is allegedly burdened only minimally by the proposed regulations.

**E. DOL Mis-Estimates or Fails to Consider Many of the Burdens on Employers.**

DOL also continues to inadequately describe the burden on H-1B employers arising from the agency's new regulatory provisions including, but not limited to, documentation of H-1B dependency computation, actual and prevailing wages, benefits, and secondary employment, as well as the completion of the new and longer LCA form. AILA's members' collective experience indicates that this failure to consider the extra burden drastically increases the number of employers subject to new paperwork burdens. The number of affected employers and the resultant burden is significantly higher than the DOL suggests. Following are examples of some of the specific areas in which DOL has failed to accurately reflect the true burden:

**Completion of the LCA.** The DOL continues to place its estimate of the average LCA burden for the expanded and revised form at one hour, even though the estimated average burden for the previous, more abbreviated, LCA form was already 1 to 2 hours. The DOL's assertion that the new LCA requirement will impose no additional burden--and in fact impose less burden than the earlier form--is completely unrealistic and without foundation. Given the massive amount of additional information and procedures imposed upon all H-1B employers by the new LCA form, the DOL cannot argue in good

faith that the time burden will now only be one hour, particularly in light of the time estimate provided on the old LCA form.

The estimate provided is startlingly low even if one were to consider the form and its instructions to be the entirety of the burden (and if one were to also presume that the person responsible for compliance is a speed reader and speed typist). But far more than the form and its instructions are involved. Any employer that attempts to rely exclusively on the form and instructions is sure to be in immediate violation of the regulations, since the regulations are filled with requirements for running the employer's business that could not be reasonably anticipated from the form. The regulations themselves are 31 Federal Register pages long, not counting the Preamble, and are dense with paragraph after paragraph of compliance requirements. In many requirements (for example, identifying and documenting prevailing wage), compliance with that item alone can take one hour or more.

But, just as an employer would be foolish to attempt to hire an H-1B worker without studying the regulations, an employer would also be in peril if it stopped at the regulations. The additional 98 pages of the preamble are also required reading, because of their frequent discussions of "enforcement positions" that are not clear or necessarily anticipatable from the regulations. While these "enforcement positions" are of questionable authority, they do so significantly extend the already-overreaching contents of the regulations as to be required study materials for any entity attempting to employ a person in H-1B status.

This absurd estimate of one hour is troubling not only for its attempt to mislead OMB and Congress, but also for the signal that it sends to the regulated public. When an employer completes the form, and finds that that act alone has taken more than the allotted hour, the employer is likely to assume that it must have done all that is required. However, that form have provided barely a clue as to the many hours of compliance action still required. Thus, as in so many of the substantive provisions of this regulation, a trap has been set to cause the innocent employer to commit "violations" where none were intended.

Because the burden estimate is so low even for merely reviewing the form and instructions and preparing the form, and because so much more than that is required to accurately complete the form, either the burden estimate must be revised upwards by many multiples of hours to be even close to accurate, or the many gratuitous requirements of the regulation must be abandoned. Just a few of the additional actions for which estimates must be added or increased are discussed below.

**Single employer calculation.** An area in which the DOL has grossly underestimated the burden is in simply performing "H-1B dependency" calculations with respect to corporate groups. Virtually all companies of any size are required by the regulation to make and document this calculation. To perform H-1B dependency calculations under the DOL's proposed scheme, an employer must first count the total number of its full-time equivalent employees (FTEs). However, to do this, an employer must first determine whether it is either a

member of a “controlled group of corporations.” 65 Fed. Reg. at 80122. If an employer belongs within a controlled group, whether as a subsidiary, a parent, or a “sister” corporation, the employer must then factor in the FTE employee count (and the respective H-1B employee count) of each company within the “controlled group.”

DOL fails to acknowledge that individual companies within a “controlled group of corporations” rarely, if ever, share employee information between themselves. However, in order to perform its H-1B dependency calculation, a subsidiary within a controlled group must contact human resource departments within *each member corporation* of the “controlled group”, poll the current FTE employee count at each corporation, and then poll each member corporation’s H-1B employee count. The corporate research and the back-and-forth communication necessary for this inquiry process will require, depending on the size and scope of the group involved, many hours of work by at least one employee—and probably more—in *each* component company. Worse, because corporate workforces are constantly changing, this process must be re-started each and every time a corporation within the “controlled group” prepares an LCA. The DOL has not factored in such considerations when determining the public burden these new regulations impose.

**Documentation of fringe benefits.** Without providing any supporting evidence or even reasoning for its figures, DOL estimates that only 2500 of the nation’s H-1B employers would be required to spend no more than 15 minutes documenting unwritten fringe benefit plans. This number is less than 5% of DOL’s estimated total of H-1B employers. See 65 Fed. Reg. at 80115. DOL understates both the number of affected employers and the amount of time necessary to comply with the new regulation regarding fringe benefits. To begin with, the new regulations require *all* (100% of) H-1B employers to maintain specific documentation regarding fringe benefits. Whether or not an H-1B employer already maintains such documentation for other IRS or Pension and Welfare Benefits Administration purposes is irrelevant. H-1B employers have never before been required to maintain documentation regarding fringe benefits *within the public access file*, and therefore the only logical conclusion is that no H-1B employers have ever before done so. Because no H-1B employers have previously maintained documentation regarding fringe benefits within the public access file, *all* H-1B employers must now add a new step to public access file creation they never previously followed. DOL cannot infer that only 2500 employers are impacted by the new regulations regarding fringe benefits; all H-1B employers will be affected.

Further, the documentation that many employers already have developed with respect to benefits may not satisfy these new DOL requirements. Thus, all H-1B employers will have to review their existing documents, with a view toward these requirements, and a significant fraction of the affected H-1B employers will need to draft a summary of the fringe benefits offered, in addition to or in lieu of a copy of the plan itself, in order to ensure that the documentation regarding fringe benefits will satisfy DOL upon review. Drafting a memo of any detail, particularly when done to satisfy regulatory requirements, will take longer than the estimated 15 minutes. Even assuming such a memorandum could be drafted in no more than 15 minutes’ time (an unlikely proposition), such a

memorandum must be reviewed and edited by a company's legal counsel in order to ensure that the regulatory burden of providing adequate documentation has been satisfied. The 15 minute estimate, then, woefully understates the true amount of time imposed upon all H-1B employers in meeting this additional regulatory burden. A figure of 3 hours per employer for this function alone would be more accurate.

**Documentation of the actual wage and periodic adjustments to include numeric pay differentials.** The preamble to the regulation provides that “*at a minimum*, the description of the actual wage system in the public access file should identify the business-related factors that are considered and the manner in which they are implemented (e.g., stating the wage/salary range for the specific employment in the employer's workforce and identifying the pay differentials for factors such as education and job duties).” 65 Fed. Reg. at 80194. Though this is stated as the *minimum* requirement for the public access file, the regulation does not even begin to estimate the burden on employers who do not have formal wage systems, or, if they do, have not previously computed the pay differentials per specific permissible factor such as job performance, education, or job duties. The language above indicates that such documentation is a minimum requirement and must be in every public access file for the specific employment in question. The time burden on employers to try to comply with the requirement of documenting the actual wage is immense.

**Secondary displacement inquiry burden on the H-1B employer.** The DOL is requiring a pro-active inquiry regarding possible layoffs by a secondary employer by obtaining a written or verbal assurance, or by including such a clause in the contract. This requirement imposes additional burdens on the employer that the DOL failed to consider in its paperwork burden estimate. There will be burdens associated with creating a verification form or revising a contract. Burdens will also arise from the need for the H-1B dependent employers to evaluate each contract situation to determine whether “indicia of employment” exists. DOL essentially ignores these burdens by declaring that its paperwork burden estimate “properly, does not include the time necessary to persuade a secondary employer to provide such an assurance....” 65 Fed. Reg. at 80114. The DOL never explains why its failure to take such real-world factors into account is “proper.” Given that these burdens did not exist for H-1B employers prior to the new rule, and these burdens now are in effect, AILA is baffled as to why the time this burden imposes is not worthy of calculation.

**Secondary displacement burden on the customer.** DOL also concludes that no burden has been imposed on customers with respect to an inquiry about secondary displacement, stating that it “has no reason to believe that the customer would have difficulty in answering the inquiry.” 65 Fed. Reg. at 80151. According to DOL, each assurance from a secondary employer “will take approximately 5 minutes.” DOL is living in a parallel universe, as the agency's reality is different from that of the business world. When major contracting companies enter into agreements with major corporations, the relationship is complex. The parties engage in extensive negotiations for contractual terms, and significant liability may attach should there be a breach of an agreement based on extensive damages that may be incurred by either party. Thus, if the statutory objective

is to be minimally satisfied, something more than a five-minute inquiry by the customer is needed. The final rule and its accompanying preamble should therefore make a more realistic estimate of the burden involved in making the extensive analysis that the DOL requires, as the real burden is closer to an average of 2 hours.

**Coverage of multiple positions in one LCA.** Section 655.730(c)(2) of the regulation provides that “an employer shall file a separate LCA for each occupation in which the employer intends to employ one or more H-1B nonimmigrants, but the LCA may cover more than one intended position (employment opportunity) within that occupation.” It appears that to the extent this provision is reflected on the new ETA 9035 Form, it is in Part C of the form. That portion of the form, however, and indeed no portion of the new ETA 9035 form, provides any way to practically implement this provision. Part C of the ETA 9035 form (which form will be read electronically, preventing employers from making any supplement, explanation, or addendum to the form), requires employers to insert the occupational code, and to then insert the specific job title. The instructions to Part C of the new ETA 9035 form, essentially define “occupation” as that indicated by the 3 digit occupational code from Appendix 1. As a result, for example, all “occupations” involving computer programming or systems analysis are considered identical, and are to be reflected by the occupational code “030.”

However, the OES Wage Survey, the most common source for prevailing wage information, provides two very different job descriptions and prevailing wages for programmers and for systems analysts. This problem is even worse with the broader occupational categories provided in Appendix 1, such as “Occupations in Mathematics,” “Occupations in Economics,” and “Occupations in Secondary School Education.” Once an occupational code is selected, Part C(5) of the new form requires an employer to insert on a single line, consisting of 29 spaces, the specific job title. Furthermore, the form requires insertion of the Prevailing Wage Part D of the form, and prevailing wages are position specific, rather than occupation specific. This aspect of the form’s design has the practical effect of eliminating the ability of an employer to include “more than one intended position (employment opportunity)” within a given occupation, something which Section 655.730(c)(2) purports to provide to employers.

This is particularly problematic because DOL has relied upon the terms of the regulations in estimating the additional paperwork burden to employers of the new regulations, in accordance with the PRA or Executive Order 12866. DOL has estimated that it will take an employer one hour to complete the form, and that 637,000 LCAs will be submitted annually by 63,500 employers. Because there is no practical implementation of Section 655.730(c)(2) in the new ETA 9035 form, substantially more LCAs will need to be submitted than estimated by DOL, one for each position, not occupation, resulting in yet another underestimate of the burden to employers of the new regulations.

**Documentation of hourly wages for professional employees who are otherwise FLSA exempt.** The DOL declares that only 17% of cases have the prevailing wage expressed as an hourly rate. 65 Fed. Reg. at 80116. DOL provides no source for this statement. In our experience, the State Employment Security Agencies (“SESAs”) regularly provide employers and attorneys with the prevailing wage stated as an hourly rate. Thus, we

believe the number of cases that would be subject to this additional recordkeeping requirement would be much greater. The DOL stated, in response to AILA's previously-expressed concern, that "employer shall convert the prevailing wage determination into the form which accurately reflects the wages which it will pay." *Id.* at 80116. However, DOL fails to acknowledge that affected employers are now required to add a time-consuming extra step each time a new LCA petition is prepared. Further, the DOL still fails to provide any support for its continued assertion that only 17% of H-1B employers will be affected. If the DOL acknowledges that the number would likely be higher, due to the way in which SESAs often provide prevailing wage determinations, and now announces that affected employers must follow an additional step when preparing LCA documentation (specifically, converting the hourly wage from a prevailing wage determination to a monthly or annual wage), it should make some attempt to calculate the time burden placed on all affected employers.

#### **F. DOL Uses Inaccurate Rates to Estimate Respondent Costs.**

DOL continues to estimate the rate of respondent costs of implementing the proposed regulations at \$25 an hour. Again, the Department provides absolutely no basis for this estimate. Rather, DOL posits the *non sequitur* justification that a "\$25 an hour respondent cost is an average cost, which recognizes higher initial cost to effect compliance, as well as the low cost of performing the clerical filing functions. 65 Fed. Reg. at 80117.

DOL never describes which hourly rates comprise the high-end or the low-end of the estimated cost when computing the "average": DOL's \$25 hourly figure appears from thin air. Instead of a justification for this figure, it is simply stated that the annual salaries of employees who perform these functions may range from "several hundred dollars to several hundred thousand dollars where the corporate executive office of a large company performs some or all of these functions themselves." *Id.* No empirical data is provided for this claim.

To reiterate, DOL's cost estimate is groundless, and the Department has essentially admitted this fact upon questioning. Actual respondent costs are much higher in light of the complexity of the regulations. To comply with the regulatory requirements, an H-1B employer must understand all the legal concepts set forth in the rules, then review and digest them, as well as the extensive rulemaking history. The faithful execution of this responsibility absolutely requires the services of legal experts (in-house or outside counsel, or both) who must analyze the labyrinthine regulatory history and apply the various provisions to the particular employer.

Because of the grave consequences of H-1B violation (including fines and potential debarment from use of the immigration laws for virtually all future job applicants), the analysis of the rules usually must be discussed in great detail with management of the company, who must then review and revise as necessary the company's personnel policies and procedures in connection with the hiring of H-1B workers. The regulations also must be thoroughly understood by the employer's human resource department,

which must revise the company's personnel policies and procedures and apply them pursuant to the regulations.

As discussed above, these regulations are extremely complex and their understanding and application require highly technical and specialized professional skills. Thus, the costs of personnel involved would alone exceed \$25 per hour. Fees for legal advice from an outside counsel range from \$100 to as high as \$300 per hour. An in-house counsel with sufficient expertise costs about the same. Compensation of a human resources director or a manager involved would easily exceed \$25 per hour, as would compensation for technical recruiters, who command high salary due to the increasing demand for human resource professionals with technical knowledge and background.<sup>1</sup>

In attempting to respond to AILA's concerns, DOL recognized "that some employers may employ highly-paid professionals to advise them on how to comply with the H-1B program requirements." 65 Fed. Reg. at 80117. Inexplicably, the DOL brushes aside this concern as follows: "However, it is believed that such a need will be short-lived and that once a system is in place, compliance can be maintained without this highly paid professional assistance." Simply put, the DOL's optimism is fantastic, in the literal sense. Only the most reckless of employers would venture into, or remain in, this regulatory maze without legal assistance.

If the history of federal governance teaches any lesson, it is that new regulatory requirements *never* lessen, much less remove, the need for "highly paid professional assistance." These new requirements not only increase the reliance of employers upon "highly paid professional assistance," but the complexity of these requirements ensure that the cost of such services will only increase to reflect the extra effort that must now be expended by such professionals. In conclusion, the \$25 per hour estimate provided by DOL is unrealistic to the point of being ludicrous, and the DOL has as much as admitted that it based its figure upon no empirical data whatsoever.

#### **G. DOL Has Made an Incorrect Overall Estimate of the Total Public Burden.**

Relying on its own baseless estimates and misguided assumptions, the DOL now estimates the total annual respondent hour costs for all information collection as \$16,685,575, more than double its original estimate.

As discussed above, the agency's estimate of the burden arising from information collection is incorrect with regard to a number of provisions. Similarly, its estimate of the respondent costs is inaccurate. As the total public burden is calculated by multiplying DOL's estimated respondent costs by its estimated total number of hours required for information collection, the Department's estimate of the total public burden is unrealistic and unreliable.

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<sup>1</sup> Although the DOL claims it has no specific wage data necessary to determine a reasonable estimate, a semblance of such wage data is available to the DOL through the OES wage survey.

## **H. DOL's Must Comply with the Laws Governing Its Activities.**

In developing a process by which it promulgates a proposed or interim regulation, DOL is governed by several statutes, over and above the Paperwork Reduction Act, including the Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, and relevant Executive Orders. As a result, the agency must perform a more thorough study of the burden that will arise as a result of its regulations, and determine a more reasonable, reliable estimate. As the Executive Order 12866 (58 Fed. Reg. 51735, Oct. 4, 1993) mandates, “[e]ach agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.” Accordingly, DOL should not be allowed to enforce the burdensome requirements proposed in its regulations until it is able to make an accurate determination of the total burden imposed on H-1B employers based on reliable information.

DOL attempts to justify its failure to comply with the regulatory process and nonetheless impose unprecedented additional burdens on employers by referring repeatedly to H-1B hiring as “voluntary.” There is, however, very little that is “voluntary” about hiring H-1B workers. Congress clearly documented an urgent need for additional qualified professionals to fill thousands of positions, particularly in international commerce and areas affected by it (including the high-tech field). Such qualified workers are necessary for these companies to survive in the competitive global marketplace. As discussed above, it is this finding by Congress that led to the enactment of ACWIA and more recently to enactment of the American Competitiveness in the Twenty-First Century Act (“AC21”).

Businesses hire H-1B workers because it is the only way they can obtain the qualified workers to fill the required positions. The H-1B “program” is in reality a government monopoly, where businesses have no choice but to accept extremely burdensome requirements of the program only because highly skilled foreign workers are absolutely necessary for their survival. Hiring an H-1B worker is “voluntary” only in the same sense that hiring any other worker is “voluntary”—you can opt to either make the hire or not have the work done.

DOL states repeatedly that because its regulations will not likely result in an annual effect on the economy of \$100 million or more, the rules are not subject to a full economic impact analysis or to review by Congress as an unfunded mandate. We do not believe this is readily apparent given that the agency has grossly underestimated the adverse impact of the proposed rules.

On the contrary, when the real costs and burdens are tallied carefully, the cost of this involuntary program may well exceed \$100 million per year, will adversely and materially affect small businesses, and cause substantial harm to a significant segment of the economy.

Unless and until DOL first takes steps to develop accurate data on which to make projections of cost and burden, and complies with all operative federal statutes and

executive orders, the agency should not proceed with further rulemaking. Moreover, as noted in the following section, DOL should reverse its thinly veiled presumption that employers are generally law violators, and instead (in light of the paucity of successful DOL enforcement actions over the eight-year history of the present H-1B program) adopt a greater number of streamlined general presumptions of good-faith employer compliance. Thus, DOL, in complying with the cited statutory mandates governing the rulemaking process, should endeavor to adopt a larger number of “design” rather than “performance” standards. Absent full compliance by DOL, however, the OMB should exercise its proper rulemaking oversight responsibilities in order to ensure full agency adherence to the applicable laws governing agency rulemaking.

### **I. The Tone and Tenor of the Regulation Treats Employers as Presumed Violators.**

The tone of the entire interim final rule conveys to the public the impression that all employers that use H-1B professionals do so in order to exploit a vulnerable population at the expense of the American workforce. This is apparent in the many areas in which the Department has taken a statutory mandate and placed the burden of proof on the employer rather than assume that employers seek to comply with their legislative and regulatory burdens. This is particularly true in the many areas in which DOL oversteps its legislative limitations, as is discussed in more detail throughout this comment. For example, the ACWIA contains a savings clause in the provision regarding recruitment (Section 412(a)(3), which states that “nothing in this [section] shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.” However, DOL establishes an elaborate paperwork burden on employers to demonstrate that they are conducting recruitment pursuant to DOL’s understanding of industry-wide standards. DOL’s lack of understanding of employers, and its presumption that employers of H-1B workers are all violators, is nowhere as evident as here. Any employer, with few exceptions, will hire workers pursuant to H-1B visas because the workers have a unique or special set of skills unavailable to that employer through the American workforce.

DOL mandates up-front recordkeeping requirements on employers rather than relying on the investigative process. This flies in the face of the original Congressional intent of the program, affirmed through ACWIA, to be an attestation based, enforcement-driven process. By over-regulating the details by which employers meet their burdens, the Department is ignoring the enforcement-based nature of the LCA process as conceived by Congress.

Finally, the underlying philosophy of the regulations is to educate and encourage employers to comply with the immigration laws rather than to create a mechanism for automatic punishment. In implementing such complex procedures whereby even the most conscientious of employers could face significant fines or possibly debarment, DOL must exercise its discretion to provide an opportunity to cure violations that are of technical or procedural in nature or involve an employer’s misunderstanding of its compliance obligations. Such a mechanism currently exists in the Form I-9 compliance

scheme and should exist for the H-1B program as well. Under INA § 274A(b)(6), before sanctions are issued against an employer, the Immigration and Naturalization Service would inform the employer, in writing, of the failure to comply with Form I-9 obligations and give 10 business days in which to correct the violation. A similar procedure should be implemented with regard to technical violations of the attestation requirements contained in the LCA. Thus, before a DOL investigator imposes a fine or debarment, he or she should notify the employer of the violations in writing and provide a reasonable period of time to cure the violations.

## **II. REGULATION SECTION 655.705: THE ROLES OF THE AGENCIES**

### **A. The IFR Includes Language that Would Arbitrarily Restrict H-1B Portability and Be in Clear Violation of the AC21.**

The IFR attempts to add impermissible restrictions on the H-1B portability provision of the AC21 that are inconsistent with the clear language and intent of the statute. Section 105 of the AC21 “allows persons previously issued a visa or otherwise provided H-1B status to accept new employment upon the filing of a new petition by a new employer, subject to the final approval of the petition.” This section unambiguously provides that a class of foreign nationals broader than foreign nationals currently in H-1B status may immediately begin work for an H-1B petitioning employer upon the petitioner’s filing the H-1B. Unfortunately, the language of the regulation and the preamble disregard this clear Congressional directive and attempts to arbitrarily limit H-1B portability to those foreign nationals (1) *in* H-1B status who (2) are changing employment to *another* H-1B employer where (3) the different petitioning employer has filed a petition *supported by a certified LCA*. 65 Fed. Reg. at 80118 and section 655.705(c)(4). DOL thus not only acts arbitrarily in this instance but also acts beyond its authority by including language relating to regulation of work authorization for foreign nationals. This is an area under INS, not DOL, jurisdiction.

