NEW MEXICO STATE UNIVERSITY
STUDENT AND FACULTY VISA ISSUES

Friday, April 20th, 2012

John W. Lawit
Attorney at Law

John W. Lawit, P.C.
2305 Renard Place SE, Suite 210
Albuquerque, NM 87106
(505) 243-0733
jwl@jlawit.com
About the Law Firm

• The attorneys and staff at John W. Lawit, P.C., are dedicated to providing the highest quality legal services to ensure the rights and benefits of the immigrant community. As a team of professionals, we provide comprehensive, innovative and competent legal and financial services to our clients to promote the opportunity for a meaningful quality of life. We foster a professional company culture that is responsive, proactive and mirrors our personal values. Our strong commitment to advocacy affirms our position as New Mexico's most successful immigration law firm.

• To achieve our mission: We are a knowledgeable, experienced and compassionate legal team that is up-to-date with all changes in immigration law. We provide comprehensive and innovative solutions for simple to complex immigration issues. We are persistent, industrious and exhaustive as we pursue every avenue of immigration eligibility for our clients. We are experts in Family, Corporate, Consular, Asylum and Immigration Court matters. We thrive on the diversity of cases, clients and ideas we work with each day. We are proud of our long-standing record of success within the immigrant community.
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A. STATUTORY NUMBERS

1. This bulletin summarizes the availability of immigrant numbers during May. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; U.S. Citizenship and Immigration Services in the Department of Homeland Security reports applicants for adjustment of status. Allocations were made, to the extent possible, in chronological order of reported priority dates, for demand received by April 6th. If not all demand could be satisfied, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. Only applicants who have a priority date earlier than the cut-off date may be allotted a number. If it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date announced in this bulletin.

2. Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2%, or 7,320.

3. INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provides that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: CHINA-mainland born, INDIA, MEXICO, and PHILIPPINES.

4. Section 203(a) of the INA prescribes preference classes for allotment of Family-sponsored immigrant visas as follows:

FAMILY-SPONSORED PREFERENCES

First: (F1) Unmarried Sons and Daughters of U.S. Citizens: 23,400 plus any numbers not required for fourth preference.
**Second:** Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, plus any unused first preference numbers:

A. (F2A) Spouses and Children of Permanent Residents: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. (F2B) Unmarried Sons and Daughters (21 years of age or older) of Permanent Residents: 23% of the overall second preference limitation.

**Third:** (F3) Married Sons and Daughters of U.S. Citizens: 23,400, plus any numbers not required by first and second preferences.

**Fourth:** (F4) Brothers and Sisters of Adult U.S. Citizens: 65,000, plus any numbers not required by first three preferences.

On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (NOTE: Numbers are available only for applicants whose priority date is earlier than the cut-off date listed below.)

<table>
<thead>
<tr>
<th>Family-Sponsored</th>
<th>All Chargeability Areas Except Those Listed</th>
<th>CHINA-mainland born</th>
<th>INDIA</th>
<th>MEXICO</th>
<th>PHILIPPINES</th>
</tr>
</thead>
<tbody>
<tr>
<td>F1</td>
<td>01MAY05</td>
<td>01MAY05</td>
<td>01MAY05</td>
<td>15MAY05</td>
<td>01JUL97</td>
</tr>
<tr>
<td>F2A</td>
<td>15NOV09</td>
<td>15NOV09</td>
<td>15NOV09</td>
<td>15OCT09</td>
<td>15NOV09</td>
</tr>
<tr>
<td>F2B</td>
<td>22FEB04</td>
<td>22FEB04</td>
<td>22FEB04</td>
<td>01DEC92</td>
<td>08DEC01</td>
</tr>
<tr>
<td>F3</td>
<td>06MAR02</td>
<td>08MAR02</td>
<td>08MAR02</td>
<td>15JAN93</td>
<td>22JUL92</td>
</tr>
<tr>
<td>F4</td>
<td>01DEC00</td>
<td>22NOV00</td>
<td>01DEC00</td>
<td>01JUN96</td>
<td>22JAN89</td>
</tr>
</tbody>
</table>

*NOTE:* For May, F2A numbers **EXEMPT from per-country limit** are available to applicants from all countries with priority dates earlier than 15OCT09. F2A numbers **SUBJECT to per-country limit** are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 15OCT09 and earlier than 15NOV09. (All F2A numbers provided for MEXICO are exempt from the per-country limit; there are no F2A numbers for MEXICO subject to per-country limit.)

5. Section 203(b) of the INA prescribes preference classes for allotment of Employment-based immigrant visas as follows:

**EMPLOYMENT-BASED PREFERENCES**

**First:** Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

**Second:** Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.
Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "*Other Workers".

Fourth: Certain Special Immigrants: 7.1% of the worldwide level.

Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of Pub. L. 102-395.

On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (NOTE: Numbers are available only for applicants whose priority date is earlier than the cut-off date listed below.)

<table>
<thead>
<tr>
<th>Employment-Based Areas Except Those Listed</th>
<th>CHINA-mainland born</th>
<th>INDIA</th>
<th>MEXICO</th>
<th>PHILIPPINES</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st</td>
<td>C</td>
<td>C</td>
<td>C</td>
<td>C</td>
</tr>
<tr>
<td>2nd</td>
<td>C</td>
<td>15AUG07</td>
<td>15AUG07</td>
<td>C</td>
</tr>
<tr>
<td>3rd</td>
<td>01MAY06</td>
<td>01APR05</td>
<td>08SEP02</td>
<td>01MAY06</td>
</tr>
<tr>
<td>Other Workers</td>
<td>01MAY06</td>
<td>22APR03</td>
<td>08SEP02</td>
<td>01MAY06</td>
</tr>
<tr>
<td>4th</td>
<td>C</td>
<td>C</td>
<td>C</td>
<td>C</td>
</tr>
<tr>
<td>Certain Religious Workers</td>
<td>C</td>
<td>C</td>
<td>C</td>
<td>C</td>
</tr>
<tr>
<td>5th Targeted Employment Areas/Regional Centers and Pilot Programs</td>
<td>C</td>
<td>C</td>
<td>C</td>
<td>C</td>
</tr>
</tbody>
</table>

*Employment Third Preference Other Workers Category: Section 203(e) of the Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997, as amended by Section 1(e) of Pub. L. 105-139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19, 1997, the 10,000 EW numbers available for a fiscal year are to be reduced by up to 5,000 annually beginning in the following fiscal year. This reduction is to be made for as long as necessary to offset adjustments under the NACARA program. Since the EW cut-off date reached...
November 19, 1997 during Fiscal Year 2001, the reduction in the EW annual limit to 5,000 began in Fiscal Year 2002.

6. The Department of State has a recorded message with visa availability information which can be heard at: (202) 663-1541. This recording is updated on or about the tenth of each month with information on cut-off dates for the following month.

B. DIVERSITY IMMIGRANT (DV) CATEGORY

Section 203(c) of the INA provides up to 55,000 immigrant visas each fiscal year to permit additional immigration opportunities for persons from countries with low admissions during the previous five years. The NACARA stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. **This resulted in reduction of the DV-2012 annual limit to 50,000.** DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For May, immigrant numbers in the DV category are available to qualified DV-2012 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers **BELOW** the specified allocation cut-off number:

<table>
<thead>
<tr>
<th>Region</th>
<th>All DV Chargeability Areas Except Those Listed Separately</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFRICA</td>
<td>50,000</td>
</tr>
<tr>
<td></td>
<td>Except: Egypt 33,000</td>
</tr>
<tr>
<td></td>
<td>Ethiopia 33,000</td>
</tr>
<tr>
<td></td>
<td>Nigeria 25,000</td>
</tr>
<tr>
<td>ASIA</td>
<td>40,500</td>
</tr>
<tr>
<td>EUROPE</td>
<td>40,000</td>
</tr>
<tr>
<td></td>
<td>Except: Uzbekistan 16,500</td>
</tr>
<tr>
<td>NORTH AMERICA (BAHAMAS)</td>
<td>10</td>
</tr>
<tr>
<td>OCEANIA</td>
<td>1,150</td>
</tr>
<tr>
<td>SOUTH AMERICA, and the CARIBBEAN</td>
<td>1,150</td>
</tr>
</tbody>
</table>

Entitlement to immigrant status in the DV category lasts only through the end of the fiscal (visa) year for which the applicant is selected in the lottery. The year of entitlement for all applicants registered for the DV-2012 program ends as of September 30, 2012. DV visas may not be issued to DV-2012 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2012 principals are only entitled to derivative DV status until September 30, 2012. DV visa availability through the very end of FY-2012 cannot be taken for granted. Numbers could be exhausted prior to September 30.

C. ADVANCE NOTIFICATION OF THE DIVERSITY (DV) IMMIGRANT CATEGORY RANK
CUT-OFFS WHICH WILL APPLY IN JUNE

For JUNE, immigrant numbers in the DV category are available to qualified DV-2012 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

<table>
<thead>
<tr>
<th>Region</th>
<th>All DV Chargeability Areas Except Those Listed Separately</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFRICA</td>
<td>CURRENT</td>
</tr>
<tr>
<td>ASIA</td>
<td>CURRENT</td>
</tr>
<tr>
<td>EUROPE</td>
<td>CURRENT</td>
</tr>
<tr>
<td></td>
<td>Except: Uzbekistan 17,050</td>
</tr>
<tr>
<td>NORTH AMERICA (BAHAMAS)</td>
<td>CURRENT</td>
</tr>
<tr>
<td>OCEANIA</td>
<td>CURRENT</td>
</tr>
<tr>
<td>SOUTH AMERICA, and the CARIBBEAN</td>
<td>CURRENT</td>
</tr>
</tbody>
</table>

D. RETROGRESSION OF THE CHINA-MAINLAND AND INDIA EMPLOYMENT SECOND PREFERENCE CUT-OFF DATE

Due to the rapid forward movement of the cut-off date, demand for China and India Employment Second preference numbers has increased dramatically during recent months, and at a much faster rate than had been expected. Therefore, it has been necessary to retrogress that cut-off date to August 15, 2007 in an attempt to hold number use within the annual limit while maintaining availability for those countries that have not yet reached their per-country limit. Notices were included in the November, January, and February Visa Bulletins alerting readers to the possibility of such a retrogression. While corrective action has become necessary earlier than was anticipated based on the information available at the time cut-off dates were determined, it is hoped that readers are not caught off guard by this retrogression.

Should additional information regarding potential demand become available, it may be necessary to take additional corrective action at any time.

Every effort will be made to return the China and India Employment Second preference cut-off date to the previously announced April date of May 1, 2010. This will be done as quickly as possible under the FY-2013 annual limits, which take effect October 1, 2012. It will not be possible to speculate on the cut-off date which may apply at that time until late summer.

USCIS has indicated that it will continue accepting China and India Employment Second preference I-485 filings based on the originally announced April cut-off date.

E. IMPORTANT NOTICE FOR DIVERSITY VISA (DV)2012 ENTRANTS
Successful entrants are encouraged to send in their required documents to the Kentucky Consular Center (KCC) immediately, so that an interview appointment at the appropriate U.S. Embassy or consulate can be scheduled in the near future. In order for an appointment to be scheduled with either a U.S. Embassy or Consulate, entrants must first submit the Form DSP-122 and Form DS-230 to KCC. Embassies and Consulates only have a limited number of appointments each month, including September, for DV applicants, so it is vital that successful entrants mail these documents to KCC very soon. There is no guarantee that a successful entrant who submits all of the required documentation to KCC will either be given an appointment or issued a DV.

There are several reasons why successful entrants should submit their documents to KCC now. First, there are 50,000 DVs available for DV-2012. **Once all of the 50,000 DV visas have been issued for DV 2012, the program will end.** In addition, because no more than 3,500 individuals from a single country may receive DVs in a given year, once 3,500 from an individual country have received a DV, other selectees from that country will no longer be eligible to receive a DV. Finally, U.S. Embassies and Consulates only have six months left to issue visas to eligible applicants in the DV 2012 program. **Successful entrants cannot be issued a DV after September 30, 2012.** Participants are reminded to check the status of their DV entry through Entrant Status Check www.dvlottery.state.gov, using the confirmation numbers they received when they initially submitted their applications.

**F. VISA AVAILABILITY IN THE COMING MONTHS**

**FAMILY-sponsored categories (monthly)**

**Worldwide dates:**

- **F1:** four to six weeks
- **F2A:** up to two and one half months
- **F2B:** three to six weeks
- **F3:** three to six weeks
- **F4:** three to five weeks

**EMPLOYMENT-based categories (monthly)**

**Employment First:** Current

**Employment Second:**

Worldwide: Potential need for cut-off date to be established

China and India: Potentially “Unavailable”

**Employment Third:**
Visa Bulletin For May 2012

Worldwide: three to five weeks

China: up to six weeks

India: up to two weeks

Mexico: three to five weeks

Philippines: three to five weeks

Employment Fourth: Current

Employment Fifth: Current

Please be advised that the above ranges are only estimates for what could happen during each of the next few months based on current applicant demand patterns. The determination of the actual monthly cut-off dates is subject to fluctuations in applicant demand which can occur at any time. Those categories with a “Current” projection will remain so for the foreseeable future.

G. OBTAINING THE MONTHLY VISA BULLETIN

The Department of State’s Bureau of Consular Affairs publishes the monthly Visa Bulletin on their website at www.travel.state.gov under the Visas section. Alternatively, visitors may access the Visa Bulletin directly by going to:

http://www.travel.state.gov/Visa(bulletin/bulletin_1360.html

To be placed on the Department of State’s E-mail subscription list for the “Visa Bulletin”, please send an E-mail to the following E-mail address:

listserv@calist.state.gov

and in the message body type:

Subscribe Visa-Bulletin First name/Last name
(example: Subscribe Visa-Bulletin Sally Doe)

To be removed from the Department of State’s E-mail subscription list for the “Visa Bulletin”, send an e-mail message to the following E-mail address:

listserv@calist.state.gov

and in the message body type: Signoff Visa-Bulletin

The Department of State also has available a recorded message with visa cut-off dates which can be heard at: (202) 663-1541. The recording is normally updated by the middle of each month with information on cut-off dates for the following month.

Readers may submit questions regarding Visa Bulletin related items by E-mail at the following
address:

VISABULLETIN@STATE.GOV

(This address cannot be used to subscribe to the Visa Bulletin.)

Department of State Publication 9514
CA/VO: April 6, 2012
THIRD COUNTRY PROCESSING OF NONIMMIGRANT VISA APPLICATIONS IN MEXICO & CANADA
NON-IMMIGRANT VISAS

Visa Section News

Who Can Apply in Mexico?

The following applicants may apply at the U.S. Embassy in Mexico City or the U.S. Consulates in Ciudad Juarez, Guadalajara, Hermosillo, Matamoros, Merida, Monterrey, Nogales, Nuevo Laredo, or Tijuana:

Mexican citizens applying with a Mexican passport may apply for their first visa or to renew a visa in any visa category.

Third Country Nationals residing in Mexico with immigration status (F1/F2 or FM1) may apply for their first visa or to renew a visa in any visa category.

3. Third Country Nationals residing in the United States may apply to renew a visa in any category except B1/B2 or H2. NOTE - The applicant must apply to renew in the same visa category and cannot apply in a different category.

4. Third Country Nationals who normally reside in a Visa Waiver Program (VWP) country and who have lost or had their biometric passports stolen may apply in Mexico for a tourist (B1/B2) or transit (C) visa in order to return to their home country.

5. Third Country Nationals who normally reside in a Non-Visa Waiver Program country and who have lost or had their visa stolen may apply in Mexico to renew their tourist (B1/B2) visa in order to return to their home country.
Renewing a Visa in the U.S.

A U.S. Visa holder cannot renew or apply for a new visa in the United States. Individuals who are already in the United States and remain in legal status are encouraged to apply at the United States Embassies and Consulates in their home countries in conjunction with foreign travel for business or pleasure. Those who plan to visit Canada, Mexico, or in the cases of students and exchange visitors, adjacent islands, may re-enter the United States within thirty days on expired visas as long as they possess a valid I-94 form.

Who May Not Apply for a Visa at a Consular Section in Canada or Mexico?

