AWAKENING A SLUMBERING GIANT: THE DEPARTMENT OF LABOR'S INTERIM FINAL RULE ON H-1B DEPENDENCY

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Enacted over two years ago, the American Competitiveness and Workforce Improvement Act (ACWIA or Act)[1] provides a classic illustration of political compromise. As its bifurcated title suggests, this legislation was intended to reflect a balance between two interests: the need of U.S. businesses to remain competitive by maintaining their access to a job pool of foreign workers, and the need to protect U.S. workers from competition by aliens.[2] This dialectic (which was so conspicuously absent from the deliberations leading to the passage of the American Competitiveness in the Twenty-First Century Act (AC21) late last year) pervaded all congressional debate on the passage of the ACWIA, and it is only by reference to it that this legislation can be understood. Although these two interests are not necessarily antagonistic, the assumption has been that they can only be seen in polar terms, and the constituency promoting the latter interest insisted, as consideration for the ACWIA's raising the ceiling for new H–1B petition approvals, on the inclusion of a number of measures that seek to fulfill this protective function.

Although the appearance of these protective measures (most strikingly, the concept of H–1B dependency and its resulting obligations) rightly caused widespread consternation upon the enactment of the ACWIA, they had largely faded from many practitioners' memories over the course of the past two years. The reason for this is that, unlike the provisions increasing the availability of new H–1B petition approvals,

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[1] American Competitiveness and Workforce Improvement Act, Title IV, Pub. L. No. 105277 [hereinafter the ACWIA or the Act]. The ACWIA was signed into law by President Clinton on October 21, 1998, as part of omnibus appropriations legislation. See 75 Interpreter Releases 1472 (Oct. 26, 1998). For a detailed summary of the Act's provisions, see A. Paparelli & Y.I. Robertson, "The Labor Department's Role in the H–1B Visa Program: Protector of Workers or Enemy of the Future?," 76 Interpreter Releases 785 (May 24, 1999); see also Note, "American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H–1B Visa Program," 85 Cornell L. Rev. 1673 (2000).

[2] Because no conference report was prepared for the ACWIA, its legislative purpose must be inferred from the separate statements of former Sen. Spencer Abraham (D–Mich.) and Rep. Lamar Smith (R–Tex.), reproduced, respectively, at 144 Cong. Rec. S12741–12810 (daily ed. Oct. 21, 1998) [hereinafter Abraham Statement] and 144 Cong. Rec. E2323–28 (daily ed. Nov. 12, 1998) [hereinafter Smith Statement]. The ACWIA represents an unusual exercise in direct negotiation between then-Sen. Abraham and the Clinton administration. As the chief architect of this legislation, Sen. Abraham's contemporaneous statements, as compared to Rep. Smith's post hoc statements, are entitled to a greater measure of deference as truer evidence of congressional intent.

these protective measures can only be implemented through Department of Labor (DOL) rulemaking. As long as the DOL failed to publish a regulation implementing these measures, they remained only abstract concepts, interesting from an intellectual point of view, but of little practical applicability to our clients. The December 20, 2000, publication of the DOL's interim final rule (IFR)[3] changes all of this. The protective measures of the ACWIA are abruptly jolted out of their cryogenic suspension, and have become realities that must be confronted.

This article will examine the DOL's implementation of the obligations imposed by the ACWIA upon H–1B "dependent" employers and "willful" violators of the immigration laws in order to protect the interests of the U.S. work force. The focus of this discussion will be upon the DOL's treatment of the ACWIA's notion of H–1B dependency, undoubtedly the conceptual kernel of the Act's "workforce improvement" function, and upon its resulting obligations for H–1B dependent employers and willful violators.

THE ACWIA'S ATTESTATION REQUIREMENTS

Section 412(a)(1) of the ACWIA required that three new "statements" appear on Labor Condition Applications (LCAs) filed to support H–1B nonimmigrant petitions. These supplement the prevailing and actual wage, working conditions, no strike or lockout, notice of filing, and posting statements currently required by INA § 212(n)(1). Through these new statements, or attestations, as they are more familiarly known in the H–1B lexicon, certain employers of H–1B aliens must affirm that: (1) they have not, and will not, directly "displace" a U.S. worker within the 90-day periods before and after the filing of the relevant H–1B petition (not the filing of the LCA); (2) they will not secondarily place the H–1B beneficiary with another employer if the beneficiary works at one or more work sites of the other employer and there are "indicia" of an employment relationship between the beneficiary and the other employer (unless they have inquired as to whether the other employer has met the no-displacement requirement, and have not received a negative reply); (3) before filing the LCA, they have taken "good faith" steps to recruit U.S. workers for the position to be filled by the H–1B beneficiary, using "procedures that meet industry-wide standards" and offering compensation at least as high as that offered to the H–1B beneficiary, and that they have actually offered the relevant position to any U.S. applicant who is equally or better qualified for

[3] Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the U.S., 65 Fed. Reg. 80109–80254 (Dec. 20, 2000) [hereinafter IFR], reported on and reproduced in 78 Interpreter Releases 41 (Jan. 8, 2001). The text of the IFR is based to a large extent on the DOL's reaction to comments received in response to its Notice of Proposed Rulemaking [NPRM] of January 5, 1999, which invited observations on the implementation of the provisions of the ACWIA. See 64 Fed. Reg. 628–78 (Jan. 5, 1999), reported on and reproduced in 76 Interpreter Releases 37 (Jan. 11, 1999). See also 76 Interpreter Releases 105 (Jan. 15, 1999); 76 Interpreter Releases 149 (Jan. 25, 1999). The content of the IFR is not limited to the implementation of the provisions of the ACWIA, but also discusses various other Labor Condition Application (LCA), prevailing wage, labor certification, short-term placement, and corporate restructuring issues. The comment period on the IFR, which was due to expire on February 19, 2001, was recently extended for a further 60 days. See 78 Interpreter Releases 420 (Feb. 26, 2001). It is not clear if this extension will result in a deferral of the enforcement of the IFR's provisions. It is also possible that the IFR will be subject to a legal challenge for alleged violations of the Administrative Procedure Act, the Unfunded Mandates Reform Act, and the Paperwork Reduction Act, although, to the authors' knowledge, no suit has yet been filed to mount such a challenge.

this position. With respect to the no secondary displacement attestation, the H–1B dependent employer must inquire as to whether the secondary employer displaced a U.S. worker 90 days before and after the placement of the H–1B worker.[4]

These attestations appear as boxes to be checked on the new LCA form introduced by the IFR. The use of this form is required after January 19 of this year. Virtually all business immigration practitioners will be familiar with this form by now, and the growing pains exhibited by the supposedly improved faxback system designed to accept this new form are wearisomely familiar to all.[5]

The attestation requirements will sunset on October 1, 2003, the start of fiscal year (FY) 2004, and the date the number of available H–1B petition approvals reverts to 65,000.[6]

Plainly, the ACWIA's attestation requirements are coercive, and are intended, as the legislative history underlines, to constrain or nullify the activities of "job shops" or "job contractors" that employ aliens in H–1B status solely to contract their services to other companies at wages that undercut the wages paid to U.S. workers.[7]

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[4] 20 CFR § 655.738 addresses in detail both the "primary" and "secondary" no-displacement obligation. See also IFR, supra note 3, at 80140.

[5] The almost immediate problems with the new faxback system have been well-documented. See "LCA Faxback System Not Working Well" (Feb. 16, 2001), "Your Missing LCAs" (Feb. 22, 2001), and "More LCA Glitches Identified" (Feb. 26, 2001), available from: *http://www.aila.org/infonet*.

[6] An issue has been raised as to whether or not the IFR, which was published in the dying days of the Clinton administration, is a valid piece of rulemaking. See Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, Executive Office of the President, 66 Fed. Reg. 7701 (Jan. 24, 2001). Under this memorandum, regulations that have been published in the Federal Register but have not taken effect are temporarily postponed for 60 days from the effective date. Although the IFR was promulgated on December 20, 2000, at least one portion of the IFR, the faxback mechanism, was effective only after January 20, 2001. The LCA by its terms is not effective, however, until the Office of Management and Budget (OMB) issues a control number (which in this case occurred before January 19, 2001). Thus, it is likely that the IFR is not affected by the Bush administration's moratorium on rulemaking activity by the outgoing Clinton administration.

[7] Smith Statement at E2323. Arguably the strongest driving force behind the protective measures of the ACWIA is the desire to penalize the much-despised "job shops" or "body shops" that reportedly flout the law by importing underpaid H–1B workers for speculative assignments with the intent to float their resumes and contract them out at substantial profit if deals ultimately materialize. The line between job shop and legitimate employer participants who are active users of the H–1B program has been obfuscated at times by the media and the DOL, however, in their zeal to address reports concerning certain exploitative practices. Indeed, the INS has published a list of the primary users of the H–1B programs in "Leading Employers of Specialty Occupation Workers (H–1B): October 1999 to February

There is a certain measure of irony in the appearance of this IFR so soon after the considerable liberalization of the norms for employing H–1B aliens introduced by the AC21 (which was passed with barely a mention of the need to protect the American worker). This liberalization strengthens the sense that the protective measures contained in this rule are unduly severe, and, indeed, anachronistic, because they seek to implement a piece of legislation that is over two years old, and that was crafted in a context that economically, politically, and socially, was very different from the one we find ourselves in today. It has become clichéd to speak of the explosive growth in technology in the past few years; the fact that this is so shows how little resistance there now is to an acceptance of the transformative effect the developments in the information technology sector have had on business, industry, and ordinary lives. A corollary to this acceptance has been a far-reaching recognition that the continued vitality of this sector is crucial, and that protectionist obstacles to its growth no longer make much sense.[8] Last year's presidential campaign and the primary contest leading to it provide an illustration of the consensus that has been reached on this point, with every serious candidate voicing his opinion that immigration obstacles to the recruitment of foreign knowledge workers should be lowered. This would have been unthinkable in late 1997, when the ACWIA's provisions were being negotiated, and when public sentiment about the importation of alien workers was far more ambivalent.

EMPLOYERS SUBJECT TO THE NEW ATTESTATIONS

In keeping with its limited punitive scope, and to the chagrin of the venerable Sen. Edward M. Kennedy (D–Mass.),[9] the ACWIA's attestation requirements do not affect all companies hiring H–1B aliens, and are imposed on only two discrete classes of employers: "H–1B dependent" employers and employers that

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2000" (June 2000), which includes such distinguished consulting companies as PricewaterhouseCoopers, LLP, KPMG LLP, and Tata Consultancy Services, a division of India's largest industrial conglomerate (see "Reinventing Tata," *Economist*, Feb. 17–23, 2001, at 61–2). These well-regarded consulting firms, which typically provide their employees with extensive formal training, a continuing employment relationship and substantial opportunities for career advancement, can by no means be described by the pejorative appellation, "job shop." Quite apart from the obligations imposed on H–1B dependent employers, however, whether job shops will survive the "benching' prohibitions contained elsewhere in the ACWIA (now codified at INA § 212(n)(2)(C)(vi)(II)) remains to be seen.