Section 105 of the AC21 provides work authorization to (1) a nonimmigrant (2) previously granted an H-1B visa or H-1B status (3) who was lawfully admitted into the United States (4) when an employer has filed a non-frivolous petition for (5) new employment (6) before the nonimmigrant’s authorized stay expires and (7) before the nonimmigrant has worked without authorization following his or her current lawful admission to the U.S. When these statutory elements are satisfied, foreign nationals in the following situations are allowed under the AC21 to work for a new employer pending the INS decision on the nonimmigrant petition:

1. An L-1B nonimmigrant previously issued an H-1B visa, whether or not she ever sought admission based on that visa, benefits from this provision since she would qualify as a nonimmigrant previously issued an H-1B visa. The statute’s language refers to a nonimmigrant “previously issued a visa or otherwise provided nonimmigrant status under section

101(a)(15)(H)(i)(b)” rather than to a nonimmigrant currently in proper H-1B status.<sup>2</sup>

2. An H-1B nonimmigrant who separated from employment three months before the new employer filed the H-1B petition would also benefit from the new provision. Nowhere does the new provision require that the nonimmigrant currently possess proper H-1B status. The AC21 language, “expiration of the period of status authorized by the Attorney General,” exactly tracks the language at the INA §212(a)(9)(B)(ii). INS has interpreted this to refer to the period of stay as provided for on the Form I-94 or to the period after either (1) an immigration judge makes a status violation determination in removal proceedings or (2) INS makes such a determination when adjudicating a benefit application. See *Memorandum of Paul W. Virtue*, HQIRT 50/5.12, September 19, 1997. Thus, many out-of-status foreign nationals may benefit from the AC21.
3. An employer may also immediately transfer an H-1B Biochemist to an H-1B Vice President of Research and Development position upon filing an H-1B petition characterizing the VP position as new employment. The AC21 refers to “new employment,” not a “new employer.”

This entire discussion in the regulation and preamble is gratuitous, since it addresses matters within the purview of INS. Thus, for the reasons discussed above and below, all of subsection 655.705(c)(4) should be deleted, and the preamble discussion on this topic should be abandoned entirely.

**B. Certification of an LCA before Filing an H-1B Petition is Unnecessary and Without Legal Authority.**

The IFR revises 20 C.F.R. section 655.705, and at (c)(4) provides:

The employer shall not allow the nonimmigrant worker to begin work until INS grants the worker authorization to work in the United States for the employer, or in the case of a nonimmigrant who is already in H-1B status and is changing employment to another H-1B employer, until the new employer files a petition *supported by a certified LCA*.

(Emphasis added.)

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<sup>2</sup> DOL’s arbitrarily restrictive interpretation of the AC21 is even more obvious when one considers that the AC21’s unambiguous language nowhere even requires that an employer file an H-1B petition as opposed to another type of nonimmigrant petition, in order to provide immediate work authorization. The above examples assume that the employer files an H-1B petition. But even that is not required by the AC21’s language. That broad language only requires the “filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a).” The INA at subsection §214(a), however, refers broadly to the Attorney General’s control over nonimmigrant admissions to the United States, and in no way restricts the AC21 portability provisions to H-1B petitions. The AC21 language is thus extremely broad.

DOL has no authority to mandate the certification of the LCA as a prerequisite to filing a petition with the INS. The INA states: “No alien may be admitted or provided status as an H-1B non-immigrant...unless the employer has *filed* with the Department of Labor an application...” (INA section 212(n)(1)). (emphasis added). The INA does not require certification. INS has the sole authority to determine what is necessary for filing a petition. (“The petition shall be in such form and contain such information as the Attorney General shall prescribe.” (INA section 214(c)) DOL overreaches its authority in attempting to require LCA certification before the H-1B petition is filed with INS.

The rule should omit this discussion entirely. Failing that, it should make clear that the employer may allow a nonimmigrant worker who previously has been in H-1B status and is changing employment to begin work when the new employer files a petition and has filed the requisite labor condition application (“LCA”) with DOL. Congressional intent is clear on this point. Section 105 of the AC21 allows persons previously issued a visa or otherwise provided H-1B status to accept new employment upon the filing of a new petition by a new employer. As noted above, the INA only requires the *filing* of an LCA as a prerequisite to an alien being admitted or being provided H-1B status.

On January 1, 2001, the Honorable Spencer Abraham, then Chair of the Senate Immigration Subcommittee wrote to Mary Ann Wyrsh, the Acting Commissioner of the Immigration and Naturalization Service:

On the H-1B portability provision, the Senate Judiciary Committee report for S.2045 states that, “This section allows an H-1B visa holder to change employers at the time a new employer files the initial paperwork, rather than having to wait for the new H-1B application to be approved. This responds to concerns raised about the potential exploitation of H-1B visa holders as a result of a specific employer’s control over the employee’s legal status...it would frustrate the purpose of the portability provision for INS to require a labor condition application (LCA) be approved. I am aware that DOL, in its recently published regulations, appears to require approval of an LCA as condition for portability. That is a clearly inappropriate interpretation of the law and, in any event, it is INS, not DOL, which is required to interpret the portability provision. It is common and accepted practice to file H-1B petitions prior to approval of the LCA when DOL is not certifying cases in a timely manner because of a technological failure or other reasons. It is the signature and dispatch of the LCA by the employer to DOL that constitutes the making by the employer of certain attestations or promises concerning wages and working conditions.

The IFR’s apparent requirement that a new employer file a petition “supported” by a certified LCA will frustrate the Congressional intent to allow H-1B nonimmigrants in the United States greater job flexibility will restrict the ability of H-1B visa holders to move quickly to a new job, frustrating the very portability the provision was designed to facilitate.

While DOL claims that certification is necessary to ensure employers meet LCA requirements, it is clear that an employer is bound by the terms and conditions of the LCA from the date it is signed, not filed. In addition, an authorized official of the employer must sign the form (under penalty of perjury and criminal penalties under the False Statements Act) before it is filed with the DOL. An employer must also attest that it “is offering and will continue to offer during the period of authorized employment” the required wage. DOL’s regulations further specify that LCA requirements, including age, working conditions and strike/lockout, “shall be satisfied when the employer signs” the LCA. Notice must merely be accomplished “on or within 30 days” before the date the LCA is filed with DOL. Of course, there is no worker to whom the terms and conditions of the LCA apply until the nonimmigrant begins work. But the AC21 structures the portability period to be a period of authorized employment, and thus once the nonimmigrant begins work, the LCA protections also begin. Thus, even though DOL’s regulations indicate that the agency cannot begin an investigation until the LCA is certified, the key obligations of the LCA begin when the application is signed and the nonimmigrant begins work. An employer is liable for any violations from that date forward.

In implementing Section 105 of the AC21, INS heretofore has allowed employers to file petitions to transfer H-1B nonimmigrants with copies of LCAs that have been filed, but not certified, as long as a certified LCA is later submitted. This practice facilitates the Congressional intent helping H-1B nonimmigrants and employers deal with DOL delays in processing LCAs.

DOL frequently takes more than two weeks to issue LCA certifications (although it is required by statute to do so within seven days, and cannot access its share of the H-1B education and training fees for enforcement until it meets the 7-day limit). Delays have resulted from DOL’s implementing an automated system for certifying LCAs (the “faxback” system), which was supposed to streamline LCA processing but has at times been backlogged for many weeks due to technical problems. In the IFR, DOL suggests that these problems have been corrected, but even before the faxback system was modified to accommodate the new expanded form under the IFR, the system suffered significant delays. And, since the implementation of the new form, the system has suffered an extensive breakdown. The problems with the LCA faxback system are detailed later in this comment under the discussion of the labor condition process. Suffice it to say, the delays in processing LCAs are so profound that requiring that employers wait until they receive the certified LCA before filing a petition with INS effectively prevents H-1B nonimmigrants and their new employers from utilizing the portability provision in the timely manner intended by Congress. For this reason, as well as the reasons stated in the section above, subsection 655.705(c)(4) should be deleted.

### III. REGULATION SECTION 655.715: DEFINITIONS

#### A. The Definition of the Term “Area of Intended Employment” Should Be Revised to Acknowledge that Employers Are in the Best Position to Judge Normal Commuting Distance.

AILA agrees that there “is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas.” While we agree that the employer should make good faith efforts to utilize surveys that fit the MSA and PMSA geographical area, this is not always possible. Some established wage surveys include data based on consolidated metropolitan statistical areas. Wherever the survey has a wage narrowed to the metropolitan statistical area encompassing the employer’s worksite, this wage should be used. For some occupations, however, there may be an insufficient sampling for the survey to have MSA or PMSA data, but the survey may have CMSA data. Also, the worksite may be within a CMSA, but not within an MSA, and thus only CMSA data is available. In these instances, the employer should be able to use CMSA data. Consequently, AILA also agrees that employers should be able to use geographic surveys broader than an MSA or PMSA where no valid local surveys can be found or the job location lies beyond the border of the MSA or PMSA.

Furthermore, the employer is in the best position to evaluate the factual circumstances affecting the normal commuting distance to its facility. Consequently, DOL should defer to the employer’s judgment unless the employer is clearly in error. AILA is concerned, however, that the IFR does not provide employers with sufficient flexibility in the review of the “widely varying factual circumstances among different areas.” To the contrary, the IFR obligates employers to demonstrate affirmatively that it was not possible to obtain a representative sample of similarly employed workers. Upon such a showing, DOL asserts that a CMSA survey merely *should* be acceptable. This places costly additional burdens on employers.

AILA, therefore, proposes that the definition of the term “area of intended employment” be revised to acknowledge that the employer is in the best position to evaluate the myriad factors affecting the local normal commuting distance. We would also propose that the regulation clearly permit an employer to use a survey from a broader geographic area, where the employer has made good faith efforts to locate a survey that fits the MSA or PMSA geographic area and is satisfied that the broader geographic area (e.g., CMSA) is within normal commuting distance or the employer is located outside the MSA or PMSA.

#### B. The Common Law Definition of “Employment Relationship” Is Outdated and Lacks Sufficient Clarity.

AILA continues its opposition to the overly broad and antiquated definition of an employment relationship that DOL insists upon using. We reiterate our suggestion that DOL adopt the clearest available test: i.e., if a worker is classified as an independent contractor for tax and benefit purposes, such worker should not be considered an employee. Employers should be able to rely on one standard for all purposes, not only to

simplify recordkeeping burdens but also to enhance their ability to meet all obligations. Employees considered to be independent contractors for IRS purposes, but not for immigration purposes, will cause confusion and uncertainty.

**Interestingly, the IFR, in the context of determining full-time equivalent employees in section 655.736(a)(2)(i), defers to an employer’s designation of a worker as an employee where the company treats the person as an employee for tax purposes. Similarly, applying an employer’s designation for tax purposes of a worker as an employee or an independent contractor, rather than applying the outdated common law standard proposed in the IFR, would be much clearer and less burdensome on both DOL and employers. Therefore, AILA encourages DOL to adopt a single applicable standard that will lessen confusion and increase employer compliance.**

### **C. The Definition of “Place of Employment” is Overreaching, Vague and Contradictory**

DOL’s overreaching attempts to legislate limitations on travel, based upon such irrelevant factors as developmental activity and job function, are at best puzzling. Once again, DOL is attempting to micromanage employers’ conduct of business activities, by arbitrarily restricting the mobility and activities of employees and creating from thin air an unworkable system whereby an employee’s every movement can subject an employer to new obligations. The IFR’s scheme is nothing more than a variation of the properly rejected “roving” and “floating” employees of previous regulations. It still ignores the statutory definition of a place of employment, and is incomprehensible and vague in its real-world application.

The INA defines the basic obligations of H-1B employers as being limited to the “place of employment” of the H-1B worker. *See, e.g.*, INA section 212(n)(1)(C) (the employer must provide notice “at the place of employment”) and 212(n)(1)(B) (no “strike or lockout in the course of a labor dispute in the occupational classification at the place of employment”). DOL goes much farther than the statute would permit in equating a “worksites” to a “place of employment.” The statute uses the term “worksites” in a narrower context (*e.g.*, the ACWIA attestation on dependent employers and willful violators that prohibits placement of an H-1B nonimmigrant at a worksite of another employer without first completing the displacement inquiry, INA section 212(n)(1)(F)).

Also, the descriptions of what constitutes developmental activity, and of which particular duties and what durations constitute worksite circumstances, are not clear and would be impossible for businesses to administer with any consistency. For example, a determination that a peripatetic H-1B software instructor does perform her job functions at “worksites” for developmental activity purposes would be contrary to the determination that those same duties would, under the job functions provision, be clearly not at locations that would constitute “worksites.” And a physical therapist that did not travel in the regular nature of her employment but “filled in” on a traveling basis would be subject to the “worksites” definition, while a regularly traveling physical therapist would not be. There is also the absurdity that an auditor performing an audit at a client site would be considered by DOL to be at a “worksites”, even though it is clearly not his

“place of employment.” Employers will be faced with making difficult decisions almost daily on which section would prevail. And certain industries, notably the IT staffing industry, will be particularly adversely affected by these definitions.

The examples that DOL provides in the definitions to illustrate “developmental activity” do not clarify the majority of difficult decisions employers face daily. For large companies with decentralized management, such activities are almost impossible to even track, let alone monitor with consistency. Even for smaller companies, applying such conceptually complex tests will prove burdensome, as the hybrid nature of many jobs will not easily fit into one section or the other. Part of the problem is a simple reality so often overlooked in these regulations: that employers ordinarily treat their H-1B employees exactly the same as they treat their other employees. Since there is no need to limit or keep track of travel by other employees, superimposing a requirement to track and thoroughly analyze each trip by an H-1B worker imposes a heavy burden of creating an entirely new system for these purposes. And, since H-1B compliance is usually handled by human resources or legal departments at most companies, to which employees’ business trips are hardly ever reported, those most concerned with H-1B compliance will never have the information needed to meet this burden.

All employers would be better served with clearer standards that can be more easily understood by the reporting entities (managers or the employees themselves) and applied by the employers. A test that goes back to the beginning and incorporates the statute, requiring only that the H-1B obligations be applied to a person’s place of employment, rather than at any “worksite,” would be a good start, being simpler to both apply and administer.

#### **IV. REGULATION SECTION 655.730: LABOR CONDITION PROCESS**

##### **A. The IFR Fails to Provide Adequate Assurance that DOL Will Meet Its Statutory Obligation to Certify an LCA within Seven Days of Receipt.**

DOL has not provided mechanisms to meet the statutory requirement to certify LCAs within 7 days of filing. Under section 212(n)(1)(D) of the INA, DOL is required to certify an LCA “within 7 days of the date of the date of the filing of the application.” In light of the portability provisions contained in the AC21 and the provision contained in the regulation purporting to require the filing of a petition with a certified LCA (section 655.705(c)(3)), the 7-day statutory requirement now is more critical than ever for DOL to honor.

The IFR, however, does not provide adequate assurances that DOL will meet its statutory timing obligations. Taking into account the pilot faxback program, which consistently experienced backlogs well in excess of 7 days, the IFR should have established clearly DOL’s intent to aggressively ensure compliance with the statutory time constraint. Unfortunately, the IFR not only retreats from DOL’s statement in the NPRM that an LCA should ordinarily be processed within 48 hours of receipt, the IFR instead treats the statutory 7-day period as merely a “reasonable period of time” after which DOL obligates the employer to investigate the delay, calculate whether the LCA should be filed anew,

and then resubmit the LCA (a process which would presumably restart the 7-day clock). As such, the IFR not only attempts to obliterate DOL's statutory obligation, but it also imposes costly additional burdens on employers, who will be required to calendar the 7-day period for each LCA filed, develop a system for monitoring the status of the automated system, investigate whether an LCA must be resubmitted, and finally resubmit the LCA when all other efforts fail.

Furthermore, the IFR does not contain any statement regarding when the automated system will deem an LCA to have been received *and* date stamped. Indeed, the IFR notes that it is technologically infeasible to verify receipt of a particular LCA. Also, the IFR makes no provision for ensuring that employers are notified of rejected LCAs within the 7-day period, nor does the IFR provide for an expedited process for applications being resubmitted after the 7-day period or following a rejection caused by system error. Again, the net result of the IFR's failure to adequately address its statutory obligation will place costly additional burdens on employers, who must now constantly monitor every LCA submitted via the faxback system.

In truth, the faxback system has been a resounding failure. Even before the system was re-tooled to accommodate the LCA form generated by the IFR, processing delays had become endemic. For example, on December 27, 2000, DOL had over 11,000 LCAs in its backlog, and was only certifying LCAs received before December 8, 2000. On top of those backlogs, many LCAs submitted to the faxback system simply disappeared and could never be traced.

The situation has only worsened since the conversion to accommodate the new form. The disaster that has been the hallmark of the converted system was virtually guaranteed from the outset. After many months of being unable to get its ludicrously overreaching rules cleared by the necessary parties, DOL hurried its IFR into publication on literally the last day possible to finalize a regulation in the departing Administration. In this untoward rush, insufficient opportunity was afforded to test the new system. The result has been catastrophic for the business community. During the first two months since the modification of the system, the faxback system has been almost totally nonfunctional. DOL recently indicated that the worst of the system's problems now seem to have been resolved. But even with that "resolution," the system operates significantly below an acceptable level. As of April 9, 2001, the "official" backlog was three weeks long. Unofficially, the backlog period is incalculable because there are many thousands of applications that have simply disappeared without being entered into the system or have been "denied" for unrecognizable reasons, requiring employers to start the process over. Thus, it can take weeks or even months to obtain a certified LCA, and there are no signs of this situation resolving itself in the near future.

A major factor in the Department's inability to meet its 7-day statutory obligation is the nature of the technology itself. Fax traffic is inherently flawed, with documents becoming distorted in transmission or lost in transit with no way to trace them. Add to this the frequent breakdowns of the system, and the problems generated by processing error. It is doubtful that the Department will ever meet its statutory processing obligation using this technology.

AILA does appreciate the budgetary problems presented by a return to hand processing the LCAs at the regional offices. Indeed, if DOL were to return to hand processing, it would be forced to experience some of the burden imposed by the new form that employers are being required to bear. While this would be only a fraction of the employers' burden, it could give the Department at least the beginning of an indication of why the business community objects so strenuously to these regulations.

Therefore, AILA suggests that DOL implement an electronic filing system. Much more reliable than fax technology, electronic filing would ensure a rapid turnaround and more accurate processing of the LCAs. We recognize that there are technological and cost issues associated with signature recognition in e-filing. However, those problems could be readily overcome by requiring that a signed LCA be placed in the public access file and included with the petition package sent to INS. Nothing in the statute requires that the LCA be signed when it is submitted to, or certified by, DOL. The LCA still would be readily enforceable, since it would have to be signed before the point at which any H-1B worker could begin work under it, even under AC21 portability (which is triggered when the petition is filed with INS).

**AILA thus urges that DOL convert to electronic filing and require the LCA signature in the public access file and in the filing with the INS. This would be consistent with the requirement in the previous regulations that required the original signature only in the public access file when the LCA was faxed to DOL.**

#### **B. The Rules Regarding Corporate Restructurings Over-Regulate the Process and Are Inconsistent With Recent Legislation.**

AILA appreciates that DOL believes that it is attempting to simplify the immigration implications of corporate restructurings for H-1B nonimmigrant employees. Unfortunately, the IFR does just the opposite. The IFR is not, as the preamble indicates, changing a "current requirement" that a new filing be made whenever the employer identification number ("EIN") changes. In fact, DOL regulations have *never* contained such a requirement. Thus, this regulation is not an attempt to liberalize the regulation, but an effort to regulate this element of corporate restructuring. Unfortunately, the specifics of the regulation reflect a misunderstanding of both how personnel issues related to employees in H-1B status are handled and how corporate restructurings take place. Most importantly, the regulation also is inconsistent with recent legislation.

In the IFR, DOL requires a new employer in a corporate restructuring to execute a sworn statement acknowledging the assumption of liabilities and obligations for the LCAs of the predecessor employer(s). Under the IFR, if this does not take place before the corporate change, new LCAs and petitions for the H-1B workers in the affected corporate entities must be filed.

DOL's requirement that new H-1B petitions be filed under these circumstances is inconsistent with the provisions of section 401 of the Visa Waiver Permanent Program Act, signed into law on October 30, 2000, which states:

“An amended H-1B petition shall not be required when the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner.”

DOL’s requirement of filing an amended H-1B petition usurps the authority of the INS to determine when an amended petition is required. Moreover, under the unambiguous language of section 401 of the Visa Waiver Permanent Program Act, neither INS nor DOL can require an amended H-1B petition in a corporate restructuring situation covered by the statute. DOL attempts to interpret the statute but has unfortunately overreached its authority as well as the authority that has been explicitly bestowed on its sister agency, the INS.

The requirement that the certification be made prior to an H-1B nonimmigrant being employed in the new corporate structure is not workable in most corporate settings. The hiring of individuals under H-1B status is hardly a grand corporate strategy, developed and managed at the highest levels of the company. Rather, employees are hired under H-1B status by individual entities only when the necessity arises. Their employment, like the employment of any other employee, is managed by the human resources office and the individual departments and offices. Because corporate restructurings are often the subject of extraordinary secrecy (usually to avoid problems with such issues as insider trading, stock price fluctuations, and disruptive worrying among vendors, customers and employees), the people most involved with H-1B hiring will not be aware of these transactions until after they have occurred. It is often only at that time that personnel issues such as H-1B employment are addressed. Under the IFR, that time would be too late.

The practicalities of corporate restructurings have long been recognized by INS, which generally has either treated such restructurings as immaterial, or has applied a rule of reason in allowing companies sufficient time to file amended petitions if needed. AILA urges that DOL apply a similar standard of materiality: that as long as the company acknowledges its continuing obligations under previous labor condition applications, no further writings should be necessary. The detailed rules as to what must be in the public access file, and when these prescribed documents must be there, are unnecessary and add a needless paperwork burden.

The best approach is to infer a presumption that, if the restructured entity has not filed new LCAs for the absorbed H-1B workers, the obligations under the old LCAs have been assumed. This would be consistent with the language of the October 30, 2000 legislation, which requires no new petition when the interests and obligations of the original employer have been succeeded to. The very act of *not* filing a new petition is evidence, in and of itself, of such succession.