Individuals who have been out of status in the United States because they violated the terms of their visa or overstayed the validity indicated on their I-94 should not seek to apply in Canada or Mexico and should return to their home country to apply. In other words, if the traveler has remained in the United States longer than the period authorized by the immigration officer when the traveler entered the United States in any visa category, the traveler must apply in the country of the traveler's nationality or legal permanent residence.

U.S. Embassies and Consulates in Canada and Mexico routinely do not accept applications for "E" visas from Third Country National applicants who are not resident in their consular districts.

The applicant may need a visa to attend an appointment at the U.S. Consular Section in Canada. The applicant should verify with Citizenship and Immigration Canada before making arrangements. For more information consult: http://www.cic.gc.ca/.

Note that there are some risks associated with applying for a visa in Canada. If the visa is not approved the applicant may not be able to return to the United States; and even successful applicants may be required to stay multiple days until a decision has been rendered. Consider all these expenses and time delays before scheduling an appointment.

Before deciding to apply at a consular section in Mexico, third country nationals should keep in mind that traveling to the country may require the appropriate Mexican visa from a Mexico's embassy or consulate before making the trip. Potential applicants should be sure they have a visa, if necessary, and are prepared to wait several days or longer in Mexico while their visa is being processed.

Please log in and follow the instructions to verify the proper procedures.
H-1B
SPECIALTY OCCUPATIONS
H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models

This visa category applies to people who wish to perform services in a specialty occupation, service of exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project, or services as a fashion model of distinguished merit or ability.

Eligibility Criteria

**Visa Category**

<table>
<thead>
<tr>
<th>H-1B Specialty Occupations</th>
</tr>
</thead>
</table>

**General Requirements**

- **The job must meet one of the following criteria to qualify as a specialty occupation:**
  - Bachelor's or higher degree or its equivalent is normally the minimum entry requirement for the position.
  - The degree requirement for the job is common to the industry or the job is so complex or unique that it can be performed only by an individual with a degree.
  - The employer normally requires a degree or its equivalent for the position.
  - The nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree.

For you to qualify to accept a job offer in a specialty occupation you must meet one of the following criteria:

1. **Have completed a U.S. bachelor's or higher degree in the specific specialty occupation from an accredited college or university.**
2. **Hold a foreign degree that is equivalent to a U.S. bachelor's or higher degree in the specialty occupation.**
3. **Hold an unrestricted state license, registration, or certification which authorizes you to fully practice the specialty occupation and be engaged in that specialty in the State of intended employment.**
4. **Have education, training, or progressively responsible experience in the specialty that is equivalent to the completion of a bachelor's or higher degree.**

For more information on establishing the relationship, see the "For Information on Establishing the Relationship" link at the left.

**Labor Condition Application Required?**

Yes. The prospective employer must file an approved ETA Form 1-018, Labor Condition Application (LCA), with the Form I-129, Petition for a Nonimmigrant Worker. See the link to the Department of Labor's (DOL) Office of Foreign Labor Certification and USCIS forms to the right for more information. For more information see the "For Information on Establishing the Relationship" link at the left.

**Visa Category**

<table>
<thead>
<tr>
<th>P-2 Artist or Entertainer Participating in a Cooperative Exchange Program</th>
</tr>
</thead>
</table>

**Eligibility Criteria**

1. **Have completed a U.S. bachelor's or higher degree in the specific specialty occupation from an accredited college or university.**
2. **Hold a foreign degree that is equivalent to a U.S. bachelor's or higher degree in the specialty occupation.**
3. **Hold an unrestricted state license, registration, or certification which authorizes you to fully practice the specialty occupation and be engaged in that specialty in the State of intended employment.**
4. **Have education, training, or progressively responsible experience in the specialty that is equivalent to the completion of a bachelor's or higher degree.**

For you to qualify to accept a job offer in a specialty occupation you must meet one of the following criteria:

1. **Have completed a U.S. bachelor's or higher degree in the specific specialty occupation from an accredited college or university.**
2. **Hold a foreign degree that is equivalent to a U.S. bachelor's or higher degree in the specialty occupation.**
3. **Hold an unrestricted state license, registration, or certification which authorizes you to fully practice the specialty occupation and be engaged in that specialty in the State of intended employment.**
4. **Have education, training, or progressively responsible experience in the specialty that is equivalent to the completion of a bachelor's or higher degree.**

For more information on establishing the relationship, see the "For Information on Establishing the Relationship" link at the left.

**Visa Category**

<table>
<thead>
<tr>
<th>J-1 Exchange Visitor Program</th>
</tr>
</thead>
</table>

**Eligibility Criteria**

1. **Have completed a U.S. bachelor's or higher degree in the specific specialty occupation from an accredited college or university.**
2. **Hold an unrestricted state license, registration, or certification which authorizes you to fully practice the specialty occupation and be engaged in that specialty in the State of intended employment.**
3. **Have education, training, or progressively responsible experience in the specialty that is equivalent to the completion of a bachelor's or higher degree.**

For you to qualify to accept a job offer in a specialty occupation you must meet one of the following criteria:

1. **Have completed a U.S. bachelor's or higher degree in the specific specialty occupation from an accredited college or university.**
2. **Hold a foreign degree that is equivalent to a U.S. bachelor's or higher degree in the specialty occupation.**
3. **Hold an unrestricted state license, registration, or certification which authorizes you to fully practice the specialty occupation and be engaged in that specialty in the State of intended employment.**
4. **Have education, training, or progressively responsible experience in the specialty that is equivalent to the completion of a bachelor's or higher degree.**

For more information on establishing the relationship, see the "For Information on Establishing the Relationship" link at the left.
H-1B Specialty Occupations and Fashion Models

**H-1B Specialty Occupations**

- Hold an unrestricted State license, registration, or certification which authorizes you to fully practice the specialty occupation and be engaged in that specialty in the state of intended employment.
- Have education, training, or progressively responsible experience in the specialty that is equivalent to the completion of such a degree, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

**H-1B Fashion Model**

- The position/skills must require a fashion model of prominence.
- To be eligible for this visa category you must be a fashion model of distinguished merit and ability.

Yes, the prospective employer must file an approved LCA with the Form I-129. (See the links to the Department of Labor’s Office of Foreign Labor Certification and USCIS home to the right.)

*For more information, see 8 C.F.R. §214.2(h)(4)(iv)(a).
**For more information see 8 C.F.R. §214.2(h)(4)(v).*

**Application Process**

**Step 1:** (only required for specialty occupation and fashion models petitions) Employer Submits LCA to DOL for certification.

The employer must apply for and receive DOL certification of an LCA. For further information regarding LCA requirements see DOL’s website. For the Foreign Labor Certification, Laboratory of Labor link to the right.

**Step 2:** Employer Submits Completed Form I-129 to USCIS.

The employer should file the Form I-129, Petition for a Nonimmigrant Worker, with the correct USCIS Service Center. Please see our I-129, Petition for a Nonimmigrant Worker, page. The DOL-certified LCA must be submitted with the Form I-129 (only for specialty occupation and fashion models). See the instructions to the Form I-129 for additional filing requirements.

**Step 3:** Prospective Workers Outside the United States Apply for Visa and/or Admission.

Once the Form I-129 petition has been approved, the prospective H-1B worker who is outside the United States may apply with the U.S. Department of State (DOS) at a U.S. embassy or consulate abroad for an H-1B visa (if a visa is required). Regardless of whether a visa is received, the prospective H-1B worker must then apply under sections 104(c) and 109(c) of the American Competitiveness and Economic Growth Act of 2000 (AC21) for admission to the United States in H-1B classification.

**Labor Certification Application (LCA)**

Prospective specialty occupation and distinguished fashion model employers must obtain a certification of an LCA from the DOL. This application includes labor attestations, a violation of which can result in a fine, basis on apostrophizing nonimmigrant or immigrant petitions, and other sanctions against the employer. The application requires the employer to attest that it will comply with the following labor requirements:

- The employer will pay the prevailing wage, which is no less than that wage paid to similarly qualified workers in the geographic area in which you will be working.
- The employer will provide working conditions that will not adversely affect other similarly employed workers.

All of these labor condition application requirements are guided by the prevailing wage, which is determined by the DOL based on the job location and the occupation.

**Period of Stay**

As an H-1B nonimmigrant, you may be admitted for a period of up to three years. Your time period may be extended, but generally cannot go beyond a total of six years, though some exceptions apply under sections 104(c) and 109(c) of the American Competitiveness in the Twenty-First Century Act (AC21).

Your employer will be liable for the reasonable costs of your return transportation if your employer terminates you before the end of your period of authorized stay. Your employer is not reimbursible for the costs of your return transportation if you voluntarily resign your position. You must contact the Service Center that approved your petition in writing if you believe that your employer has not complied with this requirement.

**H-1B Cap**

The H-1B visa has an annual numerical limit ("cap") of 65,000 visas each fiscal year. The first 20,000 petitions filed on behalf of beneficiaries with a U.S. master's degree or higher are exempt from the cap. Additionally, H-1B workers who are petitioned for or employed at an institution of higher education by its-affiliated or related nonprofit entities or a nonprofit research organization, or a government research organization are not subject to this numerical cap.

For further information about the numerical cap, see our Fiscal Year (FY) 2012 H-1B Cap packet webpage.

**Family of H-1B Visa Holders**

• Your spouse and unmarried children under 21 years of age may seek admission in the H-4 nonimmigrant classification. Family members in the H-4 nonimmigrant classification may not engage in employment in the United States.

Last updated: 09/06/2011
USCIS Update

March 27, 2012

USCIS to Accept H-1B Petitions for Fiscal Year 2013 Beginning April 2, 2012

Petitioners are Reminded to Follow Regulatory Requirements

WASHINGTON—U.S. Citizenship and Immigration Services (USCIS) announced today that it will begin accepting H-1B petitions subject to the Fiscal Year (FY) 2013 cap on Monday April 2, 2012. Cases will be considered accepted on the date that USCIS takes possession of a properly filed petition with the correct fee. USCIS will not rely upon the date that the petition is postmarked.

The congressionally mandated numerical limitation on H-1B petitions for FY 2013 is 65,000. Additionally, the first 20,000 H-1B petitions filed on behalf of individuals who have earned a U.S. master’s degree or higher are exempt from the fiscal year cap.

USCIS will monitor the number of petitions received and will notify the public of the date on which USCIS received the necessary number of petitions to meet the H-1B cap. If the number of applications received exceeds the numerical cap, USCIS will randomly select the number of petitions required to reach the numerical limit from the pool of petitions received on the final receipt date. USCIS will reject cap-subject petitions that are not selected, as well as those received after the final receipt date.

Petitions for new H-1B employment are exempt from the annual cap if the beneficiaries will work at institutions of higher education or related or affiliated nonprofit entities, nonprofit research organizations or governmental research organizations. Petitions filed on behalf of beneficiaries who will work only in Guam or the Commonwealth of the Northern Mariana Islands are exempt from the cap until December 31, 2014. Employers may continue to file petitions for these cap-exempt H-1B categories seeking work dates starting in FY 2012.

Petitions filed on behalf of current H-1B workers who have been counted previously against the cap also do not count towards the congressionally mandated H-1B cap. Accordingly, USCIS will continue to process FY 2012 petitions filed to:

- extend the amount of time a current H-1B worker may remain in the United States;
- change the terms of employment for current H-1B workers;
- allow current H-1B workers to change employers; or
- allow current H-1B workers to work concurrently in a second H-1B position.

H-1B petitioners should follow all statutory and regulatory requirements as they prepare petitions to avoid delays in processing and requests for evidence. USCIS has developed detailed information, including a processing worksheet, to assist in the completion and submission of FY 2013 H-1B petitions.

U.S. businesses use the H-1B program to employ foreign workers in specialty occupations that require theoretical or technical expertise in specialized fields, such as scientists, engineers, or computer programmers.

For more information on the H-1B nonimmigrant visa program and current Form I-129 processing times, visit www.uscis.gov or call the National Customer Service Center at (800) 375-5283.

- USCIS -
H-1B Fiscal Year (FY) 2013 Cap Season

The H-1B Program

U.S. businesses use the H-1B program to employ foreign workers in specialty occupations that require theoretical or technical expertise in specialized fields, such as scientists, engineers, or computer programmers.

For more information about the H-1B program, see the link to the left under temporary workers for H-1B Specialty Occupations and Fashion Models.

How USCIS Determines if an H-1B Petition is Subject to the FY 2013 Cap

We use the information provided in Part C of the H-1B Data Collection and Filing Fee Exemption Supplement (Form I-129, pages 17 through 19, with a revision date of November 23, 2010, or later) to determine whether a petition is subject to the 65,000 H-1B numerical limitation (the "cap").

Some petitions are exempt from the cap under the advanced degree exemption provided to the first 20,000 petitions filed by a beneficiary who has obtained a U.S. master's degree or higher. Unless otherwise exempt from the cap, petitions filed on behalf of beneficiaries who have obtained a U.S. master's degree or higher must be counted against the regular cap once USCIS has received sufficient petitions to reach the advanced degree exemption.

FY 2013 H-1B Cap Count

Cap Type

Cap Amount

Cap Eligible Petitions

Date of Last Count

H-1B Regular Cap

65,000

20,000

04/15/2012

H-1B Master's Degree Exemption

20,000

9,700

04/15/2012

Cap Eligible Petitions

This is the number of petitions that USCIS has accepted for this particular type of cap. It includes cases that have been approved or are still pending. It does not include petitions that have been denied.

Cap Amounts

The current annual cap on the H-1B category is 65,000. Not all H-1B nonimmigrants are subject to this annual cap. Please note that up to 8,500 visas are not excluded from the cap through 65,000 during each fiscal year for the H-1B program under the terms of the legislation implementing the U.S.-China and U.S.-Singapore Free Trade Agreements. Unused numbers in this pool are made available for H-1B use for the next fiscal year.

When to File an FY 2013 H-1B Cap-Subject Petition

We will begin accepting H-1B petitions that are subject to the FY 2013 cap on Monday April 2, 2012. You may file an H-1B petition no more than 6 months in advance of the requested start date.

How to Properly File Your H-1B Cap-Subject Petition

Please comply with the following to ensure that your petition is properly filed:

- Complete all sections of the Form I-129 petition, including the H Classification Supplement to Form I-129 (pages 17 through 19), and the H-1B Data Collection and Filing Fee Exemption Supplement (pages 17 through 19). We accept Form I-129 with a revision date of November 23, 2010, or later.
- Original signatures, preferably in black ink, are required on each form.
- Include a signed check or money order with the correct fee amount.
- Ensure that all required documentation and evidence is submitted with the petition at the time of filing to ensure timely processing.
- Note: It is your responsibility to ensure that Form I-129 is completed accurately. Failure to complete Form I-129 with the correct information and provide the required fees or documentation may result in the rejection or denial of the H-1B petition.

Additionally, be sure to file the petition at the correct USCIS Service Center. See section below on "Where to Mail Your H-1B Cap-Subject Petition."

Additional Documents Required With Your Petition

Labor Condition Application (LCA)

You must submit a certified Department of Labor (DOL) LCA (Form ETA 9035) at the time of filing your petition. A copy of the LCA is acceptable.

Note: USCIS encourages petitioners to keep DOL LCA processing times in mind when preparing the H-1B petition and plan accordingly. If the LCA certified by DOL is for multiple positions, you must provide the same name and USCIS case receipt number of any LCA who has previously certified the LCA.

Petitioners should ensure that they have signed the LCA prior to the LCA being submitted with the petition to USCIS.

Please see Department of Labor's Office of Foreign Labor Certification website for further information on the LCA process.
Evidence of Beneficiary's Educational Background
You must submit evidence of the beneficiary's educational degree at the time of filing. If all of the requirements for the degree have been met, but the degree has not yet been awarded, the following alternate evidence may be submitted:
- A copy of the beneficiary's final transcript;
- A letter from the Registrar confirming that all of the degree requirements have been met (if the
  educational institution does not have a Registrar, such letter must be signed by the person in
  charge of the educational record where the degree will be awarded).

If you are indicating that the beneficiary is qualified based on a combination of education and
experience, please provide substantiating evidence at time of filing.

