

TITLE 8 - ALIENS AND NATIONALITY
CHAPTER 12 - IMMIGRATION AND NATIONALITY
SUBCHAPTER II - IMMIGRATION
Part VI - Special Provisions Relating to Alien Crewmen

§ 1288. Limitations on performance of longshore work by alien crewmen

(a) In general

For purposes of section 1101 (a)(15)(D)(i) of this title, the term “normal operation and service on board a vessel” does not include any activity that is longshore work (as defined in subsection (b) of this section), except as provided under subsection (c), (d), or (e) of this section.

(b) “Longshore work” defined

(1) In general

In this section, except as provided in paragraph (2), the term “longshore work” means any activity relating to the loading or unloading of cargo, the operation of cargo-related equipment (whether or not integral to the vessel), and the handling of mooring lines on the dock when the vessel is made fast or let go, in the United States or the coastal waters thereof.

(2) Exception for safety and environmental protection

The term “longshore work” does not include the loading or unloading of any cargo for which the Secretary of Transportation has, under the authority contained in chapter 37 of title 46 (relating to Carriage of Liquid Bulk Dangerous Cargoes), section 1321 of title 33, section 4106 of the Oil Pollution Act of 1990, or section 5103 (b), 5104, 5106, 5107, or 5110 of title 49 prescribed regulations which govern—

- (A)** the handling or stowage of such cargo,
- (B)** the manning of vessels and the duties, qualifications, and training of the officers and crew of vessels carrying such cargo, and
- (C)** the reduction or elimination of discharge during ballasting, tank cleaning, handling of such cargo.

(3) Construction

Nothing in this section shall be construed as broadening, limiting, or otherwise modifying the meaning or scope of longshore work for purposes of any other law, collective bargaining agreement, or international agreement.

(c) Prevailing practice exception

(1) Subsection (a) of this section shall not apply to a particular activity of longshore work in and about a local port if—

- (A)** **(i)** there is in effect in the local port one or more collective bargaining agreements each covering at least 30 percent of the number of individuals employed in performing longshore work and
 - (ii)** each such agreement (covering such percentage of longshore workers) permits the activity to be performed by alien crewmen under the terms of such agreement; or
- (B)** there is no collective bargaining agreement in effect in the local port covering at least 30 percent of the number of individuals employed in performing longshore work, and an employer of alien crewmen (or the employer’s designated agent or representative) has filed with the Secretary of Labor at least 14 days before the date of performance of the activity (or later, if necessary due to an unanticipated emergency, but not later than the date of performance of the activity) an attestation setting forth facts and evidence to show that—

(i) the performance of the activity by alien crewmen is permitted under the prevailing practice of the particular port as of the date of filing of the attestation and that the use of alien crewmen for such activity—

(I) is not during a strike or lockout in the course of a labor dispute, and

(II) is not intended or designed to influence an election of a bargaining representative for workers in the local port; and

(ii) notice of the attestation has been provided by the owner, agent, consignee, master, or commanding officer to the bargaining representative of longshore workers in the local port, or, where there is no such bargaining representative, notice of the attestation has been provided to longshore workers employed at the local port.

In applying subparagraph (B) in the case of a particular activity of longshore work consisting of the use of an automated self-unloading conveyor belt or vacuum-actuated system on a vessel, the attestation shall be required to be filed only if the Secretary of Labor finds, based on a preponderance of the evidence which may be submitted by any interested party, that the performance of such particular activity is not described in clause (i) of such subparagraph.

(2) Subject to paragraph (4), an attestation under paragraph (1) shall—

(A) expire at the end of the 1-year period beginning on the date of its filing with the Secretary of Labor, and

(B) apply to aliens arriving in the United States during such 1-year period if the owner, agent, consignee, master, or commanding officer states in each list under section 1281 of this title that it continues to comply with the conditions in the attestation.

(3) An owner, agent, consignee, master, or commanding officer may meet the requirements under this subsection with respect to more than one alien crewman in a single list.

(4) (A) The Secretary of Labor shall compile and make available for public examination in a timely manner in Washington, D.C., a list identifying owners, agents, consignees, masters, or commanding officers which have filed lists for nonimmigrants described in section 1101 (a)(15)(D)(i) of this title with respect to whom an attestation under paragraph (1) or subsection (d)(1) of this section is made and, for each such entity, a copy of the entity's attestation under paragraph (1) or subsection (d)(1) of this section (and accompanying documentation) and each such list filed by the entity.

