

longshore work at locations in the State of Alaska. Therefore, enforcement of attestations filed under the Alaska exception will be conducted in accordance with regulations currently in place for attestations filed under the prevailing practice exception.

Section 258(c)(4) of the INA requires that the Secretary establish a system to conduct investigations where a complaint presents there is reasonable cause to believe that an attesting employer failed to meet a condition attested to or misrepresented a material fact in its attestation, or that a non-attesting employer claiming the automated vessel exception was not qualified for the exception because the performance of the associated longshore activity does not prevail in the port. The regulations provide that the Wage and Hour Administrator may conduct investigations of potential violations of the law only pursuant to a complaint. The investigative process is to be completed and a determination issued in a 180-day period, or a longer period for good cause shown. Any aggrieved person may file a complaint.

The regulations provide that, in investigating an attesting employer, the Administrator shall consider the employer's statutory burden to present and retain facts and evidence to show the matters attested to. The regulations also require that the employer cooperate in the investigation and take no retaliatory action against persons who file complaints, assist in the investigation, or participate in the administrative proceedings.

B. Administrative Law Judge Hearing and Discretionary Review by the Secretary

Section 258(c)(4)(D) of the INA requires that the Secretary provide interested parties an opportunity for a hearing within 60 days of the date of the investigative determination. Because of this compressed timeframe, the regulations require that a request for hearing be filed directly with the Chief Administrative Law Judge no later than 15 days from the date of the Administrator's determination. Further, the regulations incorporate the statutory imposition of the burden of proof on the attesting employer to establish the truth of the attestation elements.

An opportunity for discretionary review by the Secretary is afforded by the regulations, with short deadlines in accordance with the statutory intent for expedited dispositions. Any interested party may request such review, and the Secretary shall determine what matters, if any, will be reviewed.

C. Cease and Desist Order

Section 258(c)(4)(C) of the INA authorizes the Secretary, at the request of a complainant, to issue a cease and desist order against an attesting employer or against a non-attesting employer claiming the automated vessel exception. The complainant's request may be made when the Secretary has determined there is reasonable cause to conduct an investigation. The INA specifies that, if a complainant requests such an order, the employer will be notified and given 14 days within which to respond. The Secretary is then required to determine whether the preponderance of the evidence submitted supports the complainant's position and, if it does, to order that the employer cease and desist the activity(ies) at issue. The order remains in effect throughout the hearing process for the attesting employer; for the non-attesting employer claiming the automated vessel exception, the order remains in effect throughout the hearing process unless ETA accepts for filing an attestation from that employer for the activity and location which the cease and desist order affects.

The regulations provide that the complainant who desires a cease and desist order must submit two complete copies of the request and the evidence to substantiate the allegations (the second copy of the request will be provided to the employer). The Administrator's notice to the employer shall include copies of the complaint, the cease and desist order request and supporting evidence, and any other pertinent evidence from an investigation of the same or a closely related matter which the Administrator incorporates into the record. The employer, thus, will be fully informed as to the allegations and evidence. The Administrator's notice also shall specify that, during the 14-day response period specified by the INA, the Administrator will provide, at the employer's request, an opportunity for a meeting with a Wage and Hour Division official to give the employer's views on the evidence and issues. This meeting shall be informal, shall not be subject to any procedural rules, and shall include the complainant if the complainant so desires.

The regulations specify that the cease and desist order will remain in effect unless and until the Administrator withdraws the order on the ground that the employer's position is determined to have been correct or a final determination is made which results in resolution of the matter under investigation, or—in the case of the automated vessel exception—an

attestation relating to the longshore activity is accepted for filing by ETA.

A complainant's request for a cease and desist order under the Alaska exception shall specify the location(s) at issue. The regulations provide that the Secretary is required to determine whether the preponderance of the evidence submitted supports the complainant's position and, if it does, to order that the employer cease and desist the activity(ies) at the location(s) at issue. Since an attestation under the Alaska exception may be valid for multiple locations, a cease and desist order pertaining to a particular location or locations shall not prejudice the validity of the attestation with respect to the performance of longshore activities which are covered by the attestation, but which are not at issue under the cease and desist order.

D. Penalties

A violation of section 258 of the INA or the regulations thereunder by an attesting employer may result in the imposition of administrative remedy(ies), such as a civil money penalty not to exceed \$5,000 per alien crewmember illegally employed. Upon notice of the violation(s), the Attorney General thereafter shall not permit the vessels owned or chartered by the employer to enter any port of the U.S. during a period of up to one year. Additionally, ETA will be notified and shall thereafter not accept any attestation from the employer for any activity(ies) at any U.S. port for one year (or for a shorter period, if such period is specified by INS).

Upon the Department's final determination that an employer improperly claimed the automated vessel exemption, the Attorney General will be notified and shall thereafter require that, before using alien crewmembers, the employer must have on file with ETA an attestation for the activity(ies) and the port at issue. For locations in the State of Alaska such an attestation shall be made under the Alaska exception on Form ETA 9033-A. For other states, the attestation shall be made under the prevailing practice exception on Form ETA 9033.

V. Enforcement Matters

A. Clarification of Judicial Review

To ensure that the regulation comports with recent supreme court caselaw, § _____.650 of the rule has been amended to provide that a party may not seek judicial review of an administrative law judge's decision until such party has exhausted all administrative remedies.