A Duplicate Copy of the H-1B Petition
You must submit a duplicate copy of your H-1B petition at the time of filing if the beneficiary will be
seeking nonimmigrant visa issuance abroad. USCIS will not make a second copy if one is not
provided.
You may also choose to submit a duplicate copy of the petition, even if the beneficiary is requesting
a change of status to H-1B or an extension of stay. In the case the beneficiary later decides to ask
seek visa issuance abroad on the H-1B petition is approved but the beneficiary’s concurrent change of
status or extension of stay request is denied.

A copy of the H-1B petition is able to process the beneficiary's nonimmigrant visa application and for any other
consular-specific special instructions.

Multiple or Duplicative Filings
On March 19, 2008, USCIS announced an interim final rule on H-1B visas to prohibit employers
from filing multiple or duplicate H-1B visas for the same employee. To ensure fair and orderly
distribution of available H-1B visas, USCIS will deny or remove multiple or duplicate petitions filed
by an employer for the same H-1B worker and will not refund the filing fees submitted with multiple
or duplicative petitions.

Where to Mail Your H-1B Cap-Subject Petition
You must file your petition at the correct Service Center depending on the jurisdiction of the H-1B
beneficiary’s work location(s) as specified in the petition. We have established specific mailing
addresses for purposes of identification and processing of H-1B cap-subject cases.

To determine which jurisdiction you are in, see our Web page [Direct Filming Addresses for Form
I-129, Petition for Nonimmigrant Worker]

Note: A separate mailing address has been established for certain types of educational or nonprofit
organizations which file H-1B petitions on behalf of beneficiaries that are exempt from the H-1B
numerical limitations.

Please read the filing instructions very carefully. If you file your petition incorrectly, we will reject the
petition. Rejected petitions will not retain a filing date.

Required Fees
There are different fees depending on the type of H-1B petition you are submitting. Please refer to
H-1B Data Collection and Filing Fee Exemption Supplement (pages 17-19 of Form I-129) for
detailed Instructions on fees.

The following fees may be required with a cap-subject petition:
Base filing fee:
- $325
American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) fees:
(see H-1B Data Collection and Filing Fee Exemption Supplement, Part D):
- $750 for employers with 1 to 25 full-time equivalent employees, unless exempt
- $1,500 for employers with 26 or more full-time equivalent employees, unless exempt

Fraud Prevention and Detection fee:
- $200 to be submitted with a request for initial H-1B status or a request for a beneficiary
already in H-1B status to change employers (does not apply to Cap-exempt H-1B petitions)

Public Law 111-236:
- $2,000 to be submitted by a petitioner which employs 50 or more employees in the United
States where more than 50 percent of its employees in the United States are in H-1B or L-1
nonimmigrant status.
- This fee must be submitted with a request for initial H-1B status or a request for a beneficiary
already in H-1B status to change employers

Premium Processing fee:
- $1,225 for employers seeking Premium Processing Service

Checks
Make checks payable to the Department of Homeland Security or U.S. Citizenship and Immigration
Services, dated within the last 6 months, and include the proper guarantee amount and signature.

Money Orders
Money orders must be properly endorsed.

Non-payable Checks or Other Financial Instruments
USCIS will reject all applications or petitions submitted with the incorrect filing fee. Rejected
petitions and petitions in which the check or other financial instrument used to pay the filing fee is
returned as non-payable will not retain a filing date. See 8 CFR 103.2(c)(7)(i).

While petitioners are generally provided the opportunity to correct a few deficiencies permitted by the
regulations, the filing date is not established until and unless the fee deficiency has been corrected.
H-1B cap-subject petitions with non-payable fees will be given a new filing date the day

4/19/2012 9:20 AM
the fee deficiency has been corrected, as long as the cap has not been met. If the new filing date is after the cap has been met, the petition will be rejected.

Premium Processing Service

H-1B petitions are eligible for the Premium Processing Service. Petitioners may choose to file a Request for Premium Processing Service (Form I-4807) to have their petition processed within 15 calendar days. To request premium processing submit:

- the Form I-4807
- the filing fee of $1,225 (We fee is in addition to the required base filing and other applicable fees and cannot be waived).

You can file the Form I-4807 and corresponding fee:

- at the same time as Form I-129 or
- at any time after you file Form I-129 while it is still pending.

If filed after the Form I-129, be sure to include the receipt number (e.g., EAC 12-123 51234) of the Form I-129 in the pertinent section of Form I-4807.

Note: We will only accept the 08/10/08 or later edition of Form I-4807.

Please see the links to the right for more information concerning the Premium Processing program.

Organizing your H-1B package

Clearly label all H-1B cap cases, preferably in red ink, on the top margin of Form I-129. Use the following codes:

- Regular Cap (65,000 regular cap cases, not including Chile/Singapore cap cases)
- C/S Cap (Chile/Singapore H-1B cap)
- U.S. Master’s (20,000 exemption for beneficiaries with U.S. master’s degree or higher)

A separate check for each applicable filing fee (Form I-129, Premium Processing, Fraud Fee, ACWA fee, and Public Law 111-230) is preferred. Applicable fees should be stapled to the bottom right corner of the top document.

Preferred order of documents at time of submission:

- Form I-4807 (if filing for Premium Processing Service)
- Form G-28 (if represented by an attorney or accredited representative)
- Form I-129, Petition for a Nonimmigrant Worker
- Addendums/Attachments
- H Classification Supplement to Form I-129 and/or Free Trade Supplement (for H-1B Chile/Singapore petitions)
- H-1B Data Collection and Filing Fee Exemption Supplement
- All supporting documentation to establish eligibility
- Provide a "Table of Contents for supporting documentation"
- All items as listed in Table of Contents
- Attached: Departure Record (Form I-94) if the beneficiary is in the U.S.
- SEVIS Form I-20 if the beneficiary is a current or former F-1 or F-2 dependent
- DS-2019 Form I-2019 if the beneficiary is a current or former J-1 or J-2
- Form I-539 if the beneficiary is in a current A or G nonimmigrant
- DOL certificated LCA, Form ETA 9035
- Employer/attorney/representative letter(s); and
- Other supporting documentation.

- A duplicate copy of the petition, if necessary. Clearly identify the duplicate copy of the petition as "COPY", so that it is not mistaken for a duplicate filing.

How to mail multiple petitions together

If multiple petitions will be included in the same courier service or Post Office package, please place individual petitions into separate envelopes within the package. Individual petition envelopes should be marked with the following labels to reference the type of petition:

- Master’s Premium
- Master’s
- Regular Premium
- Regular
- Chile/Singapore

Filling Tips:

Form G-28, Notice of Entry of Appearance as Attorney or Representative

If the petitioner will be represented by an attorney or other accredited representative, a properly executed Form G-28 should be submitted. Each Form G-28 should include the following:

- All sections completed;
- The printed name and signature of the representative;
- The original signature of the petitioner.

Form I-129, Petition for a Nonimmigrant Worker

- Complete all sections of the form accurately.
- H-1B cap petitions and advanced degree exemption petitions for the FY 13 cap must include an employment start date no earlier than October 1, 2013. H-1B petitions requesting an earlier employment start date must start at a start date of "As Soon As Possible" or "ASAP" will be rejected.
- Ensure that the petition is properly signed. Please see the Related Links section for more information on properly signing the petition.
- Petitioners should enter their own address in Part 1, question 3 of the Form I-129 to ensure that the I-797 receipt and approval notice is sent to the petitioner. Please note: Using an address other than the petitioner’s address may delay processing.
Form I-129, Petition for Non-Immigrant Worker (pages 11 and 12 of Form I-129)

- Please be sure to complete all sections of the form accurately.
- In listing previous periods of stay in H classification (question 2), please also include the actual non-immigrant classification held (e.g., H-1B or L-1).
- Petitioner must sign the form, preferably in black ink.

Petitioner Data Collection and Filing Fee Supplement Form (pages 13 through 16 of Form I-129)

- Please be sure to complete all sections of the form accurately.
- Please enclose page 17 through 19 of the Form I-129 (with a revision date of November 23, 2010 or later).
- Be sure to answer appropriately in Part A, question 2 and Part C, question 2. If the beneficiary has earned a master's degree or higher from a U.S. educational institution, indicate this. The beneficiary may sign in both Parts 3 and 4 of the Form I-607. If there is a valid Form I-94 with the filing, otherwise, the petitioner's signature is required. Preferably, the signature(s) should be in black ink.
- Please include a copy of the Form I-129 receipt notice along with the Form I-607 when filing Form I-129.

This page can be found at http://www.uscis.gov/eb-800-

Last updated: 04/17/2012
### Questions & Answers

**Q1.** What is the cap-gap period?

- A: The cap-gap period is the time between the end of a student's F-1 status and the beginning of their approved H-1B status. The cap-gap period begins on April 1, 2013 and ends on October 1, 2013.

**Q2.** How does the cap-gap period work?

- A: If USCIS approves the H-1B petition before October 1, 2012, then the student will be eligible for a cap-gap extension of status. The student must also have a valid F-1 status at the time of H-1B filing and the H-1B petition must be approved by October 1, 2012.

**Q3.** What if a student's H-1B petition is rejected or denied?

- A: If the student's H-1B petition is rejected or denied, the student will not be eligible for a cap-gap extension of status.

**Q4.** During the cap-gap period, can students travel outside the United States?

- A: Yes, but students should travel only if they have a valid F-1 status and a valid H-1B petition that has been approved.

**Q5.** What if a student's H-1B petition is approved after October 1, 2012?

- A: If the student's H-1B petition is approved after October 1, 2012, the student will not be eligible for a cap-gap extension of status.

**Q6.** Can students work during the cap-gap period?

- A: Yes, but students should work only in the capacity of OPT (up to 12 months) or trainee status.

**Q7.** When can students start work in the United States?

- A: Students can start work immediately after the H-1B petition is approved.

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**Related Links**

- Students and Employment
- H-1B Fiscal Year (FY) 2013 Cap Season
- Extending Period of Optional Practical Training (OPT) for F-1 Nonimmigrant Students with STEM Degrees and Expanding Cap-Gap Relief for All Students F-1 Students with Pending H-1B Petitions (Federal Register) Issuance

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http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vg... 4/19/2012
A6. No. A student granted an F-1 cap-gap extension who exists to travel outside the United States during the cap-gap extension period will not be able to return in the F-1 status. The student will need to apply for an H-1B visa at a consular post abroad prior to returning. As the H-1B petition is filed on October 1, 2012 start date, the student should be prepared to submit his/her travel plans accordingly.

Q7. What if the student’s post-completion OPT has expired and the student is in a valid grace period when an H-1B cap-subject petition is filed on their behalf? It appears that F-1 status would be extended, but would OPT also be extended?

A7. F-1 students who have entered the 60-day grace period will not be employment-authorized. Consequently, if an H-1B cap-subject petition is filed on the behalf of a student who has entered the 60-day grace period, the student will receive the automatic cap-gap extension of 60 days on the F-1 status, but will not be employment-authorized (since the student was not employment-authorized at the time H-1B petition was filed, there is no employment authorization to be extended).

Q8. Do the limits on unemployment time apply to students with a cap-gap extension?

A8. Yes. The 60-day limitation on unemployment during the initial post-completion OPT authorization continues during the cap-gap extension.

Q9. What is a STEM OPT extension?

A9. F-1 students who receive science, technology, engineering, and mathematics (STEM) degrees indicated on the SEVIS Designated Degree Program List, are employed by employers certified in STEMverify, and who have received an initial grant of post-completion OPT employment authorization related to such a degree, may apply for a 17-month extension of this authorization. F-1 students may obtain additional information about STEM OPT extensions on the Student and Exchange Visitor Programs website at www.jce.gov/seyis.

Q10. May a student eligible for a cap-gap extension of post-completion OPT employment authorization and F-1 status apply for a STEM OPT extension while he or she is in the cap-gap extension period?

A10. Yes. However, such application may not be made once the cap-gap extension period is terminated (e.g., if the H-1B petition is rejected, denied, or revoked), and the student has entered the 60-day departure preparation period.

Q11. In recent years, employers have been able to file H-1B cap-subject petitions after April 1, and have not always requested an October 1 start date. However, some students’ F-1 status expired during the grace period and were nevertheless permitted to September 30, even though their H-1B employment would not begin until a later date. What should the student do to correct this?

A11. The student should contact their DSO. The DSO may request a data fix in SEVIS by contacting the SEVIS helpdesk.

Q12. If the student finds a new H-1B job, can he or she continue working with his/her approved EAD while the data fix in SEVIS is pending?

A12. Yes, if the (former) H-1B employer timely withdrew the H-1B petition and the following conditions are true:

1. the student finds employment appropriate to his or her OPT;
2. the period of OPT is unexpired; and
3. the DSO has requested a data fix in SEVIS.

Note: If the student had filed Form I-539 to request reinstatement to F-1 student status, the student may not work or attend classes until the reinstatement is approved.

Q13. If the student has an approved H-1B petition and change of status, but is laid off from his H-1B employer before the effective date, and the student has an unexpired EAD issued for post-completion OPT, can the student retrieve any unused OPT?

A13. Yes. The student will remain in student status and can continue working OPT using the unexpired EAD until the H-1B change of status goes into effect. The student also needs to make sure that USCIS receives a withdrawal request from the petitioner before the H-1B change of status effective date. This will prevent the student from changing to H-1B status. Once the petition has been revoked, the student must provide their DSO with a copy of the USCIS acknowledgment of withdrawal (i.e., the notice of revocation). The DSO may then request a data fix in SEVIS, so that the student is being terminated in SEVIS on the H-1B effective date, by contacting the SEVIS helpdesk.

If USCIS does not receive the withdrawal request prior to the H-1B petition change of status effective date, then the student will need to stop working. He is Form I-539 is required for reinstatement, and will need to be reinstated prior to resuming employment.

Q14. If the student is authorized to work OPT and the H-1B immunization occur, can the student continue working on OPT if a request to revoke/withdraw the H-1B change of status is submitted to USCIS?

A14. If the H-1B revocation occurs before the H-1B change of status effective date, the student may continue working OPT pending the data fix remains pending, because the student will still be in valid F-1 status.

If the H-1B revocation occurs on or after the H-1B change of status effective date, the student will need to stop working before the H-1B change of status effective date. The student must then file Form I-539 to request reinstatement, and will need to be reinstated prior to resuming employment.

NOTE: *THIS IS NOT A CAP-GAP SITUATION* since the student has an EAD authorizing OPT beyond the H-1B change of status effective date.

Q15. Do students remain in valid F-1 status while the request to change the OPT and data is pending?

A15. Yes. If the H-1B revocation occurs before the H-1B change of status effective date, the student is still deemed to be in F-1 status while the data fix is pending.

If the H-1B revocation occurs after the H-1B change of status effective date, the student will not be in valid F-1 status and will therefore still need to apply for reinstatement or deport the United States.

http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vg... 4/19/2012
TN – NAFTA PROFESSIONALS
**TN NAFTA Professionals**

**TN NAFTA Professionals**

The Full America Free Trade Agreement (NAFTA) created special economic and trade relationships for the United States, Canada, and Mexico. The TN nonimmigrant classification allows qualified Canadian and Mexican citizens to seek temporary entry into the United States to engage in business activities at a professional level.

Eligibility Criteria for Canadian Citizens

If you are a Canadian citizen, you are not required to apply for a visa with the U.S. consulate or file a petition with U.S. Citizenship and Immigration Services (USCIS). You can request admission as a TN nonimmigrant at a U.S. port of entry, and you must provide the following documentation:

- Proof of Canadian citizenship
- Letter from your prospective employer stating the professional capacity in which you will work in the United States, the purpose of your employment, your length of stay, your educational qualifications
- Letter of employment (if applicable)

Eligibility Criteria for Mexican Citizens

If you are a Mexican citizen, then you are not required to file a petition with USCIS. However, you are required to obtain a visa to enter the United States as a TN nonimmigrant. You should apply for a TN visa directly at a U.S. embassy or consulate in Mexico. See the Department of State link to the right “Mexican and Canadian NAFTA Professional Worker.”

If you are eligible following inspection by a U.S. Customs and Border Protection (CBP) Officer, then you will be admitted as a TN nonimmigrant. Form I-94, Arrival Departure Record, will be evidence of your admission.