(B) (i) The Secretary of Labor shall establish a process for the receipt, investigation, and disposition of complaints respecting an entity's failure to meet conditions attested to, an entity's misrepresentation of a material fact in an attestation, or, in the case described in the last sentence of paragraph (1), whether the performance of the particular activity is or is not described in paragraph (1)(B)(i).

(ii) Complaints may be filed by any aggrieved person or organization (including bargaining representatives, associations deemed appropriate by the Secretary, and other aggrieved parties as determined under regulations of the Secretary).

(iii) The Secretary shall promptly conduct an investigation under this subparagraph if there is reasonable cause to believe that an entity fails to meet conditions attested to, an entity has misrepresented a material fact in the attestation, or, in the case described in the last sentence of paragraph (1), the performance of the particular activity is not described in paragraph (1)(B)(i).

(C) (i) If the Secretary determines that reasonable cause exists to conduct an investigation with respect to an attestation, a complaining party may request that the activities attested to by the employer cease during the hearing process described in subparagraph (D). If such a request is made, the attesting employer shall be issued notice of such request and shall respond within 14 days to the notice. If the Secretary makes an initial determination

that the complaining party's position is supported by a preponderance of the evidence submitted, the Secretary shall require immediately that the employer cease and desist from such activities until completion of the process described in subparagraph (D).

(ii) If the Secretary determines that reasonable cause exists to conduct an investigation with respect to a matter under the last sentence of paragraph (1), a complaining party may request that the activities of the employer cease during the hearing process described in subparagraph (D) unless the employer files with the Secretary of Labor an attestation under paragraph (1). If such a request is made, the employer shall be issued notice of such request and shall respond within 14 days to the notice. If the Secretary makes an initial determination that the complaining party's position is supported by a preponderance of the evidence submitted, the Secretary shall require immediately that the employer cease and desist from such activities until completion of the process described in subparagraph (D) unless the employer files with the Secretary of Labor an attestation under paragraph (1).

(D) Under the process established under subparagraph (B), the Secretary shall provide, within 180 days after the date a complaint is filed (or later for good cause shown), for a determination as to whether or not a basis exists to make a finding described in subparagraph (E). The Secretary shall provide notice of such determination to the interested parties and an opportunity for a hearing on the complaint within 60 days of the date of the determination.

(E) (i) If the Secretary of Labor finds, after notice and opportunity for a hearing, that an entity has failed to meet a condition attested to or has made a misrepresentation of material fact in the attestation, the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$5,000 for each alien crewman performing unauthorized longshore work) as the Secretary determines to be appropriate. Upon receipt of such notice, the Attorney General shall not permit the vessels owned or chartered by such entity to enter any port of the United States during a period of up to 1 year.

(ii) If the Secretary of Labor finds, after notice and opportunity for a hearing, that, in the case described in the last sentence of paragraph (1), the performance of the particular activity is not described in subparagraph (B)(i), the Secretary shall notify the Attorney General of such finding and, thereafter, the attestation described in paragraph (1) shall be required of the employer for the performance of the particular activity.

(F) A finding by the Secretary of Labor under this paragraph that the performance of an activity by alien crewmen is not permitted under the prevailing practice of a local port shall preclude for one year the filing of a subsequent attestation concerning such activity in the port under paragraph (1).

(5) Except as provided in paragraph (5) of subsection (d) of this section, this subsection shall not apply to longshore work performed in the State of Alaska.

(d) State of Alaska exception

(1) Subsection (a) of this section shall not apply to a particular activity of longshore work at a particular location in the State of Alaska if an employer of alien crewmen has filed an attestation with the Secretary of Labor at least 30 days before the date of the first performance of the activity (or anytime up to 24 hours before the first performance of the activity, upon a showing that the employer could not have reasonably anticipated the need to file an attestation for that location at that time) setting forth facts and evidence to show that—

(A) the employer will make a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the activity at the particular time and location from the parties to whom notice has been provided under clauses (ii) and (iii) of subparagraph (D), except that—

minutes and 71/2 miles, respectively, unless the party responding to the request for longshore workers agrees to the lesser time and distance limitations specified in those subclauses.