## **V. REGULATION SECTION 655.731(a) & (b): WAGE REQUIREMENTS & DOCUMENTATION**

### **A. The Actual Wage Provisions Have Improved, but Still Overreach.**

AILA appreciates the modifications made to the requirements for actual wage compliance in the IFR, compared with the NPRM. Specifically the deletion of the requirement for an “objective” system calculable by a third party comes a bit closer to reflecting the actual language of the statute. However, it appears that the Department missed a major point: that a large part of the problem with the “objective” wage system is that it requires employers to develop a wage system even if they do not have one. Despite the comment in the IFR that the “Department is imposing no obligation to create such a system” (65 Fed. Reg. at 80193), the IFR is replete with requirements for a wage system.

DOL suggested in the NPRM and suggests again in the IFR that the documentation needed to ascertain the system that the “employer uses to determine the wages of non-H-1B workers” will have to be prepared once a year and will take one hour per employer. 65 Fed. Reg. at 80116. This low burden estimate demands that documentation requirements be streamlined and simple to accomplish. However, DOL has continued to use broad language in demanding that the “employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the wage statement.” Section 655.731(b)(1). DOL should indicate in the regulation that this burden is met for actual wages if the employer simply maintains documentation that shows the H-1B wage rate is consistent with the wage rates for any other “individuals with similar experience and qualifications in the specific employment in question at the place of employment.” This is the retention requirement in section 655.731(b)(2).

However, the language “retain documentation specifying the basis it used to establish the actual wage,” as well as language remaining unchanged in section 655.760(a)(3) requiring an explanation of the system used to set the actual wage, suggests that employers must explain and document the entire “basis” or “system” of determining the wage system for the position. In other words, this language seems to require documentation of the very wage system that the IFR says it is not requiring. Indeed, section 655.731(a)(2) indicates that “every H-1B employee is to be paid in accordance with the employer’s wage system,” thereby apparently indicating that employers are required to create such a system. To the contrary, under the statute they are required only to pay the H-1B worker at least as much as what they pay to their other employees with similar credentials for the employment in question. This does not require a wage system, but instead requires a simple comparison. It was this same misguided desire to determine the wage “system” or “basis” that led DOL in its ill-fated and now abandoned attempt to require the details and mechanics of an objective wage system. There is no real need for DOL under the H-1B program to intrude so deeply into employers’ wage mechanisms, nor to require such burdensome and time consuming reporting requirements.

The statute requires that the wage attestation procedure ensure that the wages of H-1B workers do not undercut the wages of U.S. workers. Part of this formula is the requirement that H-1B employees receive wages equal to or greater than equally qualified U.S. workers similarly employed by the employer. There is no reason to require documentation explaining the “basis” of an actual wage system. As stated above, merely describing how the wage compares with the wages for the other relevant co-employees is sufficient. This is consistent with DOL’s recognition that where there are no other such employees, then the actual wage is the H-1B worker’s wage. See section 655.731(a)(1). The U.S. work force would clearly be protected by the combination of the prevailing wage attestations and a simple comparison with the actual wages of similarly situated employees, without the necessity for more intrusive regulatory controls.

There is also no reason to continue to require systems for retaining documentation on *all* employees in the specific employment in the place of work, rather than the narrower group required by the statute, of “other individuals with similar experience and qualifications in the specific employment in question at the place of employment.” It is important to note that the required documentation must be retained for one year past the date of employment of the H-1B worker. This could require record maintenance for well over seven years. Under this directive, the employer is required to maintain records for a set of employees who are not directly related to the basis of determining the actual wage for some unknown period of time that cannot be predicted in advance. In order to accomplish this, a specific system must be constructed and maintained to require retention of records for all employees who worked in the specific employment at any time an H-1B worker was employed. DOL has no legitimate purpose in requiring that additional documentation be retained for this larger group.

If DOL is going to persist in its unrealistic one-hour annual time estimate for record keeping, it should use the adoption of the final rules as an opportunity to reduce the record keeping time needed to that level. One step in that direction would be to formulate a clear and simple approach. DOL should seek to reduce the significant burdens it otherwise imposes on employers by removing the requirement of documentation of the basis of the wage system.

**B. Actual Wage Is Not a Moving Target under the Statute, and Should Not Be One under the Regulation.**

The H-1B worker must be offered the greater of the prevailing wage or the actual wage offered to “other individuals with similar experience and qualifications in the specific employment in question at the place of employment.” INA section 212(n)(1)(A)(i)(I). The IFR’s requirement that the employer must continually revise its documentation to demonstrate the employer is meeting the actual wage runs counter to the statute, which specifies that actual wage, like prevailing wage, is “based on the best information available *as of the time of filing the application.*” INA section 212(n)(1)(A)(i)(II). (Emphasis added.) Making actual wage a moving target is contrary to the statutory requirements of fixing the employer’s obligation regarding both the prevailing and actual wage at the time of filing. The regulation not only overreaches in making the actual wage fluid, but in requiring continual revisions to the documentation.

### **C. A Change in the Prevailing Wage Language Requires Explanation.**

In section 655.731(a)(2), the phrase, “Except as provided in paragraph (a)(3) of this section...” has been inserted before the correct statement that “the employer is not required to use any specific methodology to determine the prevailing wage.” Paragraph (a)(3) refers to the obligation to compare the prevailing wage with the actual wage and pay the higher of the two. It is not clear how this would be an exception to the employer’s choice of prevailing wage methodologies. Clarification is needed.

### **D. The Provisions Relating to Service Contract Act Wages Are Flawed.**

DOL has determined that, where a wage rate under the McNamara-O’Hara Service Contract Act (“SCA”) exists for an occupation within a specific area of intended employment, the SCA wage rate will prevail notwithstanding exemptions for professionals and manager under the Fair Labor Standards Act (“FLSA”). Under the regulation, the existence of an available SCA wage precludes the use of other wage surveys and disallows the use of a 5% wage variance.

A major problem with the imposition of SCA wages is the lack of availability of SCA wage data. AILA has been informed that DOL has contracted with a private source to provide geographically based wage data, including SCA wage data where possible. This wage data will be made available on DOL’s website but because of geographic anomalies and other problems with SCA, the website may not be able to identify an existing SCA wage in all circumstances.

The chronic lack of availability of SCA wage rates provides an undue burden to employers and exposes them to an unfair risk of a violation if an SCA wage exists but cannot be identified. To protect employers from unwarranted violations due to lack of SCA wage data, the SCA wage should only be used if it is clearly identified on the DOL website at the time the LCA is being prepared.

DOL should only use SCA wages for an occupation where the wage data is derived only from sources within the specific occupation and not obtained through the slotting mechanism pursuant to 29 C.F.R. section 4.51(c). The slotting mechanism results in the use of wage data from unrelated occupations and can generate an inappropriate wage for a specific occupation. Moreover, *Matter of El Rio Grande*, 98-INA-133 (BALCA, Feb. 4, 2000) requires that DOL establish a reasonable basis for an SCA wage determination. Because it has been difficult to obtain the actual source of the wage data in SCA wage determinations, an inappropriate wage determination based on slotting would be unfair to the employer and would bog down the process for SESAs, which have an obligation to provide the source of the data at the employer’s request.

The implication of section 655.731(a)(2)(iii), which states that “if the job opportunity is in an occupation not covered by paragraph (a)(2)(i) or (ii), the prevailing wage shall be [the weighted average as determined by one of the other methodologies],” is that SCA wages are absolutely determinative of the prevailing wage. On the other hand, the regulation also correctly acknowledges in section 655.731(a)(2) the legislative history of

the LCA provisions, which clearly demonstrates that “the employer is not required to use any specific methodology to determine the prevailing wage.” The Miscellaneous and Technical Immigration and Nationality Amendments Act (“MTINA”) indicated that the prevailing wage should be determined based on the “best information available as of the time of filing the [LCA].” In enacting MTINA, Congress specifically did not require the use of any prescribed source of prevailing wage data. Rather, an employer “may utilize a State agency determination, such as SESA, an authoritative independent source, or other legitimate sources of wage information” to determine the prevailing wage. 137 Cong. Rec. S18243 (daily ed. Nov. 26, 1991). This legislative goal of allowing employers access to the “best information available” would be undermined if DOL insists that its prescribed SCA rate/OES survey scheme be used wherever it exists, as employers would be essentially subject to liability for exercising their statutory right to choose the best information available at the time of filing the LCA. Thus, it appears that the language in subparagraph (a)(2)(iii) is an error, and should be revised to say “as an alternative to the wages established in paragraph (a)(2)(i) or (ii).”

#### **E. SESA Wages Should Not Be Based on OES Data.**

DOL takes the position that the best wage source is one obtained from the state employment security agency (“SESA”). SESAs are mandated by DOL to use the OES survey where no SCA, Davis-Bacon Act or collective bargaining wage exists. Putting aside for the moment the issue of whether the DOL has the authority to prefer one wage source over another, its position on this particular issue conflicts with the prevailing wage requirements of sections 656.40 and 655.731(a)(2)(iii). These sections provide that the prevailing wage shall be the weighted average rate of wages, determined by adding the wages of similarly employed workers and dividing the total by the number of such workers. The regulations further preclude discretionary bonuses or other types of non-guaranteed compensation to be included in assessing whether a wage offer meets the prevailing wage.

The OES survey does not comply with the regulations and guidelines in at least two ways:

1. The OES survey includes the use of discretionary items including production bonuses, commissions, cost-of-living allowances, incentive pay and piece rates. The inclusion of these items creates an inflated prevailing wage rate.
2. The wage computations in the OES survey do not comply with the definition of weighted average of the salaries of workers surveyed. The OES survey does not obtain specific salaries for each worker but rather requests that employers identify how many employees fit into defined wage ranges. The breadth of the OES wage intervals can exceed \$7,000 and easily result in substantial inaccuracies in computing the regulatory definition of the prevailing wage.

Unless the OES survey can be brought into compliance with the regulations, it should not be used. Alternatively, the regulations should be amended to relax the stringent

requirements on employer-provided surveys.

The OES system is flawed for several other reasons, and is inferior to many authoritative surveys used by employers. The OES wage data reduces the universe to less than 1,000 possible occupation designations. This results in gross overgeneralization. To overgeneralize the data further, the OES system only provides for two (beginning and skilled) experience levels. Other authoritative surveys, many of which were used by SESAs in the past, use four or five experience levels. Multiple levels allow for a reasoned wage based upon years of experience and levels of responsibility that reflect real world patterns. Level II of the OES survey uses the same wage for moderately experienced positions and the most senior positions within an occupation. The use of only one wage for all experienced workers creates gross inaccuracies at both ends of the spectrum.

The regulations should not designate the SESA wage as being superior to other surveys as long as the OES survey is used in its present form. The results are to unfairly expose the employer to greater risk in an enforcement action if a survey other than the patently inferior SESA-quoted OES survey is used.

#### **F. The Provisions Relating to Higher Education Wages Need Revision.**

The purpose of section 415 of the ACWIA was to recognize that prevailing wages for institutions of higher education and nonprofit research and government institutions are different than for-profit sectors for employees, because these institutions are invariably pressed for funds but at the same time offer intangible rewards that cannot be measured by wage averages. It recognizes that these education and research institutions conduct research for the public benefit. It frees them from private market comparisons for all employees, not only researchers. It strictly forbids DOL from using any wages other than those of “employees at such institutions and organizations in the area of employment.” ACWIA § 415(a). DOL must adhere to this Congressional intent in its rules.

AILA supports DOL’s clarification that research includes sciences, social sciences and the humanities. However, there are still issues with the IFR. The distinction between Government and non-profit researchers makes little sense. As noted by Sen. Abraham, much of the basic science and medical research done at research institutions is federally funded. For example, in the medical field, National Institutes of Health guidelines determine the wages of grant-supported researchers. DOL’s reliance, as discussed in the preamble, on its use of its existing surveys of higher education institutions [OES Program for colleges and universities] to determine wages is not consistent with statutory language or intent. The database is flawed. In many fields the purported data in the DOL’s current survey would suggest that wages in the educational sector are higher than the private sector. Further, DOL’s data are not limited to the area of employment as absolutely required by the statute. The survey methodology does not include nonprofit research institutions and is therefore furthered skewed, especially as applied to these institutions.

DOL does not have a database that complies with the dictates of the statute, and should explicitly acknowledge its limitations. Rather than grudgingly permitting independent

wage surveys, DOL should work with the covered institutions to quickly produce data to effectively implement section 415 of the ACWIA. Rules developed to govern typical market studies need to be revised to effectively measure these markets as required by section 415. Further, the groups over which the prevailing wages are calculated should only include similarly employed individuals: individuals in positions that are substantially comparable within an occupation. A prevailing wage based on a survey over a group of occupations would violate the laws. The application of methodologies should be driven by the clear Congressional intent in enacting the ACWIA to make skilled foreign workers more readily available to nonprofit research organizations, as well as institutions of higher education. The DOL must devise a flexible, speedy and cost effective system of accurately measuring prevailing wages for these institutions.

## **VI. REGULATION SECTION 655.731(c): SATISFACTION OF WAGE REQUIREMENT**

### **A. Benefits**

#### **1. The Treatment of Benefits as Wages Exceeds DOL's Authority.**

ACWIA, as it is incorporated into the INA at section 212(n)(2)(C)(viii), includes as "benefits" to H-1B nonimmigrants "cash bonuses and noncash compensation, such as stock options (whether or not based on performance) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers."

While DOL simply included the wage-benefit topic under the definition of benefits in the request for comments in the NPRM, there was no proposed rulemaking on the subject of benefits as wages. Nevertheless, in the IFR, DOL found itself somehow concurring with unnamed commenter "that Congress intended that the requirement for offering benefits to H-1B workers on the same basis and criteria as they are offered to U.S. workers... includes both benefits paid as compensation for services rendered and working conditions." 65 Fed. Reg. at 80168. Leaping from this *nonsequiter*, DOL proceeds to equate benefits with wages for enforcement purposes. In fact, in all prior incarnations of the regulation, benefits were treated as working conditions. It is in that context that Congress decreed that failure to offer benefits to H-1B workers under the same criteria as to U.S. workers would be a violation of section 212(n)(1)(A). To suddenly change this approach without notice and comment is a clear violation of the APA.

In any event, this new approach makes no sense. While benefits with taxable income value, such as bonuses and payment of accrued leave on termination, could reasonably be regarded as wages, such benefits as vacation and holiday leave and health, life and disability insurance are not wages under any generally understood business terms. It is clear that the Department chose to arbitrarily decree these benefits as wages to authorize itself to impose yet another penalty not authorized by Congress: "back benefits." Apart from being an unrecognizable concept, the payment of back benefits is not a sanction that Congress put into DOL's arsenal, and DOL has not authority to put it there itself.

## **2. Multinational Company Rules Require Simplification and Adequate Notice & Comment.**

AILA congratulates DOL for its attention and response to the initial AILA comments on the NPRM on this topic. The IFR provisions on benefits for multinationals are substantially more acceptable in light of DOL's consideration and implementation of the comments it received.

That being said, the IFR still requires improvement as to the multinational benefits provisions at section 655.731(b)(1)(viii)(D) and (c)(3)(iii)(A),(B) and (C). In those sections, DOL distinguishes between those H-1B employees in the U.S. for less than 90 days and those in the U.S. for more than 90 days, without any statutory or logical basis for the distinction. Those H-1B workers who perform services and remain on foreign benefit plans for more than 90 days, and continue to receive foreign benefits for the reasons articulated in AILA's previous comment, are no different from those who perform services and remain on foreign benefit plans for less than 90 days. The employer obligations with respect to them should not be different either.

The IFR changes the regulatory obligations once the H-1B worker "is in the U.S. for more than 90 consecutive calendar days (or from the point where the worker is transferred to the U.S. or it is anticipated the worker will likely remain in the U.S. for more than 90 consecutive days)." Section 655.731(c)(3)(C). This articulation provides an uncertain and potentially dangerous trap for an employer which seeks the admission of an H-1B worker for a specific short term project, under section 655.731(c)(3)(B), intended by all parties to be completed in less than 90 days but which, in the normal course and despite the best intentions and efforts of all parties, takes more than 90 days to complete. Different regulatory burdens are placed on that employer for no good reason. Penalties for noncompliance can be imposed where no improper conduct is at issue. This is highly contrary to DOL's stated intent of liberalizing the multinational company rules.

Further, it is difficult if not impossible for the employer in such a situation to determine precisely when, under the promulgated formulation, it needs to alter its conduct to comply with the different and heightened regulatory burdens contained in section 655.731(c)(3)(C). If a bright line test is to be imposed, it should be a clear bright line test, not a trap for an innocent employer seeking to comply with the regulations. The "less than 90-day" obligations in subsection (B) are more than sufficient protection for the H-1B worker, and that the additional complications in subsection (C) are unnecessary to meet that objective.

In that regard, guidance on an appropriate regulatory program can be found in the regulatory scheme that governs Social Security obligations under the totalization agreements to which the U.S. is a party. Generally, the provisions of totalization agreements covering temporary transfers of key foreign personnel to the United States permit the transferee to elect to remain covered by and contributing to foreign social insurance plans rather than transferring temporarily to the U.S. Social Security system. Simply placing notice of the election in the file evidences compliance with most such

agreements. On audit, proof of the continued contribution to the foreign plan is provided. The duration of such alternative programs can be many years.

Such agreements resolve the issue of duplicate contributions by employers to multiple plans, and ensure that the benefits to the temporarily transferred worker are maintained where those benefits will be most likely used. The regulatory implementation scheme is simple and provides protection for the interests of all concerned. AILA suggests that DOL revisit this issue and utilize such a simplified plan to accomplish the statutory and regulatory purposes.

Whether DOL heeds AILA's recommendations or not, APA rules require a full notice and comment period before the multinational rules can be effective. The strictures of the IFR in this area contain many micro-managing details not anticipated by the NPRM. AILA finds the IFR requirements overly complex and impractical for the use of most multinational corporations, mooting DOL's good intentions in this area.

### **3. DOL Is Correct in Many of Its other Definitional Approaches to Benefits.**

DOL indicates that it will consider that "home-country" benefits meet the regulatory criteria if they are "equitable relative to the U.S. benefit package." AILA applauds DOL's determination that "equitable" does not necessarily mean "dollar for dollar" and that DOL will engage in a "qualitative rather than a quantitative review" in enforcement actions, considering all of the relevant facts and circumstances. AILA expects that the proof of DOL's commitment will be in its adherence to its statement that where there is "no appearance of contrivance to avoid payment of U.S. benefits" DOL "will not second guess the employer." AILA trusts that DOL will not allow the exception to replace the rule.

AILA further congratulates DOL in acknowledging that no further definition of "benefits" is required. AILA concurs with Senators Abraham and Graham in this position, and is heartened that DOL accepts and accedes to the position.

DOL also is to be applauded on its agreement that the public access file need not contain proprietary data, and that the employer can satisfy public access documentation requirements by a simple notation concerning "home-country" benefit elections.

#### **B. The Benching Rules.**

As a preliminary matter, AILA notes that that the H-1B portability provisions recently enacted by AC21 will add a layer of mobility that was previously lacking for H-1B employees. The H-1B portability provisions authorize an H-1B nonimmigrant, under certain circumstances, to "accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant." INA Section 214(m)(1). Thus, an H-1B employee changing H-1B companies can start work prior to petition approval. DOL does not comment on the benching provisions in connection with "increased portability" for H-1B status recently enacted into law even though the IFR

was issued after the passage of AC21. AILA interprets DOL's silence as agreement with AILA's view that AC21 does not affect the substantive interpretation of the benching provisions.

**1. "Enters into Employment," not "Reports to Work," is the Proper Standard.**

DOL should be applauded for its language in the Preamble that correctly notes that "entered into employment" should *not* be construed as the day the alien arrives in the United States, nor any day before petition approval. 65 Fed. Reg. at 80172. Such a construction would impose unreasonable expectations on both employer and employee.

However, DOL's rulemaking on the issue of "entering into employment" imposes a vague standard that exceeds the statutory requirements. The INA, as amended by ACWIA, states that the wage requirement for full-time and part time H-1B employees is triggered after the employee has "entered into employment with the employer." INA section 212(n)(2)(C)(vii)(I, II). But, the INA does *not* specify that the wage requirement attaches when the employee "reports to work, first makes him/herself available for work" as DOL's section 655.731(c)(6)(i) does. 65 Fed. Reg. at 80218. This would seem to indicate that an H-1B nonimmigrant making him/herself available for work will trigger an "entering into employment" obligation without further employer action. DOL's regulatory language fails to link the express 30 and 60-day periods given to employers by Congress to set reasonable start dates for their H-1B nonimmigrant employees with the "entering into employment" language. For example, under DOL's regulatory language, an employee could learn of the approval of the H-1B petition by calling INS's automated system and then report to work immediately. Under DOL's regulation, the employer would be obligated by regulation to pay the wage in this situation or face investigation and/or penalties, even though the employee has no documentation yet to satisfy the I-9 verification requirement.

The only support offered for DOL's approach is DOL's note that the FLSA requires payment for orientation or training time if there is an employment relationship. 65 Fed. Reg. at 80172. AILA does not disagree with DOL on this point, but does not find this proper support for DOL's proposition that an employee can decide unilaterally when the employment relationship will start. AILA's proposal in the comments to the NPRM that the payment obligation should begin when the work or training *actually starts* also comports with the FLSA and is a much more reasonable interpretation of the INA.

Congress, in section 212(n)(2)(C)(vii)(III), granted employees and employers very reasonable 30 and 60-day windows in which to start wage payment. These windows open when the approved H-1B petition becomes effective, either due to U.S. admission under the petition or the granting of a change of employer/status petition for H-1B nonimmigrants already resident in the U.S. The extra time period allows for reasonable start dates in light of delays arising from the petition and relocation process as well as the annual numeric cap on total H visas. Due to these factors, petitions are regularly approved by INS well after the "start date" listed on the petition and labor condition application. Not often is it possible to know whether a petition filed in February will be

approved in April, May, June or October. After approval finally occurs, employers need time to arrange for workstation, orientation, relocation, training and everything else needed to start the H-1B nonimmigrant working. The INA gives employers this time under 212(n)(2)(C)(vii)(III). Similarly, employees may need time for relocation issues such as finding an apartment and arranging children's schooling. Like their U.S. counterparts, many foreign workers just want to take a few weeks off between jobs for rest and relaxation. The statute allows flexibility for these factors, but DOL's "first makes him/herself available for work" standard may not.

