Department the usual regulatory authority to require recordkeeping as a means of ensuring compliance with an employer's statutory obligations—either generally or with specific reference to the recruitment obligation. The fact that the H–1B program is primarily complaint-driven with only attestations of compliance filed initially with the Department makes it all the more important that documentation be retained so that the Department can determine compliance in the ew- with an

providing services to patients in their homes within an area of employment''

period. Notice by e-mail may be provided by notification to an e-mail group consisting of all of the affected employees. Electronic posting, unlike

American workers based in the U.S., lies with the American (United States) employer who brings nonimmigrant workers into the country. Ultimately, it is the American employer, not the foreign subsidiary, pledging a benefit package similar to that of its American workers. Congress would expect the Secretary to look with particular care at circumstances involving a foreign subsidiary where there is an appearance of contrivance to avoid the obligation to provide equal wages and benefits to H–1B and American workers.

144 Cong. Rec. E2326 (Nov. 12, 1998).

1. What Does ''Same Basis and Same Criteria'' Mean With Respect to an Employer's Treatment ofj/F/F/F spoBasits to Hj/F' Mean Wgaro ao/F/F sp[(B and be? E2§-1657(655.731(c)(3), §-1657(655.732)ations1)Tj4
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Abraham and Graham suggested that the statute would allow employers to offer benefit incentives above and beyond normal benefits to lure foreign-based employees with critical skills to work in the United States. The Senators suggested that so long as the packages are offered on the same basis to U.S. and foreign nationals based abroad, the practice should be permitted.

In the Department's view, the statute

employer's foreign affiliate, rather than his or her status as an H–1B worker.

TCS stated that it appreciated the Department's sensitivity to the issue of the application of the benefits requirement to employees who receive a range of benefits from their foreign employer and are only in the United States on short-term assignments in connection with their long-term TCS appreciaenefits FedncjT*''similarlyheir foreign

on factors such as lack of work for the worker—or due to the worker's lack of a license or permit. Congressman Smith also remarked that Congress anticipated the Secretary's close scrutiny of ''voluntariness'' in circumstances that appear to be contrived to take advantage of unpaid time. Senator Abraham listed the following examples of H–1B employees taking unpaid leave which

requires payment, after a nonimmigrant has entered into employment with an employer, whenever nonproductive status is due to a decision by the employer or to the nonimmigrant's lack of a permit or license. In contrast, payment is not due when the nonproductive time is due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work. Therefore the Department cannot

training or orientation or medical examinations, since U.S. workers are not. AILA suggested that ''entered into employment'' occurs when the employee actually commences the orientation, training or work because ACWIA, in mandating payments by the 30–day and 60–day deadlines, appears to provide the employer with discretion regarding the starting date prior to those deadlines.

The statutory language does not permit the Department to define the term ''entered into employment'' as the date the H–1B worker arrives in the United States. Likewise, payment of wages by the employer cannot be required before the H–1B petition is approved. On the other hand, the Department notes that the Fair Labor Standards Act itself requires that where there is an employment relationship (including where the worker has been promised employment, even if the employee is not yet on the payroll), both H–1B and U.S. workers be paid for orientation or training time required by the employer.

The Department has concluded that the term ''entered into employment'' means the date on or after the date of need on the H–1B petition when the worker makes himself or herself available for work or otherwise comes under the control of the employer and includes all activities thereafter, such as waiting for an assignment, going to an interview or meeting with a customer, attending orientation, studherself

I. What Special Rule Does the ACWIA Provide for Academic Salaries? (§ 655.731(c)(4))

The ACWIA provision on non-

they stated, they were not aware of under any State's law—constituted an attempt by the Department to create federal law on this question in contravention of the statute's direction that State law was to be applied in resolving such matters. They stated that it was the intention of Congress not to require litigation over each such agreement, but instead to allow the Department to bring an enforcement action if it believes an agreement is punitive as a matter of State law.

Congressional commenters and Network Appliance objected to any requirement that employers obtain a state court judgment where there is no

reflect these additional provisions,

law, or to exclude potential *de minimis* violations.

BRI commented that the employer should not be liable for wrongful termination until found guilty by the appropriate authority. The Department agrees that an employer is not liable for wrongful termination until a final decision is issued in a Department of Labor proceeding.

5. What Changes Does the ACWIA Make in Enforcement Remedies and Penalties? (§ 655.810)

Prior to the ACWIA's enactment, the INA authorized the assessment of a civil money penalty (up to $1,000 per

or whistleblower violations in particular, such relief must logically include reinstatement and back pay. Nor does the Department believe that the fact that explicit language concerning such relief was not contained in the ACWIA, as Senator Abraham indicates was sought by the Administration,

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interest. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services.''

The INS Interim Final Rule also provides, in relevant part, that a nonprofit organization or entity is one that is qualified as a tax exempt organization under Section 501(c) (3), (4) or (6) of the Internal Revenue Code of 1986 (IRC) and has received approval as a tax exempt organization from the

historic affiliation with universities but do not meet the strict definition of

performed will constitute a ''worksite'' for that worker (see subsection b, below). It is important for employers to recognize that if the location is not a ''worksite'' for that H–1B worker, then the short-term placement provision will not be applicable to that worker at that location and, consequently, the placement of the worker there will not be subject to the requirements of this section of the regulation (see IV.O.1.b and c, below). The following discussion of the short-term placement option is, therefore, based on the assumption that the H–1B worker(s) will be temporarily placed at worksites which are not covered by an LCA.