(4) Subject to subparagraphs (A) through (D) of subsection (c)(4) of this section, attestations filed under paragraph (1) of this subsection shall—

(A) expire at the end of the 1-year period beginning on the date the employer anticipates the longshore work to begin, as specified in the attestation filed with the Secretary of Labor, and

(B) apply to aliens arriving in the United States during such 1-year period if the owner, agent, consignee, master, or commanding officer states in each list under section 1281 of this title that it continues to comply with the conditions in the attestation.

(5) (A) Except as otherwise provided by subparagraph (B), subsection (c)(3) of this section and subparagraphs (A) through (E) of subsection (c)(4) of this section shall apply to attestations filed under this subsection.

(B) The use of alien crewmen to perform longshore work in Alaska consisting of the use of an automated self-unloading conveyor belt or vacuum-actuated system on a vessel shall be governed by the provisions of subsection (c) of this section.

(6) For purposes of this subsection—

(A) the term “contract stevedoring companies” means those stevedoring companies licensed to do business in the State of Alaska that meet the requirements of section 932 of title 33;

(B) the term “employer” includes any agent or representative designated by the employer; and

(C) the terms “qualified” and “available in sufficient numbers” shall be defined by reference to industry standards in the State of Alaska, including safety considerations.

(e) Reciprocity exception

(1) In general

Subject to the determination of the Secretary of State pursuant to paragraph (2), the Attorney General shall permit an alien crewman to perform an activity constituting longshore work if—

(A) the vessel is registered in a country that by law, regulation, or in practice does not prohibit such activity by crewmembers aboard United States vessels; and

(B) nationals of a country (or countries) which by law, regulation, or in practice does not prohibit such activity by crewmembers aboard United States vessels hold a majority of the ownership interest in the vessel.

(2) Establishment of list

The Secretary of State shall, in accordance with section 553 of title 5, compile and annually maintain a list, of longshore work by particular activity, of countries where performance of such a particular activity by crewmembers aboard United States vessels is prohibited by law, regulation, or in practice in the country. By not later than 90 days after November 29, 1990, the Secretary shall publish a notice of proposed rulemaking to establish such list. The Secretary shall first establish such list by not later than 180 days after November 29, 1990.

(3) “In practice” defined

For purposes of this subsection, the term “in practice” refers to an activity normally performed in such country during the one-year period preceding the arrival of such vessel into the United States or coastal waters thereof.

Footnotes

¹ So in original. The word “at” probably should not appear.

(June 27, 1952, ch. 477, title II, ch. 6, § 258, as added Pub. L. 101–649, title II, § 203(a)(1), Nov. 29, 1990, 104 Stat. 5015; amended Pub. L. 102–232, title III, § 303(a)(4), Dec. 12, 1991, 105 Stat. 1747; Pub. L. 103–198, § 8(a), (b), Dec. 17, 1993, 107 Stat. 2313, 2315; Pub. L. 103–206, title III, § 323(a), (b), Dec.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 5, 2009 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

20, 1993, 107 Stat. 2428, 2430; Pub. L. 103–416, title II, § 219(f), (gg), Oct. 25, 1994, 108 Stat. 4317, 4319; Pub. L. 104–208, div. C, title VI, § 671(e)(4)(B), Sept. 30, 1996, 110 Stat. 3009–723.)

References in Text

Section 4106 of the Oil Pollution Act of 1990, referred to in subsec. (b)(2), is section 4106 of Pub. L. 101–380, title IV, Aug. 18, 1990, 104 Stat. 513, which amended section 1228 of Title 33, Navigation and Navigable Waters, and sections 6101 and 9101 of Title 46, Shipping.

The National Labor Relations Act, referred to in subsec. (d)(1)(D)(i), is act July 5, 1935, ch. 372, 49 Stat. 452, as amended, which is classified generally to subchapter II (§ 151 et seq.) of chapter 7 of Title 29, Labor. For complete classification of this Act to the Code, see section 167 of Title 29 and Tables.