## **2. DOL's Position on Export Licensing is Contrary to Public Policy and Unnecessary under Law.**

ACWIA amends INA section 212(n)(2)(C)(vii)(I) to establish a rule intended to penalize employers who put an H-1B worker into "nonproductive status due to the nonimmigrant's lack of a permit or license." While DOL's regulations at section 655.731(c)(6)(ii) contain only one implementing statement that "matters such as the worker's obtaining a State license" are not relevant to the nonproductive time determination, DOL's Preamble adamantly disputes the persuasive arguments made by ACIP and Intel differentiating export licenses from the INA "lack of permit or license" mandate.

Neither the Preamble nor the regulation adequately respond to the comments of ACIP and Intel differentiating export control licenses from the "due to the nonimmigrant's lack of a permit or license" language of the INA. As ACIP clearly noted, the nonimmigrant's lack of a license or permit is "distinguishable from an export control license which must be procured by an employer in a process which can take three to six months." DOL's response however, states: "clearly the employee is legally eligible to work, but work is simply not available (even if due to circumstances beyond the employer's control)." 65 Fed. Reg. at 80172. DOL's reading polarizes the statute, deflecting responsibility for nonproductive time either to the employer or the employee, and seeing no area in between. Under this unreasonable reading of the statute, if the decision of the H-1B candidate is not at issue, then the employer is always in violation. Encouraging the exposure of H-1B nonimmigrants without an export license to forbidden technology is contrary to public policy. There is no support for this assertion, especially when it would force an employer to risk violation of federal law to make an H-1B nonimmigrant who is subject to an export license requirement report to work prior to the approval of the license. This is clearly not the sort of "job shop" benching abuse that was contemplated by Congress when crafting ACWIA. It is within DOL's discretion to recognize the strong public policy served by allowing employers to consider the lack of export license a "circumstance rendering an employee unable to work."

## **3. DOL's Position on Hourly Part Time Employment is Generally Acceptable.**

DOL's softening of the harsh NPRM language on part time employment is generally acceptable. DOL has stepped back from the NPRM's suggestion that workers who sometimes work more hours than indicated on the petition be paid for hours that exceed

the petition, when such hours are not actually worked. 65 Fed. Reg. at 80172. The IFR incorporates the simple standard that AILA and Senators Abraham and Graham advocated, that nonproductive pay be based on the number of hours per week on the H-1B petition. This tracks the language of the statute, which states an employer will pay an H-1B nonimmigrant designated as part time “for such hours as are designated on such petition consistent with the rate of pay identified on such petition.” INA section 212(n)(2)(C)(vii)(I). Where a range of hours is listed on the petition the IFR requires payment for “at least the average number of hours normally worked.” Section 655.731(c)(7)(i). This reading is also acceptable as long as the average is computed over a reasonable period of time as noted below.

AILA understands DOL’s concern in the Preamble over situations where an employee listed as part time is actually working in a fulltime capacity as possible misrepresentation. However, AILA cautions DOL that full consideration should be given to the circumstances before making a finding of misrepresentation. An H-1B petition and underlying LCA are generally valid for three years, and the fact that surges in workload of a part time worker that may last for several months does not necessarily represent a change to fulltime capacity. In workload surge and similar cases, DOL should consider the long-term employment practices of the employer before making a finding of misrepresentation.

AILA commends DOL’s statement in the Preamble agreeing with AILA’s position that the filing and approval of a new H-1B petition reflecting part-time hours will relieve the employer of the fulltime payment obligation. 65 Fed. Reg. at 80172. AILA encourages DOL to add this position to the regulatory text.

#### **4. The IFR’s Treatment of Plant Shutdowns Is Inconsistent with a Reasonable Reading of the Statute and with Legislative History.**

As AILA noted in its original comment on the NPRM, the legislative history clearly shows that Senator Abraham did not regard plant closings as benching. Senator Abraham stated that INA 212(n)(2)(C)(vii)(IV) “makes clear that an employer does not commit a violation of the prevailing/actual wage attestation by granting an H-1B worker a period of unpaid leave or reduced pay for reduced hours worked at the request of the H-1B worker. Thus, H-1B employees taking unpaid leave for other reasons, i.e. leave under the Family and Medical Leave Act or other corporate policies, *annual plant shutdowns for holidays or retooling*, summer recess or semester breaks or personal days or vacations, *should not be considered ‘benched’*.” (Emphasis added.) Cong. Rec. S12754, October 21, 1998.

In this very straightforward statement, Senator Abraham, who sponsored ACWIA in the Senate and negotiated the final language of the legislation, stated that wage and benefit liability does *not* attach for annual plant shutdowns. This view is consistent with section 212(n)(2)(C)(vii)(I), which requires wages to be paid when an H-1B worker is “in nonproductive status due to a decision by the employer (based on factors such as lack of work),” and can be read to regard periods of unproductive status due to “annual plant shutdowns for holidays or retooling, summer recess... etc.” not to be “due to a decision

of the employer.” In addition, subsection (IV), permitting non-payment of wages during periods of nonproductivity, states: “[t]his clause does not apply to a failure to pay wages to an H-1B nonimmigrant for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.” Thus, nonpayment for plant shutdowns and similar situations can be viewed as “circumstances rendering the nonimmigrant unable to work,” consistent with Senator Abraham’s comments.

When statutory language is ambiguous, the regulatory agency must look to legislative intent when interpreting a statute and promulgating regulations to implement the statute. DOL has frequently acknowledged that a primary purpose of the statute is to protect U.S. workers. Forcing employers to pay H-1B nonimmigrants in circumstances where U.S. workers would not be paid hardly protects U.S. workers, but instead subjects employers to a Hobson’s choice of either violating the national origin discrimination laws or violating DOL’s regulations. Congress can hardly have intended such a result.

#### **5. DOL’s Comments regarding Unpaid Leaves of Absence at an H-1B Employee’s Request Are in Error.**

With regard to unpaid leave, DOL states in the Preamble that the Department will not “relieve an employer from liability simply because the employee agreed to periods without pay in the employment contract.” 65 Fed. Reg. at 80171. The statute provides no authority for such a provision, which unreasonably interferes with the freedom of U.S. employers and H-1B workers to negotiate fairly and enter into arms-length agreements for terms and conditions of employment that would otherwise comply with DOL regulations. Many employment agreements provide for unpaid disciplinary leave.

Accordingly, if an H-1B worker accepts an offer of employment that includes provisions for unpaid disciplinary leave, and is put on disciplinary leave without pay pursuant to the terms of the employment agreement, it should not be considered “nonproductive status due to a decision of the employer” because the H-1B worker agreed to the terms of employment and it was the act of the H-1B nonimmigrant that caused the disciplinary action under the employment agreement. Since many of the provisions of ACWIA require employers to treat H-1B workers in the same manner as U.S. workers, such as offering the same benefits etc., it is inconsistent with these provisions to require employers to discipline H-1B workers in a different manner from U.S. workers when U.S. workers are subject to disciplinary unpaid leave. Requiring U.S. employers to discipline H-1B workers in a different manner than it disciplines similarly employed U.S. workers does not further the stated goals of protecting H-1B and U.S. workers and does nothing to improve the competitiveness of the U.S. workforce.

#### **6. DOL’s Definition of Termination Is Inappropriate and Unrealistic**

Section 655.731(c)(7)(ii) of the IFR states that the payment obligation ends if there is a bona fide termination of the employment relationship pursuant to INS regulations at 8 CFR 214.2(h)(11), which, according to the IFR, “require the employer to notify INS that

the employment relationship has ended” and regulations at 8 CFR 214.2(h)(4)(iii)(E) which the IFR says “require the employer to provide the employee with payment for transportation home under certain circumstances.” Further, the preamble states that “[t]he Department would not likely consider it to be a *bona fide* termination for purposes of this provision unless INS has been notified that the employment relationship has been terminated...and the petition canceled, and the employee has been provided with payment for transportation home where required...” 65 Fed. Reg. at 80171. These statements strongly imply that notification to INS is a prerequisite to the termination being considered *bona fide*.

However, in the DOL stakeholder’s meeting of January 16, 2001, as summarized by Eleanor Pelta, Chair, AILA-DOL-ETA Liaison Committee, a different position was stated:

[t]he Department clarified its position that employers must revoke an H-1B petition upon termination and failure to do so would make the employer liable for back pay under the benching rules. DOL-ESA stated that revocation of an H-1B petition is one indication that the employment relationship has been officially terminated, however, failure to revoke may not be entirely dispositive of the question of whether the employment relationship has been terminated. The real issue is whether it is clear to the employee that the employment relationship has been severed. In this regard, a termination letter from the HR director is the best evidence.

The position articulated above is much more reasonable than the one the IFR appears to take. The INS regulatory provision indicating that employers should notify it of the end of an H-1B employee’s has attached to it no form, no sanctions, and no directions as to how this notification is to be achieved. Thus, it is frequently overlooked by employers. And even if the employer does provide the notification to INS, the lack of a designated process for doing so usually means that the notification goes ignored for many months or even years. Therefore, AILA urges DOL to promulgate final regulations that comport with DOL’s position on this issue, as stated in the stakeholders’ meeting, and do not tie the ongoing wage obligation to notification to the INS.

Further, the Preamble to the IFR states:

“[U]nder no circumstances would the Department consider it to be a *bona fide* termination if the employer rehires the worker if or when work later becomes available unless the H-1B worker has been working under an H-1B petition with another employer, the H-1B petition has been canceled and the worker has returned to the home country and been rehired by the employer, or the nonimmigrant is validly in the United States pursuant to a change of status.”  
65 Fed. Reg. at 80171

A plain reading of this comment would seem to indicate that, in addition to working for another employer pursuant to another approved H-1B petition, the H-1B nonimmigrant must also return to his home country and be rehired, or remain in the United States

pursuant to a change of status. DOL furnishes no authority for its requirement that “the worker has returned to the home country and been rehired,” and, as such, the requirement is *ultra vires* because the statute includes no provision for this. The comment regarding notifying INS of changes in employment is beyond the jurisdiction of DOL and is controlled by INS regulations at 8 CFR 214.2(h)(11). Accordingly, we urge DOL to omit these comments from the Final Rule.

## **7. DOL Regulations Do Not Have Extra-Territorial Reach.**

It has come to AILA’s attention that DOL is considering an enforcement position that would improperly give its regulations world-wide reach. Specifically, it often happens that an H-1B employee will leave the U.S. for periods of time for a variety of reasons. Those reasons can range from a desire to “take a break” or to visit family, to wishing to go to another country to hone new skills, to the employer not having sufficient work for the employee.

Whatever the reason for departing the country, time spent outside the U.S. cannot be considered benching under the ACWIA. INA section 212(n)(2)(C)(vii)(I) couches the benching prohibition as “a failure to meet a condition of paragraph (1)(A).” Paragraph (1)(A), in turn, indicates that the required wage must be offered “to aliens admitted or provided status as a nonimmigrant...” If an individual is not in the U.S., he has not been admitted and does not have the requisite nonimmigrant status. The alien in this case, in fact, has no status in the U.S. That status can only be obtained, and re-obtained, after inspection by an INS officer upon entry or re-entry. Thus, the LCA rules cannot apply to him while he is outside the U.S.

This is no mere technicality. In adding the benching provisions, Congress was trying to stop the practice of H-1B workers being brought to the U.S., then being left here to flounder in questionable status and without the ability to work elsewhere. Having the H-1B leave the U.S. was exactly the desired result. The employee is no longer in the U.S. not maintaining status, and is free to work in his own country, just as he was before his arrival. Any attempt by DOL to sanction the ability of aliens to leave the U.S. would be not only outside its authority, but contrary to public policy.

### **C. The Employee’s Attorney Fees Should Not Be Treated as the Employer’s Business Expense.**

DOL categorizes attorney fees incurred by the H-1B worker as a reduction of the wage paid to the worker. See 20 C.F.R. sections 655.731(c)(9)(iii), (c)(12) and (c)(13). DOL broadly applies this characterization where the employer recoups the attorney fee from the worker (section 655.731(c)(9)(iii)(C)), lends the fee amount to the worker (section 655.731(c)(13)), or “imposes” the attorney fee on the worker (section 655.731(c)(12)). The deduction of legal fees from the wage paid is wrong for several reasons.

Perhaps the first and most obvious reason is that the regulation goes beyond the scope of the statute it is meant to implement. This violates the most simple and fundamental

precept of the law. *See* APA, 5 U.S.C. section 706(2)(C) (1976); *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979). Nowhere in the statute or the legislative history does Congress even suggest that attorney fees should be borne by the employer only, or otherwise be treated as a suppression of the H-1B worker's wage. Congress did specifically allocate other expenses as an employer obligation, specifically the \$1,000 scholarship and training fee. *See* INA section 212(n)(2)(C)(vi)(II). If Congress had intended that employers also be legally obligated to include the H-1B legal fee paid by the worker as a part of the worker's wage, it would have said so. But Congress was noticeably and intentionally silent on that point. Therefore, DOL's imposition of the legal fee upon the employer impermissibly exceeds the scope of the statute.

Second, it is a mis-characterization of the fee to assume it is solely the employer's expense. The expense of obtaining an H-1B is the expense of the employee obtaining permission to work. If there is a problem with the H-1B petition, it is the employee who pays the ultimate price and is at the greatest risk: he becomes removable (i.e., deportable), and can lose eligibility for future immigration benefits, such as the ability to change, extend or adjust status or obtain a new visa. In fact, the petition and the status request documents are one the same form. Attorney fees are often paid by the H-1B worker because the worker himself wants to protect his legal status, to ensure that the H-1B petition is processed properly, quickly and legally, and to enjoy the right to select an attorney of his own liking.

This is an expense that many H-1B workers choose to incur because it is an investment in their future. An H-1B worker's retention of an attorney to prepare and process the H-1B petition can be compared to another employee's retention of an employment law attorney to draft or review an employment contract. The attorney fees for an employment contract is an expense of being a professional. The H-1B attorney fee is just another of those expenses. H-1B workers, like U.S. workers, regularly incur such expenses in the process of securing employment. It cannot be presumed that it is in the interest of the employer to pay the costs associated with obtaining the employee's H-1B work permission.

Indeed, there are many similar expenses of making oneself available for work (such as moving expenses) that are sometimes borne by the employer and sometimes by the employee. Who pays such expenses is, and always has been, a matter of private agreement. These issues are not for the DOL to regulate.

**D. DOL Needs to Clarify that Actual Enforcement of a Penalty Provision, not the Mere Existence of a Penalty Provision in a Contract, Triggers the Statutory Penalty Provision.**

The regulation needs to be clearer regarding the precise point at which a violation of the penalty provision occurs. Section 212(n)(2)(C)(vi)(I) of the INA provides that "the employer is not permitted to require (directly or indirectly) that the nonimmigrant pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer." This language indicates that a violation under the regulation will only be found in cases where an alien has been made to pay a penalty for ceasing employment prior to an agreed upon date. Therefore, if the employer has

erroneously drafted a contract agreement that would require a penalty from an H-1B employee, but cures the defect before any payment is made under the provision, there is no violation. This interpretation is consistent with the language of INA section 212(n)(2)(C)(vi)(I). However, the IFR language found in section 655.731(c)(10)(i)(A) is not clear, particularly when measured against the regulatory language in IFR section 655.805(a)(12) which treats as a violation the mere “attempt” to require an H-1B alien to pay a prohibited penalty.

DOL has clearly exceeded its statutory authority by promulgating a regulation that makes it a violation for an employer to “attempt” to require an H-1B nonimmigrant to pay a penalty. Section 655.805(a)(12). INA section 212(n)(2)(C)(vi)(I) provides that it “is a violation . . . for an employer . . . to require an H-1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.” The statutory language is clear. There is only a violation when the employer actually “requires” the payment of a penalty. An “attempt” to require a penalty payment cannot be considered a violation under the plain language of the statute. See e.g., *INS v. Phinpathya*, 464 U.S. 183 (1984) (where language of statute is clear on its face, there is no need to inquire into the intent of Congress). If Congress wanted to make it a violation for an employer to “attempt” to require a penalty payment, it knew how to do so. Indeed, when Congress decided that “attempt” crimes could constitute aggravated felonies, it clearly stated this intent under INA section 101((a)(43)(U).

In addition, IFR section 655.805(a)(12) is vague. The section does not define what would constitute an “attempt” to require a penalty payment. The language of this section does not delineate whether a violation would occur if an employer took no action to collect payment from a former H-1B nonimmigrant employee in order to enforce a liquidated damages provision, but simply neglected to rescind a contract provision allowing recovery of liquidated damages that later might be deemed by DOL to be a penalty. The mere presence of an *unenforced* provision in a contract that DOL might later view as a penalty does not trigger a statutory violation. A mere attempt is not sufficient. Rather, the employer must take affirmative steps to require, i.e., insist upon, the payment of the penalty, e.g., by sending a demand letter, making a payroll deduction to recoup the amount, or verbally threatening the alien with enforcement of the contract provision.

AILA therefore requests that the final regulation should be amended to contain more specific language to alert the public regarding when a violation of INA section 212(n)(2)(C)(vi)(I) occurs. As suggested above, AILA submits that an employer does not violate this section unless it has taken affirmative steps to insist upon the payment of a penalty. The mere presence of a contract provision, without such affirmative steps, does not constitute a violation of the provision prohibiting an unlawful penalty.

Furthermore, public policy dictates that DOL should allow employers the opportunity to cure defective contract provisions that DOL deems are penalty provisions. DOL’s public pronouncements have long encouraged voluntary employer compliance in lieu of exacting the maximum penalties that the statute would allow. This commendable enforcement position has been a part of the H-1B program since the inception of DOL’s

role. Thus, just as DOL recognizes its authority with regard to longstanding program features, even when the literal reading of the statute could linguistically permit a more strict interpretation (see, e.g., the comments in the Preamble regarding the timing of recruitment activities by H-1B dependent employers), this power to cure violations of the penalty provision should be expressly acknowledged in the Final Rule and preamble.

**E. Further Refinement of the Liquidated Damages Provisions under the “No Penalty Penalty” Is Needed.**

DOL is correct in abandoning the proposal to require a State court judgment before enforcing any liquidated damages provisions. However, it is not necessary to ignore the appropriate residual authority of State courts in deciding whether a payment for breach of contract would constitute liquidated damages or a penalty. While employers and H-1B employees are not required to seek a State court ruling in order to resolve this issue, there is nothing that prevents them from doing so. In light of DOL’s acknowledgement that individual State courts are “better versed than the Department to resolve State law questions” (65 Fed. Reg. at 80173), the regulations should specifically provide that, while not required for a payment to be considered liquidated damages, a final State court judgment upholding a liquidated damages provision will be considered by DOL as binding upon the agency. Alternate dispute resolutions, such as mediation, private settlement or arbitration decisions, granting or stipulating to an award for liquidated damages should likewise foreclose any subsequent enforcement actions by the DOL. If DOL does not acquiesce to decisions by State judges, arbitrators and other officials and does not honor voluntary private settlement agreements, but instead substitutes its own interpretation of State law, the effect could be the impermissible creation of Federal law.

In addition, AILA submits that DOL should promulgate a regulation that prohibits an enforcement action against an employer for requiring the payment of a penalty if the parties voluntarily settle a dispute over the matter. This regulation would be in the public interest, because the law would discourage potentially costly litigation and the unnecessary use of DOL’s resources. DOL should also clearly inform the public in its Final Rule that a negative determination by DOL against an employer regarding a penalty provision does not prohibit the employer from seeking to overturn that decision by resort to appropriate State judicial procedures or to collect “actual” damages in a State court.

Furthermore, DOL’s position that it will invoke the principles of administrative collateral estoppel in deciding cases involving the question of whether a penalty has been imposed upon an H-1B worker is incorrect and unsupported by citation of legal authority. In the Preamble to the IFR, DOL proclaims that it “will apply principles of administrative collateral estoppel . . . where appropriate, just as it would for any other employment law violation.” 65 Fed. Reg. at 80175. DOL has failed to justify this position. DOL cites no authority for the use of administrative collateral estoppel in cases involving a dispute over a liquidated damages provision. Indeed, the Department admits that the distinction between liquidated damages and a penalty generally requires an analysis of the particular “circumstances of the parties and the purpose(s) of the agreement . . . .” 65 Fed. Reg. at

80175, 80176. Administrative collateral estoppel against an employer is inappropriate because each determination must involve a fact-specific, case-by-case analysis; hence, the use of collateral estoppel in these cases would be improper.

The use of administrative collateral estoppel is especially inappropriate in cases where a violation is found against an employer in one state, and DOL then attempts to use the principle with respect to the employees in a different state. In this instance, collateral administrative estoppel cannot be applied because different state laws would govern the cases.

At the very least, once DOL makes a finding that an employer has required the payment of a penalty from an H-1B worker, DOL should recognize an employer's right to cure a contract defect with respect to agreements with other H-1B workers within a reasonable period of time. This policy would encourage employers to comply voluntarily with H-1B regulations in good faith once the employer has notice of a violation of law in an area that DOL recognizes is complex and difficult to comprehend. The policy would also allow DOL to assume its proper role with regard to its stated purpose of educating "the public regarding the H-1B program and its requirements . . . ." 65 Fed. Reg. at 80111. By allowing employers to cure defects in liquidated damages provisions rather than broadly applying the principle of administrative collateral estoppel, DOL can use its enforcement powers in a manner that both educates the business sector and promotes protection of the rights of H-1B workers.

## **VII. REGULATION SECTION 655.734: NOTICE ATTESTATION**

### **A. The Electronic Notice Provisions Are Reasonable and Appropriate.**

The ACWIA modified the physical posting requirement by allowing electronic communication as an alternative to posting. We commend DOL for recognizing the concerns expressed in the comments to the NPRM by providing increased flexibility in the use of electronic notification.

The IFR clarifies that:

1. the electronic notice need not incorporate a copy of the LCA but merely provide a summary of the required information;
2. if direct notice is given to each affected employee, such as through e-mail, the notice need only be given once during the ten-day period. In contrast, if posting is done on an electronic bulletin board, it must be posted for ten days;
3. electronic posting is not required in two locations.