[8] The softening of the economy over the past few months and the resulting well-publicized layoffs by major companies in the high-technology sector has created the deceptive impression that the demand for H–1B workers in this sector has abated. See, e.g., "Demand for Foreign Skilled Workers Drops in Wake of High-Tech Woes," The Minn. Star Tribune, Mar. 12, 2001. While it may be true that high-technology companies are not importing knowledge workers from overseas in the numbers experienced last year (this article makes the point that even last year's H–1B quota of 115,000 is unlikely to be threatened this year), such companies continue to recruit large numbers of workers from the pool of H–1B aliens already present in the U.S. The windfall of H–1B portability has done nothing to inhibit this.

[9] 144 Cong. Rec. S13001 (daily ed. Nov. 12, 1998) (statement of Sen. Kennedy).

have been found, on or after the date of the enactment of the ACWIA, to have committed a willful failure or misrepresentation with respect to the LCA process within five years of the filing of the relevant LCA. This latter class of employers is referred to as "willful violators."[10] As noted by Rep. Smith, these two categories encompass the employers most likely to abuse the H–1B program.[11] At the very outset, a strong objection should be registered to the lack of distinction made between these two entirely different categories of employers throughout the ACWIA and the IFR. It is offensive to class dependent employers and willful violators together, as if their sins were of equal opprobrium and as if both are equally deserving of punishment. Dependent employers are entities that, frequently because of circumstances beyond their control (including the need to survive in a fiercely competitive business environment[12]), have made the only prudent decision possible, given the facts of today's knowledge worker labor pool, and have accepted a significant number of H–1B nonimmigrants into their work forces. Willful violators are those employers that have violated the immigration laws and have done so in a particularly reprehensible manner (the negative moral resonance of the modifier "willful" cannot be overstated).[13] The DOL aggravates this misleading identification by providing on the new LCA form only one box to be checked by dependent employers and willful violators, thus denying the former category of employers an opportunity to distinguish themselves from the latter. Thus, an INS officer reviewing an H–1B petition would have no means of knowing whether he or she is dealing with a dependent employer or a willful violator, and would be free to treat an H–1B petition filed by a dependent employer with the umbrage and skepticism usually reserved for petitions filed by willful violators.aggravates this misleading identification by providing on the new LCA form only one box to be checked by dependent employers and willful violators, thus denying the former category of employers an opportunity to distinguish themselves from

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[10] 20 CFR § 655.736(f) defines a willful violator as an employer that has been subject to either a DOL or an INS enforcement procedure, and has been found to have committed a willful failure or a misrepresentation of a material fact during the five years preceding the filing of the LCA, as long as the agency's finding was entered on or after October 21, 1998. See IFR, supra note 3, at 80226. A full analysis of the implications of this definition is outside the scope of this article.

[11] Smith Statement at E2325.

[12] The DOL, however, has chosen to disregard this fact, stating in a rather brazen manner, "While from an employer's perspective, use of the H–1B visa program may be an economic necessity, participation in the program remains voluntary since it applies only to employers who choose to participate in the program." IFR, supra note 3, at 80208.

[13] American jurisprudence has customarily viewed "willful" misconduct as wanton behavior surpassing in gravity behavior that is reckless or merely negligent. See, e.g., *Stephens v. U.S.*, 472 F. Supp. 998, 1017 (C.D. Ill. 1979). The IFR, at 20 CFR § 655.805(c), departs from this traditional interpretation and, without justification, enlarges the scope of "willful failures" to embrace actions that are taken with "reckless disregard" as to whether or not they are violative of the immigration laws. IFR, supra note 3, at 80234. This of course is not the first time the DOL has departed from this common law standard; this definition has existed for some years in its regulations.

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- Determining H–1B Dependency

The concept of an H–1B dependent employer was not introduced by the ACWIA, and first appeared in H.R. 2202, the immigration reform bill passed by the House in 1996 to target employers (primarily the despised "job shops") whose work forces contain uncommonly high percentages of aliens in H–1B status. Section 412(b)(1) of the ACWIA created a new INA § 212(n)(3)(A) that offers three simple arithmetic formulae for determining H–1B dependency: (1) employers with 25 or fewer "full-time equivalent employees" that employ more than seven H–1B aliens; (2) employers with at least 26 but no more than 50 full-time employees that employ more than 12 H–1B aliens; (3) employers with at least 51 full-time employees if at least 15 percent of their work force is comprised of H–1B aliens.[14] It should be noted that the DOL provides that the calculation of H–1B dependency must take into consideration the total work force "employed in the U.S. (including both U.S. workers and H–1B nonimmigrants, and measured according to full-time equivalent employees)."[15] Similar references to "U.S. workers" are found on the LCA form. Given that a "U.S. worker" is very specifically defined under immigration law, however (as a citizen or national of the U.S., a lawfully admitted permanent resident, a refugee, an alien granted asylum, or an immigrant otherwise authorized to be employed[16]), the total work force to be considered for H–1B dependency calculation may not be complete. Rather, in the total work force, the DOL should include other nonimmigrant workers in statuses other than H–1B (for example, L–1, O–1, TN, E–1 and E–2, and J–1). Including other nonimmigrants would be consistent with the definition of H–1B dependent employers, who are categorized based on the number of "employees who are employed in the U.S." Such an oversight is probably attributable simply to inattentive drafting, and should not be interpreted as a ground to infer an intent by the DOL to exclude what may be a significant portion of an employer's work force. Indeed, the DOL mentions in the preamble to the IFR that in calculating H–1B dependency, the proper ratio is the number of H–1B nonimmigrants employed to the number of full-time equivalent

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[14] The ACWIA contained a temporary omission of "exempt" H–1B aliens (as defined below) from the calculation of the ratios described above. Under § 412(a)(1) of the ACWIA, exempt H–1B aliens were to be omitted from H–1B dependent ratio calculations during the longer of the six-month period beginning with the ACWIA's enactment or the period until final regulations were issued. Exempt employees could not be used to compute either the total number of full-time employees or the number of H–1B employees under a dependency calculation. The IFR makes it clear that this exception is no longer available. Employers of H–1B aliens must therefore include all such employees in their calculations. See IFR, supra note 3, at 80124–25.

[15] 20 CFR § 655.736(a)(1).

[16] § 412(b)(4)(E) of the ACWIA, codified at INA § 212(n)(3)(E). This same definition is included in the IFR under 20 CFR § 655.715.

employees (FTEs) (including both H–1B workers and other employees) employed.[17] By limiting the universe of workers to H–1B nonimmigrants and a specially defined class of U.S. workers, this careless oversight may, under certain circumstances, have the effect of making employers become dependent more rapidly than otherwise would have occurred.

The IFR creates a new § 655.736 in Title 20 of the CFR that repeats these formulae and discusses at some length the processes and criteria involved in making a determination of H–1B dependency. Particular attention is paid to the meaning of "full-time equivalent employees." Such persons must be "employed by the employer," as defined in 20 CFR § 655.715 (the definitional section of the IFR).[18] The meaning of this phrase is to be determined by an analysis based upon the "common law," whose key determinant is "the employer's right to control the means and manner in which the work is performed."[19] The "common law," for purposes of the IFR, is the 1968 Supreme Court case of *NLRB v. United Ins. Co. of America*.[20] This qualification diminishes the effect of the IFR's exemption of "bona fide" consultants and independent contractors by allowing these to be classed as employees, as long as application of the common law test identifies them as such. The DOL does insist that it will accept an employer's designation of persons as employees, provided, however, that they are "consistently" treated as such.[21] According to the DOL, individuals "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," need not be included in the determination of FTEs. This position raises the issue of whether the DOL's definition of "indicia of employment" for the prohibition against secondary displacement is proper. If the DOL relies on the IRS Form 1099 as evidence of the consistent classification of a worker as an independent contractor, logic dictates that such evidence also would be the clearest indicator of whether indicia of employment exist.[22]

In choosing the common law test to determine who is employed by an employer for purposes of the ACWIA's protective functions, the DOL is breaking new ground, apparently for no other reason than because the ACWIA does not mandate a standard test, the common law test applies "as a matter of law[.]"[23] In doing so, the DOL has turned its back on the definition of "employer" provided in its own regulations at 20 CFR § 655.715.

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17 IFR, supra note 3, at 80124.

18 Id. at 80211.

19 Id.

20 390 U.S. 254, 258 (1968).

21 IFR, supra note 3, at 80223.

22 See section below entitled "The Secondary No-Displacement Attestation."

23 IFR, supra note 3, at 80126.

The IFR makes it clear that all employers that intend to file an LCA or to petition for H–1B status (whether for initial or continued employment) between January 19, 2001, and October 1, 2003, must, if they are not willful violators, make a calculation as to their H–1B dependency. LCAs filed before January 19, 2001, may continue to be used to support H–1B petitions, but all LCAs filed between this date and October 1, 2003, must contain an attestation concerning H–1B dependency.[24] A dilemma may arise for some employers who may be unsure of their status at the time of filing an H–1B petition. Specifically, consider the situation in which an employer who employs 25 full-time workers currently has three H–1B workers and is waiting for the approval of five more H–1B petitions. The approval of the petitions would mean that the employer becomes H–1B dependent. While these petitions are pending, however, the employer desires to file another LCA and H–1B petition for another worker. Because the employer currently is not H–1B dependent, but may become dependent in the near future, would the employer be required to state that it is H–1B dependent on the new LCA? For dependency calculation purposes, the employer is required only to count "H–1B nonimmigrants employed."[25] Moreover, the employer attests to its dependency status each time it files a new LCA.[26] In this situation, as long as the pending applications are not approved and the individuals have not joined the employer, the employer currently employs only three H–1B workers. The employer would not become H–1B dependent until after the pending petitions are approved and the individuals on whose behalf the petitions were filed begin employment. According to the DOL, if an employer's dependency status changes after the LCA is filed (and thus no longer accurately reflects that status), the employer must file a new LCA if it wishes "to seek access to H–1B workers through either new petitions or requests for extensions."[27]

The mechanics of calculating H–1B dependency. A new 20 CFR § 655.736(c) describes the steps that must be followed in an H–1B dependency calculation, depending on whether the employer is one with a "readily apparent" dependent or non-dependent status, or one with a "borderline" H–1B dependency status. For the first category of employers, those with an obvious ratio of H–1B employees to the total workforce, no calculation is necessary, because the dependency or non-dependency is of an overt nature. Using a photographic trope, the DOL allows employees in the second category to perform a "snap-shot" test to determine whether or not a full computation is necessary to assess their dependency.[28] Precisely what type of snapshot is required depends upon whether the employer is small or large. Small employers (those with 50 or fewer employees) should compare the number of their H–1B employees to the numbers set out in the ACWIA as benchmarks of dependency and must make a calculation if the number of H–1B employees exceeds the number specified in the relevant benchmark (i.e., more than seven H–1Bs out of a total workforce of 25 or fewer, or more than 12 H–1Bs out of a total workforce of

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24 Id. at 80224.