Period of Stay

Initial Period of Stay

Up to 3 years

If you wish to stay beyond the time indicated on Form I-94, you must seek an extension of stay. If you are in the United States, your employer may file Form I-129, Petition for a Nonimmigrant Worker with USCIS. For more information see the “Extend Your Stay” link to the right.

Note: You may apply at a port of entry using the same application and documentation procedures required at the time of your initial entry.

**Family of TN Visa Holders**

Any accompanying or following to join spouse and children under the age of 21 may be eligible for TN nonimmigrant status, if:

- You are a citizen of Canada or Mexico
- Your profession qualifies under the regulations
- You have the qualifications of the profession
- The position in the United States requires a NAFTA professional
- You have a prearranged full-time or part-time job (with a U.S. employer (not self-employment) - see documentation required below)
- You have the qualifications of the profession

Eligibility Criteria for Canadian Citizens

If you are a Canadian citizen, then you are not required to file a petition with USCIS. However, you are required to obtain a visa to enter the United States as a TN nonimmigrant. You should apply for a TN visa directly at a U.S. embassy or consulate in Mexico. See the Department of State link to the right “Mexican and Canadian NAFTA Professional Worker.”

If you are eligible following inspection by a CBP Officer, then you will be admitted as a TN nonimmigrant. Form I-94, Arrival Departure Record, will be evidence of your admission.

**Period of Stay/Extension of Stay**

Initial Period of Stay

Up to 3 years

If you wish to stay beyond the time indicated on Form I-94, you must seek an extension of stay. If you are in the United States, your employer may file Form I-129, Petition for a Nonimmigrant Worker with USCIS. For more information see the “Extend Your Stay” link to the right.

Note: You may apply at a port of entry using the same application and documentation procedures required at the time of your initial entry.

**Family of TN Visa Holders**

Any accompanying or following to join spouse and children under the age of 21 may be eligible for TN nonimmigrant status, if:

- You are a citizen of Canada or Mexico
- Your profession qualifies under the regulations
- You have the qualifications of the profession
- The position in the United States requires a NAFTA professional
- You have a prearranged full-time or part-time job (with a U.S. employer (not self-employment) - see documentation required below)
- You have the qualifications of the profession

Eligibility Criteria for Mexican Citizens

If you are a Mexican citizen, then you are not required to file a petition with USCIS. However, you are required to obtain a visa to enter the United States as a TN nonimmigrant. You should apply for a TN visa directly at a U.S. embassy or consulate in Mexico. See the Department of State link to the right “Mexican and Canadian NAFTA Professional Worker.”

If you are eligible following inspection by a CBP Officer, then you will be admitted as a TN nonimmigrant. Form I-94, Arrival Departure Record, will be evidence of your admission.

**Related Links**

- Extend Your Stay
- More Information
- Forms
  - I-129, Petition for a Nonimmigrant Worker
  - Employment Based Forms
- Department of State
  - Mexican and Canadian NAFTA Professional Worker
- Add Our RSS Feed

Last updated: 09/30/2010
EMPLOYMENT-BASED IMMIGRATION:

FIRST PREFERENCE EB-1
Employment-Based Immigration: First Preference EB-1

Employment-Based Immigration: First Preference EB-1

You may be eligible for an employment-based, first-preference visa if you have an extraordinary ability, as an outstanding professor or researcher, or are a multinational executive or manager. Each occupational category has certain requirements that must be met.

Eligibility Criteria

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
<th>Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extraordinary Ability</td>
<td>You must be able to demonstrate extraordinary ability in the sciences, arts, education, business, or athletics through sustained national or international acclaim. Your achievements must be recognized in your field through extensive documentation. No offer of employment is required.</td>
<td>You must meet 5 of 10 criteria below, or provide evidence of one-time achievement (i.e., Pulitzer, Oscar, Olympic Medal).</td>
</tr>
<tr>
<td>Outstanding professors and researchers</td>
<td>You must demonstrate international recognition for your outstanding achievements in a particular academic field. You must have at least 5 years experience in teaching or research in that academic area. You must be entering the United States to pursue tenure or tenure track teaching or comparative research position at a university or other institution of higher education.</td>
<td>You must include documentation of at least two listed below in addition to an offer of employment from the prospective U.S. employer.</td>
</tr>
<tr>
<td>Multinational manager or executive</td>
<td>You must have been employed outside the United States for at least 1 year by a firm or corporation and you must be seeking to enter the United States to continue service in the same firm or organization. Your employment must have taken place outside the United States in a managerial or executive capacity and with the same employer, or affiliate, or subsidiary of the employer.</td>
<td>Your principal employer must be a U.S. employer. Your employee must have been doing business for at least 1 year, as an affiliate, subsidiary, or the same corporation or other legal entity that employed you abroad.</td>
</tr>
</tbody>
</table>

* Criteria for Demonstrating Extraordinary Ability

You must meet 5 out of the 10 listed criteria below to prove extraordinary ability in your field:

- Evidence of receipt of fallout nationality or internationally recognized prizes or awards for excellence
- Evidence of your membership in associations in the field which demand outstanding achievement of their members
- Evidence of publication about you in professional or major trade publications or other major media
- Evidence that you have been asked to judge the work of others, either individually or on a panel
- Evidence of your original scientific, scholarly, artistic, athletic, or business-related contributions of major significance to the field
- Evidence of your authorship of scholarly books or articles of high quality
- Evidence that your work has been displayed at major exhibitions or performances
- Evidence of your performance as a leader or critic in distinguished organizations
- Evidence that you have received recognition for your outstanding work from peers in the field
- Evidence of your commercial success in the performing arts

** Examples of Documentary Evidence That A Person Is An Outstanding Professor Or Researcher

- Evidence of receipt of major prizes or awards for outstanding achievement
- Evidence of membership in associations that require their members to demonstrate outstanding achievement
- Evidence of publication about you in professional or major trade publications or other major media
- Evidence that you have been asked to judge the work of others, either individually or on a panel
- Evidence of your original scientific, scholarly, artistic, athletic, or business-related contributions of major significance to the field
- Evidence of your authorship of scholarly books or articles of high quality
- Evidence that your work has been displayed at major exhibitions or performances
- Evidence of your performance as a leader or critic in distinguished organizations
- Evidence that you have received recognition for your outstanding work from peers in the field
- Evidence of your commercial success in the performing arts

Application Process

- Extraordinary Ability: You may petition for yourself by filing Form I-140, Petition for Alien

Non- USCIS Links

- Foreign Labor Certification, Department of Labor
- Department of State: Visa Bulletin
- My Case

Add Our RSS Feed
Worker

- Outstanding Professors and Researchers: Your employer must file a Form I-140, Petition for Alien Worker.
- Multinational Manager or Executive: Your employer must file USCIS Form I-140, Petition for Alien Worker.
EMPLOYMENT-BASED IMMIGRATION:
SECOND PREFERENCE EB-2
Employment-Based Immigration: Second Preference EB-2

Employment-Based Immigration: Second Preference EB-2

You may be eligible for an employment-based, second preference visa if you are a member of the professions holding an advanced degree in his/ her field or an alien national who has exceptional ability. Below are the occupational categories and requirements:

Eligibility Criteria

<table>
<thead>
<tr>
<th>Sub-Categories</th>
<th>Description</th>
<th>Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advanced Degree</td>
<td>The job you apply for must require an advanced degree and you must possess such a degree or its equivalent (at least 5 years of progressive work experience in the field).</td>
<td>Documentation, such as an official academic record showing that you have a U.S. advanced degree or a foreign equivalent degree, or an official academic record showing that you have a U.S. bachelor's degree or a foreign equivalent degree and letters from current or former employers showing that you have at least 5 years of progressive post-baccalaureate work experience in the specialty.</td>
</tr>
</tbody>
</table>

Exceptional Ability

You must be able to show exceptional ability in the sciences, arts, or business. Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

National Interest Waiver

Aliens seeking a national interest waiver are categorizing the Labor Certification to be valid because it is in the national interest of the United States. Though the job that qualifies for a national interest waiver are not defined by statute, national interest waivers are usually granted to those who have exceptional ability (see above) and whose employment in the United States would greatly benefit the national. Those seeking a national interest waiver may self-petition (they do not need an employer to sponsor them) and may file their labor certification directly with USCIS along with their Form I-140, Petition for Alien Worker.

You must meet at least three of the criteria below:

- Official academic record showing that you have a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning related to your area of exceptional ability
- Letters documenting at least 10 years of full-time experience in your occupation
- A license to practice your profession or certification for your profession or occupation
- Evidence that you have commanded a salary or other remuneration for services that demonstrates your exceptional ability
- Membership in a professional association(s)
- Recognition for your achievements and significant contributions to your industry or field by your peers, government entities, professional or business organizations
- Other comparable evidence of eligibility is also acceptable.

Note: Employment-based, second preference petitions must generally be accompanied by an approved labor certification form the Department of Labor on Form ETA-750. Please see the Department of Labor's Foreign Labor Certification link to the right for more information.

To qualify for an EB-2 visa, your employer must file a Form I-140, Petition for Alien Worker. For more information about filing, see the "Forms" link to the right.

Family of EB-2 Visa Holders

Your spouse and children under the age of 18 may be admitted to the United States in E-21 and E-22 immigrant status, respectively. During the process where you and your spouse are applying for permanent resident status (usually via a green card holder), your spouse is eligible to file for an Employment Authorization Document (EAD).
EMPLOYMENT-BASED IMMIGRATION:

THIRD PREFERENCE
EB-3
## Employment-Based Immigration: Third Preference EB-3

### Employment-Based Immigration: Third Preference EB-3

You may be eligible for this immigrant visa preference category if you are a skilled worker, professional, or other worker.

- "Skilled workers" are persons whose job requires a minimum of 2 years training or work experience, not of a temporary or seasonal nature.
- "Professionals" are persons whose job requires at least a U.S. baccalaureate degree or a foreign equivalent, and are a member of the professions.
- The "other worker" subcategory is for persons performing unskilled labor requiring less than 2 years training or experience, not of a temporary or seasonal nature.

### Eligibility Criteria

<table>
<thead>
<tr>
<th>Sub-category</th>
<th>Evidence</th>
<th>Certification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Skilled Workers</td>
<td>You must be able to demonstrate at least 2 years of job experience or training. You must be performing work for which qualified workers are not available in the United States.</td>
<td>Labor certification and a permanent, full-time job offer required.</td>
</tr>
<tr>
<td>Professionals</td>
<td>You must be able to demonstrate that you possess a U.S. baccalaureate degree or foreign degree equivalent, and that a baccalaureate degree is the normal requirement for entry into the occupation. You must be performing work for which qualified workers are not available in the United States. You must be performing work in the United States. Education and experience may not be substituted for a baccalaureate degree.</td>
<td>Labor certification and a permanent, full-time job offer required.</td>
</tr>
<tr>
<td>Unskilled Workers (Other Workers)</td>
<td>You must be capable, at the time the petition is filed on your behalf, of performing unskilled labor (requiring less than 2 years training or experience), that is not of a temporary or seasonal nature, for which qualified workers are not available in the United States.</td>
<td>Labor certification and a permanent, full-time job offer required.</td>
</tr>
</tbody>
</table>

Note: While eligibility requirements for the third preference classification are less stringent, you should be aware that a long backlog exists for visas in this "other worker" category. See the "Department of State: Visa Bulletin" link to the right.

### U.S. Department of Labor – Labor Certification

Third preference petitions must generally be accompanied by an approved, individual labor certification from the Department of Labor on Form ETA-9089. In some cases, the petition may be submitted to U.S. Citizenship and Immigration Service (USCIS) with an uncertified ETA-9089 for consideration as Subcategory A, Group I. For more information, see the "Department of Labor: Foreign Labor Certification" link to the right.

### Application Process

Your employer (petitioner) must file a Form I-140, Petition for Alien Worker. As part of this application process, your employer must be able to demonstrate an ability to pay the offer wages as of your visa priority date. Your employer may use an annual report, federal income tax return, or audited financial statement to demonstrate an ability to pay your wages.

For more information on filing fees, see the "Fees My Application Online" link to the right.

### Family of EB-3 Visa Holders

Your spouse may be admitted as an E35 (child of a "skilled worker" or "professional") or EWS (child of an "other worker"). You may also be eligible to file for an Employment Authorization Document (EAD). Your minor children (under the age of 18) may be admitted as E34 (child of a "skilled worker" or "professional") or EWS (child of an "other worker").

### More Information

- Special Immigrant Religious Workers
- Employment Based Forms
- U.S. Department of Labor – Labor Certification
- Foreign Labor Certification, Department of Labor
- Department of State: Visa Bulletin
- Add Our RSS Feed

### Non-USCIS Links

- Bulletin Immigrant USCIS Press Releases
- USCIS Initiatives to Promote Small Businesses and Spur Job Creation Fact Sheet
- TITLE 8 CODE OF FEDERAL REGULATIONS (8 CFR)
- U.S. Citizenship and Immigration Service (USCIS) Home Page

### More Resources

- USCIS News
- USCIS Forms
- USCIS Legal Information
- USCIS Resources
- USCIS Services
- USCIS Statistics
- USCIS Travel

### USCIS - Employment-Based Immigration: Third Preference EB-3

http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac8...
PERMANENT
LABOR
CERTIFICATION
A permanent labor certification issued by the Department of Labor (DOL) allows an employer to hire a foreign worker to work permanently in the United States. In most instances, before the U.S. employer can submit an immigration petition to the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS), the employer must obtain a certified labor certification application from the DOL's Employment and Training Administration (ETA). The DOL must certify to the USCIS that there are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.

To improve the operations of the permanent labor certification program (PERM), ETA published a final regulation on December 27, 2004, implementing a new, re-engineered permanent labor certification program, effective March 28, 2005. This new electronic program has improved services to our various stakeholders.

As of March 28, 2005, ETA Form 750 applications were no longer accepted under the regulation in effect prior to March 28, 2005, and instead new ETA Form 9089 applications had to be filed under the new PERM regulation at the appropriate National Processing Center (NPC). Applications filed under the regulation in effect prior to March 28, 2005, continued to be processed under the rule in effect at the time of filing at an appropriate Backlog Elimination Center until such time as the backlog was eliminated. Where an employer chose to withdraw an application filed under the regulation in effect prior to March 28, 2005, and still in process, and to refile an application for the identical job opportunity under the refill provisions of the PERM regulation, the employer was permitted to use the previously filed ETA Form 750 application filing date.

DOL processes Applications for Permanent Employment Certification, ETA Form 9089, with the exception of Schedule A and sheepherder applications filed under 20 CFR §656.16. The date the labor certification application is received by the DOL is known as the filing date and is used by USCIS and the Department of State as the priority date. After the labor certification application is certified by DOL, it should be submitted to the USCIS service center with a Form I-140, Immigrant Petition for Alien Worker. The certification has a validity period of 180-days and expires if not submitted to
USCIS within this period.

Qualifying Criteria

- Applications filed on or after March 28, 2005, must comply with the new PERM process and adhere to the new PERM Regulation.
- There must be a bona fide, full-time permanent job opening available to U.S. workers.
- Job requirements must adhere to what is customarily required for the occupation in the U.S. and may not be tailored to the foreign worker's qualifications. In addition, the employer shall document that the job opportunity is described without unduly restrictive job requirements, unless adequately documented as arising from business necessity.
- The employer must pay at least the prevailing wage for the occupation in the area of intended employment.

Process for Filing

1. **Application.** The employer must complete an Application for Permanent Employment Certification, ETA Form 9089. A completed application will describe in detail the job duties, educational requirements, training, experience, and other special skills the employee must possess to perform the work, and outline the foreign worker's qualifications.

2. **Signature requirement.** Applications submitted by mail must contain the original signature of the employer, foreign worker, and preparer, if applicable, when they are received by the NPC. Applications filed electronically must, upon receipt of the labor certification issued by ETA, be signed immediately by the employer, foreign worker, and preparer, if applicable, in order to be valid.