Amendments

1996—Subsec. (b)(2). Pub. L. 104–208 substituted “section 5103 (b), 5104, 5106, 5107, or 5110 of title 49” for “section 105 or 106 of the Hazardous Materials Transportation Act (49 App. U.S.C. 1804, 1805)”.

1994—Subsecs. (a), (c)(4)(A), (5). Pub. L. 103–416, § 219(gg), repealed Pub. L. 103–198, § 8(b), which had made amendments identical to those made by Pub. L. 103–206, § 323(b). See 1993 Amendment note below.

Subsec. (d). Pub. L. 103–416, § 219(gg), repealed Pub. L. 103–198, § 8(a), which had made an amendment substantially identical to that made by Pub. L. 103–206, § 323(a). See 1993 Amendment note below.

Subsec. (d)(3)(B). Pub. L. 103–416, § 219(f), substituted “subparagraph (A)(iii)” for “subparagraph (A)”.

Subsec. (e). Pub. L. 103–416, § 219(gg), repealed Pub. L. 103–198, § 8(a), which had made an amendment substantially identical to that made by Pub. L. 103–206, § 323(a). See 1993 Amendment note below.

1993—Subsec. (a). Pub. L. 103–206, § 323(b)(1), substituted “subsection (c), (d), or (e) of this section” for “subsection (c) of this section or subsection (d) of this section”. Pub. L. 103–198, § 8(b)(1), which amended subsec. (a) identically, was repealed by Pub. L. 103–416, § 219(gg).

Subsec. (c)(4)(A). Pub. L. 103–206, § 323(b)(2), inserted “or subsection (d)(1) of this section” after “paragraph (1)” in two places. Pub. L. 103–198, § 8(b)(2), which amended subpar. (A) identically, was repealed by Pub. L. 103–416, § 219(gg).

Subsec. (c)(5). Pub. L. 103–206, § 323(b)(3), added par. (5). Pub. L. 103–198, § 8(b)(3), which amended subsec. (c) identically, was repealed by Pub. L. 103–416, § 219(gg).

Subsecs. (d), (e). Pub. L. 103–206, § 323(a), added subsec. (d) and redesignated former subsec. (d) as (e). Pub. L. 103–198, § 8(a), which made substantially identical amendments to this section, was repealed by Pub. L. 103–416, § 219(gg).

1991—Subsec. (c)(2)(B). Pub. L. 102–232 substituted “each list” for “each such list”.

Effective Date of 1994 Amendment

Amendment by Pub. L. 103–416 effective as if included in the enactment of the Immigration Act of 1990, Pub. L. 101–649, see section 219(dd) of Pub. L. 103–416, set out as a note under section 1101 of this title.

Effective Date of 1991 Amendment

Amendment by Pub. L. 102–232 effective as if included in the enactment of the Immigration Act of 1990, Pub. L. 101–649, see section 310(1) of Pub. L. 102–232, set out as a note under section 1101 of this title.

Effective Date

Section applicable to services performed on or after 180 days after Nov. 29, 1990, see section 203(d) of Pub. L. 101–649, set out as an Effective Date of 1990 Amendment note under section 1101 of this title.

Regulations

Section 323(c) of Pub. L. 103–206 provided that:

“(1) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this section [amending this section].”

NB: This unofficial compilation of the U.S. Code is current as of Jan. 5, 2009 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

“(2) Attestations filed pursuant to section 258 (c) (8 U.S.C. 1288 (c)) with the Secretary of Labor before the date of enactment of this Act [Dec. 20, 1993] shall remain valid until 60 days after the date of issuance of final regulations by the Secretary under this section.”

Similar provisions were contained in Pub. L. 103–198, § 8(c), Dec. 17, 1993, 107 Stat. 2315, prior to repeal by Pub. L. 103–416, title II, § 219(gg), Oct. 25, 1994, 108 Stat. 4319.

Abolition of Immigration and Naturalization Service and Transfer of Functions

For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related references, see note set out under section 1551 of this title.

Inapplicability of Amendment by Pub. L. 101–649

Section 203(a)(2) of Pub. L. 101–649 provided that: “This section [enacting this section, amending section 1101 of this title, and enacting provisions set out as a note under section 1101 of this title] does not affect the performance of longshore work in the United States by citizens or nationals of the United States.”