25 Id. at 80124.

26 Id. at 80130.

27 Id. at 80132.

28 Id. At 80225.

more than 25, but fewer than 50). Larger employers (those with 50 or more employees) should divide the number of H–1B employees by the total number of full-time employees. If the result is 0.15 or higher, then a full calculation is necessary if the employer wishes to claim non-dependency.

Documenting H–1B dependency. The IFR introduces a novel requirement that "all" employers retain copies of H–1B petitions filed on behalf of their employees with the INS.[29] As a result, while it has been a standard practice for many immigration practitioners to provide their corporate clients with copies of H–1B petitions upon approval, it should now become customary to provide these upon filing with the INS.

Employers with "readily apparent" dependency or non-dependency need not maintain any particular documentation concerning the number involved in this dependency unless there is an investigation or enforcement action.[30] Employers with "borderline" dependency or non-dependency status (i.e., the snapshot takers) also need not keep any particular documentation of these numbers, absent an investigation or enforcement action.[31] H–1B dependent employers (regardless of whether that status has been divined through ready appearance or calculation) are also not required to maintain any documentation of the numbers involved in making up this dependency, even in the event of an enforcement action.[32] The mere fact that a dependency designation is made on the LCA is "conclusive and sufficient" documentation of dependent status. The only category of employers that is required to maintain a documentation of its dependency calculation are those employers that attest that they are non-H–1B dependent but are required to make a full calculation under the "snap-shot" standards outlined above. Such employers must maintain a dated copy of the relevant calculation of non-dependency.[33]

Employers that become H–1B dependent as a result of a change in their workforce need not make or maintain a "record" of this change, and, significantly, need not file new LCAs to reflect their new dependent status.[34] This dependency need not be declared until a new LCA is filed for a new employee or for the extension of status of an existing employee. If the converse occurs, and the employer's status changes from H–1B dependent to non-H–1B dependent, the employer must complete a "full" calculation of this non-dependency, and must retain a copy of this calculation. Upon hiring a new H–1B employee or extending the period of stay of an existing employee, the employer may either file a new LCA reflecting non-dependency, or use an existing certified LCA that contains a dependency notation. If it does the

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29 Id.

30 Id.

31 Id.

32 Id.

33 Id.

34 Id.

latter, the employer will continue to be bound by the attestations on the LCA, even though it is no longer dependent.

If the employer is involved in a corporate restructuring such as an acquisition, merger, or spin-off, and has to file an LCA to support an H–1B petition, the entity resulting from the transaction should "redetermine" its H–1B dependency status.[35]

The single employer rule. The ACWIA embraces the "single employer" rule of § 414(b), (c), (m), and (o) of the 1986 Internal Revenue Code (IRC) to determine H–1B dependency. Under this rule, related entities (whether separately incorporated or not) that report their respective incomes in a consolidated manner for tax purposes are treated as a single employer. Subsection (b) defines all members of a "controlled group of corporations" as a single employer. Subsection (c) refers to "trades or businesses...which are under common control." Subsection (m) embraces "affiliated service groups." Subsection (o) contemplates "separate organizations," "employee leasing," and "other arrangements." This means that all the employees of one of the groups defined in the IRC will be treated as employees of one employer for purposes of an H–1B dependency calculation. The application of this standard should allow individual subsidiary corporations with more than the permitted number or percentage of H–1B aliens to escape H–1B dependency, as long as the sum of employees in their overall corporate family does not exceed this number or percentage. This will provide welcome relief to research and development subsidiaries or divisions of high-technology companies, because these subsidiaries or divisions generally employ higher numbers of H–1B employees.[36]

Once an employer determines that the company and related entities comprise a "single employer" for determining H–1B dependency, and subsequently concludes that the employer is H–1B dependent, it may wish to argue that the recruitment efforts of the related entities should be credited toward the recruitment obligation.[37] Ostensibly, the ACWIA's definition of "H–1B dependent" employer is based on a proportion of H–1B workers to full-time equivalent employees in the U.S. In computing this ratio, the ACWIA provides that "any group treated as a single employer under [the IRC] shall be treated as a single employer."[38] Extending the single employer rule to all aspects of H–1B dependency would be improper. If the entities in a group were deemed responsible for each other's no-displacement obligations, all of the entities could be exposed to significant liability. For example, close scrutiny of each entity's personnel

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35 Id. at 80226.

36 The IFR's preamble notes that the DOL had been considering adopting the single employer rule for "all purposes" related to the H–1B program, including the acquisition, merger, or spin-off of an H–1B petitioner. IFR, supra note 3, at 80122–23. The number of negative comments prompted by this proposal was high, and the DOL decided to limit the application of the single employer rule to the calculation of H–1B dependency.

37 See section below entitled "The Secondary No-Displacement Attestation."

38 INA § 212(n)(3)(C)(ii).

activity would be required to ensure that there is no direct or secondary displacement of U.S. workers.[39] An even more disturbing aspect of applying the single employer rule to the no-displacement obligation is that each entity would be held strictly liable for the other.

The DOL is therefore correct in limiting the application of the single employer definition to dependency calculation, and it would be improper to ascribe liability to one company in a family for the violations of another affiliated entity. With respect to the recruitment obligation, however, the DOL should recognize the collaborative advertisement efforts of affiliated entities. This type of activity is common among affiliated companies as an efficient method of attracting qualified applicants. The DOL should encourage such collaborative efforts by crediting such actions toward satisfaction of the good faith recruitment requirement without extending the single employer definition into the recruitment arena.

The IFR itemizes the respective "single employer" definitions of the IRC as follows:

IRC § 414(b). This defines a "single employer" as a "controlled group of corporations." Such a group may take one of three forms: (1) a parent-subsidiary-controlled group, consisting of one or more "chains of corporations" connected through stock ownership with a common parent corporation, as long as at least 80 percent of the stock of each subsidiary is owned by one or more of the other corporations, and the common parent owns at least 80 percent of the stock of at least one subsidiary; (2) a brother-sister controlled group, consisting of a group of corporations in which five or fewer persons (including estates and trusts) own at least 80 percent of the stock of these corporations; (3) a combined group, consisting of a group of three or more corporations, each of which is a member of one of the groups defined above, and one of which is a common parent of a parent-subsidiary-controlled group and also forms part of a brother-sister controlled group.[40]

IRC § 414(c). Under this section, all employees of "trades and businesses" (incorporation is not necessary and sole proprietorships, partnerships, trusts, and estates are included) that are under "common control" will be deemed to be employees of the same single employer. Common control exists if the relevant trades or businesses are included in any of the three groups defined above. Ownership of at least 80 percent of the profits or capital interest of a partnership, or of the actuarial value of a trust or estate constitutes a controlling interest.[41]

IRC § 414(m). Under this section, all employees of the members of "an affiliated service group" will be treated as employees of a single employer. An affiliated service group will generally consist of a service organization (the "first" organization) and (1) a second service organization that is a shareholder or partner in the first organization and regularly performs services for the first organization, or (2) another organization that has as a significant portion of its business the performance of services for the first

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39 See the forthcoming sections for a detailed discussion of the no-displacement obligation.

40 IFR, supra note 3, at 80224.

41 Id.

organization, as long as such services are of a type "historically performed" in the relevant service field and at least 10 percent of the interest in the second service organization is held by "highly compensated" employees of the first organization. [42]

IRC § 414(o). This section simply gives the Department of the Treasury authority to define as single employers other "business arrangements," including employee leasing. Because no such definition has yet been made, arrangements of this type are not embraced under the single employer rule. They will be, however, if the Department of the Treasury publishes a regulation to that effect before October 30, 2003, the date the ACWIA's dependency provisions expire.

Employers wishing to take advantage of the single employer rule have the burden of establishing that they meet its requirements.[43]

- Employees Exempted from the Attestation Requirements

Even if an employer is H–1B dependent or has been determined to be a willful violator by the DOL, it is relieved of the obligation to include these new attestations in an LCA if the LCA is being used to support the employment of an "exempt" H–1B alien. Section 412(b)(1) of the ACWIA created a new INA § 212(n)(3)(B) that defined exempt aliens as those that receive annual compensation of $60,000 or more or have obtained a master's or higher degree in a field related to the employment. For practical purposes, this means that only LCAs that indicate an annual compensation of less than $60,000 and are filed for H–1B beneficiaries that do not possess a master's or higher degree in a related field are affected. Whether or not the position at issue actually requires a master's or higher degree is apparently not relevant. Unlike the dependency calculation exemption, this exemption did not expire within six months of the enactment of the ACWIA or the issuance of final regulations.

The IFR offers considerable scrutiny of both the $60,000 compensation and master's degree bases for the attestation exemption.

$60,000 annual compensation. A new 20 CFR § 655.737(c) makes it clear that employer contributions or benefits such as health insurance, life insurance, and pension plans cannot make up any part of the $60,000 figure. [44] Cash bonuses and "similar payments" can be considered, however, as long as these are paid "cash in hand, free and clear, when due." [45] The due date must be within the year for which the $60,000 annual compensation is granted. Cash bonuses may not be contingent if they are to make up

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42 Id.

43 Id. at 80122.

44 Id. at 80227.

45 Id.

any part of the $60,000 figure, but must be "assured." Thus, any bonus that is subject to reduction or elimination because of a contingency may not be included.