3. **Prevailing wage.** Prior to filing ETA Form 9089, the employer must request and obtain a prevailing wage determination from the National Prevailing Wage Center (NPWC). The employer is required to include on the ETA Form 9089 the NPWC provided information: the prevailing wage, the prevailing wage tracking number, the SOC (O*NET/OES) code, the occupation title, the skill level, the wage source, the determination date, and the expiration date.

4. **Pre-Filing Recruitment Steps.** All employers filing the ETA Form 9089 (except for those applications involving Schedule A occupations and sheepherders filed under 20 CFR §656.16) must attest, in addition to a number of other conditions of employment, to having conducted recruitment prior to filing the application.

When filing under 20 CFR §656.17, the employer must recruit using the standards for professional occupations set forth in 20 CFR §656.17(e)(1) if the occupation involved is on the list of occupations published in Appendix A to the preamble of the final PERM regulation. The occupations listed have been deemed to be professional occupations, as they normally require a bachelor's or higher degree. For all other occupations not normally requiring a bachelor's or higher degree, employers can simply recruit under the requirements for nonprofessional
occupations at 20 CFR §656.17(e)(2). Employers are not prohibited from conducting more recruitment than is required by the regulations.

The employer must prepare a recruitment report in which it categorizes the lawful job-related reasons for rejection of U.S. applicants and provides the number of U.S. applicants rejected in each category. The recruitment report does not have to identify the individual U.S. workers who applied for the job opportunity, however, if requested by the Certifying Officer, the employer must submit the resumes.

5. **Audits/requests for information.** Supporting documentation may not be filed with the ETA Form 9089, but the employer must provide the required supporting documentation if the employer’s application is selected for audit or if the Certifying Officer otherwise requests it.

6. **Retention of records.** The employer is required to retain copies of applications for permanent employment certification and all supporting documentation for five years from the date of filing the ETA Form 9089. For example, the NPWC prevailing wage determination documentation is not submitted with the application, but it must be retained for a period of five years from the date of filing the application by the employer.

7. **Online filing.** The employer has the option of filing an application electronically (using web-based forms and instructions) or by mail. However, DOL strongly recommends that employers file electronically. Not only is electronic filing, by its nature, faster, but it will also ensure the employer has provided all required information, as an electronic application can not be submitted if the required fields are not completed. Additionally, when completing the ETA Form 9089 online, the preparer is provided prompts to assist in ensuring accurate data entry.

The employer can access a customer-friendly Web site (www.plc.doleta.gov) and, after registering and establishing an account, electronically fill out and submit an Application for Permanent Employment Certification, ETA Form 9089.

**Registration.** To better assist employers with processing the Application for Permanent Employment Certification, the electronic Online Permanent System requires employers to set up individual accounts. An employer must set up a profile by selecting the appropriate profile option in the Online System. By completing an Employer Profile, the employer is able to:

- Save time by pre-populating its general information.
- View the status of its labor certification applications online.
- Update its profile information online.
- Track newly submitted labor certification applications.
- E-mail saved labor certification applications to others within the company.
- Add new users to its account.
- Withdraw labor certification applications no longer needed.

8. **Filing by mail.** Employers can submit paper applications to the Atlanta NPC. The address and contact information are provided on our Contact Information page.

9. **Approvals.** If the Atlanta NPC approves the application, the ETA Form 9089 is signed by the Certifying Officer and returned to the employer/employer representative who submitted the
application.

The USCIS Petition

Within 180 days of the date an application is certified, the employer must file an Immigrant Petition for an Alien Worker, Form I-140, with the USCIS. The employer must attach the certified ETA Form 9089 to the completed USCIS Form I-140, along with other USCIS specified documentation and applicable fees, and submit the package to the appropriate USCIS Service Center.

Schedule A Occupations

Schedule A is comprised of certain occupations, as set forth at 20 CFR 656.15, for which DOL has determined there are not sufficient U.S. workers who are able, willing, qualified and available. In addition, Schedule A establishes that the employment of aliens in such occupations will not adversely affect the wages and working conditions of U.S. workers similarly employed.

The occupations listed under Schedule A include:

Group I

1. Physical Therapists - who possess all the qualifications necessary to take the physical therapist licensing examination in the state in which they propose to practice physical therapy; and
2. Professional Nurses - the alien (i) has a Commission on Graduates in Foreign Nursing Schools (CGFNS) Certificate, (ii) the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) exam, or (iii) the alien holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment.

Group II

1. Sciences or arts (except performing arts) - Aliens (except for aliens in the performing arts) of exceptional ability in the sciences or arts including college and university teachers of exceptional ability who have been practicing their science or art during the year prior to application and who intend to practice the same science or art in the United States. For purposes of this group, the term "science or art" means any field of knowledge and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge and/or skill. An alien, however, need not have studied at a college or university in order to qualify for the Group II occupation.
2. Performing arts - Aliens of exceptional ability in the performing arts whose work during the past 12 months did require, and whose intended work in the United States will require, exceptional ability.

An employer must apply for a labor certification for a Schedule A occupation by filing an ETA Form
9089, in duplicate, with the appropriate USCIS Service Center, and NOT with DOL.

For more information about the Permanent regulation that went into effect on March 28, 2005, and details regarding filing, please review our FAQs HERE.

Forms & Instructions

• Appendix A - Professional Occupations
• ETA Form 9089
• Instructions for ETA Form 9089
• Permanent Online System

Program Regulations & FAQs

• 20 CFR 656
• Federal Register Vol. 69, No. 247 (December 27, 2004)
• Federal Register Vol. 70, No. 232 (December 5, 2005)
• Federal Register Vol. 72, No. 95 (May 17, 2007)
• FAQs - Round 1
• FAQs - Round 2
• FAQs - Round 3
• FAQs - Round 4
• FAQs - Round 5
• FAQs - Round 6
• FAQs - Round 7
• FAQs - Round 8
• FAQs - Round 9
• FAQs - Round 10
PERMANENT LABOR CERTIFICATION
PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

Section Contents

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§ 656.2 Description of the Immigration and Nationality Act and of the Department of Labor's role thereunder.
§ 656.3 Definitions, for purposes of this part, of terms used in this part.

Subpart B—Occupational Labor Certification Determinations

§ 656.5 Schedule A.

Subpart C—Labor Certification Process

§ 656.10 General instructions.
§ 656.11 Substitutions and modifications to applications.
§ 656.12 Improper commerce and payment.
§ 656.15 Applications for labor certification for Schedule A occupations.
§ 656.16 Labor certification applications for sheepherders.
§ 656.17 Basic labor certification process.
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§ 656.19 Live-in household domestic service workers.
§ 656.20 Audit procedures.
§ 656.21 Supervised recruitment.
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§ 656.27 Consideration by and decisions of the Board of Alien Labor Certification Appeals.
§ 656.30 Validity of and invalidation of labor certifications.
§ 656.31 Labor certification applications involving fraud, willful misrepresentation, or violations of this part.
§ 656.32 Revocation of approved labor certifications.

Subpart D—Determination of Prevailing Wage

§ 656.40 Determination of prevailing wage for labor certification purposes.
§ 656.41 Review of prevailing wage determinations.

Source: 69 FR 77386, Dec. 27, 2004, unless otherwise noted.

Subpart A—Purpose and Scope of Part 656

§ 656.1 Purpose and scope of part 656.

(a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

(1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

(b) The regulations under this part set forth the procedures through which such immigrant labor certifications may be applied for, and granted or denied.

(c) Correspondence and questions about the regulations in this part should be addressed to: Office of Foreign Labor Certification, Employment and Training Administration, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210.


§ 656.2 Description of the Immigration and Nationality Act and of the Department of Labor's role thereunder.

(a) Description of the Act. The Act (8 U.S.C. 1101 et seq.) regulates the admission of aliens into the United States. The Act designates the Secretary of Homeland Security and the Secretary of State as the principal administrators of its provisions.

(b) Burden of proof under the Act. Section 291 of the Act (8 U.S.C. 1361) provides, in pertinent part, that:

Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act * * *

(c) Role of the Department of Labor. The permanent labor certification role of the Department of Labor under the Act derives from section 212(a)(5)(A) (8 U.S.C. 1182(a)(5)(A)), which provides that any alien
who seeks admission or status as an immigrant for the purpose of employment under paragraph (2) or (3) of section 203(b) of the Act may not be admitted unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

(i) There are not sufficient United States workers who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor; and

(ii) The employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) This certification is referred to in this part 656 as a "labor certification."

(3) We certify the employment of aliens in several instances: For the permanent employment of aliens under this part; and for temporary employment of aliens for agricultural and nonagricultural employment in the United States classified under 8 U.S.C. 1101(a)(15)(H)(ii), under the DHS regulation at 8 CFR 214.2(h)(5) and (6) and sections 101(a)(15)(H)(ii), 214, and 218 of the Act. See 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188. We also administer labor attestation and labor condition application programs for the admission and/or work authorization of the following nonimmigrants: Specialty occupations and fashion models (H-1B visas), specialty occupations from countries with which the U.S. has entered agreements listed in the INA (H-1B I visas), registered nurses (H-1 C visas), and crewmembers performing longshore work (D visas), classified under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1101(a)(15)(H)(i)(b1), 1101(a)(15)(H)(i)(c), and 1101(a)(15)(D), respectively. See also 8 U.S.C. 1184(c), (m), and (n), and 1288.

§ 656.3 Definitions, for purposes of this part, of terms used in this part.

**top**

*Act* means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 et seq.

*Agent* means a person who is not an employee of an employer, and who has been designated in writing to act on behalf of an alien or employer in connection with an application for labor certification.

*Applicant* means a U.S. worker (see definition of U.S. worker below) who is applying for a job opportunity for which an employer has filed an *Application for Permanent Employment Certification* (ETA Form 9089).

*Application* means an *Application for Permanent Employment Certification* submitted by an employer (or its agent or attorney) in applying for a labor certification under this part.

*Area of intended employment* means the area within normal commuting distance of the place (address) of intended employment. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., normal commuting distances might be 20, 30, or 50 miles). If the place of intended employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of intended employment; however, not all locations within a Consolidated Metropolitan Statistical Area (CMSA) will be deemed automatically to be within normal commuting distance. The borders of MSA's and PMSA's are not controlling in the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (e.g., near the border of)
the MSA or PMSA (or CMSA). The terminology CMSAs and PMSAs are being replaced by the Office of Management and Budget (OMB). However, ETA will continue to recognize the use of these area concepts as well as their replacements.

Attorney means any person who is a member in good standing of the bar of the highest court of any state, possession, territory, or commonwealth of the United States, or the District of Columbia, and who is not under suspension or disbarment from practice before any court or before DHS or the United States Department of Justice's Executive Office for Immigration Review. Such a person is permitted to act as an agent, representative, or attorney for an employer and/or alien under this part.

Barter, for purposes of an Application for Permanent Employment Certification (Form ETA 9089) or an Application for Alien Labor Certification (Form ETA 750), means the transfer of ownership of a labor certification application or certification from one person to another by voluntary act or agreement in exchange for a commodity, service, property or other valuable consideration.

Board of Alien Labor Certification Appeals (BALCA or Board) means the permanent Board established by this part, chaired by the Chief Administrative Law Judge, and consisting of Administrative Law Judges assigned to the Department of Labor and designated by the Chief Administrative Law Judge to be members of the Board of Alien Labor Certification Appeals. The Board of Alien Labor Certification Appeals is located in Washington, DC, and reviews and decides appeals in Washington, DC.

Certifying Officer (CO) means a Department of Labor official who makes determinations about whether or not to grant applications for labor certifications.

Closely-held Corporation means a corporation that typically has relatively few shareholders and whose shares are not generally traded in the securities market.

Employer means:

(1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an “authorized representative” means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

(2) Persons who are temporarily in the United States, including but not limited to, foreign diplomats, intra-company transferees, students, and exchange visitors, visitors for business or pleasure, and representatives of foreign information media can not be employers for the purpose of obtaining a labor certification for permanent employment.

Employment means:

(1) Permanent, full-time work by an employee for an employer other than oneself. For purposes of this definition, an investor is not an employee. In the event of an audit, the employer must be prepared to document the permanent and full-time nature of the position by furnishing position descriptions and payroll records for the job opportunity involved in the Application for Permanent Employment Certification.
(2) Job opportunities consisting solely of job duties that will be performed totally outside the United States, its territories, possessions, or commonwealths can not be the subject of an Application for Permanent Employment Certification.

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) that includes the Office of Foreign Labor Certification (OFLC).

Immigration Officer means an official of the Department of Homeland Security, United States Citizenship and Immigration Services (USCIS) who handles applications for labor certifications under this part.

Job opportunity means a job opening for employment at a place in the United States to which U.S. workers can be referred.

Nonprofessional occupation means any occupation for which the attainment of a bachelor's or higher degree is not a usual requirement for the occupation.

Non-profit or tax-exempt organization for the purposes of §656.40 means an organization that:

(1) Is defined as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6) (26 U.S.C. 501(c)(3), (c)(4) or (c)(6)); and

(2) Has been approved as a tax-exempt organization for research or educational purposes by the Internal Revenue Service.

Office of Foreign Labor Certification means the organizational component within the Employment and Training Administration that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the Immigration and Nationality Act, as amended, concerning alien workers seeking admission to the United States in order to work under section 212(a)(5)(A) of the Immigration and Nationality Act, as amended.

O*NET means the system developed by the Department of Labor, Employment and Training Administration, to provide to the general public information on skills, abilities, knowledge, work activities, interests and specific vocational preparation levels associated with occupations. O*NET is based on the Standard Occupational Classification system. Further information about O*NET can be found at http://www.onetcenter.org.

Prevailing wage determination (PWD) means the prevailing wage provided or approved by an OFLC National Processing Center (NPC), in accordance with OFLC guidance governing foreign labor certification programs. This includes PWD requests processed for purposes of employer petitions filed with DHS under Schedule A or for sheepherders.

Professional occupation means an occupation for which the attainment of a bachelor's or higher degree is a usual education requirement. A beneficiary of an application for permanent alien employment certification involving a professional occupation need not have a bachelor's or higher degree to qualify for the professional occupation. However, if the employer is willing to accept work experience in lieu of a baccalaureate or higher degree, such work experience must be attainable in the U.S. labor market and must be stated on the application form. If the employer is willing to accept an equivalent foreign degree, it must be clearly stated on the Application for Permanent Employment Certification form.
Purchase, for purposes of an Application for Permanent Employment Certification (Form ETA 9089) or an Application for Alien Labor Certification (Form ETA 750), means the transfer of ownership of a labor certification application or certification from one person to another by voluntary act and agreement, based on a valuable consideration.

Sale, for purposes of an Application for Permanent Employment Certification (Form ETA 9089) or an Application for Alien Labor Certification (Form ETA 750), means an agreement between two parties, called, respectively, the seller (or vendor) and the buyer (or purchaser) by which the seller, in consideration of the payment or promise of payment of a certain price in money terms, transfers ownership of a labor certification application or certification to the buyer.

Secretary means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.


Secretary of State means the chief official of the U.S. Department of State or the Secretary of State's designee.

Specific vocational preparation (SVP) means the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. Lapsed time is not the same as work time. For example, 30 days is approximately 1 month of lapsed time and not six 5-day work weeks, and 3 months refers to 3 calendar months and not 90 work days. The various levels of specific vocational preparation are provided below.

<table>
<thead>
<tr>
<th>Level</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Short demonstration.</td>
</tr>
<tr>
<td>2</td>
<td>Anything beyond short demonstration up to and including 30 days.</td>
</tr>
<tr>
<td>3</td>
<td>Over 30 days up to and including 3 months.</td>
</tr>
<tr>
<td>4</td>
<td>Over 3 months up to and including 6 months.</td>
</tr>
<tr>
<td>5</td>
<td>Over 6 months up to and including 1 year.</td>
</tr>
<tr>
<td>6</td>
<td>Over 1 year up to and including 2 years.</td>
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<tr>
<td>7</td>
<td>Over 2 years up to and including 4 years.</td>
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<tr>
<td>8</td>
<td>Over 4 years up to and including 10 years.</td>
</tr>
<tr>
<td>9</td>
<td>Over 10 years.</td>
</tr>
</tbody>
</table>

State Workforce Agency (SWA), formerly known as State Employment Security Agency (SESA), means the state agency that receives funds under the Wagner-Peyser Act to provide employment-related services to U.S. workers and employers and/or administers the public labor exchange delivered through the state's one-stop delivery system in accordance with the Wagner-Peyser Act.