DOL is to be commended for adopting this sensible approach to electronic posting. Unfortunately, the electronic posting provisions are deeply flawed by a requirement in common with the "paper" posting requirements: the provision notice to "affected" persons, including third party company employees. As discussed more fully below, this

requirement is *ultra vires*, will impose severe complications on corporate and contractual relationships, and will put parties at disadvantages in competitive situations. Where third-party communication to employees is restricted or prohibited, this requirement will require contract re-negotiation, business disruption, and unfair advantage.

**B. Posting in the Same Area of Intended Employment Is Overreaching and Will Be Administratively Burdensome.**

The posting requirement is essentially the same as that struck down by the court in *National Association of Manufacturers v. Department of Labor*, Civ. No. 95-CV-00715 (RCL), in which the court found that over-reaching parts of the regulatory scheme present “very substantial questions that may ultimately cause the court to strike the regulations as exceeding defendant’s statutory authority under the Act.” (Memorandum Opinion, p. 45). DOL is once again exceeding its authority. By the terms of the IFR, employers would be required to post notices at every “worksite” visited by an H-1B employee within the area covered by the LCA. The attempts by DOL to exempt certain time frames (i.e., short-term placement) and activities (the “development activities” and “job function” exceptions to worksites) only demonstrate the arbitrary nature of this requirement.

This requirement appears nowhere in the statute, and places tremendous burden on employers whose employees must visit different sites frequently. The requirement accomplishes nothing, but adds significantly to the cost of compliance. Because of its illogical nature, constant posting is not something that a rational employer would expect in the normal course of business. Particularly given that DOL has attested that LCA compliance will take little more than an hour (signaling to employers a logical and clear-cut compliance program), burying such un-anticipatable requirements inside the regulation does nothing but set a trap for unwary employers.

**C. Posting of the Form Should Continue To Be Acceptable.**

The IFR omits the provision that “[t]he posting of exact copies of the labor condition application shall be sufficient to meet the requirements of this paragraph.” This provision should be restored, at least as it may pertain to non-H-1B dependent employers, as it provides confidence to the employer that the posting has been completed in an acceptable manner. Many employers prefer to post the copies of the LCA so that they are squarely in compliance with the posting requirements. The omission of this provision leaves employers without a secure method for assurance that they are following the law.

**D. Posting at Third Party Worksites Disrupts Established Corporate Practices and Contractual Relationships, and Is Often Impossible to Achieve.**

AILA notes with dismay the requirement that the posting must occur at the “worksite” regardless of whether the location is owned or operated by the employer or by some other person or entity. This requirement will compel employers of H-1B workers to post the notice of filing at client businesses over which they have no authority or control. Under the IFR, if a client refuses to post the notice, then the H-1B worker cannot be sent to that site, or the employer will be out of compliance. Many employers contract to undertake

work that would involve employees with advanced and specific skills to spend time at particular client sites, whether as a regular course of business, or for specific activities. The confusion that will be engendered by the DOL definition of what constitutes a worksite (see earlier discussion) will ensure that more employers, not fewer, will seek to comply by looking at such situations as worksites—but they will then be prohibited, whether contractually or otherwise, from fulfilling this extra-statutory requirement.

Moreover, many businesses, particularly in staffing industries, include in their contracts provisions which specifically prohibit the H-1B employer's communicating with the client's employees, or even identifying the name of the H-1B employer among the client's employees. These are valid contractual prohibitions, having the desired effect of limiting communication between a potential competitor and employees of its client (so as to limit contact and possibly the attraction of luring away potential employees). In either case, it would be impossible to meet the posting requirements without clear violations of the business contract, thus interfering with contractual relationships that may be of many years' standing.

Furthermore, third party posting also gives the client access to confidential information that would allow the client to calculate the "markup" on services. This could cause a substantial disruption in business relationships that may have an unwanted economic ripple effect, and could, ironically, cause a reduction in wages by the many employers that pay more than the prevailing wage to enable the employer to maintain its profit margin while satisfying client demands.

Another equally important consideration is that the employer is subject to potential violations of the requirement simply because of a lack of control over the client's worksite. For example, an employer would have no way of knowing if, indeed, the posting remained visible for 10 days or even if the posting was properly placed at all. To hold an employer responsible for matters beyond its control is unreasonable, and to fine and possibly even debar an employer despite its best good faith efforts is a deprivation of due process.

Putting aside for the moment the frequent impossibility of compliance and the unwarranted negative impact on private business relationships, DOL is faced with an even larger problem with this provision: it is beyond the Department's authority to require third part worksite postings. The notice provisions refer throughout to "employees" and "the employer's employees." The concept of "affected" persons was added by DOL, and was not anticipated by the statute. By inserting this concept, and from there legislating a highly intrusive and often impossible notice requirement, DOL is not only exceeding its statutory authority in the specific area of notice, but is reflecting the long-term hostility to the employment of H-1B nonimmigrants that permeates the entire rulemaking history of DOL's involvement with the H-1B process. Congress has spoken, and spoken clearly, time and again on the desirability of H-1B workers. It is not for DOL to try to indirectly defeat these Congressional mandates by devising requirements with which employers cannot comply.

## **VIII. REGULATION SECTION 655.735: SHORT-TERM PLACEMENT**

Once again, DOL has attempted to over-regulate the activities of employers, demonstrating the agency's lack of understanding of how the modern workplace operates. We do note with appreciation, however, DOL's recognition that time, in and of itself, in a short-term placement situation should not be determinative. But the needlessly complex and ultimately arbitrary travel restrictions of the IFR leave employers with little practical means of operating with H-1B employees in the modern business environment, with the eventual result that the rule will by necessity be violated.

### **A. Employee Travel Is Not an Appropriate Subject for Regulation.**

In the modern economy, few employees arrive at a place of employment and then sit there for three years. Business has become more dynamic than ever, requiring frequent travel for often indeterminate periods. The DOL response to such travel, throughout its regulatory history, has been to act as though such travel is some form of abuse that must be squelched. But it has never been clear exactly what the abuse is, or why it is so deeply troubling that the Department must promulgate absurdity after absurdity to address it. Employees travel frequently and for periods that can vary from a few days to a few months. Such travel does not change their place of employment or any of the terms and conditions of employment.

DOL representatives have stated on more than one occasion that the only alternative to these unrealistic "short-term placement" rules is to require a new LCA for each trip. Congress, which seems to have a better grasp of the modern workplace, never intended such a result. As stated by Senators Graham and Abraham in their comment on the NPRM, "individuals employed in one location frequently must travel to other locations to perform their duties. This does not mean that they are employed there....At no point did Congress intend to authorize such regulation of ordinary commerce, even under the guise of defining place of employment."

As AILA has reiterated in each of its comments to each of the incarnations of the "short-term placement" rule, attempts to devise such rules should be abandoned, and DOL should return to a rule of reason, based on all the facts and circumstances as elicited in an enforcement context, to determine if the place of employment has truly changed and a new LCA is therefore required for the new site. Indeed, the sheer variety of time frames and standards in the different permutations of the short-term placement rule demonstrate its arbitrariness and lack of necessity.

But if DOL insists on clinging to such a pointless rule, the rule needs to be significantly revised, as discussed below.

### **B. The 30/60-Day Rule Is Unrealistic, Unclear and Excessively Micro-Managing.**

DOL's attempt to impose limits on H-1B travel once again fails in light of business realities. The imposition of this time frame is extraordinarily restrictive, arbitrary, and inconclusive in its objectives. Limiting an individual to only 30 or 60 days per year for short-term travel presents a severe limitation to companies that renders the potential

benefits of such a rule moot. Moreover, the regulation limits the short-term placement to 30 or 60 days per year in not only any worksite, but also in any “combination of worksites in the area.” This definition is too restrictive to be of any practical value.

Thirty or sixty days within one year is a very short period of time to accomplish many of the business objectives that would otherwise benefit from a short-term travel. Limiting to 30 or 60 days during any given year a company’s ability to send an H-1B to an “area” severely limits that company’s ability to build relationships, establish qualifications, establish confidence, negotiate terms for business contracts, etc. Thirty or even 60 days is a narrow time frame to accomplish these goals, especially in arms-length relationships and in the all-too-frequent circumstances where the employee must travel back to the area several times a year to conclude the business. Attempts to follow this rule, particularly in third-party situations or situations of numerous trips, will only result in certain failure to meet the requirements.

Further, the limitation on placement in a “combination of worksites in the area” makes it impossible for an employer to understand whether a series of placements in that area would count toward the overall limitation. For example, an H-1B worker may be sent to one location for a few days, then to successive sites that are each within commuting distance from each other, but farther and farther from the initial site. Would the fourth or fifth placement, all within the 30 or 60 days, and within commuting distance of each other, but not within commuting distance of the first, be eligible for short-term placement? There are myriad combinations of such placements which would be unreasonably complex and impossible to administer, making the short-term placement rule more a puzzlement than a bright-line test.

**C. The Prohibition against Short-Term Placement Where an LCA Exists Is Unworkable.**

The prohibition against short-term trips to any area for which an employer has a certified LCA for the occupational classification is also without practical purpose or reason, yet will cause many employers tremendous difficulty in tracking employees in a given area. (In fact, it seems perverse to *prohibit* travel to a location where an LCA is in effect.) Especially for large companies, it often is impossible to know whether another division or office has filed an LCA for a particular area, or even if that same office had filed one in a previous year. Thus, this limitation sets a trap for employers while serving no useful purpose. This prohibition should be removed from the regulation.

**D. The Bar Against Initial Short-Term Placements is Pointless.**

The bar to initial placement of an H-1B worker in a short-term worksite is also unnecessarily restrictive and poses an unfair disadvantage in certain businesses. Companies often apply for H-1B visa status for individuals without knowing to where that individual will need to travel upon approval. This is particularly true, for example, in staffing industries. The LCA is based upon the employer’s primary place of business, or the most likely initial placement. Circumstances frequently change in the intervening weeks that it takes to get an LCA certified and in the months that it takes to get an H-1B

petition processed. When the employee is finally in the employ of the company, and about to enter the U.S., the assignment has been changed (perhaps several times), and yet the need for the services is now critical.

Filing an LCA for the new area of intended employment may be easy, but accumulating the necessary public access file to support the obligations made on that LCA is not, and will cause delays of several days or weeks, proving costly to the employer—perhaps at the cost of the contract for the services, as often happens. The employer is faced with a loss of business (and goodwill) or being out of compliance with DOL’s unnecessary restrictions. The regulation needs to be cognizant both of how modern business is conducted and of the realities resulting from the lengthy processing times of the government agencies involved. These regulations ignore both realities.

**E. Reimbursement of Actual Costs Will Lead to Significant Disparity Among Workers.**

The provision requiring that an employer reimburse the *actual* costs of H-1B nonimmigrants for lodging, travel, meal and other incidental costs is outside the authority of the DOL to regulate. Most entities do reimburse for actual and reasonable costs, within their own established guidelines. DOL would impose a new reimbursement structure that, while a distinct improvement over the Federal guidelines previously attempted to be imposed on businesses, is still beyond its regulatory scope. Nowhere in the H-1B statutory scheme does DOL have authority to tell employers how and when to reimburse travel expenses. That is an issue handled differently by every employer, and which has never been considered an appropriate subject for government regulation.

Moreover, this provision will result in significant disparity among businesses and even among employees in a single business. Many businesses that hire H-1B workers already have reimbursement policies in place, which apply to U.S. workers as well as H-1B workers. An employer now may be forced to have two standards because it may have a different system for reimbursement of its general workforce than the one being imposed by DOL for H-1B workers. Also, there is no definition for “incidentals” or “miscellaneous expenses” to limit the claims for reimbursement; at a minimum, a “reasonableness” standard should be imposed. Furthermore, payment of actual costs for both work and non-work days is particularly onerous and could again result in disparate treatment among U.S. and H-1B workers, defeating the purpose of the statute.

The issue of reimbursement of travel expenses should be treated as one of the facts and circumstances examined in an enforcement action to determine whether H-1B workers are receiving parity in benefits, as compared to U.S. workers, and whether an H-1B worker is, in fact, in a short term assignment or whether a new labor condition application and notice of filing are required. As an enforcement action matter, regulations such as these are entirely misguided and present significant burdens on employers.

#### **F. The Rule Imposes Sanctions Not Within DOL’s Authority.**

The consequences for violations of these rules are particularly harsh, and are not authorized anywhere in the statute. The DOL regulation overreaches when it states that an employer has violated the terms of its LCA(s) and the regulations, simply upon any worker exceeding the workday limit within the one year period. As written, the regulation leaves no room for unknowing violations or mistake. Because of the complexities and ambiguities in the regulation, as noted above, an employer could be viewed by the DOL as being in violation, all the while concluding in good faith that the placements are acceptable. If the DOL persists in retaining these *ultra vires* travel restrictions, there must be a good-faith exception because the consequence for even unknowing violations is so severe. The consequence for this violation is a blanket prohibition on travel for workers in that occupational classification in that area of employment. Such a prohibition could debilitate an innocent company’s business.

#### **G. A National or Regional LCA is a Workable Approach**

As an alternative to the complex and unrealistic short-term placement rules, AILA endorses the creation of a national or regional LCA for those situations in which the nature of the job involves constant travel. With respect to DOL’s request for comments regarding the impact of such a system on the statutory attestation requirements (65 Fed. Reg. at 80188), this type of system would still provide necessary protections for the U.S. workforce. The statute requires payment of prevailing wage in the area of employment. For a company with employees that frequently travel, the region or the nation often is the true area of employment. Actual wage, again for traveling employees, is the wage paid to others in the “specific employment in question”: the traveling employment. Notice can be posted, as it properly should be in any event, by posting at the home base. That is where the employer’s employees would see the notice. No H-1B could be placed where a strike or lockout is occurring, as is the requirement now. In other words, all the attestation elements could be readily satisfied. In creating an LCA system that covers a larger geographic region while still binding the employer to the attestations of the LCA, the protections for the workforce and the H-1B employee would still be intact.

### **IX. REGULATION SECTION 655.736: DEPENDENT EMPLOYERS AND WILLFUL VIOLATORS**

#### **A. DOL Is Correct to Rely on the Employer’s Determination of Who Is an Employee.**

AILA agrees with the IFR’s exclusion of *bona fide* consultants and independent consultants from consideration as full time equivalents (“FTEs”). AILA also agrees with the IFR’s acceptance of the employer’s designation of people as employees or non-employees so long as that designation is consistently applied for all other statutory purposes.

AILA continues to believe that the IFRs should contain a provision that would enable an employer to document that a full-time workweek is less than 35 weekly hours.

Given how cumbersome the computation of the aggregation of part-time employees could become, if all pay period hours of work must be considered, then AILA is pleased that the IFR allows alternative methods to perform this computation.

**B. The Single Employer Documentation Requirements Are Excessive and Unnecessary**

AILA agrees with the IFR's conclusion that ACWIA authorized a definition of "single employer" solely for the purposes of the determination of whether or not an employer is H-1B dependent.

However, the regulation at section 655.736 exceeds DOL's authority, and imposes undue burdens in a number of respects. First, it requires that an employer subject to the single employer test "place a list of the entities included...in the public access file...." Most companies subject to the single employer test are large national or multi-national entities for which non-H-1B dependency is readily apparent. The information that will make up the single employer documentation is spread far and wide. Collection will be a time-consuming endeavor, serving no real purpose.

Even more outrageous is the requirement that single employer entities perform the "snapshot" test and keep documentation of that calculation in their records. Again, these are the entities most likely to have a readily apparent non-H-1B dependent status and for which performing and documenting the calculation would be an astronomically massive undertaking. The only explanation provided for requiring these multiple hours of information-gathering and paperwork is that "the records may not all be under [the filing entity's] control." 65 Fed. Reg. at 80531. But that is exactly the point. This information is not under any one entity's control, yet it is apparent from the sheer size of the organization that it is not H-1B dependent. This requirement, like so many others in this regulation, serves no purpose but to harass employers.

**C. The Identification of the Workforce in the U.S. Needs Clarification.**

The employer's "total" workforce is assumed in the IFR to include only U.S. workers and H-1B workers. By its references to "U.S. workers," the IFR can be read to omit from the definition of the employer's work force workers who are not H-1B workers and who are not U.S. workers as that term is defined in the IFR (such as persons in L-1 or O-1 status). This is not the result intended by ACWIA, and probably is not the result truly intended by the IFR. The regulation should be revised to make clear that the total workforce includes all the employer's employees in the U.S. , and not just its "U.S. workers" and H-1Bs.

**D. The “Snap Shot” Dependency Calculation Is an Improvement over the NPRM.**

AILA supports the efforts in the IFR to make the burden of the calculation as minimal as possible on the employer whose dependency status is readily apparent. As discussed above, this effort should include entities subject to the “single employer” test as well. The IFR includes methods for the dependency calculation for non-dependent employers which reduce the burden in the NPRM. AILA applauds DOL for the rule that, when it is readily apparent that an employer is or is not H-1B dependent, no calculation needs to be made, and that the snap shot test may be used for borderline H-1B dependency status.

**E. The Documentation of Dependency Rules Are Appropriate.**

The NPRM imposed upon the employer a burden to maintain documentation which has been lessened by the IFR. AILA supports the general concept that a reasonable employer will maintain documentation required to establish compliance with its attestations in case it is investigated. AILA agrees that documentation of the calculation need not be maintained except in circumstances which might provoke inquiry such as a change from dependent to non-dependent and work force changes which impact the characterization of the workforce. Again, however, this approach should also be applied to “single employer” entities. There is no reason for placing additional burdens on them.

**F. Allowance Needs to Be Made for Good Faith Errors.**

The IFR provides that employers “which falsely attest to non-dependent status, or experience a change of status to H-1B dependency but continue to use the LCA to support new H-1B petitions or requests for extension of status shall – despite the LCA designation of non-H-1B dependency – be held to its obligations to comply with the attestation requirements concerning non-displacement of U.S. workers, as explicitly acknowledged and agreed on the LCA.” The IFR would apparently subject the employer to the additional attestations for all applications filed pursuant to the LCA, even though a number of petitions may have been filed appropriately while the employer was non-dependent. Similarly, dependent employers or willful violators that use an LCA valid for exempt nonimmigrants for an employee who is not exempt are subjected to the attestation requirements for all employees for whom the LCA was used, even though the LCA may have been otherwise used appropriately, and solely, for exempt nonimmigrants.

Under both scenarios, employers who use these LCAs in good faith but err, either because of a slight miscalculation or misunderstanding of non-dependency status, or because of simple clerical error in the case of using an “exempt” LCA for a non-exempt worker, are penalized in a manner not prescribed by the statute. Specifically, an employer who has properly used 49 of 50 approved “slots” on a non-dependent employer LCA, or for 49 of 50 slots for exempt workers, would retroactively become subject to additional attestations. Such an employer, not aware of the error, would, on the day of filing, automatically have significant violations, despite being in otherwise full compliance for the first 49 filings.

Applying the additional attestations only to the errant “slot” avoids this tenuous result and allows the employer appropriate exemptions while holding them to the attestations required after they actually become dependent and for slots used for non-exempt employees.

#### **G. Retroactive Invalidation of LCAs Is Beyond DOL’s Authority.**

DOL proposes to invalidate any current LCA for purposes of future H-1B petitions of employers who are or become H-1B dependent. Such retroactive rulemaking is prohibited by Supreme Court precedent. *See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), (an agency may not issue a rule that has retroactive effect unless there is an “express” grant of retroactive rulemaking power, even “where some substantial justification for retroactive rulemaking is presented,...” *Id.* at 208-09.); *see also* Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise*, 3d ed. (1994 and Supp. 1997). Indeed, DOL previously has declined to give its rules retroactive effect explicitly because of the prohibition established in *Georgetown* (*see Service Employees International Union v. County of San Diego*, 60 F. 3d 1346 (9<sup>th</sup> Cir. 1995)(FLSA regulation). Additionally, DOL followed this rule, at least implicitly, in grandfathering pre-existing LCAs of 6-year validity when it promulgated regulations reducing the LCA validity period to 3 years.

Not only is ACWIA devoid of an “express” grant of retroactive rulemaking authority, but the clear language of the statute specifically limits its application to prospective LCAs. ACWIA states that the new attestations apply to applications filed “on or after the date final regulations are first promulgated...and before October 1, 2001, by an H-1B dependent employer...or by an employer that has been found...to have committed a willful violation...” (ACWIA Section 412(d)). DOL is precluded from applying the law retroactively and invalidating existing LCAs, because by definition no LCA is subject until after the regulations are effective.

### **X. REGULATION SECTION 655.737: EXEMPT EMPLOYEES**

#### **A. DOL’S Position that INS Should Make the Determination of Exempt Status Is without Statutory Basis.**

The IFR establishes an elaborate system under which INS is to determine whether an employee is exempt during adjudication of the H-1B petition, after the LCA itself is processed. The system for making this determination is without basis under ACWIA, and without precedent under DOL procedures governing LCAs.

As AILA pointed out in its comments to the NPRM, ACWIA contains absolutely no indication that the determination of exempt status should be made by INS, nor does it indicate that with respect to this determination DOL should depart from the well-established concept of the LCA as an attestation document.

Formal review and adjudication of any statement made under oath and under personal liability on an LCA is a radical departure from past LCA procedure. When the LCA was introduced as an additional element of the H-1B process in IMMACT 90, the LCA was viewed both by Congress and DOL as a document containing representations made under oath, requiring limited review in the adjudicatory phase, but legally binding and enforceable on the employer by the DOL in an investigation. Employers are presumed to have understood the definitions inherent in the attestations, and there is no review during the LCA approval process to determine, for example, whether the employer correctly calculates the actual wage, or compares the beneficiary of the LCA to the appropriate group of workers with “similar experience and qualifications.”

In contrast to its treatment of the “exempt” determination, DOL’s IFR regarding the H-1B dependency calculation properly creates a system wherein the employer makes the initial assessment, which assessment is accepted when attested to under oath on the LCA, and is enforceable by DOL in investigations. The employer is expected to self-monitor its dependency and take action when there are changed circumstances, or face possible penalties. There is no basis for treating the determination of whether an employee is “exempt” in a different manner from the H-1B dependency calculation.

Apart from the complete lack of statutory support for its delegation of power to INS, DOL’s structure for the determination of exempt status is wholly impractical and certain to cause adjudicatory confusion and delays. While delegating the decision making to INS on the one hand, DOL also establishes confusing and unwieldy rules regarding equivalencies on the other. These rules are generally inconsistent with INS current practice regarding degree equivalents. Requiring INS to look behind an LCA attestation while applying a set of new equivalency rules generated by a different agency will inevitably create confusion and petition processing delays, adding considerable time to the 3 to 4 month wait for an H-1B approval that currently exists in many jurisdictions.