20 CFR § 655.737(c) also stipulates that the $60,000 annual salary figure may not be reduced or prorated on the basis of a part-time work schedule.[46] Thus, an employee who works 20 hours per week only and receives annual compensation of $50,000 would not be considered exempt for purposes of the attestation requirement, even though he or she would receive $100,000 if working full-time. Additionally, a worker who works for less than a full year will only be considered exempt if he or she receives the appropriate pro rata share of the $60,000 amount. The IFR provides the example of a worker who resigns after three months of employment: such a worker must receive at least $15,000 in compensation to be deemed exempt.[47] How the DOL defines "appropriate pro rata share," however, is unclear. In the preamble to the IFR, the DOL states that if an H–1B worker is hired at a salary of at least $60,000, but is employed for less than one year, he or she must receive at least $5,000 for each month worked.[48] This language does not take into account the fact that a worker may resign in the middle of the month (or even the middle of the week). In these cases, if the employer does not pay the employee the monthly salary amount, would the DOL find this to be an improper proration of compensation? Moreover, because the employee has not worked the entire year, the employer's W–2 form clearly would show that he or she did not "actually receive hourly wages or annual salary totaling at least $60,000 in the calendar year under 8 CFR § 655.737(c)."[49] Given that the W–2 is the measuring stick for determining a worker's actual compensation, the DOL's position must be refined to account for such business world realities.[50]

Master's or higher degree requirement. A new 20 CFR § 655.737(d)(1) defines, rather curiously, a "Master's or higher degree (or its equivalent)" as "a foreign academic degree from an institution which is accredited or recognized under the law of the country where the degree was obtained, and which is equivalent to a master's or higher degree issued by a U.S. academic institution." Apparently excluded from this definition are master's or higher degrees from U.S. academic institutions. This is a fairly obvious oversight, because the preamble to the IFR makes it clear that this definition is intended only to elucidate

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46 Id.

47 Id.

48 Id. at 80135.

49 Id. at 80227.

50 See Id. at 80135, 20 CFR § 655.737(c), 20 CFR § 677.731(c)(2) and (3). The DOL has taken the position that the standards for the satisfaction of the required wage for H–1B employees will apply in determining whether a worker actually received $60,000 for purposes of gaining status as an "exempt" H–1B worker. These standards provide that the required wage is satisfied when an H–1B worker received the proper "cash wages paid," which includes payment reported to the IRS as the employee's earnings with the appropriate withholdings.

the meaning of "or its equivalent."[51] This section also makes it clear that the actual degree must be held by the exempt alien; an equivalence to a master's or higher degree cannot be made on the basis of the alien's experience or expertise.[52]

The IFR also discusses the meaning of the ACWIA's requirement that the master's or higher degree be in "a specialty related to the intended employment." Under 20 CFR § 655.737(d)(2), the degree must be "in a specialty which is *generally accepted* in the industry or occupation as an appropriate or necessary credential or skill[.]"[53] Failing such general acceptance, the necessary relationship to the intended employment cannot be shown. The preamble to the IFR devotes some attention to this issue, stating the DOL's position that it will not defer to an employer's determination that a degree in a given area is related to the intended employment, preferring instead reference to two external sources, the U.S. Bureau of Labor Statistics' *Occupational Outlook Handbook* (OOH) and O*NET 98 (an occupational profile available on CD-ROM or from the DOL's website)[54] for this determination.[55] The DOL will allow an employer that chooses not to rely upon these sources (or cannot, because they do not contain the necessary information) to obtain a report from a "credentialing organization" that a degree in a given field is recognized by the appropriate industry as appropriate or necessary.[56]

To most immigration practitioners, it will be troubling to see the DOL treating as normative works of reference that were intended to be descriptive. The language of the IFR appears to indicate that the authority of the OOH and 0*NET 98 will be no less than oracular, and that their content represents mandatory standards to be observed by all employers. This is a highly dubious position, given the

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51 See IFR, supra note 3, at 80136.

52 Id. at 80227. The AFL-CIO's suggestion that the North American Industrial Classification System (NAICS) be used to make this determination was rejected by the DOL.

53 Id. (emphasis added). Without carping, it must be stated that the IFR's disjunctive use of the adjectives "appropriate" and "necessary" to describe the academic specialty in which the master's or higher degree has been earned is confusing. Appropriateness and necessity are not synonymous, but represent quite distinct standards. Invariably, the former standard will be subsumed under the latter. It is difficult to imagine a situation in which a credential or skill will be necessary but not appropriate. It would therefore make little sense to retain the term "necessary" in the final text of this rule.

54 For more on the O*NET (Occupational Information Network), see 75 Interpreter Releases 1622 (Nov. 23, 1998).

55 See IFR, supra note 3, at 80139.

56 Id. Precisely what type of "credentialing organization" the DOL had in mind when it drafted the IFR is not clear. Whether or not this is the type of association envisaged in 8 CFR § 214.2(h)(2)(iii)(D)(4) is not clear. The commentary to the final rule should provide examples of such organizations.

subjectivity inherent in these sources, and is particularly suspect with regard to 0*NET 98, which is simply too new and unproven to serve as the type of authority envisaged by the DOL.

Documentation regarding exempt employees. Under a new 20 CFR § 655.737(e)(1), dependent employers that make an "exempt" notation on an LCA (thus indicating that it will be used only for exempt aliens) must maintain in the LCA Public Inspection File a list of the H–1B employees whose petitions are supported by the LCA.[57] Making such a notation on the LCA will trigger an analysis by the INS of whether the relevant employee or employees are truly exempt.[58] The effect of this additional analysis upon the INS' already chronically slow processing of H–1B petitions is fairly easy to predict.

THE PRIMARY NO-DISPLACEMENT ATTESTATION

Section 412(a)(1) of the ACWIA amended INA § 212(n)(1) to add a new subparagraph (E)(i) that requires dependent employers to state on their LCAs that they have not "displaced" a U.S. worker employed by them in the 90 days before filing an H–1B petition, and that they will not displace a U.S. worker within 90 days after this filing. The onerous nature of this requirement is mitigated to a significant degree by narrowing the concept of "displacement" to a "lay-off' of a U.S. worker from a job that is "essentially equivalent" to the job to be held by the H–1B beneficiary. The IFR creates a new 20 CFR § 655.738 that discusses the standards governing a dependent employer's no-displacement obligation. Under this new rule, displacement will be found to have occurred only if two criteria are met: (1) a "lay-off" has occurred; and (2) the job from which the U.S. worker has been laid off is "essentially equivalent" to the job to be filled by the H–1B alien.[59]

- Layoffs

The ACWIA created a new INA § 212(n)(4) that defined a layoff as a loss of employment that is not based on inadequate performance, a violation of workplace rules, cause, voluntary departure or retirement, or the expiration of an employment grant or contract (unless the temporary contract was entered into in order to evade the ACWIA's attestation requirements). This section also states that, if the employer offers the affected U.S. worker similar employment at the same or higher compensation and benefits, no actionable layoff will have occurred, regardless of whether or not the U.S. worker accepts this employment. The new 20 CFR § 655.738 carves out four exceptions to the general rule that an employer

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57 Throughout the IFR, the DOL uses inconsistent terms to describe the Public Access Folder. This inconsistency may create confusion, given that the IFR distinguishes three different files the employer must maintain: (1) the "master" public access folder that must contain documents pertaining to all H–1B petitions (such as a summary of an employee benefit plan); (2) the "individual" public access folder, which includes documentation related to a particular H–1B worker; and (3) the "limited" access folder retained for inspection by the DOL upon request.

58 See IFR, supra note 3, at 80139.

59 Id. at 80228.

who causes a U.S. worker to lose his or her employment has caused a layoff of that worker: (1) the discharge has occurred because of inadequate performance, a violation of workplace rules, or another cause related to the worker's performance or behavior; (2) the worker has voluntarily departed[60] or retired, bearing in mind the standards for constructive discharge; (3) the grant or contract under which the worker was employed has expired; or (4) the worker is offered similar employment with the same employer at equivalent or higher compensation and benefits than those paid for the position from which the worker was discharged.

The DOL includes constructive discharge as an exception to a worker's "voluntary departure." The concept that an individual's working conditions were so intolerable that he or she was compelled to quit has been accepted as legally cognizable in various employment-related settings, including unemployment benefits, sexual harassment, and employment discrimination cases.[61] This principle generally relieves a worker of the burden of showing that he or she was subjected to an "adverse employment action" in these types of cases. The DOL's rather casual adoption of constructive discharge as an exception to a permissible layoff exposes H–1B dependent employers to potentially serious (and unfair) liability. Admittedly, one of the purposes of the enactment of the ACWIA is to protect U.S. workers. Merely creating an exception for constructive discharge, however, is impractical given that the employer is prohibited from displacing a U.S. worker 90 days before and after placement of the H–1B worker. Essentially, the employer will be forced to wait 90 days after any employee resigns to place an H–1B worker, and, given the shortage of workers in certain sectors, this prohibition could damage an employer's business operations. Moreover, the DOL fails to address whether a causal link between the alleged constructive discharge and the employer's placement of an H–1B worker is necessary. A worker's claim that he or she was constructively discharged should be based on an employer's motivation to replace that worker with an H–1B worker. Without this link, any employee complaint of constructive discharge could result in a claim that the H–1B dependent employer unlawfully displaced a U.S. worker.

Exceptions (3) and (4) are elaborated upon in the IFR. Under exception (3), the pivotal issue is "whether the loss [or expiration] of the contract or grant has caused the worker's loss of employment." Such causality must be present for the exception to apply; if the employer routinely moves employers from one

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[60] "Voluntary departure" is, of course, a legal term of art with a very specific meaning under INA § 240B, and its confusing use here to convey a very different meaning is simply an example of inartful drafting.

[61] See, e.g., *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 506 (7th Cir. 1993) (holding that to establish a sexual harassment claim, a worker was required to show that constructive discharge resulted from her membership in a protected class); *Taylor v. Virginia Union Univ.*, 193 F.3d 219 (7th Cir. 1996) (holding that in a sexual harassment claim, a worker must show that the conduct that led to the alleged constructive discharge was motivated by discriminatory animus toward women); *EEOC v. Sears*, 233 F.3d 432 (7th Cir. 2000) (holding that in a disability discrimination claim, the plaintiff must show that the alleged constructive discharge was "because of disability").

contract to another when a contract ends, and work on another contract is available, a layoff will be deemed to have occurred if a worker working on an expired or terminated contract is discharged.[62]

Under exception (4), the validity of the job offer made to the discharged employee will be analyzed under a three-part test. First, the offer must be a bona fide one, not one designed to be refused or made with the expectation that it will be refused. Second, the new job offer must provide an opportunity similar to the one provided by the position from which the worker was discharged, taking into account the level of authority, discretion, responsibility, opportunity for advancement, tenure, and work schedule. Third, the new job offer must offer the U.S. worker equivalent or higher compensation and benefits to those he/she previously received. In comparing the former compensation to the one offered, "all forms of remuneration" must be taken into consideration, including cost of living differentials and relocation expenses. Thus, as the IFR states, if a worker discharged from a job in Kansas City is offered a new opportunity in New York, a wage adjustment and relocation allowance must be made.[63]

- "Essentially Equivalent"

A job is essentially equivalent if it involves essentially the same responsibilities as a position held by a U.S. worker, was held by a U.S. worker with substantially equivalent qualifications, and is located in the same area of employment (defined in geographical terms as the area within normal commuting distance of the relevant work site) as the H–1B beneficiary's job. The ACWIA's requirement of essential equivalence is obviously intended to focus the scope of this provision on situations where an employer has replaced, or intends to replace, a U.S. worker with an H–1B alien. The ACWIA's no-displacement attestation is not intended to serve as a generalized prohibition on layoffs, or to address only "one-for-one" replacements of U.S. workers. Under the relatively broad essential equivalence standard, it is enough if the H–1B alien is to hold a position that is sufficiently similar to a laid-off U.S. worker's, and has skills that are also sufficiently similar to this worker's, even if the H–1B alien will not serve as a replacement for the laid-off U.S. worker. By not requiring identity between the job held by the laid off U.S. worker and the job held by the H–1B alien, the statute prevents employers from avoiding the reach of this provision by making modest or cosmetic changes to the relevant job duties.[64] Affected employers should note that the no-displacement prohibition does not prevent them from hiring an H–1B alien with substantially better credentials than a laid-off U.S. worker, because substantial equivalence would be missing by virtue of the alien's superior qualifications.