United States, when used in a geographic sense, means the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam.

United States worker means any worker who is:
(1) A U.S. citizen;
(2) A U.S. national;
(3) Lawfully admitted for permanent residence;
(4) Granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1);
(5) Admitted as a refugee under 8 U.S.C. 1157; or


Subpart B—Occupational Labor Certification Determinations

§ 656.5 Schedule A.

We have determined there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on Schedule A and the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. An employer seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification under §656.15.

Schedule A

(a) Group I:

(1) Persons who will be employed as physical therapists, and who possess all the qualifications necessary to take the physical therapist licensing examination in the state in which they propose to practice physical therapy.

(2) Aliens who will be employed as professional nurses; and

(i) Who have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS);

(ii) Who hold a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or

(iii) Who have passed the National Council Licensure Examination for Registered Nurses (NCLEX–RN), administered by the National Council of State Boards of Nursing.
(3) Definitions of Group I occupations:

(i) **Physical therapist** means a person who applies the art and science of physical therapy to the treatment of patients with disabilities, disorders and injuries to relieve pain, develop or restore function, and maintain performance, using physical means, such as exercise, massage, heat, water, light, and electricity, as prescribed by a physician (or a surgeon).

(ii) **Professional nurse** means a person who applies the art and science of nursing which reflects comprehension of principles derived from the physical, biological and behavioral sciences. Professional nursing generally includes making clinical judgments involving the observation, care and counsel of persons requiring nursing care; administering of medicines and treatments prescribed by the physician or dentist; and participation in the activities for the promotion of health and prevention of illness in others. A program of study for professional nurses generally includes theory and practice in clinical areas such as obstetrics, surgery, pediatrics, psychiatry, and medicine.

(b) Group II:

(1) **Sciences or arts (except performing arts).** Aliens (except for aliens in the performing arts) of exceptional ability in the sciences or arts including college and university teachers of exceptional ability who have been practicing their science or art during the year prior to application and who intend to practice the same science or art in the United States. For purposes of this group, the term “science or art” means any field of knowledge and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge and/or skill. An alien, however, need not have studied at a college or university in order to qualify for the Group II occupation.

(2) **Performing arts.** Aliens of exceptional ability in the performing arts whose work during the past 12 months did require, and whose intended work in the United States will require, exceptional ability.

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Subpart C—Labor Certification Process

§ 656.10 General instructions.

(a) **Filing of applications.** A request for a labor certification on behalf of any alien who is required by the Act to be a beneficiary of a labor certification in order to obtain permanent resident status in the United States may be filed as follows:

(1) Except as provided in paragraphs (a)(2), (3), and (4) of this section, an employer seeking a labor certification must file under this section and §656.17.

(2) An employer seeking a labor certification for a college or university teacher must apply for a labor certification under this section and must also file under either §656.17 or §656.18.

(3) An employer seeking labor certification for an occupation listed on Schedule A must apply for a labor certification under this section and §656.15.
(4) An employer seeking labor certification for a sheepherder must apply for a labor certification under this section and must also choose to file under either §656.16 or §656.17.

(b) Representation. (1) Employers may have agents or attorneys represent them throughout the labor certification process. If an employer intends to be represented by an agent or attorney, the employer must sign the statement set forth on the Application for Permanent Employment Certification form: That the attorney or agent is representing the employer and the employer takes full responsibility for the accuracy of any representations made by the attorney or agent. Whenever, under this part, any notice or other document is required to be sent to the employer, the document will be sent to the attorney or agent who has been authorized to represent the employer on the Application for Permanent Employment Certification form.

(2)(i) It is contrary to the best interests of U.S. workers to have the alien and/or agents or attorneys for either the employer or the alien participate in interviewing or considering U.S. workers for the job offered the alien. As the beneficiary of a labor certification application, the alien can not represent the best interests of U.S. workers in the job opportunity. The alien's agent and/or attorney can not represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien's agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative, as described in paragraph (b)(2)(ii) of this section.

(ii) The employer's representative who interviews or considers U.S. workers for the job offered to the alien must be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.

(3) No person under suspension or disbarment from practice before any court or before the DHS or the United States Department of Justice's Executive Office for Immigration Review is permitted to act as an agent, representative, or attorney for an employer and/or alien under this part.

(c) Attestations. The employer must certify to the conditions of employment listed below on the Application for Permanent Employment Certification under penalty of perjury under 18 U.S.C. 1621 (2). Failure to attest to any of the conditions listed below results in a denial of the application.

(1) The offered wage equals or exceeds the prevailing wage determined pursuant to §656.40 and §656.41, and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment;

(2) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage;

(3) The employer has enough funds available to pay the wage or salary offered the alien;

(4) The employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States;

(5) The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;
(6) The employer's job opportunity is not:

(i) Vacant because the former occupant is on strike or locked out in the course of a labor dispute involving a work stoppage;

(ii) At issue in a labor dispute involving a work stoppage.

(7) The job opportunity's terms, conditions and occupational environment are not contrary to Federal, state or local law;

(8) The job opportunity has been and is clearly open to any U.S. worker;

(9) The U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons;

(10) The job opportunity is for full-time, permanent employment for an employer other than the alien.

(d) Notice. (1) In applications filed under §§656.15 (Schedule A), 656.16 (Sheepherders), 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the Certifying Officer, as follows:

(i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.

(ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

(2) In the case of a private household, notice is required under this paragraph (d) only if the household employs one or more U.S. workers at the time the application for labor certification is filed. The documentation requirement may be satisfied by providing a copy of the posted notice to the Certifying Officer.

(3) The notice of the filing of an Application for Permanent Employment Certification must:

(i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
(ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;

(iii) Provide the address of the appropriate Certifying Officer; and

(iv) Be provided between 30 and 180 days before filing the application.

(4) If an application is filed under §656.17, the notice must contain the information required for advertisements by §656.17(f), must state the rate of pay (which must equal or exceed the prevailing wage entered by the SWA on the prevailing wage request form), and must contain the information required by paragraph (d)(3) of this section.

(5) If an application is filed on behalf of a college and university teacher selected in a competitive selection and recruitment process, as provided by §656.18, the notice must include the information required for advertisements by §656.18(b)(3), and must include the information required by paragraph (d)(3) of this section.

(6) If an application is filed under the Schedule A procedures at §656.15, or the procedures for sheepherders at §656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

(e)(1)(i) Submission of evidence. Any person may submit to the Certifying Officer documentary evidence bearing on an application for permanent alien labor certification filed under the basic labor certification process at §656.17 or an application involving a college and university teacher selected in a competitive recruitment and selection process under §656.18.

(ii) Documentary evidence submitted under paragraph (e)(1)(i) of this section may include information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions for the employment of alien workers and co-workers. The Certifying Officer must consider this information in making his or her determination.

(2)(i) Any person may submit to the appropriate DHS office documentary evidence of fraud or willful misrepresentation in a Schedule A application filed under §656.15 or a sheepherder application filed under §656.16.

(ii) Documentary evidence submitted under paragraph (e)(2) of this section is limited to information relating to possible fraud or willful misrepresentation. The DHS may consider this information under §656.31.

(f) Retention of documents. Copies of applications for permanent employment certification filed with the Department of Labor and all supporting documentation must be retained by the employer for 5 years from the date of filing the Application for Permanent Employment Certification.


§ 656.11 Substitutions and modifications to applications.

(a) Substitution or change to the identity of an alien beneficiary on any application for permanent labor
certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

(b) Requests for modifications to an application will not be accepted for applications submitted after July 16, 2007.

[72 FR 27944, May 17, 2007]

§ 656.12 Improper commerce and payment.

The following provision applies to applications filed under both this part and 20 CFR part 656 in effect prior to March 28, 2005, and to any certification resulting from those applications:

(a) Applications for permanent labor certification and approved labor certifications are not articles of commerce. They shall not be offered for sale, barter or purchase by individuals or entities. Any evidence that an application for permanent labor certification or an approved labor certification has been sold, bartered, or purchased shall be grounds for investigation under this part and may be grounds for denial under §656.24, revocation under §656.32, debarment under §656.31(f), or any combination thereof.

(b) An employer must not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application, except when work to be performed by the alien in connection with the job opportunity would benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer. For purposes of this paragraph (b), payment includes, but is not limited to, monetary payments; wage concessions, including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor.

(c) Evidence that an employer has sought or received payment from any source in connection with an application for permanent labor certification or an approved labor certification, except for a third party to whose benefit work to be performed in connection with the job opportunity would accrue, based on that person's or entity's established business relationship with the employer, shall be grounds for investigation under this part or any appropriate Government agency's procedures, and may be grounds for denial under §656.24, revocation under §656.32, debarment under §656.31(f), or any combination thereof.

[72 FR 27945, May 17, 2007]

§ 656.15 Applications for labor certification for Schedule A occupations.

(a) Filing application. An employer must apply for a labor certification for a Schedule A occupation by filing an application with the appropriate DHS office, and not with an ETA application processing center.
(b) **General documentation requirements.** A Schedule A application must include:

1. An *Application for Permanent Employment Certification* form, which includes a prevailing wage determination in accordance with §§656.40 and 656.41.

2. Evidence that notice of filing the *Application for Permanent Employment Certification* was provided to the bargaining representative or the employer's employees as prescribed in §656.10(d).

(c) **Group I documentation.** An employer seeking labor certification under Group I of Schedule A must file with DHS, as part of its labor certification application, documentary evidence of the following:

1. An employer seeking Schedule A labor certification for an alien to be employed as a physical therapist (§656.5(a)(1)) must file as part of its labor certification application a letter or statement, signed by an authorized state physical therapy licensing official in the state of intended employment, stating the alien is qualified to take that state's written licensing examination for physical therapists. Application for certification of permanent employment as a physical therapist may be made only under this §656.15 and not under §656.17.

2. An employer seeking a Schedule A labor certification for an alien to be employed as a professional nurse (§656.5(a)(2)) must file as part of its labor certification application documentation that the alien has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); that the alien holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment; or that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). Application for certification of employment as a professional nurse may be made only under this §656.15(c) and not under §656.17.

(d) **Group II documentation.** An employer seeking a Schedule A labor certification under Group II of Schedule A must file with DHS, as part of its labor certification application, documentary evidence of the following:

1. An employer seeking labor certification on behalf of an alien to be employed as an alien of exceptional ability in the sciences or arts (excluding those in the performing arts) must file documentary evidence showing the widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field; and documentation showing the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability. In addition, the employer must file documentation about the alien from at least two of the following seven groups:

   (i) Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought;

   (ii) Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields;

   (iii) Published material in professional publications about the alien, about the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material;

   (iv) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or an allied field of specialization to that for which certification is sought;
(v) Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought;

(vi) Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation;

(vii) Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

(2) An employer seeking labor certification on behalf of an alien of exceptional ability in the performing arts must file documentary evidence that the alien's work experience during the past twelve months did require, and the alien's intended work in the United States will require, exceptional ability; and must submit documentation to show this exceptional ability, such as:

(i) Documentation attesting to the current widespread acclaim and international recognition accorded to the alien, and receipt of internationally recognized prizes or awards for excellence;

(ii) Published material by or about the alien, such as critical reviews or articles in major newspapers, periodicals, and/or trade journals (the title, date, and author of such material shall be indicated);

(iii) Documentary evidence of earnings commensurate with the claimed level of ability;

(iv) Playbills and star billings;

(v) Documents attesting to the outstanding reputation of theaters, concert halls, night clubs, and other establishments in which the alien has appeared or is scheduled to appear; and/or

(vi) Documents attesting to the outstanding reputation of theaters or repertory companies, ballet troupes, orchestras, or other organizations in which or with which the alien has performed during the past year in a leading or starring capacity.

(e) Determination. An Immigration Officer determines whether the employer and alien have met the applicable requirements of §656.10 and of Schedule A (§656.5); reviews the application; and determines whether or not the alien is qualified for and intends to pursue the Schedule A occupation. The Schedule A determination of DHS is conclusive and final. The employer, therefore, may not appeal from any such determination under the review procedures at §656.26.

(f) Refiling after denial. If an application for a Schedule A occupation is denied, the employer, except where the occupation is as a physical therapist or a professional nurse, may at any time file for a labor certification on the alien beneficiary's behalf under §656.17. Labor certifications for professional nurses and for physical therapists shall not be considered under §656.17.

(a) **Filing requirements and required documentation.** (1) An employer may apply for a labor certification to employ an alien (who has been employed legally as a nonimmigrant sheepherder in the United States for at least 33 of the preceding 36 months) as a sheepherder by filing an *Application for Permanent Employment Certification* form directly with DHS, not with an office of DOL.

(2) A signed letter or letters from each U.S. employer who has employed the alien as a sheepherder during the immediately preceding 36 months, attesting the alien has been employed in the United States lawfully and continuously as a sheepherder for at least 33 of the immediately preceding 36 months, must be filed with the application.

(b) **Determination.** An Immigration Officer reviews the application and the letters attesting to the alien's previous employment as a sheepherder in the United States, and determines whether or not the alien and the employer(s) have met the requirements of this section.

(1) The determination of the Immigration Officer under this paragraph (b) is conclusive and final. The employer(s) and the alien, therefore, may not make use of the review procedures set forth at §§656.26 and 656.27 to appeal such a determination.

(2) If the alien and the employer(s) have met the requirements of this section, the Immigration Officer must indicate on the *Application for Permanent Employment Certification* form the occupation, the immigration office that made the determination, and the date of the determination (see §656.30 for the significance of this date). The Immigration Officer must then promptly forward a copy of the *Application for Permanent Employment Certification* form, without attachments, to the Office of Foreign Labor Certification (OFLC) Administrator.

(c) **Alternative filing.** If an application for a sheepherder does not meet the requirements of this section, the application may be filed under §656.17.


§ 656.17  **Basic labor certification process.**

(a) **Filing applications.** (1) Except as otherwise provided by §§656.15, 656.16, and 656.18, an employer who desires to apply for a labor certification on behalf of an alien must file a completed Department of Labor *Application for Permanent Employment Certification* form (ETA Form 9089). The application must be filed with an ETA application processing center. Incomplete applications will be denied. Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

(2) The Department of Labor may issue or require the use of certain identifying information, including user identifiers, passwords, or personal identification numbers (PINS). The purpose of these personal identifiers is to allow the Department of Labor to associate a given electronic submission with a single, specific individual. Personal identifiers can not be issued to a company or business. Rather, a personal identifier can
only be issued to specific individual. Any personal identifiers must be used solely by the individual to whom they are assigned and can not be used or transferred to any other individual. An individual assigned a personal identifier must take all reasonable steps to ensure that his or her personal identifier can not be compromised. If an individual assigned a personal identifier suspects, or becomes aware, that his or her personal identifier has been compromised or is being used by someone else, then the individual must notify the Department of Labor immediately of the incident and cease the electronic transmission of any further submissions under that personal identifier until such time as a new personal identifier is provided. Any electronic transmissions submitted with a personal identifier will be presumed to be a submission by the individual assigned that personal identifier. The Department of Labor's system will notify those making submissions of these requirements at the time of each submission.

(3) Documentation supporting the application for labor certification should not be filed with the application, however in the event the Certifying Officer notifies the employer that its application is to be audited, the employer must furnish required supporting documentation prior to a final determination.

(b) Processing. (1) Applications are screened and are certified, are denied, or are selected for audit.

(2) Employers will be notified if their applications have been selected for audit by the issuance of an audit letter under §656.20.

(3) Applications may be selected for audit in accordance with selection criteria or may be randomly selected.

(c) Filing date. Non-electronically filed applications accepted for processing shall be date stamped. Electronically filed applications will be considered filed when submitted.