Rather than slow down the H-1B adjudicatory process by adding new issues for INS examiners to review, DOL should treat the determination of whether an employee is “exempt” as another LCA attestation or statement made under oath and enforceable by DOL. DOL has set forth clearly in the ETA 9035CP the criteria for the definition of “exempt.” In accordance with the attestation scheme required by statute, employers should be responsible for self-monitoring the exempt status of their employees. Misclassifications should be dealt with in the enforcement context.

Notwithstanding DOL’s discussion in the Preamble to the Interim Final Rule of the difficulty of curing a violation relating to exempt status after the fact, AILA can perceive absolutely no hindrance whatsoever to DOL’s ability to impose penalties during enforcement actions, where the “exempt” status of an employee is accepted as an attestation under penalty of perjury.

## **B. DOL Should Consider As Exempt Part-Time H-1B Workers Whose Wages Would Annualize To \$60,000**

In its Interim Final Rule, DOL has decided that part-time workers who do not receive \$60,000 annually cannot qualify as “exempt,” unless they qualify based upon their education. This determination is inconsistent with ACWIA and with established INS practice allowing H-1B workers to engage in part-time employment.

In its preamble at page 80136, DOL cites statements in the Congressional Record by Senator Abraham and Congressman Smith, describing the \$60,000 wage figure as “firm.” Neither these comments – nor the statutory language of ACWIA – specifically exclude the possibility that the wage figure may be met by annualizing an hourly wage paid for part-time work.

Determining whether a part-time H-1B worker’s wages, when annualized, would be equivalent to \$60,000 or more for full time employment, is a relatively simple matter. It is not necessary, as DOL claims in its Preamble (65 Fed. Reg. at 80136), to determine that the part-time worker received “an appropriate ‘share’ of annual compensation, based upon the portion of a full-time years work” performed. DOL may require that part-time wages for exempt employees be expressed as hourly wages. This would allow DOL or INS to take the hourly wage stated on the LCA and multiply it by the number of full time hours in a year to ensure that the wage is above \$60,000.

The law allowing H-1B workers to be employed on a part-time basis is well-established. Many of these workers are highly talented individuals and perform complex duties, notwithstanding their limited hours. To intimate, as DOL does in its preamble, that a part-time worker receiving the hourly equivalent of a full time \$60,000 salary, is not “highly compensated,” or otherwise does not belong to the level of employee that Congress intended to exempt, is without basis in reason. An hourly wage may indicate a high level of compensation just as readily as an annual wage. Therefore, DOL should reconsider its decision that part-time H-1B workers may not qualify as “exempt” under the wage criterion, unless actually earning \$60,000 per year.

## **C. DOL Should Allow a Master’s Degree Equivalency to Be Established By Work Experience.**

Notwithstanding considerable commentary urging DOL to allow work experience equivalents to master’s degrees, DOL in its IFR has decided not to allow equivalency to be established through work experience. This narrow rule is unwarranted by the statutory language. Moreover, as noted above, it is both counterintuitive and counterproductive for the DOL to delegate to the INS the responsibility for determining whether a worker is “exempt,” and then dictate a standard for such determination that is a radical departure from INS procedure in determining equivalencies.

DOL relies upon Congressman Lamar Smith’s statement that “[a]ny amount of on-the-job experience does not qualify as the equivalent of an advanced degree,” (144 Cong. Rec. H8584 (Sept. 24, 1998)) as an indication of Congressional intent with respect to its interpretation. AILA urges DOL to recognize that Congressman Smith’s fine distinction did not find its way into the statutory text. Rather, the statutory language, “master’s or higher degree (or its equivalent)” was drafted broadly. The use of this broad and generous language supports long-standing INS rules allowing equivalencies to be established through either degree equivalents or work experience. Clearly, under well-established principles of statutory construction, Congress in drafting this language may be presumed to have known of, and incorporated, previous interpretations of similar language in the same law.

As AILA argued in its comments to DOL’s NPRM, INS allows for work experience equivalencies in two specific instances: for establishment of the degree requirement for H-1B status, and most notably, with respect to establishing a master’s degree for the purpose of qualifying for the second preference employment category. In the Preamble to its Interim Final Rule, DOL attempts to distinguish the ACWIA language, “master’s or higher degree (or its equivalent)” from the language relating to the second preference employment category “advanced degrees or their equivalent.” In fact, the statutory language in both provisions is virtually identical. A “master’s or higher degree” encompasses all post-graduate degrees just as the term “advanced degree” from Section 203 (b)(2)(A) of the INA does. The terms are plainly synonymous. Therefore, if, as DOL concedes in its preamble, “the expression ‘advanced degrees or their equivalent’ would seem to be without meaning if not interpreted to include work experience,” it clearly and logically follows that the term “master’s or higher degree (or its equivalent)” encompasses precisely the same meaning.

**DOL also attempts to argue that the “exempt” status should only apply to “highly qualified employees,” thus implying that those who could meet the master’s degree threshold through work experience are somehow not as “highly qualified” as those who actually possess the degree. However, it is simply illogical that an individual possessing the work experience equivalent of a master’s degree would be considered as highly qualified an employee as a master’s degree recipient for the purposes of classification in the second preference category, but not as highly qualified as a master’s degree recipient for the purpose of being determined an “exempt” employee. DOL’s new standard leads to this inconsistent result.**

**D. AILA Opposes the Proposal to Incorporate the AACRAO Guidelines as the Primary Guide in Determining Whether a Foreign Master’s Degree Is Equivalent to a U.S. Master’s Degree.**

In the Preamble to its Interim Final Rule, DOL has solicited comments on whether to incorporate into its Final Rule the guidelines on degree equivalence developed by The National Council on the Evaluation of Foreign Educational Credentials and the American Association of Collegiate Registrars and Admissions Officers (the “AACRAO guidelines”). DOL further proposes that an employer would be able to present evidence of degree equivalence from a credentials evaluation service only where the AACRAO

guidelines contain no foreign degree listed as equivalent to a master's, or where the candidate's master's degree was obtained in the past, and terminology in the foreign country has changed. AILA has serious concerns with respect to the reliability of this publication as a primary resource for determining whether an individual with a foreign degree has the equivalent of a U.S. master's degree, and strongly opposes DOL's suggestion that the publication should be "incorporated" into the Final Rule as the primary resource for master's degree equivalencies.

As a preliminary matter, it must be noted that the AACRAO guidelines were last published in 1994. As education and geopolitics are in a continuous state of flux, the AACRAO guidelines do not represent the most current source of international educational information. Many countries and degrees are not listed in these guidelines, particularly in light of the recent break-up of the former Soviet Union. Moreover, according to specialists in the field of educational credentials evaluation, the AACRAO guidelines do not contain information on many new degrees in Poland, Russia, the Ukraine, and Germany since reunification. The AACRAO guidelines are not viewed as a primary resource by educational credentials evaluation services, in great part because of the limited number of credentials listed.

Moreover, the AACRAO guidelines are non-binding. They are simply recommendations voted on by a small number of college admissions professionals on an infrequent basis. The guidelines do not appear to be reviewed or updated regularly, and, according to credentialing specialists, many of the recommendations in the AACRAO guidelines have been reversed or changed in recent years.

Finally, AILA notes that AACRAO apparently has its own revenue-generating educational credentials evaluation service, the Office of International Education Services. DOL should avoid incorporating in its Final Rule any publication that might directly or indirectly appear to endorse one particular educational credentials evaluation service over others.

AILA strongly opposes any proposal by DOL to restrict the use of educational credentials evaluation services to the instances described in the Preamble. Under long-standing INS policy, the source of an educational credentials evaluation is not restricted as long as the credentialing service is reputable. ACWIA contains no further limitation on the source of an educational equivalency for a foreign master's degree. AILA views any effort by DOL to restrict the source of educational credentials evaluations as inappropriate and beyond its authority.

**E. DOL'S Standard for Determining Whether a Master's Degree Is in a Field Related to the Area of Intended Employment Is Unwarranted by the Language in ACWIA.**

As AILA stated in its comments to the NPRM, there is no statutory authority for the DOL to define "a specialty related to the intended employment" as an "appropriate or necessary skill or credential." Clearly, the term "related" is broader than the term "appropriate or necessary." The plain language of the statute simply does not support the

narrower standard proposed by DOL. Moreover, even the statement by Congressman Smith, cited for support by DOL in the Preamble, that a degree must have a “legitimate, commonly accepted connection” to the field of employment of the H-1B worker (144 Cong. Rec. E2325 (Nov. 12, 1998)), is more generous than the standard devised by DOL.

The employer should be able to determine what studies it considers “appropriate” to a particular position. Educational curricula at the master’s level are constantly changing, especially in the areas of technology, engineering and related fields. New emerging fields of study are appearing almost annually across the US and abroad. In addition, the INS, in adjudicating H-1B visa petitions, examines not only industry standards, but will also look to the university transcripts to determine whether there is sufficient coursework that is related to the occupation, even if the candidate’s major is not related on its face. In addition, INS takes into account the standard hiring practices of the employer to determine whether the employer typically hires individuals with a particular educational background to fill certain positions. The DOL proposal that the specialty must be generally accepted in the industry or occupation as an appropriate or necessary credentials or skill is a departure from current INS practice in establishing whether a degree is related to the specialty occupation.

AILA opposes DOL’s proposal to incorporate the *Occupational Outlook Handbook* or the O\*Net as the primary resources for establishing a relationship between the field of study and the area of employment. While AILA recognizes these as valuable resources, neither the *Occupational Outlook Handbook* nor the O\*Net are sufficiently comprehensive to serve as mandatory resources to establish the required relationship. Moreover, AILA disagrees with DOL’s suggestion that an employer could obtain a report from an educational credentials evaluation service to establish the required relationship between the degree and the employment. Most evaluation services evaluate foreign degrees into U.S. degree equivalencies. They do not opine on the relationship between an educational background and a professional field. Indeed, many educational credentials evaluation services provide disclaimers stating that it is the responsibility of a particular profession to determine whether an individual can practice in a particular field. It is not the charge of the evaluation service to determine the level, scope and depth of a skill set needed to perform a particular job.

DOL’s approach to the establishment of the connection between the field of study and the area of employment is unnecessarily restrictive. DOL fails to take into account the fact that employers often search for a particular educational background that might not be evident merely from the academic department that conferred the degree. Thus, DOL should allow employers to establish that the degree bears a reasonable relationship to the employment through a variety of means, including industry standards or specific coursework. Moreover, even when the degree requirements cannot be shown to be an “industry standard,” the employer should be permitted to show that the degree is related to the employment by establishing that it is a standard company requirement and that all others in the same position have the similar credentials, as currently permitted by INS regulations. As AILA has stated in the context of its discussion of work experience equivalencies for master’s degrees, if DOL has decided to delegate to INS the task of determining whether a master’s degree is related to a particular area of employment,

DOL should defer to INS expertise and policy in this matter, rather than attempting to micromanage the determination by promulgating new standards. Even if this task is not so delegated, INS has already built up a body of law and standards that address this issue, and those standards should be given deference.

## **XI. REGULATION SECTION 655.738: NON-DISPLACEMENT ATTESTATION**

### **A. The Test for “Employed by the Employer” Is Not Appropriate.**

INA section 212(n)(1)(E) and (F) as amended by ACWIA requires that H-1B dependent employers and willful violators must attest that, from the time period of ninety days before filing an H-1B petition to ninety days after, they are not displacing U.S. workers. This provision only protects U.S. workers who are “employed by the employer.”

The Department’s interpretation in the IFR of the term “employed by the employer” relies upon the application of the “common-law test” as derived from Supreme Court decisions and EEOC guidelines. Use of the common law test is unnecessary, cumbersome and unpredictable.

First, the common law test for employment is unnecessary in that a definition is already well-established in immigration law. INS and DOL regulations both use a similar definition of “employer.” 8 CFR section 274a.1(g), 20 CFR section 655.715. These definitions, which are much more focused and predictable than the proposed common law test, have functioned well, providing both employers and officials with an objective standard to determine when an employer employs an individual. Longstanding INS regulations have focused upon the services provided and the nature of the payment. DOL’s regulation defining “employer” states clearly that tax status is an important element. This standard has been accepted by business and regulators, who have relied on it for many years and have established a body of law to help clarify any questions that may arise as to the identity of the employer. ACWIA, which was passed to fit neatly into the INA, does not evince any intent to replace this definition with a new and more expansive definition. Senators Graham and Abraham convincingly made this point in comments to the NPRM. The Department does not indicate any reason why the definition in the regulations is inadequate for ACWIA.

In the absence of a clear Congressional intent to add a new definition of “employer,” DOL should continue to use the same reliable and predictable standard that focuses upon the tax and benefit status of the employee to determine the employer. Such an approach would keep stability and predictability in the law. The business community structures its workforce principally according to laws regarding tax and benefits. The Department should, therefore, strive to implement regulations that take these facts into account and not force employers to reevaluate their employment relationships with potentially thousands of employees.

For this reason, the common law test is unduly burdensome on employers. Adoption of this test would add a measure of uncertainty and cause employers to undertake a long and

protracted effort to redefine their employment relationships. Such a prediction is not mere hyperbolic fantasy but a likely result when there are two different standards for “employees” versus “independent contractors.” The Department should recognize that thousands of business decisions have been made relying upon the continued congruity of the two definitions. To force a wholesale review of all of those decisions, when not mandated by statute, places an enormous burden on employers.

Finally, such a definition is confusing, subjective, and unreliable. The common law test introduces many new factors that employers will have to review when determining who is an employee under the ACWIA. It is certainly conceivable that many employers or officials could apply the test wrongly even if attempted in good faith. Confusion over the contours of the common law test could subject employers to extensive penalties and, perhaps, lengthy litigation. Furthermore, in the absence of a clear test such as the IRS standard, disputes could arise between business partners as to whose employee was laid off. Employers could attempt to evade the requirements by claiming that a particular laid-off employee was actually “employed” by a different “employer.” Use of the criteria already established in this field would provide clear accountability and ensure that employers are one hundred percent clear about their responsibilities under ACWIA.

In conclusion, continued application of the IRS test would be in keeping with the legislative intent not to depart from definitions of “employer” already in the regulations. It would provide a single standard for tax, benefits, and immigration, which employers and officials could use to clearly demarcate and assign responsibility under a variety of laws. Adoption of the common law test would force employers to revisit and reevaluate thousands of business decisions and could cause significant confusion and uncertainty of the nature of an employer’s obligations. A single, clear-cut test can accomplish the goals of ACWIA and provide predictable and clear guidelines for employers and officials to use in evaluating their responsibilities under ACWIA.

## **B. DOL’s Definition of “Essentially Equivalent” Is Overly Broad.**

Under ACWIA, a covered employer is prohibited from laying off a U.S. worker from a job that is essentially equivalent to that for which the H-1B is being hired for a period of ninety days before and after the filing of the H-1B. By focusing on the “core elements and competencies,” DOL has adopted an overly broad construction of “essentially equivalent” jobs that would expand the universe of protected positions beyond the statute and hamper an employer’s ability to make vital business decisions.

The language of “essentially equivalent” indicates Congressional intent to ensure that this provision would be read narrowly and to ensure that employers would not replace an American worker with an H-1B. It is clear that Congress was concerned that employers may try to evade their obligations by making trivial changes in job responsibilities of a US worker and hiring an H-1B in a “different” job. This concern was manifested by the inclusion of the word “essentially” which was to ensure that employers could not make cosmetic changes to job descriptions to comply with the Act. However, the legislative history is clear that “this provision is not intended to be a generalized prohibition on

layoffs” and that the focus should be on a strict comparison of the duties of the laid off employee with the H-1B.

The Department, however, has expanded the focus of the inquiry by introducing the “core elements and competencies” test. AILA, in commentary to the NPRM, noted that very different positions could have similar core competencies and that the test would not accurately convey the difference in the position. AILA used the positions of “administrative software engineer” and “telecommunication software engineer” as examples of how the core competencies test could be applied too broadly. AILA is encouraged to see that DOL clarified how the test would apply in such a circumstance and understands that the core competencies test is to be interpreted to recognize differences in the duties of position beyond the lowest common denominator. However, the regulatory language remains overly broad. While section 655.738(a)(2) acknowledges the one-on-one comparison intended by Congress, it then proceeds to discard that standard with the vague and limitless statement “but shall be broader in focus where appropriate.” This “standard” opens the door for almost any comparison a person cares to make, and its broadness completely abandons the narrow construct dictated by the statute.

In addition to looking at the essential equivalency of the positions, the ACWIA looks to the qualifications of the individuals holding the positions. The ACWIA mandates that, in determining whether jobs are essentially equivalent, the qualifications and experience for candidates should be “substantially equivalent.” DOL is correct to assert that “the jobs will be viewed as different if the skill required to perform the job the U.S. worker was holding is substantially different than that required to perform the job of the H-1B worker.”

However, the inquiry continues. DOL proposes to first determine whether the two individuals meet the minimum requirements for the position and then to determine whether or not there is a difference in education, experience or training that would materially affect the ability of one individual to do the job better than the other. To illustrate the point, DOL states that it would view Bachelor’s degrees from accredited universities as “substantially equivalent” without regard to the reputation of the universities. Furthermore, DOL would consider ten years of relevant experience to be substantially equivalent to fifteen years of experience. For some jobs, such an approach may be reasonable as applied to such extensive experience. However, the comparison is more likely to arise in cases where two employees have less experience than ten or fifteen years. For example, three years of experience is substantially different from five years of experience. Jobs requiring three years of experience should be treated as different jobs from those requiring five years. The Department should clarify that when dealing with such situations, the distinctions based on amount of experience will be more acute when dealing with lower or more immediate levels of experience.

### **C. Adjustment to the Definition of Layoff Is Needed.**

The nondisplacement provisions of ACWIA only prohibit H-1B dependent or willful violator employers that have laid off U.S. workers from replacing them with H-1B workers. However, the ACWIA is clear that not all terminations of employment constitute impermissible layoffs triggering application of the attestation requirements. A “layoff” under the ACWIA only occurs when the “employer has caused the worker’s loss of employment.” AILA is encouraged to see that DOL accepted AILA’s suggestion that it include all of the exceptions to impermissible layoffs listed in the statute. These exceptions include inadequate performance, violation of workplace rules or other cause related to the employee’s work or behavior on the job.

In addition to performance or behavioral cause for termination, the ACWIA provides that an employer may offer an affirmative defense to an impermissible layoff by showing that the laid off employee was offered a “similar employment opportunity with the same employer at equivalent or higher compensation and benefits.” This is a defense whether or not the laid off U.S. worker accepts the offer.

The offer must be bona fide and, in determining the bona fides of an alternative offer, DOL will ascertain whether the offer is truly at “equivalent or higher compensation and benefits.” Under the IFR, DOL will look not only to wages but also to benefits, cost of living adjustments and relocation expenses. AILA is concerned with the application of the cost of living and relocation calculations. These are questions of benefits, not pay, and thus fall under the rubric of the ACWIA’s mandate to offer benefits to H-1B workers on the same basis and criteria as to U.S. workers. DOL should make clear in the final regulation that cost of living and relocation expenses are to be calculated by the employers’ own policies governing these matters. Where an employer has a cost of living differential for employees in different geographic regions, the inquiry should only focus upon whether the employer complied with its own policies, and not on a government-derived calculation of living expenses between geographic areas. In addition, the employer should be expected to comply with its own relocation expenses policy.

### **D. DOL’s Standard for “Indicia of Employment” is Unworkable and Is Arbitrary and Capricious.**

DOL’s definition of “indicia of employment” is an unworkable standard for triggering nondisplacement obligations. According to DOL, “the displacement obligation would not be triggered simply because the H-1B worker performed duties on the customer’s premises.” 65 Fed. Reg. at 80144. However, DOL establishes a nine-factor test which would trigger the nondisplacement obligation in virtually all instances in which an H-1B “simply” performs duties at the client’s premises. Although DOL correctly states that work performed on a client company’s premises alone will not trigger secondary displacement (Section 655.738(d)(2)), DOL posits that the single most important factor is

the right to control when, *where* and how the work is performed [emphasis added].  
Section 655.738(d)(2)(ii)(A).

In today's world of outsourcing and consulting, however, when a corporate customer enters into a contract for services, the servicing company's employees will virtually always perform projects at the client company's work site. As a result, it is unreasonable to believe that there would be situations in which the client company would not have control over where the work is performed. Moreover, given the rise in the incidence of workplace violence, a corporate customer generally will not give a contractor's employees free rein in terms of the hours they keep and their access to the workplace. Instead, as a matter of workplace safety, and for other valid business reasons, such as, for example, protection of intellectual property, the customer will routinely require the contractor's H-1B workers to confine their activities to designated areas. In this way, the customer's interests in protection of its own employees and its intellectual property will be safeguarded. In this sense, the degree of control over the placing employer's employees will be significant, yet the control cannot reasonably be said to derive from an employment relationship or suggest indicia of employment. The indicia-of-employment test should apply only where there is demonstrable control, not merely because the place of employment is an everyday reality.

In AILA's view, the indicia-of-employment test should be readily discernable and easily applied. The proper test can be found elsewhere in the Preamble and IFR. In an analogous setting, when describing the procedure for calculating H-1B dependency, the DOL does not include as full-time equivalent employees those "persons who are consistently treated by the employer as consultants or independent contractors for all such purposes, and for whom the employer fills out IRS Form 1099." 65 Fed. Reg. at 80126. Thus, *bona fide* consultants are excluded from this calculation because they are not individuals who are "consistently treated as 'employees' for all purposes including FICA, FLSA, etc." See Section 655.736(a)(2)(i). As the legislative history suggests, *viz.*, the statement of Sen. Abraham, this standard would provide greater consistency, and thereby offer greater certainty for dependent employers and their corporate customers. In light of the severity of the potential penalties, the triggering mechanism for secondary nondisplacement obligations (namely, the indicia-of-employment test) should provide H-1B dependent employers and their customers with better notice of this responsibility and a less burdensome, but more uniform trigger. The *bona fide* consultant test is the best method, consistent with the legislative history, and therefore should be used.