The IFR plans to implement the requirement of essential equivalence on the basis of a number of individual comparisons between the job held by an H–1B worker and the job from which the U.S. worker was laid off. These are the following: (1) the two jobs must involve "essentially" the same duties and

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62 Id.

63 Id. at 80228.

64 Smith Statement at E2324.

responsibilities.[65] The focus here is upon the "core elements" and "core competencies" of the jobs (these include supervisory duties, design and engineering functions, and budget and financial accountability); (2) the qualifications and experience of the laid-off worker must be substantially equivalent to those of the H–1B worker. Substantial equivalence exists if, for example, one worker holds a bachelor's degree from an accredited academic institution (say, Harvard College) and the other worker holds a bachelor's degree from a different academic institution (say, Bob Jones University), or if one worker has 10 years of experience and the other has 15[66]; and (3) both jobs must be in the same area of employment, i.e., within the same commuting area (such as a Metropolitan Statistical Area).[67]

The American Immigration Lawyers Association (AILA) objected that the "core" elements and competencies test is too broad and encompasses positions that are, in practice, very different and require different expertise and knowledge, and gave the example of a software engineer engaged in a telecommunications project and one involved only in administrative functions. The IFR accepted this example as one involving qualitatively different positions (assuming software engineers are not treated as "fungible"), but restated the DOL's position that it will continue to base its analysis upon a distinction between core and peripheral elements of a given job.[68]

The most obvious criticism of the primary displacement attestation requirement is that, although it is clearly intended to target employers who replace U.S. workers with cheaper foreign labor, its scope embraces all layoffs by covered employers, regardless of their motivation or business or economic necessity. This was not unnoticed by the ACWIA's creators. In Rep. Smith's words, an employer that lays off a U.S. worker and subsequently hires an H–1B alien with similar skills to perform a similar job violates the no-displacement attestation, "regardless of whether the replacement was intentional or unintentional, or whether it was done in bad faith or not."[69] As such, the no layoff attestation requirement, as noted above, punishes covered employers who have laid off employees for legitimate reasons and without the intention of replacing them with cheaper foreign labor. The no layoff attestation requirement also fails to take account of the speed and frequency with which business circumstances change in many sectors of industry (including, most notably, the information technology sector), as well as of the consequent need of U.S. companies to react to such changes by making personnel decisions with equal speed and frequency. By imposing the no layoff attestation requirement, the ACWIA effectively imposes a period of hiring/firing paralysis upon a covered employer that files an LCA. For example, a company may lay off a U.S. software engineer working on a software development project that has been terminated. A month later, the project is revived, because of the actions of a competitor that threaten to

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65 IFR, supra note 3, at 80229.

66 Id.

67 Id.

68 Id. at 80145.

69 Smith Statement at E2324.

drive the company out of business. The project can only proceed with the participation of experienced software engineers, and the only software engineers who are available in the job pool are nonimmigrants. As a result of its dismissal of the U.S. software engineer, the company must now wait over two months (an eternity in today's information technology sector) before filing H–1B petitions for the software engineers upon whom the project depends, or must pay these engineers at least $60,000, a sum that in some contexts will be unreasonable from a budgetary perspective. Additionally, because of this experience, the employer may be forced to continue employing U.S. workers who would normally be laid off in order not to jeopardize its future ability to react to situations of this kind.

The primary no-displacement attestation requirement also ignores the fact that short-term employment is a common practice in many sectors of industry. This is certainly the case with the motion picture industry, which today employs large numbers of digital animators, computer programmers, and graphic designers to create special effects. Under the ACWIA's no layoff attestation requirement, a production company that finishes work on a film and consequently discharges such workers would be prohibited, unless those workers were hired pursuant to a contract, from hiring an H–1B professional to work on its next film.

THE SECONDARY NO-DISPLACEMENT ATTESTATION

Section 412(a)(1) of the ACWIA also amended INA § 212(n)(1) to add a new paragraph (F) that requires dependent employers to attest that they have not placed an H–1B employee with another employer without having inquired as to whether or not this employer has displaced, or intends to displace, a U.S. worker. The inquiry obligation concerns the period beginning 90 days before the placement of the H–1B alien at the secondary employer and ending 90 days after this placement.[70] This attestation requirement is plainly intended, once again, to penalize "job shops" that contract out H–1B aliens as cheap replacements for U.S. workers. The key issue here is the level of inquiry that is required of the placing employer. The Act does not specifically address this, but the legislative intent appears to be to require reasonable due diligence, and something more than a purely pro forma inquiry.[71] A claim that a reasonable inquiry has been made will serve only as a partial defense, however. As discussed below, § 413(c) of the ACWIA amended the INA by adding § 212(n)(2)(E) to provide for strict liability on the part of a placing employer if the second employer displaces a U.S. worker either before or after the placement. This section made it clear, however, that the placing employer can only receive a debarment penalty if it is found to have known, or had reason to know, of the secondary displacement at the time of placement, or if it was previously sanctioned for a secondary displacement with the same employer.

A new 20 CFR § 655.738(d) addresses the secondary displacement prohibition. Under this section, the placement must fulfill two criteria to be actionable: (1) the H–1B alien must perform duties at a worksite or worksites owned, operated, or controlled by the secondary employer; and (2) there must be "indicia" of an

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70 IFR, supra note 3, at 80230 (to be codified at 20 CFR § 655.738(d)(4)).

71 Id.

employment relationship between the alien and the secondary employer.[72] This relationship need not meet the employment threshold set out in 20 CFR § 655.715, and all that is required is that certain facts tending to show an employment relationship be present. The facts cited by the IFR include the following: (a) the secondary employer has the right to control when, where, and how the H–1B alien performs the job (this is the strongest indicium); (b) the secondary employer furnishes the tools, materials, and equipment used by the alien; (c) the work is performed on the premises of the secondary employer (this by itself will not trigger the secondary displacement prohibition); (d) a continuing relationship exists between the alien and the secondary employer; (e) the secondary employer has the right to assign additional projects to the alien; (f) the secondary employer sets the hours of work and the duration of the alien's job; (g) the work performed by the alien is part of the regular business of the secondary employer; (h) the secondary employer is in business; (i) the secondary employer can discharge the alien.[73]

With respect to factor (1), despite the DOL's insistence that "the displacement obligation would not be triggered simply because the H–1B worker performed duties on the customer's premises,"[74] it is predictable that the nondisplacement obligation would be triggered in virtually all instances in which an H–1B "simply" performed duties at the client's premises. This agency clearly posits, in the new 20 CFR § 655.738(d)(2)(ii)(A), that the single most important factor in a secondary displacement analysis is the right to control *when*, *where*, and how the work is performed.[75]

It is a common practice in the outsourcing and consulting industry for the servicing company's employees to perform projects at the client company's work site. As a result, it will be generally unavoidable for the client company not to have control over where the work is performed. The rise in the incidence of workplace violence also means that 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 customer's workplace. For reasons of workplace safety and other valid business reasons (including the protection of intellectual property), the customer will routinely require the contractor's H–1B workers to confine their activities to designated areas. The degree of control exercised by the customer over the placing employer's employees will be significant, yet this control is not derived from an employment relationship, but from factors extraneous to any indicia of employment that cannot reasonably be interpreted as reflective of the type of demonstrable control by the secondary employer over the H–1B worker that is contemplated in the ACWIA.

In light of the severity of the potential penalties for secondary nondisplacement violations, the triggering mechanism for this obligation should provide H–1B dependent employers and their customers with better notice of this responsibility and a less burdensome, but more uniform trigger. An arguably more transparent and easily administered test for determining an individual's status as an employee can be

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72 Id. at 80229.

73 Id. at 80229–30.

74 Id. at 80144.

75 Id. (emphasis added).

found elsewhere in the IFR. Describing the procedure for calculating H–1B dependency, the DOL exempts from inclusion 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."[76] Thus, bona fide consultants are excluded from this calculation because, under 20 CFR § 655.736(a)(2)(i), they are not individuals who are "consistently treated as 'employees' for all purposes including FICA, FLSA, etc." As the statement of Sen. Abraham makes clear,[77] this standard provides a more consistent mechanism to determine who is an employee and who is not, and thereby offers more predictability to dependent employers and their corporate customers.

The IFR requires that dependent employers show "due diligence" in making the relevant inquiry of a secondary employer regarding nondisplacement and offers (by way of illustration and not limitation) three examples of how such due diligence can be established. All involve some form of documentation. First, a written assurance could be obtained from the secondary employer that it has not, and does not intend to, displace a similarly employed U.S. worker within the 180-day period.[78] Second, a memorandum to the file can be prepared shortly after receiving the secondary employer's oral assurance that it has committed no displacement.[79] The memorandum should include the substance of the conversation, the date it took place, and the names of the individuals participating in it. Third, a secondary displacement clause could be included in the contract between the H–1B employer and the secondary employer, through which the secondary employer agrees that it has not, and will not, displace a similarly employed U.S. worker within the prescribed period.[80] The IFR allows the DOL to require that dependent employers make further inquiry when information exists to indicate that a displacement of U.S. workers has occurred (such as when the placed H–1B aliens are performing duties that were previously performed by the secondary employer's work force). In addition, when the placing employer receives information (by, for example, reading newspaper reports of layoffs) that a displacement may have occurred, it has a duty to contact the secondary employer to obtain the necessary assurance.