Prior to promulgation of the short-

Several commenters considered the rule to be complex and burdensome for employers. Seven commenters (ACIP, AILA, Cowan & Miller, Rubin & Dornbaum, White Consolidated Industries, Network Appliance, FHCRC) stated that the Department's proposal unrealistically requires the human resources staff at a large company to keep track of personnel movement from multiple divisions or offices to various customer sites around the country. Three commenters (Senators Abraham and Graham, Congressional commenters, and Oracle) stated that the

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program's requirements, many of which are worksite-specific. The Department presumes that employers are taking appropriate steps to assure such compliance, which would logically include the employer's being aware of the locations of its H–1B worker(s). An employer which is unable to determine the whereabouts of its H–1B worker(s) would be handicapped in assuring that

employment with certified LCAs. The Department has approached this matter on a case-by-case basis, taking into account the confusion created by the *NAM* decision. However, with the issuance of this Interim Final Rule, the Department considers all such confusion to have been dispelled. Therefore, the Department cautions employers that—except in accordance with the strict requirements of the short-term placement option—the H–1B provisions of the INA and the Department's regulations require that an LCA be filed for any and all worksites where H–1B workers are employed. Violations of any of the provisions of the short-term placement option will

unanimous in their opposition to a regulation that would require employers to have separate travel reimbursement standards for H–1B workers than for other employees. These commenters suggested that the standard for H–1B workers, like all other workers, should be reimbursement for actual expenses incurred while on travel.

The Department has fully considered these comments, as well as its own post-*NAM* enforcement experience. During the post-*NAM* period, when the regulation has been enjoined, the Department has been enforcing actual expense reimbursement for all H–1B business travelers. In these enforcement proceedings, the Department has not encountered problems pertaining to abusive practices or difficulties in proof of actual expenses, since it has found that employers in fact keep a record of expenses as a prudent business practice. Therefore, the Department is adopting th611B workersa recB wodlatios. Thg regulation ismo diired in t isIorkeimg that employerB
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were dissatisfied with the NPRM's proposal of five consecutive workdays as the test for a ''casual, short-term'' stay

After carefully considering all the comments, the Department has concluded that Appendix A—which was created in response to employers' requests for technical guidance—has not served its intended purpose and has, instead, caused some confusion. The Department has, therefore, decided that Appendix A will not be included in the Interim Final Rule. The controlling standards for determining and documenting an employee's ''actual wage'' are contained in the current regulation, 20 CFR 655.731(a)(1), 655.731(b)(2), and 655.760(a)(3) (none of which were opened for comment in the NPRM). If the need arises in the future, the Department, as appropriate, will provide compliance advice or technical assistance further explaining the current regulation.

The commenters' reactions to the proposed Appendix A are based, in large part, on a lack of understanding of the fact that the Department's regulations (e

Interim Final Rule. The controlling

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attorney representing an employer is more competent or more impartial than an attorney suggested by an alien, and that employers may not be aware of the expertise necessary to file H–1B petitions. This attorney also suggested that the requirement that employers pay attorney fees would intimidate a potential whistleblower.

Many commenters (AILA, ACIP, and a number of attorneys, businesses and trade associations) argued, in effect, that since Congress, in drafting the ACWIA, specifically prohibited employers from imposing the additional petition fee on employees, the failure to prohibit the payment of other expenses by employees evidences an intention to allow their imposition by an employer.

ITAA and ACIP argued that the current law is directed toward prohibiting certain deductions from an employee's salary that will push it below the required wage rate. In other words, as long as the H–1B worker receives at least the required wage, it should not be a violation if the worker then spends that money for job-related matters such as fees. ACIP and ITAA stated that as a minimum, if the H–1B worker's wages minus the expenses equals or exceeds the required wage rate, there should be no violation. Latour agreed with the Department that if an H–1B worker's wage is below the prevailing wage, it would be a violation to deduct attorney fees from the worker's compensation, but stated that there is no basis for prohibiting the employer from having the employee handle the payment if the fees, when subtracted from the worker's pay, would not result in compensation less than the prevailing wage.

LCA and H–1B petition on to the employee. With respect to the concerns regarding small employers who may not have familiarity with H–1B requirements and may not know an attorney specializing in this area of law, there is nothing to prohibit an H–1B worker from recommending to the employer an attorney familiar with the requirements of the H–1B program. In addition, if an applicant for a job hired an attorney clearly to serve the employee's interest, to negotiate the terms of the worker's employment contract, to provide information necessary for the H–1B petition or review its terms on the worker's behalf, or to provide the applicant with advice in connection with application of U.S.

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qualifications and principal assignments, for all U.S. workers who left employment during the 180-day window. The employer must also keep all documents concerning the departure of any such U.S. employees and the terms of any offers of similar employment made to them and their responses. In most cases no special records need to be created to meet these requirements. EEOC requires under its regulations that any such existing records be maintained by employers.

H–1B-dependent employers and willful violators must make good faith efforts to recruit U.S. workers using procedures that meet industry-wide standards before hiring H–1B workers. These employers will be required to keep documentation of the recruiting methods they used, including the places, dates, and contents of advertisements or postings, and the compensation terms (if not included in contents of advertisements and postings). These employers must also summarize in the public disclosure file the principal recruitment methods used and the time frame within which the recruitment was conducted. As

workers and, thereby, accomplishing a significant reduction in the ratio of H–