**E. The DOL's Prescribed Methods for Obtaining Assurances of Nondisplacement from a Secondary Employer Are Unlikely to Achieve the Statutory Compliance Objective and Are Overly Burdensome.**

As previously discussed in the context of the Paperwork Reduction Act, DOL seems to have utterly no idea of the amount of time and level of business communication involved in the secondary displacement inquiry. The conclusion that each assurance from a secondary employer "will take approximately 5 minutes" is laughable. As previously noted, when major contracting companies enter into agreements with major corporations,

the relationship is complex. The parties engage in extensive negotiations for contractual terms, and significant liability may attach should there be a breach of an agreement. Thus, if the statutory objective is to be minimally satisfied, something more than a five-minute inquiry by the customer is needed. Therefore, either the nature of the customer's comparison to other "essentially equivalent" workers must be dramatically scaled back to comport with true statutory intent, or the time estimate for the customer query must be significantly enlarged. The agency simply cannot have it both ways.

Moreover, according to DOL, even after an H-1B dependent employer makes the required inquiry, the employer may still be found to have violated the secondary displacement prohibition if the secondary employer in fact displaces any U.S. worker 90 days before and after the placement of the H-1B worker. Section 655.738(d). An unlawful displacement of a U.S. worker with the secondary employer, the DOL concludes, is a strict liability offense. As a result, there is a likelihood that H-1B dependent employers will seek to recover damages for breach of contract or (as the Preamble acknowledges) will endeavor to secure and invoke an indemnification clause if a customer's effort to determine secondary displacement is not full-fledged or comprehensive.

In cases where the constructive knowledge standard is applied, a distinction should be noted more clearly between a dependent employer's "reason to know" and duty of inquiry, on the one hand, and the "reckless disregard" of available information, on the other. See section 655.738(d)(5)(ii), and 65 Fed. Reg. at 80151. DOL equates this latter level of intent to willfulness (see section 655.805(b)); thus, if an employer could be found to have committed a willful violation and displacement, the consequences could be debarment for at least three years and penalties of up to \$35,000 per violation. See sections 655.810(b)(3) and 655.810(c)(3).

AILA believes that numerous situations will foreseeably arise where a customer does not fully comply or perhaps only half-heartedly complies with the requirements of secondary displacement, e.g., by taking only five minutes to assess the issue, as DOL suggests in its time estimate, rather than fully investigating the question. Such a feeble customer investigation on displacement may not fully, but instead only partially, inform the placing employer of all relevant developments. It thus takes no leap of faith to imagine that a partial disclosure of information, coupled with half-hearted customer cooperation, could lead to a *post-hoc* determination by DOL that the dependent employer's duty of inquiry was not satisfied and that the inquiry should have been more robust. AILA therefore fears that – unless the rule and Preamble are clarified – a duty of inquiry will easily be transformed into a reckless disregard of evidence and thus lead (quite unfairly) to a finding of willful violation and debarment. There are many situations in which a customer legitimately may not be forthcoming about possible or actual displacement. The customer may be reluctant to stir up its workforce, or engage in a disclosure that would violate its duties under the securities laws. Thus, the risk of debarment liability for an H-1B dependent employer is unreasonably high and inconsistent with statutory intent. The DOL must therefore create a safe and clearly delineated distance between the "should have known" constructive-knowledge standard and the abyss of recklessness equated with willfulness.

## **F. Employers Should Be Provided an Opportunity to Take Curative Measures.**

DOL should allow a reasonable investigation period, an opportunity to cure apparent violations and a minimum of a three-day period for an H-1B dependent employer to take curative measures. The H-1B dependent employer is required to exercise due diligence and make a reasonable effort to inquire with the client company about potential secondary employment. The due diligence requirement continues “where there is information which indicates that U.S. worker(s) have been or will be displaced. Section 655.738(d)(5). DOL requires employers to engage in a more “particularized” inquiry if information regarding potential secondary displacement becomes available before the placement of H-1B workers. See section 655.738(d)(5)(ii). DOL explains that there is no presumption about an employer’s knowledge of public information, including newspaper articles. If the H-1B employer does receive such information, it “would be expected to recontact the secondary employer and receive credible assurances that no layoffs are planned or have occurred in the applicable time frame.” 65 Fed. Reg. at 80151.

This further inquiry should be permitted after the H-1B worker is placed, and DOL should allow time for the H-1B dependent employer to cure an impermissible displacement. First, because the nondisplacement covers 90 days before and after the H-1B worker’s placement with the secondary employer, information may become available after the worker has already been placed. Moreover, if a client’s needs are such that an H-1B worker’s services are required immediately, the employer’s reasonable inquiry may be limited. After the worker is placed, and information becomes available to the placing employer of a potential layoff, the dependent employer should be permitted time to recontact the client and make the necessary inquiry to determine whether a U.S. worker has been or will be displaced. The client may not be able to confirm this information immediately. Both the client and employer likely will need a reasonable period of time to gather information and determine whether a U.S. worker was “laid off” and whether the job from which the U.S. worker was laid off is “essentially equivalent” to the job for which the H-1B worker was sought. Furthermore, if through the inquiry and confirmation, the placing employer learns that displacement has occurred, DOL provides no guidance on steps that the placing employer should take. Thus, DOL should allot time and provide guidance enabling the H-1B dependent employer to cure an impermissible displacement rather than merely punishing the employer for circumstances beyond the placing employer’s control.

Despite DOL’s claim that its discretion in this area is limited (see 65 Fed. Reg. at 80152), the agency has authorized curative measures in other areas of H-1B enforcement. For example, the agency has allowed curative measures to eliminate the imposition of fines for technical violations or mitigate the size of the fine in connection with technical violations relating to posting and to public access file creation and retention. Moreover, the three-day period to cure a violation of the no-strike or lockout condition was not statutorily established. Rather, 20 CFR 655.733(a)(1) provides that if a strike or lockout occurs after certification of an LCA, an employer may within three days of the occurrence of the strike/lockout submit written notice to ETA of the strike. This

provision allows the employer to remain in compliance with the no-strike or lockout provision, and recognizes that a reasonable time period is necessary to remove a worker when the conditions under the LCA have changed. When a customer does not provide information after the H-1B dependent employer makes clear, persistent and “particularized” requests, the placing employer will be forced to take H-1B workers off the job immediately or face strict-liability fines and possible debarment. However, if the placing employer takes this action, the client may claim breach of contract based on the placing employer’s failure to complete the agreed-upon project. Thus, the refusal to provide a reasonable time period in which to cure a displacement places the H-1B dependent employer between a rock and a hard place.

There is no evidence whatsoever that Congress ever intended such a harsh result. Congress could reasonably have believed that the agency would adopt measures that strike a fair balance between worker protection and an employer’s real-world needs. Congress presumably was aware of the three-day grace period in the no-strike/no-lockout provision and likely expected the DOL to adopt a similar safe-harbor provision in the secondary placement context. The final rule and preamble should establish such safe-harbor and curative provisions that protect workers yet avoid costly breaches of major consulting contracts (and avoid the inevitable court-congesting litigation that such breaches will no doubt engender). Public policy concerns and reasonable interpretation of legislative intent thus demand a better balance than the DOL provided in the IRF and its preamble.

**G. Including “Constructive Discharge” as an Impermissible Layoff for Purposes of Secondary Displacement is Fundamentally Unfair and Unworkable.**

In defining “layoff” of a U.S. worker, DOL provides that a U.S. worker’s departure will not be considered voluntary “under established principles concerning ‘constructive discharge.’” See Section 655.738(a)(1)(ii). Requiring a placing employer to inquire about constructive discharge from a customer is unworkable and essentially amounts to a trap for the H-1B dependent employer. When a placing employer makes its inquiry, the customer will state that a U.S. worker has resigned but will not state that he or she was forced to quit because of intolerable working conditions. Even if a placing employer specifically asks if the worker was constructively discharged, the secondary employer’s response will always be “no.” Moreover, many details of an employee’s separation must remain confidential between the employer and employee. The concern for a placing employer in this situation is that it will either be forced to assume the risk of documenting a *pro forma* inquiry or to interrogate the customer regarding every voluntary departure or retirement. In the latter case, the placing employer would be put (quite inappropriately) in the position of acting as the customer’s counsel by evaluating the circumstances of every departing worker’s employment history and determining whether the customer’s actions were designed to force the employee’s resignation. However, the nature of the two parties’ business relationship is such that the placing employer could never actually fulfill such a role.

Moreover, unlike layoffs, which may be publicized through newspaper articles or through the secondary employer’s press releases, no amount of due diligence will lead the placing

employer to learn of a constructive discharge. Such an allegation generally is brought in the context of employment-related litigation or administrative action, such as a claim for unemployment benefits. Only in the rarest cases will such actions be publicized, and a placing employer should not be saddled with the burden of monitoring every unemployment benefits claim or employment-related lawsuit involving the customer to learn of potential constructive discharge.

## **XII. REGULATION SECTION 655.739: RECRUITMENT ATTESTATION**

### **A. The Active/Passive/Internal/External Requirement Is Counter to Congressional Intent.**

DOL mandates that “recruitment methods shall include, at a minimum, the following: both internal and external recruitment .... and at least some active recruitment.” While acknowledging “the common thread through employer, trade association, and attorney comments .... that there is no single template for recruitment to fit all situations, and that recruitment procedures vary by industry, size, geographic location, and working conditions,” DOL nonetheless is “of the view that some guidance is appropriate to assist employers in determining industry wide standards.” It is notable, however, that the regulatory language is mandatory and not mere “guidance.”

In his analysis of this provision of ACWIA, Senator Abraham, made the following statement:

Section 412(a) is the “recruitment” attestation, to be set out in new paragraph (G) of Section 212(n)(1). It requires a covered employer to state that it has taken good faith steps to recruit U.S. workers for the job for which it is seeking the H-1B worker, and has offered the job to any equally or better qualified U.S. worker. This provision allows employers to use normal recruiting practices standard to similar employers in their industry in the United States; it is not meant to require employers to comply with any specific recruiting regimen or practice or to confer any authority on DOL to establish such regimens by regulations or guidelines. 144 Cong. Rec. at S12751.

Not only is DOL’s establishment of this active/passive/internal/external requirement in direct conflict with Congressional intent, by establishing this requirement, DOL mistakenly assumes that all customary recruitment patterns are uniform in the various industries in which H-1B workers may be found. In addition, no consideration is given by the Department for differences within an industry such as the size of the employer or the geographic location. There may be widely disparate recruiting practices between large and small employers or variations based on geographical location and local job market conditions. In certain industries or for certain large corporations, national job searches may be customary, whereas in other situations, strictly local recruitment is the norm.

In its supplementary information, DOL insists that the employer will not satisfy the requirement to utilize “industry wide standards” for recruitment by easy methods that might constitute the least common denominator. Conversely, an employer cannot be held to the highest common denominator as these regulations seem to require. The regulations fail to explicitly recognize that there is no definitive source for an employer to refer to determine what are “industry wide standards.” DOL itself has solicited information about such sources and no commentator has been able to identify such sources. In light of this, determination of what is an “industry wide standard” will, at best, be subjective and variable. With this in mind, the regulations should recognize any good faith effort of an employer to ascertain “industry wide standards” and view them as complying with ACWIA.

Further, by prescribing a specific regimen to include internal and external recruitment as well as to require active recruitment, the Department ironically and unjustifiably requires more ambitious recruitment efforts for H-1B employment than what it currently requires for permanent labor certification. DOL clearly contradicts the position it takes in the area of reduction in recruitment labor certification applications. In the Department’s General Administration Letter (GAL) No. 1-97 on Measures for Increasing Efficiency in the Permanent Labor Certification Process, the Department specifically did not establish a presumptive regimen for employers filing RIR labor certification applications. The language of GAL 1-97 states, “the employer can show an adequate test of the labor market ... through sources normal to the occupation and industry.” Since the issuance of GAL 1-97, the Department has continually stated that each recruitment pattern must be viewed on a case by case basis.

DOL should, therefore, adopt for H-1B purposes the reasonable recruitment approach it now allows in the reduction in recruitment method of labor certification, which takes into account recruitment practices normal to the industry today and also takes into account a variety of other factors such as the industry, the size of the employer, the local geographic and demographic factors, etc. The Department should refrain from mandating “guidelines” and instead evaluate the employers’ efforts on a case by case basis in an enforcement action. Taking this broader approach will allow for normal variations in any industry that occur due to market conditions, geographic location and the size of the employer. It will then allow for an employer to utilize any legitimate or customary practice that is recognized in its industry as normal recruitment activity. To codify a specific regimen that applies to all H-1B employers, regardless of market conditions, size and geographic location, creates an arbitrary and inflexible rule that does not permit a covered employer to effectively recruit based on then-current industry conditions.

Finally, in keeping with the “real world” recruitment activities of employers, DOL should recognize that the collective efforts of affiliated entities to recruit U.S. workers should be credited toward the satisfaction of the good faith recruitment obligations. Collaborative recruitment is common among affiliated companies and is an efficient method of attracting qualified applicants. By fostering such collaborative efforts, DOL will only encourage compliance with this attestation requirement, thereby bolstering the

protections for U.S. workers, as intended by Congress in enacting ACWIA.

## **B. The IFR Applies the Wrong Standard for Good Faith Recruitment.**

The Department, in its interim rule, has retreated from its presumption that success in recruiting U.S. workers would equate to good faith recruitment. However, the Department states that it “intends to look particularly carefully at the recruitment practices of employers who have not had success in hiring U.S. workers.” Even though the Department of Labor has removed the regulatory language allowing employers to meet their recruitment obligations by demonstrating success in recruiting U.S. workers, a negative presumption appears to remain in place that any dependent employer that is unable to demonstrate success will be presumed not to have acted in good faith. The statute in this connection merely requires employers to use industry wide standards of recruitment even when such recruitment, “has been demonstrably unsuccessful.” (NPRM, 64 Fed. Reg. at 643). AILA urges DOL to remember the very impetus behind the enactment of the ACWIA, which is the current deficiency of qualified U.S. workers to fill the vacant positions. The Department’s proposed approach still penalizes those very employers whose employee shortage the ACWIA was enacted to ameliorate by treating the recruitment efforts of employers who have been unsuccessful as *per se* suspect.

Senator Abraham clearly stated that the statute was carefully worded to avoid any type of “disparate impact” analysis or “validation” of selection criteria as mandated under Title VII of the Civil Rights Act of 1964. “Given the absence of any kind of record that employers use hiring criteria as a covert mechanism for preferring non-U.S. workers, such an analysis would make no sense in this context.” (144 Cong. Rec. S12751). Clearly, the Department does not have the statutory authority to examine the success of an employer’s efforts.

## **C The Definition of Legitimate Selection Criteria Is Too Narrow.**

The Department persists in its IFR in narrowly defining the statutory standard requiring an employer to use “legitimate selection criteria relevant to the job that are normal or customary to the type of job involved.” The statute includes the allowance of “legitimate selection criteria” not as an affirmative requirement on employers, but as a savings clause to aid in statutory interpretation. To wit: “Nothing in paragraph (G) shall prohibit an employer from using legitimate selection criteria ...” This clause does not require an employer to affirmatively justify or document its selection criteria unless the agency conducting an investigation (which should be the Attorney General, not the Department of Labor; see the discussion below) believes that such criteria did not meet the exclusion in this paragraph, i.e. were not “legitimate,” were not “relevant,” or were applied in a discriminatory manner. The legislative history is clear:

It is the intent of Congress that this provision not require an employer to set aside its normal standards for selection of recruitment of employees, including, but not limited to, legitimate objective criteria and legitimate

subject of criteria ... . The purpose of this language is to make clear that an employer may use ordinary selection criteria in evaluating the relative qualifications of an H-1B worker and a U.S. worker ... . It is intended to emphasize that the obligation to hire a U.S. worker who is “equally or better qualified” is not intended to substitute someone else’s judgement for the employers’ regarding the employers’ hiring needs. Rather, the employer remains free to use ordinary hiring criteria, either subjective or objective, in deciding who in the employer’s view is the right person for the job. Moreover, its judgement as to what qualifications are relevant to a particular job is entitled to very significant deference. (144 Cong. Rec. S12751).

DOL’s interim regulation violates the ACWIA’s clear mandate to DOL not to interfere with the enforcement of the “selection” aspects of an employer’s recruitment practice. The statute specifically sets up a separate mechanism for alleged violations of the selection portion of the recruitment attestation. While including a savings clause, it states that this section does not restrict either the Department of Labor or the Attorney General’s enforcement authorities with respect to other violations.

Senator Abraham’s statement makes this distinction clear:

This savings clause, however, is not meant to serve as a backdoor way around the exclusivity of the remedy set out in 212(n)(5) for a violation of the selection attestation itself. It should also be noted that by setting up separate mechanisms, one lodged at Labor concerning recruitment and one lodged at Justice concerning selection, this provision contemplates that two different kinds of violations be handled differently. Thus, it does not contemplate, for example, recharacterizing a “failure to select” complaint as a “failure to recruit in good faith” and then using the enforcement regime for the latter category of violations to pursue what in fact is a “failure to select” complaint ... . It should be noted that *nothing in this section should be construed to give the Attorney General or the Department of Labor any authority to write regulations or guidelines concerning permissible and impermissible selection criteria* or mechanism for determining when such selection criteria are permissible or impermissible. 144 Cong. Rec. S12754 (emphasis added).

Thus, DOL’s mere suggestion that the use of criteria from O\*NET or the U.S. Bureau of Labor Statistics’ *Occupational Outlook Handbook* would be an appropriate tool for employers to use to ensure that legitimate selection criteria is beyond the legislative authority quoted to the Department. In this connection, the prohibition in section 655.739(h) on employers to “exercise a preference for its incumbent nonimmigrant workers who do not yet have H-1B status (e.g., workers on student visas)” is without justification in the statute and, in fact, contradicts the statutory language, which explicitly states in INA section 212(n)(1)(G) that “nothing in subparagraph (G) shall be construed to prohibit employer from using legitimate selection criteria relevant to the job that are

normal or customary to the type of job involved.” DOL apparently fails to realize that it is a time honored practice for many employers, including employers in the high-technology industry and other professional fields, to offer internships to recent college graduates and to use this pool of interns as a resource to eventually fill the company’s ranks of career employees. The reality is that a very high percentage of graduates from U.S. universities, particularly in technical fields, are in fact foreign students.

Thus, this provision would require employers to discriminate against foreign student interns in favor of U.S. interns, possibly violating prohibitions against national origin discrimination. Similarly, the regulation cautions employers against too much recruitment at universities as this might give rise to allegations of age discrimination. Again, most U.S. companies, particularly in the high-tech field, require employees who have state-of-the-art skills and abilities. Such skills and abilities are normally imparted by our universities, and to recruit at universities is the most logical and efficient course of action. Thus, the Department’s interim regulations contravene the plain language of the statute by in fact prohibiting employers from engaging in legitimate selection criteria and practices that are normal and customary in their industries.

#### **D. DOL Overreaches in Its Recruitment Documentation Requirements.**

With regard to documentation of recruitment efforts, Senator Abraham stated: “The intent is not to require employers to retain extensive documentation in order to be able to retroactively justify recruitment and hiring decisions, provided that the employers can give an articulable reason for the decisions that it actually made.” 144 Cong. Rec. S12754.

The Department again takes the position that it is not necessary to maintain copies of advertisements provided the employer maintains documentation of recruitment methods used including places and dates of the advertisements, postings or other recruitment methods, the content thereof and the compensation terms. AILA still believes that this proclamation is virtually the same as requiring employers to keep copies of all advertisements.

The requirement of retaining every resume received also constitutes an outrageous level of additional documentation. DOL’s reliance on EEOC guidelines for the creation and maintenance of such documentation continues to be misplaced. The referenced guidelines only require that *if* such documentation is created or retained, it must be done consistently. They do not require the actual maintenance of the documents. By imposing these substantial recordkeeping requirements, DOL is creating a massive paperwork burden in the form of retaining, organizing and storing copious quantities of paper where no requirement currently exists. For some odd reason, DOL continues to erroneously state that most employers keep such documentation anyway to comply with the guidelines of EEOC and other federal agencies. If this is the Department’s belief, then AILA would respectfully submit that the regulations should state that employers are required to comply with the regulatory provisions of the EEOC or whatever other agency rather than to create an entirely new set of requirements here. All that should be required

in this regulation is a brief summary of the recruitment efforts over the six months immediately preceding filing an LCA, in a manner similar to the Reduction in Recruitment program in the permanent labor certification context. This would provide a sufficient overview to evaluate the employer's good faith especially when it is still recruiting for open positions.

However, AILA continues to object that the Department's requirement that this summary be made available in the public access file. First, this is not required by the statute and, secondly, it compromises an employer's business in that it invites competitor intrusion into the H-1B employer's recruitment practices. These days, competing for the limited pool of workers is critical to success of most companies. Sharing the scope and nature of their recruitment activities with their competitors can hurt, not help, companies' ability to recruit U.S. workers. Though some information may be public, putting a complete summary of the company's recruitment practices together in one location, and available to any member of the public, makes it far too easy for a competitor to get a full picture of an employer's activities. It would further tip off competitors to the employer's hiring needs in a specific geographic market as well as with regard to its recent growth, none of which is appropriately divulged in such an easy-to-access public manner. Such a memo should be required only upon request by the Department in the course of an investigation.

### **XIII. REGULATION SECTION 655.760: PUBLIC ACCESS FILE & RECORD RETENTION**

#### **The Documentation Requirements Added by the IFR are Unnecessary and Violate the Fundamental Premises of the Attestation-Based System Established by Congress.**

The IFR states that "the Department has limited the documents that must be disclosed to the public to those which the Department has concluded are necessary for a member of the public to be able to determine the employer's obligations and the general contours of how it will comply with its attestation obligations." Notwithstanding this statement, the IFR substantially increases the amount of records that employers must keep in the public access file and retain for prompt retrieval in the event of an investigation. The new records the IFR requires to be retained and/or placed in the public access file are not necessary to enable the public to "determine the employer's obligations and the general contours of how it will comply with its attestation obligations." Rather, they are onerous, time-consuming tasks having little to no practical value for the program's purpose. Furthermore, DOL has exceeded the authority granted by Congress and has violated the fundamental premises of the attestation-based LCA system.

The new requirements for the public access file and retention of records require employers to develop and maintain, in addition to the substantial documentation previously required, the following:

- A copy of the completed LCA, *including* cover pages.