Again, the DOL's prescribed methods for obtaining assurances of nondisplacement from a secondary employer will, in practice, be overly burdensome. In the IFR, the DOL observes, in a somewhat conclusory manner, 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

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76 Id. at 80126.

77 Abraham Statement at S12751 provides, "The requirement that there be 'indicia of employment' between the employer with whom the covered employer is placing covered H–1B worker and the H–1B worker is intended to operate similarly to the provisions in the Internal Revenue Code in determining whether or not an individual is an employee."

78 Id. at 80230.

79 Id.

80 Id.

in answering the inquiry."[81] According to the DOL, each assurance from a secondary employer "will take approximately 5 minutes."[82] This estimate verges on the ludicrous, and ignores business realities. When major contracting companies enter into agreements with large corporations, the resulting relationship is complex. The parties engage in extensive negotiations over contractual terms. Significant liability, in the form of heavy damages, may be incurred by either party in the event of a breach of such contractual terms. In this context, making an inquiry that lasts only five minutes would amount to gross irresponsibility. 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 elsewhere in the regulation (including the laborious "Equal-Pay-Act"-type query, if that ill-advised procedure survives the final rulemaking). Thus, 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.

Under the strict liability standard noted above, 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.[83] As a result, it is to be expected 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 whether or not secondary displacement has occurred is not fully fledged or comprehensive and fails to uncover the actionable displacement.[84]

To apply the constructive knowledge standard more reasonably, a distinction should be made in the preamble and the final rule between a dependent employer's 'reason to know' and duty of inquiry, on the one hand, and the 'reckless disregard' of available information under 20 CFR § 655.738(d)(5)(ii), on the other.[85] As noted below, the DOL equates this latter level of intent with willfulness. Thus, if an employer is found to have committed a willful violation and a displacement, the consequences could be debarment for at least three years and penalties of up to $35,000 per violation.[86] Numerous situations will arise

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[81] Id. at 80151.

[82] Id.

[83] 20 CFR § 655.738(d).

[84] The possibility of securing such indemnification protection is recognized, and apparently encouraged, by the DOL's preamble. IFR, supra note 3, at 80151.

[85] Id. at 80151.

[86] See 20 CFR §§ 655.810(b)(3) and 655.810(c)(3). The IFR states, at 20 CFR § 655.810(b)(3)(iii), that the $35,000 penalty for a displacement violation may also be imposed upon employers who are not dependent or willful violators. The authors are indebted to Lawrence Bastone, of Boston, Massachusetts, for this observation. This entirely illegitimate parenthetical comment cannot be expected to survive in the final rule.

where a customer does not fully comply with the secondary displacement requirements by, for example, taking only five minutes to assess the issue (as the DOL suggests), rather than fully investigating the situation. Such a cursory investigation will only partially inform the placing employer of all relevant displacement activities. It is therefore likely that a partial disclosure of information, coupled with perfunctory customer cooperation, will result in a post-hoc determination by the DOL that the dependent employer's duty of inquiry was not satisfied. The possibility thus exists that—unless the rule and preamble are clarified—a duty of inquiry will easily be interpreted as a reckless disregard of evidence and will thus lead (quite unfairly) to a finding of willful violation and a penalty of debarment. There are many situations in which a customer, for entirely legitimate business reasons, may not volunteer complete disclosure about possible or actual displacement, including the avoidance of unrest among its workforce, engaging in a disclosure that would violate its duties under the securities laws, or providing the H–1B dependent employer with a basis for claiming a customer breach of contract that would allow indemnification against the customer. In our current economic downturn, where large layoffs occur on a frequent basis, the risk of debarment for an H–1B dependent employer is unreasonably high and inconsistent with the ACWIA's statutory intent. The DOL should therefore create in its final rule a safe and clearly delineated distance between the "should have known" constructive-knowledge standard and the abyss of recklessness equated with willfulness.

Interpreting a "constructive discharge" situation as an impermissible layoff for purposes of secondary displacement is fundamentally unfair and unworkable in a secondary displacement context. As noted above, in defining the "layoff" of a U.S. worker (for both primary and secondary displacement purposes), the DOL provides that a U.S. worker's departure will not be considered voluntary "under established principles concerning 'constructive discharge.' "[87] Requiring a placing employer to inquire about constructive discharge from a secondary employer raises considerable difficulties and in practice amounts to a trap for the dependent employer. When a placing employer makes its inquiry, the secondary employer will state that a U.S. worker has resigned but it is hard to imagine the secondary employer admitting that the worker 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 can usually be expected to be negative. 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 secondary employer regarding every voluntary departure or retirement. In the latter case, the placing employer would be placed (quite impermissibly) in the position of acting as the secondary employer's counsel by analyzing in depth the circumstances of every departing worker's departure and his or her employment history and determining whether the secondary employer's actions were designed to force the employee to leave this employer.

Unlike a layoff situation, which may be publicized through newspaper articles or through the secondary employer's press releases, no reasonable amount of due diligence will enable the placing employer to become informed of a constructive discharge situation. Constructive discharge allegations are generally raised in the context of employment-related litigation or administrative action, such as a claim for

[87] 20 CFR § 655.738(a)(1)(ii).

unemployment benefits. Only in the rarest cases will such actions be publicized, and although they may be identifiable through litigation discovery, a placing employer should not be burdened with the duty to monitor every unemployment benefits claim or employment-related lawsuit involving the secondary employer in order to identify a potential constructive discharge.

Finally, the determination of whether a constructive discharge has occurred is ultimately a legal determination that can only be made by a court or an administrative tribunal. Because the nondisplacement prohibition covers 90-day periods before and after the placement of the H–1B worker, a voluntary resignation occurring during this period could later be found to be a constructive discharge. Thus, to avoid potential penalties and debarment, the H–1B dependent employer may be required to attempt to intervene in all legal actions involving any constructive discharge claims against its customers. Imposing liability on H–1B dependent employers for any potential constructive discharge at the secondary employer does not serve the workforce protection interest of the ACWIA. Although an H–1B dependent employer may obtain reasonable assurances of an employee termination based on violation of work rules or other cause (including the expiration of a grant or contract), the placing employer will generally not be able to obtain an assurance for a worker's resignation beyond the statement that it was voluntary.

DOCUMENTING COMPLIANCE WITH THE NO-DISPLACEMENT OBLIGATIONS

The IFR sets out the types of documents that must be retained by dependent employers to demonstrate their compliance with the no-displacement obligations. As far as direct displacement is concerned, the IFR requires, with extraordinary broadness, that employers keep, under 20 CFR § 655.738(e)(1), "all" records concerning the circumstances under which each U.S. worker in the same location and occupation as any H–1B employee hired left their employment during the period from 90 days before to 90 days after the relevant H–1B petition was filed.[88] Employers must also maintain these records for any U.S. workers toward whom the employer took any "action" during the relevant period that caused the worker's subsequent termination.[89] The minimal amount of documentation the employer must retain regarding these terminated employees includes the following: the employee's name, last mailing address, occupational title and job description, information concerning the employee's experience, qualifications, and principal assignments, "all" documents concerning the departure of the employee, and evaluations of the employee's job performance.[90] These documents need not be placed in the LCA public inspection file, unlike the recruitment documentation discussed below.

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88 Id. at 80230.

89 Id.

90 Id.

To demonstrate their compliance with the secondary no-displacement attestation, employers must maintain copies of the "due diligence" documentation discussed above.[91]

THE RECRUITMENT ATTESTATION

The ACWIA created a new INA § 212(n)(1)(G)(i) that obligates dependent employers to state on their LCAs that they have taken "good faith steps" to recruit U.S. workers for the relevant H–1B position, "using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H–1B nonimmigrants[.]" This requirement appears to impose on employers of H–1B aliens the obligation to conduct a test of the labor market before employing an H–1B alien.

The preamble to the IFR recognizes that, strictly interpreted, the language of the ACWIA requires dependent employers to engage in recruitment efforts before the LCA is filed. Noting that this requirement appears to have been based on a presumption that employers only file LCAs for individual workers at the time their services are needed, the DOL, to its credit, acknowledges that many employers use LCAs for multiple positions that may arise within the three-year period of the LCA's validity, and therefore announces its conclusion that, in light of this practice, it would be unreasonable to infer that Congress intended dependent employers to have recruited for every position that might be filled under the LCA during its three-year validity. The DOL therefore proposes to interpret and implement the recruitment attestation as a "promise" on the part of the employer that "it has, or will recruit with respect to any job opportunity for which the application is used, whether that recruitment occurs before or after the application is filed (if the application is to be used in support of multiple petitions for future workers)."[92] The DOL should be applauded for this sensible construction of the statute and its rejection of a narrowly literal reading for a more balanced one that takes into account legitimate employer concerns and addresses the practicability of implementation. Such an approach would be welcomed in the DOL's implementation of other provisions of the ACWIA.[93]

- Basic Elements of the Recruitment Attestation

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91 Id. at 80230–31.

92 Id. at 80153. The only objection to this proposal, which was included in the NPRM, was from the AFL-CIO, which opined that good faith recruitment must be a precondition to the filling of any position with an H–1B worker, and suggested that the three-year validity of LCAs be reduced to six months to fulfill more effectively the ACWIA's worker protection policy. The DOL declined to accept this suggestion.

93 For example, in the IFR's preamble, the DOL responded to a suggestion that good faith efforts to cure violations of the secondary displacement prohibition should be allowed to preclude or reduce sanctions. The response retreated into a strict construction of the ACWIA to claim, with complete earnestness, that its discretion to accept the suggestion was limited by the text of the statute. Id. at 80152.

The following elements must be present to show that acceptable recruitment of U.S. workers has taken place.

Good faith. This psychological requirement can reasonably be interpreted to mean that the employer must honestly intend to locate a qualified U.S. worker. This state of mind element is obviously difficult to prove or disprove. Subjective good faith, as the term is customarily understood, may not be enough. Rep. Smith has suggested that an employer's candid belief that its recruitment is geared toward attracting U.S. workers is not relevant to a good faith scrutiny, and that good faith can only be found by reference to the DOL's determination of what constitutes "fair, adequate and equal consideration of all American applicants."[94] In practical terms, the only irrefutable proof of good faith would be the actual hiring of a U.S. worker in place of the H–1B candidate. Rep. Smith has hinted that employers that "consistently" fail to find U.S. workers should have their good faith called into question by the DOL because of that fact alone.[95]

The IFR does not plumb the depths of good faith, other than to require, under 20 CFR § 655.739(h), that dependent employers perform their recruitment of U.S. workers "so as to offer fair opportunities for employment to U.S. workers, without skewing the recruitment process against U.S. workers or in favor of H–1B nonimmigrants."[96] A practice of interviewing H–1B aliens but not U.S. workers, or of screening the applications of H–1B workers differently from those of U.S. workers, is likely to be considered probative of bad faith.[97] Interestingly, the IFR specifically prohibits dependent employers from exercising a "preference" for an incumbent nonimmigrant worker who has not yet obtained H–1B status (for example, F–1 or J–1 aliens employed pursuant to optional, curricular, or academic training).[98] The fact that such person has proven himself or herself to be an exemplary employee and is already fully familiar with the employer's technologies (thus not requiring any training in these technologies) is apparently something that cannot be taken into consideration by a dependent employer in deciding whether to hire this employee or a similarly qualified U.S. worker. Doing so causes the employer to have its good faith questioned.