(d) Refiling procedures. (1) Employers that filed applications under the regulations in effect prior to March 28, 2005, may, if a job order has not been placed pursuant to those regulations, refile such applications under this part without loss of the original filing date by:

(i) Submitting an application for an identical job opportunity after complying with all of the filing and recruiting requirements of this part 656; and

(ii) Withdrawing the original application in accordance with ETA procedures. Filing an application under this part stating the employer's desire to use the original filing date will be deemed to be a withdrawal of the original application. The original application will be deemed withdrawn regardless of whether the employer's request to use the original filing date is approved.

(2) Refilings under this paragraph must be made within 210 days of the withdrawal of the prior application.

(3) A copy of the original application, including amendments, must be sent to the appropriate ETA application processing center when requested by the CO under §656.20.

(4) For purposes of paragraph (d)(1)(i) of this section, a job opportunity shall be considered identical if the employer, alien, job title, job location, job requirements, and job description are the same as those stated in the original application filed under the regulations in effect prior to March 28, 2005. For purposes of determining identical job opportunity, the original application includes all accepted amendments up to the time the application was withdrawn, including amendments in response to an assessment notice from a SWA pursuant to §656.21(h) of the regulations in effect prior to March 28, 2005.
(e) **Required pre-filing recruitment.** Except for labor certification applications involving college or university teachers selected pursuant to a competitive recruitment and selection process (§656.18), *Schedule A* occupations (§§656.5 and 656.15), and sheepherders (§656.16), an employer must attest to having conducted the following recruitment prior to filing the application:

(1) **Professional occupations.** If the application is for a professional occupation, the employer must conduct the recruitment steps within 6 months of filing the application for alien employment certification. The employer must maintain documentation of the recruitment and be prepared to submit this documentation in the event of an audit or in response to a request from the Certifying Officer prior to rendering a final determination.

(i) **Mandatory steps.** Two of the steps, a job order and two print advertisements, are mandatory for all applications involving professional occupations, except applications for college or university teachers selected in a competitive selection and recruitment process as provided in §656.18. The mandatory recruitment steps must be conducted at least 30 days, but no more than 180 days, before the filing of the application.

(A) **Job order.** Placement of a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application shall serve as documentation of this step.

(B) **Advertisements in newspaper or professional journals.** (1) Placing an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, willing, qualified, and available U.S. workers.

(2) If the job opportunity is located in a rural area of intended employment that does not have a newspaper with a Sunday edition, the employer may use the edition with the widest circulation in the area of intended employment.

(3) The advertisements must satisfy the requirements of paragraph (f) of this section. Documentation of this step can be satisfied by furnishing copies of the newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper.

(4) If the job involved in the application requires experience and an advanced degree, and a professional journal normally would be used to advertise the job opportunity, the employer may, in lieu of one of the Sunday advertisements, place an advertisement in the professional journal most likely to bring responses from able, willing, qualified, and available U.S. workers. Documentation of this step can be satisfied by providing a copy of the page in which the advertisement appeared.

(ii) **Additional recruitment steps.** The employer must select three additional recruitment steps from the alternatives listed in paragraphs (c)(1)(ii)(A)-(J) of this section. Only one of the additional steps may consist solely of activity that took place within 30 days of the filing of the application. None of the steps may have taken place more than 180 days prior to filing the application.

(A) **Job fairs.** Recruitment at job fairs for the occupation involved in the application, which can be documented by brochures advertising the fair and newspaper advertisements in which the employer is named as a participant in the job fair.
(B) **Employer's Web site.** The use of the employer's Web site as a recruitment medium can be documented by providing dated copies of pages from the site that advertise the occupation involved in the application.

(C) **Job search Web site other than the employer's.** The use of a job search Web site other than the employer's can be documented by providing dated copies of pages from one or more website(s) that advertise the occupation involved in the application. Copies of web pages generated in conjunction with the newspaper advertisements required by paragraph (e)(1)(i)(B) of this section can serve as documentation of the use of a Web site other than the employer's.

(D) **On-campus recruiting.** The employer's on-campus recruiting can be documented by providing copies of the notification issued or posted by the college's or university's placement office naming the employer and the date it conducted interviews for employment in the occupation.

(E) **Trade or professional organizations.** The use of professional or trade organizations as a recruitment source can be documented by providing copies of pages of newsletters or trade journals containing advertisements for the occupation involved in the application for alien employment certification.

(F) **Private employment firms.** The use of private employment firms or placement agencies can be documented by providing documentation sufficient to demonstrate that recruitment has been conducted by a private firm for the occupation for which certification is sought. For example, documentation might consist of copies of contracts between the employer and the private employment firm and copies of advertisements placed by the private employment firm for the occupation involved in the application.

(G) **Employee referral program with incentives.** The use of an employee referral program with incentives can be documented by providing dated copies of employer notices or memoranda advertising the program and specifying the incentives offered.

(H) **Campus placement offices.** The use of a campus placement office can be documented by providing a copy of the employer's notice of the job opportunity provided to the campus placement office.

(I) **Local and ethnic newspapers.** The use of local and ethnic newspapers can be documented by providing a copy of the page in the newspaper that contains the employer's advertisement.

(J) **Radio and television advertisements.** The use of radio and television advertisements can be documented by providing a copy of the employer's text of the employer's advertisement along with a written confirmation from the radio or television station stating when the advertisement was aired.

(2) **Nonprofessional occupations.** If the application is for a nonprofessional occupation, the employer must at a minimum, place a job order and two newspaper advertisements within 6 months of filing the application. The steps must be conducted at least 30 days but no more that 180 days before the filing of the application.

   (i) **Job order.** Placing a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application serve as documentation of this step.

   (ii) **Newspaper advertisements.** (A) Placing an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity.
(B) If the job opportunity is located in a rural area of intended employment that does not have a newspaper that publishes a Sunday edition, the employer may use the newspaper edition with the widest circulation in the area of intended employment.

(C) Placement of the newspaper advertisements can be documented in the same way as provided in paragraph (e)(1)(i)(B)(3) of this section for professional occupations.

(D) The advertisements must satisfy the requirements of paragraph (f) of this section.

(f) Advertising requirements. Advertisements placed in newspapers of general circulation or in professional journals before filing the Application for Permanent Employment Certification must:

(1) Name the employer;

(2) Direct applicants to report or send resumes, as appropriate for the occupation, to the employer;

(3) Provide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought;

(4) Indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity;

(5) Not contain a wage rate lower than the prevailing wage rate;

(6) Not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089; and

(7) Not contain wages or terms and conditions of employment that are less favorable than those offered to the alien.

(g) Recruitment report. (1) The employer must prepare a recruitment report signed by the employer or the employer's representative noted in §656.10(b)(2)(ii) describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections. The Certifying Officer, after reviewing the employer's recruitment report, may request the U.S. workers' resumes or applications, sorted by the reasons the workers were rejected.

(2) A U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training. Rejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers.

(h) Job duties and requirements. (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones. To establish a business necessity, an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner.
(2) A foreign language requirement can not be included, unless it is justified by business necessity. Demonstrating business necessity for a foreign language requirement may be based upon the following:

(i) The nature of the occupation, e.g., translator; or

(ii) The need to communicate with a large majority of the employer's customers, contractors, or employees who can not communicate effectively in English, as documented by:

(A) The employer furnishing the number and proportion of its clients, contractors, or employees who can not communicate in English, and/or a detailed plan to market products or services in a foreign country; and

(B) A detailed explanation of why the duties of the position for which certification is sought requires frequent contact and communication with customers, employees or contractors who can not communicate in English and why it is reasonable to believe the allegedly foreign-language-speaking customers, employees, and contractors can not communicate in English.

(3) If the job opportunity involves a combination of occupations, the employer must document that it has normally employed persons for that combination of occupations, and/or workers customarily perform the combination of occupations in the area of intended employment, and/or the combination job opportunity is based on a business necessity. Combination occupations can be documented by position descriptions and relevant payroll records, and/or letters from other employers stating their workers normally perform the combination of occupations in the area of intended employment, and/or documentation that the combination occupation arises from a business necessity.

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(i) Actual minimum requirements. DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer’s actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer’s expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term “employer” means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at §656.3.

(ii) A “substantially comparable” job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

(j) Conditions of employment. (1) Working conditions must be normal to the occupation in the area and industry.

(2) Live-in requirements are acceptable for household domestic service workers only if the employer can demonstrate the requirement is essential to perform, in a reasonable manner, the job duties as described by the employer and there are not cost-effective alternatives to a live-in household requirement. Mere employer assertions do not constitute acceptable documentation. For example, a live-in requirement could be supported by documenting two working parents and young children in the household, and/or the existence of erratic work schedules requiring frequent travel and a need to entertain business associates and clients on short notice. Depending upon the situation, acceptable documentation could consist of travel vouchers, written estimates of costs of alternatives such as babysitters, or a detailed listing of the frequency and length of absences of the employer from the home.

(k) Layoffs. (1) If there has been a layoff by the employer applicant in the area of intended employment within 6 months of filing an application involving the occupation for which certification is sought or in a related occupation, the employer must document it has notified and considered all potentially qualified laid off (employer applicant) U.S. workers of the job opportunity involved in the application and the results of the notification and consideration. A layoff shall be considered any involuntary separation of one or more employees without cause or prejudice.

(2) For the purposes of paragraph (k)(1) of this section, a related occupation is any occupation that requires workers to perform a majority of the essential duties involved in the occupation for which certification is sought.

(l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

(1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
(2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;

(3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and

(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.

(5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

§ 656.18 Optional special recruitment and documentation procedures for college and university teachers.

(2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;

(3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and

(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.

(5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

§ 656.18 Optional special recruitment and documentation procedures for college and university teachers.

(a) Filing requirements. Applications for certification of employment of college and university teachers must be filed by submitting a completed Application for Permanent Employment Certification form to the appropriate ETA application processing center.

(b) Recruitment. The employer may recruit for college and university teachers under §656.17 or must be able to document the alien was selected for the job opportunity in a competitive recruitment and selection process through which the alien was found to be more qualified than any of the United States workers who applied for the job. For purposes of this paragraph (b), documentation of the “competitive recruitment and selection process” must include:

(1) A statement, signed by an official who has actual hiring authority from the employer outlining in detail the complete recruitment procedures undertaken; and which must set forth:

(i) The total number of applicants for the job opportunity;

(ii) The specific lawful job-related reasons why the alien is more qualified than each U.S. worker who applied for the job; and

(2) A final report of the faculty, student, and/or administrative body making the recommendation or selection of the alien, at the completion of the competitive recruitment and selection process;

(3) A copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements;

(4) Evidence of all other recruitment sources utilized; and

(5) A written statement attesting to the degree of the alien's educational or professional qualifications and academic achievements.

(c) Time limit for filing. Applications for permanent alien labor certification for job opportunities as college
and university teachers must be filed within 18 months after a selection is made pursuant to a competitive recruitment and selection process.

(d) Alternative procedure. An employer that can not or does not choose to satisfy the special recruitment procedures for a college or university teacher under this section may avail itself of the basic process at §656.17. An employer that files for certification of employment of college and university teachers under §656.17 or this section must be able to document, if requested by the Certifying Officer, in accordance with §656.24(a)(2)(ii), the alien was found to be more qualified than each U.S. worker who applied for the job opportunity.

§ 656.19 Live-in household domestic service workers.

(a) Processing. Applications on behalf of live-in household domestic service occupations are processed pursuant to the requirements of the basic process at §656.17.

(b) Required documentation. Employers filing applications on behalf of live-in household domestic service workers must provide, in event of an audit, the following documentation:

(1) A statement describing the household living accommodations, including the following:

(i) Whether the residence is a house or apartment;

(ii) The number of rooms in the residence;

(iii) The number of adults and children, and ages of the children, residing in the household; and

(iv) That free board and a private room not shared with any other person will be provided to the alien.

(2) Two copies of the employment contract, each signed and dated prior to the filing of the application by both the employer and the alien (not by their attorneys or agents). The contract must clearly state:

(i) The wages to be paid on an hourly and weekly basis;

(ii) Total hours of employment per week, and exact hours of daily employment;

(iii) That the alien is free to leave the employer's premises during all non-work hours except the alien may work overtime if paid for the overtime at no less than the legally required hourly rate;

(iv) That the alien will reside on the employer's premises;

(v) Complete details of the duties to be performed by the alien;

(vi) The total amount of any money to be advanced by the employer with details of specific items, and the terms of repayment by the alien of any such advance by the employer;

(vii) That in no event may the alien be required to give more than two weeks' notice of intent to leave the employment contracted for and the employer must give the alien at least two weeks' notice before terminating employment;
(viii) That a duplicate contract has been furnished to the alien;

(ix) That a private room and board will be provided at no cost to the worker; and

(x) Any other agreement or conditions not specified on the Application for Permanent Employment Certification form.

(3) Documentation of the alien's paid experience in the form of statements from past or present employers setting forth the dates (month and year) employment started and ended, hours of work per day, number of days worked per week, place where the alien worked, detailed statement of duties performed on the job, equipment and appliances used, and the amount of wages paid per week or month. The total paid experience must be equal to one full year's employment on a full-time basis. For example, two year's experience working half-days is the equivalent of one year's full time experience. Time spent in a household domestic service training course can not be included in the required one year of paid experience. Each statement must contain the name and address of the person who signed it and show the date on which the statement was signed. A statement not in English shall be accompanied by a written translation into English certified by the translator as to the accuracy of the translation, and as to the translator's competency to translate.

§ 656.20 Audit procedures.

(a) Review of the labor certification application may lead to an audit of the application. Additionally, certain applications may be selected randomly for audit and quality control purposes. If an application is selected for audit, the Certifying Officer shall issue an audit letter. The audit letter will:

(1) State the documentation that must be submitted by the employer;

(2) Specify a date, 30 days from the date of the audit letter, by which the required documentation must be submitted; and

(3) Advise that if the required documentation has not been sent by the date specified the application will be denied.

(i) Failure to provide documentation in a timely manner constitutes a refusal to exhaust available administrative remedies; and

(ii) The administrative-judicial review procedure provided in §656.26 is not available.

(b) A substantial failure by the employer to provide required documentation will result in that application being denied under §656.24 and may result in a determination by the Certifying Officer pursuant to §656.24 to require the employer to conduct supervised recruitment under §656.21 in future filings of labor certification applications for up to 2 years.

(c) The Certifying Officer may in his or her discretion provide one extension, of up to 30 days, to the 30 days specified in paragraph (a)(2) of this section.

(d) Before making a final determination in accordance with the standards in §656.24, whether in course of an audit or otherwise, the Certifying Officer may:
(1) Request supplemental information and/or documentation; or

(2) Require the employer to conduct supervised recruitment under §656.21.


§ 656.21 Supervised recruitment.

(a) Supervised recruitment. Where the Certifying Officer determines it appropriate, post-filing supervised recruitment may be required of the employer for the pending application or future applications pursuant to §656.20(b).

(b) Requirements. Supervised recruitment shall consist of advertising for the job opportunity by placing an advertisement in a newspaper of general circulation or in a professional, trade, or ethnic publication, and any other measures required by the CO. If placed in a newspaper of general circulation, the advertisement must be published for 3 consecutive days, one of which must be a Sunday; or, if placed in a professional, trade, or ethnic publication, the advertisement must be published in the next available published edition. The advertisement must be approved by the Certifying Officer before publication, and the CO will direct where the advertisement is to be placed.

(1) The employer must supply a draft advertisement to the CO for review and approval within 30 days of being notified that supervised recruitment is required.

(2) The advertisement must:

(i) Direct applicants to send resumes or applications for the job opportunity to the CO for referral to the employer;

(ii) Include an identification number and an address designated by the Certifying Officer;

(iii) Describe the job opportunity;

(iv) Not contain a wage rate lower than the prevailing wage rate;

(v) Summarize the employer's minimum job requirements, which can not exceed any of the requirements entered on the application form by the employer;

(vi) Offer training if the job opportunity is the type for which employers normally provide training; and

(vii) Offer wages, terms and conditions of employment no less favorable than those offered to the alien.

(c) Timing of advertisement. (1) The advertisement shall be placed in accordance with the guidance provided by the CO.

(2) The employer will notify the CO when the advertisement will be placed.

(d) Additional or substitute recruitment. The Certifying Officer may designate other appropriate sources of
workers from which the employer must recruit for U.S. workers in addition to the advertising described in paragraph (b) of this section.