- A summary of benefits offered to U.S. workers in the same occupational classifications as H-1B workers.
- A statement explaining any differentiation of benefits where not all employees are offered or receive the same benefits.
- A statement that some or all H-1B employees are receiving “home country” benefits.
- A sworn statement that a new employing entity, following a change in corporate structure, accepts all obligations, liabilities and undertakings under the LCAs filed by the predecessor, together with a list of *each affected LCA and its date of certification*, and a description of the actual wage system and EIN of the new employing entity.
- A list of any entity included as part of the single employer in determining H-1B dependency status, where the employer is subject to the IRC definition of single employer.
- A list of “exempt” H-1B employees, where the employer is dependent or has been found to be a willful violator and indicates that only “exempt” H-1B workers will be employed on the LCA.
- Documentation of the recruitment methods used and the time frames during which the employer recruited U.S. workers.

In addition, employers must, under the IFR, retain an additional overwhelming volume of detailed records regarding wages, hours, benefits, home country benefits, dependency status, recruitment efforts by dependent employers, INS petitions and countless other documents. DOL has trivialized and substantially underestimated the burden on employers of developing, collecting, maintaining and retaining this voluminous and complex information, whether for the public access file or for retention for production in the event of an investigation. Given the nature of the documentation required, the risk of disclosing proprietary information, and the inherent privacy concerns for employees and employers alike, employers will be forced to expend significant resources for attorneys, accountants, specialized human resources personnel and other specialists, simply to generate, review, monitor and retain the newly required documentation.

Given that the LCA system is attestation-based, there is no reason to require employers to establish documentation of the nuances of the attestations. The public access file requirements go much farther than demonstrating the general contours of how the employer intends to comply, which can be satisfied by requiring employers to retain records *necessary* to establish compliance with the attestation obligations. It must be recognized that the purpose of a public access file is to allow employees of an H-1B employer to verify that the employer is not using H-1B labor to disadvantage the U.S.

workforce or exploit the H-1B employee. It is not meant to be a receptacle for all documents that DOL might require an employer to produce in an investigation.

#### **XIV. REGULATION SECTION 655.805: ENFORCEMENT**

##### **A. DOL Improperly Assumes Jurisdiction to Investigate Alleged Displacement of a U.S. Worker**

Section 655.805 of the 1/5/99 NPRM (entitled “Complaints And Investigative Procedures”) lists 14 potential violations of the LCA requirements. Section 655.805 of the IFR lists 16 potential violations. Two newly proposed violations under DOL jurisdiction, with respect to which the regulated public has had no opportunity for comment, are as follows:

- a. Displacement of a U.S. worker (whether by a primary or secondary employer); and
- b. Displacement of a U.S. worker in the course of committing a willful violation of any of the conditions in paragraphs (A)(2) through (9) of Section 655.805.

INA section 212(n)(2) grants authority to DOL to establish a procedure for the investigation of complaints for failure to meet a condition specified on the face of the labor condition – with the exception of complaints respecting an employer’s failure to meet the condition of paragraph (1)(G)(i)(II) or a petitioner’s misrepresentation of material facts with respect to such a condition. ACWIA section 413, amending INA section 212(n) by adding new subsection 5(B). DOL’s enforcement authority is clearly limited to complaints arising under paragraph (1)(G)(i)(I), alleging that the employer, prior to filing the application, has failed to take good faith steps to recruit in the United States using industry wide standards and offering the required wage for jobs to be offered to H-1B workers.

There is no statutory authority for DOL assumption of jurisdiction over investigation of U.S. worker displacement complaints. Such complaints are within the exclusive jurisdiction of the Attorney General, and then solely for the purpose for administering the arbitration procedures provided under ACWIA section 413(b), amending INA section 212(n).

New paragraph 5(A) of INA section 212(n) deliberately excludes DOL from jurisdiction over complaints dealing with the alleged displacement of U.S. workers by H-1B workers. DOL’s attempt to use the proviso language found at the end of new paragraph 5(A) to justify assumption of jurisdiction over displacement claims violates Congressional intent to have such claims adjudicated by private arbitrators funded by DOJ/INS, after a preliminary determination by the Attorney General that the complaint is timely and based on reasonable cause. Congress specifically designated the administrative and judicial

authorities with jurisdiction over displacement complaints. DOL is given no authority over such complaint.

The authority of the Attorney General to reverse or modify the findings of the arbitrator is limited to the conditions specified in sections 10 and 11 of Title 9 of the U.S. Code (The Federal Arbitration Act). The federal circuit courts of appeal enjoy only limited jurisdiction over the review of the arbitration record following the termination of proceedings before DOJ/INS. Only the Attorney General is authorized to impose administrative remedies (including civil money penalties) against a respondent employer, subject to the provisions of new subsection 5(E) of INA section 212(n). Congressional intent with respect to the exclusivity of the Attorney General's jurisdiction within DOJ itself is explicitly set forth in new subsection 5(F), which provides that no delegation within DOJ shall be permitted until 60 days after the submission of a work plan to the Committees on the Judiciary of the United States House of Representatives and the Senate.

Under the well established rules of statutory construction, the exclusion of DOL from proceedings under paragraph (1)(G)(i)(II) demonstrates that Congress clearly intended to relieve DOL of all jurisdiction over allegations of displacement of U.S. workers. *See also* ACWIA section 413(b)(2) (entitled "Conforming Amendment") amending the first sentence of INA section 212(n)(2)(a)(A) by striking "The Secretary" and inserting "Subject to paragraph 5(A), the Secretary".

Consequently, the proposed additions to the violations DOL is authorized to investigate and remediate are *ultra vires* of DOL's statutory authority. Further, the agency's failure to provide prior notice and comment, as required under the APA render this rule invalid.

## **B. DOL Invents New Violations to Investigate**

DOL also impermissibly devises new violations to investigate, in the form of "failure to maintain documentation" and "failure to otherwise comply" with any other rules that DOL may have invented. Section 655.805(a)(15) and (16). Nowhere did Congress authorize investigation of such matters, and DOL acts beyond its authority in granting itself such power.

## **XV. REGULATION SECTION 655.807: INVESTIGATIONS**

### **A. DOL'S Continued Insistence that It Has Authorization to Conduct "Directed" Investigations Is Contrary to Accepted Rules of Statutory Construction.**

ACWIA section 413(e) amends INA section 212(n)(2)(d) to establish the conditions under which the Secretary may investigate employers for alleged violations of the LCA requirements of the H-1B program, other than by complaints received from aggrieved parties and spot investigations conducted during the 5-year probationary period following a final determination of prior willful violation.

Notwithstanding the specificity with which Congress defined the circumstances under which DOL may conduct LCA investigations, circumstances which do not include the right to conduct “self-directed” or “self-initiated” investigations, DOL continues to insist that its authority to conduct such investigations is in no way limited by law. *See* 65 Fed. Reg. at 80177, citing 144 Cong.Rec. E2327 (November 12, 1998)(Remarks of Congressman L. Smith).

DOL’s interpretation is contradicted by the conditions imposed under INA section 212(n)(2)(G)(iii) which provides: “Any investigation initiated or approved by the Secretary under clause (i) shall be based on information that satisfies the requirements of such clause and that (I) originates from a source other than an officer or employee of the Department of Labor, or (II) was lawfully obtained by the Secretary of Labor in the course of lawfully conducting another Department of Labor investigation under this Act or any other Act.” This language clearly limits “directed” investigations to circumstances in which the Secretary had lawful authority to pursue the employer in connection with another investigation, which lead to the evidence giving rise to an investigation under the expanded authority of ACWIA section 413(e).

**B. DOL Has Exceeded Its Statutory Authority by Asserting Jurisdiction over the Investigation of Displacement Complaints under ACWIA 413(e).**

New paragraph (G)(i) requires the Secretary to obtain “specific credible information from a source, who is likely to have knowledge of an employer’s practices or employment conditions, or an employer’s compliance with the employer’s labor condition application under paragraph (1), and whose identify is known to the Secretary, and such information provides reasonable cause to believe that the employer has committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(E), (1)(F) or (1)(G)(i)(I) or has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees...The Secretary (or the Acting Secretary in the case of the Secretary’s absence or disability) shall personally certify that the requirements for conducting such an investigation have been met and shall approve the commencement of the investigation...”

DOL acknowledges that the conditions established under paragraph (G)(i) are extremely restrictive and difficult to meet. 65 Fed. Reg. at 80177. Notwithstanding the express language of the statute limiting such investigations to other than allegations of displacement of U.S. workers, DOL has nonetheless included such allegations among those which may give rise to investigations of complaints filed by other than aggrieved parties. Just as DOL is prevented from conducted such investigations with respect to complaints filed by aggrieved individuals, so too DOL is prohibited from conducting investigations of such complaints under the provisions of ACWIA section 413(e).

**C. DOL Should Define the Circumstances under which the Administrator May Withhold Notice of an Investigation.**

New paragraph (G)(vi) mandates the Secretary to “provide notice to an employer with respect to whom the Secretary has received information described in clause (i), prior to the commencement of an investigation under such clause, or the receipt of the information and of the potential for an investigation. The notice shall be provided in such a manner, and shall contain sufficient detail, to permit the employer to respond to the allegations before an investigation is commenced.”

The NPRM contained no language implementing the notice provision. The IFR, on the other hand, provides for such notice but provides the affected employer with only 10 days within which to respond to the allegations. A 10-day time period is inadequate to permit the employer to investigate and respond to allegations of the kind authorized, particularly pattern and practice allegations. AILA proposes that employers be given no less than 15 business days in which to respond, subject to extension for good cause shown.

New paragraph (G)(vi) relieves the Secretary of the obligation to give notice “if the Secretary determines that to do so would interfere with an effort by the Secretary to secure compliance by the employer with the requirements of this subsection...” The NPRM contained no language authorizing the Secretary to avoid providing notice to the affected employer. The IFR, on the other hand, permits the Administrator (as the delegate of the Secretary) to dispense with notification if such notification might interfere with an effort to secure the employer’s compliance, but fails to define what findings, if any, must be made by the Administrator before withholding notification.

DOL suggests that a decision not to notify an employer of the substance of allegations against it will likely be “rare.” 65 Fed. Reg. at 80177. However, the IFR provides the Administrator with unbridled discretion to withhold notice, whereas Congress expressed clear intent that notice be provided in the normal course. The regulation must be amended to provide that notice be withheld only where the Administrator has clear and compelling evidence that the employer is engaged in conduct that would undermine the Administrator’s ability to conduct an investigation, including the destruction of evidence, subornation of perjury, or witness intimidation. In all other circumstances, notice should be provided.

**D. DOL Has No Authority to Extend the Time Period for the Conduct of an LCA Investigation.**

Without notice or comments, the IFR extends the statutorily prescribed 30-day investigation period without requiring the express agreement of the affected employer. Section 655.807(i). The conditions for extension are virtually standardless. An investigation can be continued beyond 30 days “for reasons outside the control of the Administrator or, additional time is necessary to obtain information needed from the employer or other source to determine whether a violation has occurred.”

In at least one decision, an Administrative Law Judge has determined the 30-day time limit bars any action against an employer based upon a determination rendered outside the 30-day time frame. *Administrator v. Beverly Enterprises, Inc.*, 1998-ARN-3 (ALJ Feb. 4, 1999). Although the Administrative Review Board reversed the ALJ, thus far no court has approved DOL's interpretation that the 30-day time limit is merely precatory.

Congress established the 30-day rule in order to shield employers from long, drawn out investigations that would adversely affect the employer's ability to recruit and operate its business. The longer a DOL/LCA investigation drags on, the more serious the potential economic damage to the employer – even where DOL eventually dismisses the investigation without a determination of a violation.

AILA objects to the attempt to extend the investigation period by regulatory fiat, when Congress clearly declined to grant DOL the more extended investigation period it sought during the debate leading to the passage of ACWIA in 1998. Further, the inclusion of such language in the IFR for the first time violates the APA notice and comment requirements.

## **XVI. REGULATION SECTION 655.810: REMEDIES**

DOL also announces in the IFR new, heretofore unheard-of, remedies not authorized by Congress. As previously discussed, a new concept of “back fringe benefits” is introduced without notice or opportunity for comment. No previous discussion in the NPRM could have given notice of such an anomaly, which defies both logic and the mandates of Congress.

Similarly, DOL authorizes itself in section 655.810(a)(vi) to fine employers for a violation that “impedes the ability of the Administrator to determine whether a violation...has occurred.” This broad pronouncement is virtually limitless, and could result in sanctions where none were authorized or contemplated by Congress. DOL might just have well provided fines for “any employer that does anything we don't like.” The effect would be the same.

## **XVII. FORM ETA 9035**

### **A. Designation of H-1B Dependency or Willful Violator Status Should Not Be Required if the Prospective Employees are Exempt.**

The modified LCA in section F requires that employers check one of three boxes, indicating that they (1) are not H-1B dependent or a willful violator; (2) are H-1B dependent and/or a willful violator; or (3) are H-1B dependent and/or a willful violator but will use the LCA only to support H-1B petitions for exempt workers. Thus under the IFR, every employer must make a determination of dependency status. This requirement overlooks the fact that section 412(a)(1)(E)(ii) of the ACWIA does not require an employer to make the new attestations on LCAs if hiring exempt H-1B nonimmigrants (*i.e.*, the proposed nonimmigrant worker holds at least a master's degree in the field of intended employment or will be paid over \$60,000 in annual wages). Since the ACWIA

does not require the attestations where exempt workers are employed, it can be fairly inferred that the statute does not impose the burdensome determination of dependency when exempt workers are to be hired. Therefore, the appropriate check-off method should require employers to indicate that (1) the LCA is used only for exempt workers (requiring no additional attestations); (2) the employer is non-dependent (requiring no additional attestations); or (3) the employer is H-1B dependent or a willful violator and the workers sought are non-exempt (requiring the additional attestations).<sup>3</sup>

In the IFR, DOL rejected AILA's position on this matter without any discussion of the ACWIA's language in section 412(a)(1)(E)(ii) discussed above. Instead, DOL focused on its belief that this approach "would impose an unreasonable administrative burden on the INS in examining the exempt status of workers employed by the vast majority of employers which are non-dependent." 65 Fed. Reg. at 80132. DOL ignores the fact that any burden on the INS would at most be very minimal. The information necessary to determine if a nonimmigrant worker is exempt is readily determined from the H-1B petition papers filed by an employer; salary is provided in INS Form I-129, and an H-1B worker's educational level is set forth in INS Form I-129W. Thus, confirmation that a nonimmigrant worker is exempt can easily be made during INS' normal review of an H-1B petition.

In contrast, the administrative burden on an employer who may be on the threshold of becoming dependent due to new H-1B arrivals and/or U.S. worker attrition is great. To such an employer, it is obviously preferable to claim exempt H-1B workers whenever possible to avoid the burden of calculating, for each and every LCA, whether or not it is in dependent status. If an employer miscalculates, even if by just one worker, it can be held liable for the more severe penalties for misrepresentation. It is administratively far easier for a company to determine whether the wages paid or the employee's degree will qualify for exempt status.

In any event, section F of the LCA should still be modified slightly for clarity. As it stands now, an employer is first directed to A -- employer is not H-1B dependent and is not a willful violator; then B -- employer is H-1B dependent and/or a willful violator; and then C -- employer is H-1B dependent and/or a willful violator but is using the LCA only to support H-1B petitions for exempt nonimmigrants. If the employer answers B, it is directed to Subsection 2 containing the additional attestations required by ACWIA. It would be clearer to switch B and C, so that an employer reaches the additional attestations as the last alternative. This progression of the alternatives is more logical.

#### **B. Use of Shaded Circles Raises Problems for Employers Not Utilizing Filler Technology.**

The LCA, instead of utilizing boxes for various choices that can be completed with an "X", instead uses circles that must be shaded-in to complete the form. For example, in Parts B and D, an employer must indicate whether the rate of pay and prevailing wage is

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<sup>3</sup> Actually, a fourth check-off is needed: "the LCA is for a TN application." TN applications for Mexican nationals require an LCA, but are not subject to the dependent attestations. However, some H-1B dependent employers may file LCAs for TNs. That circumstance needs to be addressed on the form.

per year, week, month, hour, or 2 week period by shading a circle next to the appropriate choice. Moreover, a change from the format of the LCA proposed in the NPRM is the addition of circles in Part C numbering 1, 2, 3, 4, 5, 6, 7, 8, 9 and 0 that must be shaded in for each of the 3 boxes used to show a position's occupational code and the number of H-1B nonimmigrants for whose petitions will be supported by the LCA. While not particularly an issue for someone using the fill-in program available from DOL's website, for an employer utilizing a typewriter or manual completion of the form, the use of these circles instead of boxes into which an "X" can be typed or written is a time consuming nuisance. Why DOL added the shaded circles is unclear, but it would not seem to be to facilitate the automated scanning of the LCA, since the simple use of numbered boxes, or boxes marked with an "X", was successfully utilized in the pilot program. Unless specifically required by the automated process, AILA believes the shaded circles should be excised in favor of the use of boxes to assist those completing the form without the benefit of technology.

**C. Wages Attestation Does Not Properly Define Prevailing Wage.**

The statement regarding wages to which every employer must attest states, in part, that "H-1B nonimmigrants will be paid wages which are at least the higher of the actual wage level paid by the employer . . . *or the prevailing wage level* for the occupational classification in the area of intended employment." This statement should be modified to correctly reflect that the employer is only required to pay 95% of the prevailing wage. 20 C.F.R section 656.40(a)(2)(i)(except in Service Contract, Davis-Bacon, and union contract cases). DOL has deemed the payment of 95% of the prevailing wage as sufficient because of the difficulty inherent with determining the prevailing wage. The statement can be easily clarified as follows: "H-1B nonimmigrants will be paid wages which are at least the higher of the actual wage level paid by the employer . . . *or at least 95% of the prevailing wage level* for the occupational classification in the area of intended employment."

**D. Wages Attestation Improperly Requires Development and Maintenance of Documentation Concerning Nonproductive Status and Benefits.**

Section E states that the employer, in making the attestations contained therein, is agreeing to develop and maintain documentation supporting each of four labor condition statements. In the wages attestation, this includes payment of the required wage for time in nonproductive status due to a decision by the employer, and that H-1B nonimmigrants will be offered benefits and eligibility for benefits on the same basis as U.S. workers. However, absent the clear intent of the legislature, DOL lacks the authority to impose additional paperwork burdens to the LCA process. References to these requirements should be removed.

**E. Explanatory Material Concerning Alternative A -- The Employer is Not H-1B Dependent -- is Ambiguous and Misleading.**

In Subsection 1 of Section F, employers are required to choose one of three alternatives regarding their H-1B Dependent/Willful Violator status. Alternative A is for employers

who are not H-1B dependent, nor willful violators. After definition of this alternative, an employer is instructed that if it chooses alternate A and “is or becomes H-1B dependent” or is found to have committed a willful violation, then “the submitted labor application *shall be deemed invalid* and may not be used in support of a new petition or extension of a petition for an H-1B nonimmigrant.” The invalidity language is both ambiguous and misleading as it suggests an impact upon existing H-1B visas.

As DOL clearly states in the IFR, H-1B visas under previously certified LCAs remain valid and in effect, *even where the employer has subsequently become H-1B dependent*. The newly H-1B dependent employer is required to file a new LCA only for any new H-1B petitions or extensions of status. 65 Fed. Reg. at 80129-30. “The employer’s previously certified LCA(s) would continue to be valid.” 65 Fed. Reg. at 80128. Thus, the language in alternative A stating that the LCA is “deemed invalid” is incorrect, and requires clarification. Otherwise, it appears that a new LCA must be obtained for current H-1B visas because they are not supported by a valid LCA. Better language would be that should an employer become H-1B dependent or is found to have committed a willful violation, then “*previously approved LCAs may not be used in support of a new petition or extension of a petition for an H-1B nonimmigrant, and a new LCA must be obtained.*” This language correctly explains that a current LCA may not be used for new petitions or extensions, but avoids the ambiguity associated with the “invalid” language.

AILA also believes that further clarification is needed in the situation where an employer obtains an LCA when not H-1B dependent, but then becomes H-1B dependent while the H-1B petition is pending with INS. The IFR is unclear on this point, though logic seems to dictate that the filed H-1B petition is not a new H-1B petition or an extension of status, thus not requiring a new LCA.

#### **F. The Labor Condition Application Cover Pages are Unwieldy and Overwhelming to an Employer.**

The LCA cover pages, excluding the three pages of occupational codes, are six pages long, consisting of a combination of instructions and attestations to which the employer signifies having read in the LCA. This combination is unwieldy at best, and is presented in an intimidating manner to an employer, given the sheer bulk of the document. For many, if not most, employers, the instruction aspect of the cover pages is unnecessary as agents or attorneys are completing the form.

AILA believes a better approach is to separate the instructions from the attestations into two documents -- one containing the attestations on one page for the employer to read and certify thereto, and one encompassing the instructions for completion of the LCA. In this manner, the employer representative responsible for signing the LCA will not be overwhelmed by the length of the document and will be able to better focus on the import of the various attestations. Additionally, AILA believes, placing the attestations into a one-page document will ensure greater compliance with the requirement that the employer read the full attestations. Separation in this manner will also avoid possible confusion on the part of a reader as to what in the cover pages are by way of instruction, and what are by way of attestations.

**G. The Cover Pages are Difficult to Read.**

The cover pages available from DOL's website have, on each page, a dark gray watermark underlying the text of the cover pages that reads: "Do Not Fax or Mail These Cover Pages, Keep them in your records." This message makes the text of each page quite difficult to read, and is wholly unnecessary as the bottom footer of each page instructs the user not to fax the cover pages with the LCA. The watermark message should be eliminated from the form.

**H. The "State" Fields in the Filler Program Need to Be Corrected.**

The "state" fields on the new form are in Helvetica font, rather than Courier, which is the font applied to the remainder of fill-in fields of the LCA form. The font difference causes the state abbreviation to touch the sidewalls of the field box. AILA is concerned that this could lead to unnecessary rejections of the faxed in form, and requests that the filler software be corrected.

**CONCLUSION**

While DOL has backed away from a number of outrageous positions suggested in the NPRM, the IFR remains a document riddled with requirements that are overly burdensome and exceed the Department's authority. An immediate review and overhaul of this overreaching regulatory scheme is urged.