The IFR considers two factors to be important to a good faith determination: (1) the use of "legitimate selection criteria" in the recruitment of U.S. workers; and (2) a prohibition on the "discriminatory" application of such criteria. Its treatment of each of these two factors is discussed below.

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94 Id.

95 Smith Statement at E2324.

96 IFR, supra note 3, at 80232.

97 Id.

98 Id.

Legitimate selection criteria. A new 20 CFR § 655.739(f) provides a three-pronged test for determining whether or not a dependent employer has employed legitimate selection criteria in its recruitment of U.S. workers. First, such criteria must be "legitimate" from a legal point of view; unlawful considerations such as age, sex, race, or national origin may not be taken into account.[99] Second, the criteria must be "relevant" to the job at issue; this means that they must have a "nexus" with the job's duties and responsibilities.[100] Third, the criteria must be "normal and customary" to the job. This is to be determined by the "practices and expectations" of the relevant industry, and not by the preferences of the employer.[101]

Discriminatory treatment. Under the new 20 CFR § 655.739(g), dependent employers may not apply facially legitimate screening criteria (i.e., those that meet the requirements of 20 CFR § 655.739(f)) in a manner designed to "skew" the recruitment process in favor of H–1B aliens. Such skewing would occur if the employer were to apply such criteria in a disparate manner between H–1B aliens and U.S. workers or between jobs held by H–1B workers and jobs not held by such workers.[102] The IFR also adds that the use of unlawful screening criteria also constitutes discriminatory treatment.[103] The use of such unlawful criteria also runs afoul of the prohibition included in 20 CFR § 655.739(f), discussed above. The DOL does point out, however, that it has no intention of "second-guessing" employers' work-related screening criteria or requiring that employers depart from the way in which they customarily recruit workers.[104] The preamble notes that the DOL recognizes that "a multitude of legitimate factors, objective and subjective" are considered in making hiring decisions, and that its role will be limited to ensuring that the employer's recruitment efforts meet the statutory standard.[105] The use of different personnel to interview H–1B candidates and U.S. worker candidates is permitted, as long as the persons interviewing the H–1B

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99 Id. at 80231.

100 Id.

101 Id.

102 It should be noted that, in Sen. Abraham's statements regarding recruitment efforts, he clearly stated that Congress did not intend "to invite the kind of elaborate scrutiny of selection criteria and the accompanying 'validation' machinery that has developed under a 'disparate impact' analysis of such criteria under Executive Order 11246 and Title VII of the Civil Rights Act of 1964." Abraham Statement at S12751. In defense against the DOL's scrutiny of an employer's facially legitimate screening criteria, an employer may argue that Congress had intended a "common sense" approach to determining good faith recruitment and specifically rejected a highly technical dissection of the employer's practices.

103 IFR, supra note 3, at 80232.

104 Id. at 80157.

105 Id.

candidates do not have more influence in the hiring process than the persons interviewing U.S. worker candidates, and do not have a financial interest in hiring H–1B aliens.[106]

Procedures that meet industry-wide standards. The ACWIA's requirement that an employer's recruitment steps conform to industry-wide standards is presumably intended to ensure that employers do not utilize unorthodox and mala fide recruitment methods that will almost certainly fail to attract qualified candidates. Such methods might include posting job notices in obscure locations on the work site, and placing advertisements in trade journals dedicated to unrelated industries (for example, placing an ad for a petroleum engineer in the *American Woodworker*). Although it may be easy to identify such subterfuges, the determination of what is and what is not a recruitment procedure that meets industry-wide standards will generally be a complicated one, given the heterogeneity of such procedures in today's labor market and the differing preferences of individual industries. The ACWIA left this determination to the DOL, which has proven itself to be obstinately insensitive to prevailing trends in recruitment methods. The reduction in recruitment (RIR) labor certification procedure provides a case in point of this insensitivity. Although it has been settled for some years that advertising on the Internet is overwhelmingly the most effective and popular mode of recruitment for the information technology industry, the DOL continues to insist on printed advertisements in local newspapers as the primary form of recruitment for RIR purposes.

The IFR creates a new 20 CFR § 655.739(e) that describes the "industry-wide standards" requirement. Although this section makes it clear that dependent employers are not required to employ any particular number or type of recruitment methods, such entities are not granted complete license to employ the standards they deem fit. A determination of which standards are appropriate may apparently only be made by reference to such external authorities as "trade organization surveys, studies by consultative groups, or reports/statements from trade organizations."[107]

This section also stipulates that an employer's recruitment efforts must be "at a level and through methods and media which are normal, common, or prevailing in the industry, including those strategies that have been shown to be successfully used by employers in the industry to recruit U.S. workers."[108] This could be interpreted to mean that any strategy that has resulted in the recruitment of U.S. workers is ipso facto acceptable. The preamble uncharitably makes it clear, however, that the DOL does not believe that success in recruiting U.S. workers creates a presumption that the recruitment obligation has been met, because the failure to recruit such workers could give rise to an opposite presumption.[109] It is made

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106 Id.

107 Id. at 80231.

108 Id.

109 Id. at 80157.

equally clear, however, that in its enforcement actions, the DOL will look "particularly carefully" at employers who have not been successful in hiring U.S. workers.[110]

The IFR further constrains dependent employers by prohibiting the exclusive use of the "lowest common denominator" of recruitment methods utilized in the industry.[111] Such a lowest common denominator would be the minimal or least effective recruitment method used in the industry to recruit U.S. workers. Also prohibited is the use of methods that can "reasonably be expected to be likely to yield few or no U.S. worker applicants."[112]

20 CFR § 655.739(d) explains what the DOL means by the "solicitation methods" that may be used to recruit U.S. workers. Such methods fall into two categories: "external" and "internal," and two sub-categories: "active" and "passive." External solicitation refers, obviously enough, to recruitment from without the employer's workforce, and internal solicitation refers to recruitment from within the workforce. An important caveat in this latter regard is that internal solicitation methods must be directed to former employees as well as current employees.[113] Active solicitation methods are those that involve (apparently first and foremost) direct communication with current and former employees. In this regard, the notice function of the LCA would be of prime importance. Training of current employees, "outreach" through trade unions and other associations, job fair attendance, and the use of college placement services, employment agencies, and headhunters are also acceptable active solicitation methods. Passive solicitation methods include (it is not clear if their sequence in the IFR indicates a preferential order) advertising in publications or journals (including "special interest" publications), on America's Job Bank, on "other" Internet sites (of the Monsterboard.com variety), as well as notices on the employer's worksite and/or on its Internet home page.[114] Contained in this section are the first explicit regulatory acknowledgments that Internet recruitment is an accepted and widely used form of recruitment. The preamble's discussion makes it clear, however, that this concession has only been grudgingly made, and that the DOL remains skeptical of the effectiveness of Internet recruiting, viewing it as "overrated" and no substitute for "active" methods of recruitment.[115]

20 CFR § 655.739(e) enlarges upon this discussion by offering two specific prescriptions for the recruitment methods to be used by dependent employers and willful violators: first, both internal and

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110 Id.

111 Id. at 80231.

112 Id.

113 Id.

114 Id.

115 Id. at 80156.

external recruitment methods must be used; second, some "active" recruitment method must be used.[116] Whether this is used internally or externally is irrelevant, but passive recruitment is apparently not necessary.

The PERM alien employment certification program, currently scheduled for introduction later this year, will alter the current labor certification procedure by permitting employers to fax a copy of the labor certification application and an affidavit summarizing the recruitment efforts made.[117] There has been some indication that the technology used for the LCA faxback system will be implemented for the PERM program.[118] The DOL's position regarding Internet recruitment in the IFR may be an indication as to how the PERM program will handle electronic recruitment issues.

Offering compensation. This requirement seems to be self-evident, and in little need of interpretation. It is intended to require that the recruitment steps undertaken specify at least a prevailing wage, and thereby to prevent the deterrence of potential applications through the offering of a very low wage. The IFR does not analyze this requirement, but a minor point that might require clarification is whether the "offering compensation" requirement applies to the "procedures" used, or to the actual advertisements used by the employer. Arguably, the advertisements themselves need not contain the prevailing wage, as long as this compensation is offered at some juncture in the recruitment process.

- The Job Offer Requirement

The most intrusive element of the ACWIA's recruitment attestation requirement is the requirement that dependent employers state that they have actually offered the job to be filled by the H–1B beneficiary to any U.S. applicant who is "equally or better qualified" for this job.[119] This contrasts with the labor certification process, which does not require employers actually to offer employment to candidates that meet the minimum requirements for a position seeking certification. It is also pertinent to note that, unlike the labor certification process, the standard of reference here is the H–1B alien's qualifications, not the job's requirements. If a U.S. worker applicant is not better or equally qualified, he or she can be rejected, even in spite of the fact that he or she may be well qualified for the job at issue.

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116 Id.

117 For more on the PERM program, see 77 Interpreter Releases 1087 (July 31, 2000).

118 Draft Minutes for DOL ETA Liaison Meeting, November 15, 2000, available at *http://www.aila.org/infonet*.

119 This is of course not an entirely novel provision. Under INA § 274B(a)(4), it is not an unfair immigration-related practice to prefer to hire a U.S. "citizen or national" over an alien if both are equally qualified. The "equally or better qualified" standard has for some time been applied with some leniency by the DOL in the context of Special Handling labor certification applications.

Precisely who is entitled to make an initial determination of whether or not an applicant is "equally or better" qualified, and the ingredients that must go into such a determination, are left unclear by the ACWIA, which leaves open the possibility of government intrusion into the personnel decisions of U.S. employers that is based on purely objective criteria (or any other criteria of the DOL's choosing), and ignoring discretionary factors customarily considered by an employer. Thus, an employer seeking to hire an Indian national with a B.S. degree in Computer Science with a 3.5 grade point average, an affable personal manner, and impeccable personal hygiene, may be penalized for not offering the position first to a U.S. citizen with a B.S. degree in Computer Science with a 3.5 grade point average who has a morose disposition and showers once a month. Alternatively, an employer that intends to hire in H–1B status a Chinese electrical engineer with a B.S. in Electrical Engineering with a 3.0 grade point average and experience in a given technology used by the employer may be penalized if it does not offer the job first to a permanent resident with a B.S. in the same subject with a 3.1 grade point average, but no experience in the relevant technology.

Section 412(a)(3) of the ACWIA amended INA § 212(n)(1), however, to state plainly that, in assessing whether or not a U.S. worker is equally or better qualified, employers may use legitimate selection criteria that are "normal" or "customary" for the type of job at issue, as long as these are not used in a discriminatory manner. Former Sen. Abraham's Committee Report on the ACWIA was also at pains to emphasize that the job offer requirement is not intended to force employers to comply with a specific recruitment regimen or to confer authority on the DOL to prescribe such a regimen.[120] Mr. Abraham further stated that the requirement is not intended to substitute "someone else's" judgment for the employer's, and that the employer's judgment as to which qualifications are relevant to a particular job are entitled to very significant deference.[121]

- The "First Preference" Exception

The ACWIA exempted from the recruitment attestation an LCA filed in support of an H–1B petition for a beneficiary who is "described" in subsections (A), (B), or (C) of INA § 203(b)(1). This appears to mean that no recruitment attestation is required if the beneficiary of the H–1B petition is an alien of extraordinary ability, an outstanding researcher, or a multinational executive or managerial transferee.[122] It is unlikely that an employer would file an H–1B petition for such a person, given the availability of the O–1 and L–1A categories. It is equally difficult to see how this exemption can be implemented in practice without substantial problems. A determination of an alien's eligibility for one of the first preference immigrant categories is a legal, rather than factual, determination, involving a complex exercise that can

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120 Abraham Statement at S12751.

121 Id. Former Sen. Abraham further stressed that the job offer requirement is not intended to invite the type of searching inquiry necessitated by a "disparate impact" analysis under Title VII of the Civil Rights Act of 1964.

122 The DOL demonstrates its close familiarity with the text of the ACWIA by referring to "exceptional" aliens as falling into this category. IFR, supra note 3, at 80117.

only be made on the basis of an intimate familiarity with immigration law and an appropriate evaluation of differing types of evidence, and certainly requires a far more searching inquiry than the simple factual determination of whether or not the alien is making $60,000 a year or has a master's degree. As such, this determination is, for most purposes, exclusively within the purview of the INS. Despite this, the ACWIA empowers the DOL to make this determination.

The IFR does not amend the DOL's regulations to take account of this provision, but its discussion of the comments received in response to the NPRM acknowledges an observation by the Cooley Godward law firm with respect to the practical difficulties in implementing the first preference exception to the recruitment obligation.[123] In response to Cooley Godward's suggestion that the DOL's regulations contain protection for employers who have made a good faith determination that a given alien is qualified for first preference immigrant status, the DOL notes that it will consult with the INS if such an issue arises, and will take into account an employer's good faith in assessing any remedy.[124]

- Documenting Compliance with the Recruitment Obligation

A new 20 CFR § 655.739(i) requires dependent employers to maintain documentation of the recruiting methods they have used. This must include the places and dates of the various forms of recruitment used, the content of the advertisements and postings and the compensation terms offered (unless these terms are already mentioned in the advertisements and postings). The documentation may be in form of a memorandum; copies of the advertisements and postings placed may be used, as may orders and proofs for these, as long as the necessary information is contained. Dependent employers must also maintain documentation of the "treatment" received by job applicants, including copies of applications, test papers, rating forms, and interview records. In what appears to be a rule-swallowing exception, the regulation states that employers are not required to create any documentation they would not otherwise create.[125] This documentation must be made available to the DOL in the event of an investigation, and, under 20 CFR § 655.760(c), must be retained by the employer for one year after the last date on which an H–1B alien is employed under the relevant LCA. Notably, the new rule creates a new 20 CFR § 655.739(i)(4) that requires that dependent employers maintain in their LCA public inspection files a

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123 Id. at 80154.

124 Id.

125 The DOL overlooks the fact that it has placed greater recordkeeping obligations on employers in other arenas. On November 13, 2000, the DOL's Office of Federal Contract Compliance Programs promulgated its final rule restructuring government contractors and federally assisted construction contractors' obligations regarding affirmative action programs. Thus, the march of greater documentation requirements continues with a newly created Equal Opportunity Survey, a 12-page survey requiring employers that must maintain affirmative action programs to detail, among other things, the racial composition of the work force, and the company's pay levels. For information on the new survey and the final rule, visit the OFCCP's website at *http://www.dol.gov/dol/esa/public/ofcp_org.htm*. See also 41 CFR part 60–1 and 60–2.

summary of the principal recruitment methods used and the time frame during which these methods were used.[126] Again, a memorandum will satisfy this requirement, as will copies of the relevant documents. It should be noted that no information concerning the treatment of applicants need be included in the public inspection file; no privacy issues are therefore raised. The IFR does reject, however, AILA's concern that including recruitment information in public access files invites competitor intrusion, because it believes that such information is already publicly available through the public nature of the employer's advertisements and attendance at job fairs.[127] This is a questionable conclusion, because it assumes that it is just as easy for a competitor to maintain a record of an employer's advertisements and job fair attendance as it is for this competitor to peruse the contents of the employer's summary of its recruitment.

Under this regime, H–1B dependent employers must maintain a detailed record of all applications from U.S. workers for positions that the employer intends to fill with H–1B aliens. In some states, including California, employers are already obligated to meet this recordkeeping requirement by maintaining all employment applications for at least two years after the applicant is hired or rejected.[128] In addition, federal contractors and subcontractors that are subject to affirmative action obligations must keep records of all applications as part of their affirmative action programs.[129] Such a record should include the applicant's résumé, the date the résumé was received, a description of the review made of the résumé and of any contact made with the applicant, and, most importantly (given the obligation to offer the job to "equally or better qualified" U.S. workers), a careful explanation of why the applicant was found not to be equally or better qualified for the position. Because the ACWIA imposes a 12-month statute of limitation on complaints filed under the enforcement mechanism described below with respect to the job offer obligation, such records need be maintained (for purposes of compliance with the ACWIA) only for one year from the date of the rejection of the applicant's employment application. Employers should note that it is the date of the negative decision, not the date of receipt of the application, that begins the running of the statute of limitation. It should also be noted that this enforcement mechanism applies only to alleged violations of the duty to offer a position to an equally or better qualified U.S. worker, and may not be initiated to remedy violations of the no-displacement or recruitment attestation requirements.

- Enforcing the Job Offer Requirement

The ACWIA gives teeth to the requirement that dependent employers offer the job to be filled by an H–1B alien to a U.S. worker who is equally or better qualified by establishing an enforcement mechanism designed to deal with alleged violations of this requirement. Under this exclusive mechanism, an "aggrieved individual" who has applied for such a job may file a complaint with the Attorney General no

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126 IFR, supra note 3, at 80232.

127 Id. at 80160.

128 The California application retention requirement is regulatory, and appears in § 12946 of the state's Government Code. It applies to employers with five or more employees.

129 41 CFR § 60–1.12.

later than 12 months after the alleged violation occurred. If the Attorney General determines that the complaint presents reasonable cause[130] to believe a violation has been committed, he will initiate binding arbitration proceedings with an arbitrator from the Federal Mediation and Conciliation Service. The fees and expenses of the arbitrator will be paid by the Attorney General. In the proceeding, the complainant has the burden of showing by clear and convincing evidence that an employer is in violation of the job offer requirement. The arbitrator's finding will be reviewed by the Attorney General, who may approve, modify, reverse, or vacate this finding. If both the arbitrator and the Attorney General find that a violation has occurred, the Attorney General may impose a civil monetary penalty of $1,000 per violation (or $5,000 if a willful failure or misrepresentation has occurred) and a one-year debarment from filing nonimmigrant and immigrant petitions (a two-year debarment applies in the case of willful failures or misrepresentations). This enforcement mechanism is administered by the Department of Justice, and is only parenthetically mentioned in the IFR.[131]

CONCLUSION

Despite the DOL's thoroughness and painstaking detail, it is hard to argue that the IFR represents a successful or even-handed attempt to implement the ACWIA's "workforce improvement" provisions. The DOL has failed to apprehend the realities and complexities of today's workplace and business environment and has crafted a piece of rulemaking that owes little to fairmindedness and much to outmoded protectionism. The net result of the IFR's provisions governing H–1B dependency is an overwrought regime of coercive measures that attempts to micromanage the hiring and retention process and inserts the DOL in places where some might argue it has little reason to be. This new regime will force dependent employers to engage in a wholesale overhaul of their hiring practices, and will cause many to consider whether or not it makes sense to continue hiring H–1B aliens. The widespread dismay caused by the IFR among the H–1B employer community is already receiving national attention.[132] Few would argue with the proposition that the protection of the U.S. worker is a laudable goal, but it remains questionable whether or not making dependent employers carry the albatross of H–1B dependency around their necks is truly designed to serve this objective. Reviewing these requirements, one is left

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130 The reasonable cause standard is apparently intended by Congress to be a less exacting standard than the "probable cause" standard applied to Fourth Amendment protections against unreasonable searches and seizures. In this respect, Rep. Smith has stated that employers of H–1B aliens are expected to "cooperate fully" with the Attorney General in all investigations, and that the Attorney General is expected to exercise his discretion "in an appropriate manner within the scope of [his] authority." Smith Statement at E2327. The result is arguably that "reasonable cause" means whatever the Attorney General wants it to mean.

131 IFR, supra note 3, at 80232.

132 See, e.g., "Entrepreneurs' H–1B Blues Just Got Worse: Last-Minute Regulations From the Clinton Administration Further Complicate the Byzantine Process of Hiring Foreign Workers," *Business Week*, Feb. 1, 2001.

with the uncomfortable feeling that their motivation is to punish as much as to protect. What is particularly unsettling is the presumption of guilt on the part of H–1B dependent employers that courses through the ACWIA and the IFR. Simply by virtue of having more than an (arbitrary) number of H–1B employees in their work forces, they are assumed to be harming the interests of the victimized U.S. worker and therefore in need of corrective action. As noted above, the point is driven home by classing them together with (and therefore no better than) willful violators. This, then, is retributive justice at its worst: punishing entities for what they are, rather than what they do. Castigating certain employers just because their number of H–1B employees rises above an "acceptable" level surely carries the evangelism of U.S. worker protection too far.