(e) Recruitment report. The employer must provide to the Certifying Officer a signed, detailed written report of the employer's supervised recruitment, signed by the employer or the employer's representative described in §656.10(b)(2)(ii), within 30 days of the Certifying Officer's request for such a report. The recruitment report must:

1. Identify each recruitment source by name and document that each recruitment source named was contacted. This can include, for example, copies of letters to recruitment sources such as unions, trade associations, colleges and universities and any responses received to the employer's inquiries. Advertisements placed in newspapers, professional, trade, or ethnic publications can be documented by furnishing copies of the tear sheets of the pages of the publication in which the advertisements appeared, proof of publication furnished by the publication, or dated copies of the web pages if the advertisement appeared on the web as well as in the publication in which the advertisement appeared.

2. State the number of U.S. workers who responded to the employer's recruitment.

3. State the names, addresses, and provide resumes (other than those sent to the employer by the CO) of the U.S. workers who applied for the job opportunity, the number of workers interviewed, and the job title of the person who interviewed the workers.

4. Explain, with specificity, the lawful job-related reason(s) for not hiring each U.S. worker who applied. Rejection of one or more U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training, is not a lawful job-related reason for rejecting the U.S. workers. For the purpose of this paragraph (e)(4), a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.

(f) The employer shall supply the CO with the required documentation or information within 30 days of the date of the request. If the employer does not do so, the CO shall deny the application.

(g) The Certifying Officer in his or her discretion, for good cause shown, may provide one extension to any request for documentation or information.

§ 656.24 Labor certification determinations.

(a)(1) The Office of Foreign Labor Certification Administrator (OFLC Administrator) is the National Certifying Officer. The OFLC Administrator and the certifying officers in the ETA application processing centers have the authority to certify or deny labor certification applications.

(2) If the labor certification presents a special or unique problem, the Director of an ETA application processing center may refer the matter to the Office of Foreign Labor Certification Administrator (OFLC Administrator). If the OFLC Administrator has directed that certain types of applications or specific applications be handled in the ETA national office, the Directors of the ETA application processing centers shall refer such applications to the OFLC Administrator.
(b) The Certifying Officer makes a determination either to grant or deny the labor certification on the basis of whether or not:

(1) The employer has met the requirements of this part.

(2) There is in the United States a worker who is able, willing, qualified, and available for and at the place of the job opportunity.

(i) The Certifying Officer must consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. For the purposes of this paragraph (b)(2)(i), a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.

(ii) If the job involves a job opportunity as a college or university teacher, the U.S. worker must be at least as qualified as the alien.

(3) The employment of the alien will not have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. In making this determination, the Certifying Officer considers such things as: labor market information, the special circumstances of the industry, organization, and/or occupation, the prevailing wage in the area of intended employment, and prevailing working conditions, such as hours, in the occupation.

(c) The Certifying Officer shall notify the employer in writing (either electronically or by mail) of the labor certification determination.

(d) If a labor certification is granted, except for a labor certification for an occupation on Schedule A (§656.5) or for employment as a shepherder under §656.16, the Certifying Officer must send the certified application and complete Final Determination form to the employer, or, if appropriate, to the employer's agent or attorney, indicating the employer may file all the documents with the appropriate DHS office.

(e) If the labor certification is denied, the Final Determination form will:

(1) State the reasons for the determination;

(2) Quote the request for review procedures at §656.26 (a) and (b);

(3) Advise that failure to request review within 30 days of the date of the determination, as specified in §656.26(a), constitutes a failure to exhaust administrative remedies;

(4) Advise that, if a request for review is not made within 30 days of the date of the determination, the denial shall become the final determination of the Secretary;

(5) Advise that if an application for a labor certification is denied, and a request for review is not made in accordance with the procedures at §656.26(a) and (b), a new application may be filed at any time; and

(6) Advise that a new application in the same occupation for the same alien can not be filed while a request for review is pending with the Board of Alien Labor Certification Appeals.
(f) If the Certifying Officer determines the employer substantially failed to produce required documentation, or the documentation was inadequate, or determines a material misrepresentation was made with respect to the application, or if the Certifying Officer determines it is appropriate for other reasons, the employer may be required to conduct supervised recruitment pursuant to §656.21 in future filings of labor certification applications for up to two years from the date of the Final Determination.

(g)(1) The employer may request reconsideration within 30 days from the date of issuance of the denial.

(2) For applications submitted after July 16, 2007, a request for reconsideration may include only:

(i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or

(ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of §656.10(f).

(3) Paragraphs (g)(1) and (2) of this section notwithstanding, the Certifying Officer will not grant any request for reconsideration where the deficiency that caused denial resulted from the applicant's disregard of a system prompt or other direct instruction.

(4) The Certifying Officer may, in his or her discretion, reconsider the determination or treat it as a request for review under §656.26(a).


§ 656.26 Board of Alien Labor Certification Appeals review of denials of labor certification.

(a) Request for review. (1) If a labor certification is denied, if a labor certification is revoked pursuant to §656.32, or if a debarment is issued under §656.31(f), a request for review of the denial, revocation, or debarment may be made to the Board of Alien Labor Certification Appeals by the employer or debarred person or entity by making a request for such an administrative review in accordance with the procedures provided in paragraph (a) of this section. In the case of a finding of debarment, receipt by the Department of a request for review, if made in accordance with this section, shall stay the debarment until such time as the review has been completed and a decision rendered thereon.

(2) A request for review of a denial or revocation:

(i) Must be sent within 30 days of the date of the determination to the Certifying Officer who denied the application or revoked the certification;

(ii) Must clearly identify the particular labor certification determination for which review is sought;

(iii) Must set forth the particular grounds for the request; and

(iv) Must include a copy of the Final Determination.
(3) A request for review of debarment:

(i) Must be sent to the Administrator, Office of Foreign Labor Certification, within 30 days of the date of the debarment determination;

(ii) Must clearly identify the particular debarment determination for which review is sought;

(iii) Must set forth the particular grounds for the request; and

(iv) Must include a copy of the Notice of Debarment.

(4)(i) With respect to a denial of the request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based.

(ii) With respect to a revocation or a debarment determination, the BALCA proceeding may be de novo.

(b) Upon the receipt of a request for review, the Certifying Officer immediately must assemble an indexed Appeal File:

(1) The Appeal File must be in chronological order, must have the index on top followed by the most recent document, and must have consecutively numbered pages. The Appeal File must contain the request for review, the complete application file, and copies of all the written material, such as pertinent parts and pages of surveys and/or reports upon which the denial was based.

(2) The Certifying Officer must send the Appeal File to the Board of Alien Labor Certification Appeals, Office of Administrative Law Judges, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002.

(3) The Certifying Officer must send a copy of the Appeal File to the employer. The employer may furnish or suggest directly to the Board of Alien Labor Certification Appeals the addition of any documentation that is not in the Appeal File, but that was submitted to DOL before the issuance of the Final Determination. The employer must submit such documentation in writing, and must send a copy to the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

(c) Debarment Appeal File. Upon the receipt of a request for review of debarment, the Administrator, Office of Foreign Labor Certification, immediately must assemble an indexed Appeal File:

(1) The Appeal File must be in chronological order, must have the index on top followed by the most recent document, and must have consecutively numbered pages. The Appeal File must contain the request for review, the complete application file(s), and copies of all written materials, such as pertinent parts and pages of surveys and/or reports or documents received from any court, DHS, or the Department of State, upon which the debarment was based.

(2) The Administrator, Office of Foreign Labor Certification, must send the Appeal File to the Board of Alien Labor Certification Appeals, Office of Administrative Law Judges, 800 K St., NW., Suite 400–N, Washington, DC 20001–8002.

(3) The Administrator, Office of Foreign Labor Certification, must send a copy of the Appeal File to the
debarred person or entity. The debarred person or entity may furnish or suggest directly to the Board of Alien Labor Certification Appeals the addition of any documentation that is not in the Appeal File. The debarred person or entity must submit such documentation in writing, and must send a copy to the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210.


§ 656.27 Consideration by and decisions of the Board of Alien Labor Certification Appeals.

(a) Panel designations. In considering requests for review before it, the Board of Alien Labor Certification Appeals may sit in panels of three members. The Chief Administrative Law Judge may designate any Board of Alien Labor Certification Appeals member to submit proposed findings and recommendations to the Board of Alien Labor Certification Appeals or to any duly designated panel thereof to consider a particular case.

(b) Briefs and Statements of Position. In considering the requests for review before it, the Board of Alien Labor Certification Appeals must afford all parties 30 days to submit or decline to submit any appropriate Statement of Position or legal brief. The Certifying Officer is to be represented solely by the Solicitor of Labor or the Solicitor's designated representative.

(c) Review on the record. The Board of Alien Labor Certification Appeals must review a denial of labor certification under §656.24, a revocation of a certification under §656.32, or an affirmation of a prevailing wage determination under §656.41 on the basis of the record upon which the decision was made, the request for review, and any Statements of Position or legal briefs submitted and must:

(1) Affirm the denial of the labor certification, the revocation of certification, or the affirmation of the PWD; or

(2) Direct the Certifying Officer to grant the certification, overrule the revocation of certification, or overrule the affirmation of the PWD; or

(3) Direct that a hearing on the case be held under paragraph (e) of this section.

(d) Notifications of decisions. The Board of Alien Labor Certification Appeals must notify the employer, the Certifying Officer, and the Solicitor of Labor of its decision, and must return the record to the Certifying Officer unless the case has been set for hearing under paragraph (e) of this section.

(e) Hearings. (1) Notification of hearing. If the case has been set for a hearing, the Board of Alien Labor Certification Appeals must notify the employer, the alien, the Certifying Officer, and the Solicitor of Labor of the date, time, and place of the hearing, and that the hearing may be rescheduled upon written request and for good cause shown.

(2) Hearing procedure. (i) The “Rules of Practice and Procedure For Administrative Hearings Before the Office of Administrative Law Judges,” at 29 CFR part 18, apply to hearings under this paragraph (e).

(ii) For the purposes of this paragraph (e)(2), references in 29 CFR part 18 to: “administrative law judge”
mean the Board of Alien Labor Certification Appeals member or the Board of Alien Labor Certification Appeals panel duly designated under §656.27(a); “Office of Administrative Law Judges” means the Board of Alien Labor Certification Appeals; and “Chief Administrative Law Judge” means the Chief Administrative Law Judge in that official's function of chairing the Board of Alien Labor Certification Appeals.

§ 656.30 Validity of and invalidation of labor certifications.

(a) Priority date. (1) The filing date for a Schedule A occupation or shepherders is the date the application was dated by the Immigration Officer.

(2) The filing date, established under §656.17(c), of an approved labor certification may be used as a priority date by the Department of Homeland Security and the Department of State, as appropriate.

(b) Expiration of labor certifications. For certifications resulting from applications filed under this part and 20 CFR part 656 in effect prior to March 28, 2005, the following applies:

(1) An approved permanent labor certification granted on or after July 16, 2007 expires if not filed in support of a Form I–140 petition with the Department of Homeland Security within 180 calendar days of the date the Department of Labor granted the certification.


(c) Scope of validity. For certifications resulting from applications filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, the following applies:

(1) A permanent labor certification for a Schedule A occupation or shepherders is valid only for the occupation set forth on the Application for Alien Employment Certification (Form ETA 750) or the Application for Permanent Employment Certification (Form ETA 9089) and only for the alien named on the original application, unless a substitution was approved prior to July 16, 2007. The certification is valid throughout the United States unless the certification contains a geographic limitation.

(2) A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the Application for Alien Employment Certification (Form ETA 750) or the Application for Permanent Employment Certification (Form ETA 9089).

(d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in §656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as
appropriate, of the Department of Labor's Office of Inspector General.

(e) Duplicate labor certifications. (1) The Certifying Officer shall issue a duplicate labor certification at the written request of a Consular or Immigration Officer. The Certifying Officer shall issue such duplicate labor certifications only to the Consular or Immigration Officer who initiated the request.

(2) The Certifying Officer shall issue a duplicate labor certification to a Consular or Immigration Officer at the written request of an alien, employer, or an alien's or employer's attorney/agent. Such request for a duplicate labor certification must be addressed to the Certifying Officer who issued the labor certification; must include documentary evidence from a Consular or Immigration Officer that a visa application or visa petition, as appropriate, has been filed; and must include a Consular Office or DHS tracking number.

(3) A duplicate labor certification shall be issued by the Certifying Officer with the same filing and expiration dates, as described in paragraphs (a) and (b) of this section, as the original approved labor certification.


§ 656.31 Labor certification applications involving fraud, willful misrepresentation, or violations of this part.

The following provisions apply to applications filed under both this part and 20 CFR part 656 in effect prior to March 28, 2005, and to any certifications resulting from those applications.

(a) Denial. A Certifying Officer may deny any application for permanent labor certification if the officer finds the application contains false statements, is fraudulent, or was otherwise submitted in violation of the Department's permanent labor certification regulations.

(b) Possible fraud or willful misrepresentation. (1) If the Department learns an employer, attorney, or agent is involved in possible fraud or willful misrepresentation in connection with the permanent labor certification program, the Department will refer the matter to the Department of Justice, Department of Homeland Security, or other government entity, as appropriate, for investigation, and send a copy of the referral to the Department of Labor's Office of Inspector General (OIG). In these cases, or if the Department learns an employer, attorney, or agent is under investigation by the Department of Justice, Department of Homeland Security, or other government entity for possible fraud or willful misrepresentation in connection with the permanent labor certification program, the Department may suspend processing of any permanent labor certification application involving such employer, attorney, or agent until completion of any investigation and/or judicial proceedings. Unless the investigatory agency, in writing, requests the Department to do otherwise, the Department shall provide written notification to the employer of the suspension in processing.

(2) A suspension pursuant to paragraph (b)(1) of this section may last initially for up to 180 days. No later than 180 days after the suspension began, if no criminal indictment or information has been issued, or judicial proceedings have not been concluded, the National Certifying Officer may resume processing some or all of the applications, or may extend the suspension in processing until completion of any investigation and/or judicial proceedings.

(c) Criminal indictment or information. If the Department learns that an employer, attorney, or agent is
named in a criminal indictment or information in connection with the permanent labor certification program, the processing of applications related to that employer, attorney, or agent may be suspended until the judicial process is completed. Unless the investigatory or prosecutorial agency, in writing, requests the Department to do otherwise, the Department shall provide written notification to the employer of the suspension in processing.

(d) No finding of fraud or willful misrepresentation. If an employer, attorney, or agent is acquitted of fraud or willful misrepresentation charges, or if such criminal charges are withdrawn or otherwise fail to result in a finding of fraud or willful misrepresentation, the Certifying Officer shall decide each pending permanent labor certification application related to that employer, attorney, or agent on the merits of the application.

(e) Finding of fraud or willful misrepresentation. If an employer, attorney, or agent is found to have committed fraud or willful misrepresentation involving the permanent labor certification program, whether by a court, the Department of State or DHS, as referenced in §656.30(d), or through other proceedings:

(1) Any suspension of processing of pending applications related to that employer, attorney, or agent will terminate.

(2) The Certifying Officer will decide each such application on its merits, and may deny any such application as provided in §656.24 and in paragraph (a) of this section.

(3) In the case of a pending application involving an attorney or agent found to have committed fraud or willful misrepresentation, DOL will notify the employer associated with that application of the finding and require the employer to notify DOL in writing, within 30 days of the notification, whether the employer will withdraw the application, designate a new attorney or agent, or continue the application without representation. Failure of the employer to respond within 30 days of the notification will result in a denial. If the employer elects to continue representation by the attorney or agent, DOL will suspend processing of affected applications while debarment proceedings are conducted under paragraph (f) of this section.

(f) Debarment. (1) No later than six years after the date of filing of the labor certification application that is the basis for the finding, or, if such basis requires a pattern or practice as provided in paragraphs (f)(1)(iii), (iv), and (v) of this section, no later than six years after the date of filing of the last labor certification application which constitutes a part of the pattern or practice, the Administrator, Office of Foreign Labor Certification, may issue to an employer, attorney, agent, or any combination thereof a Notice of Debarment from the permanent labor certification program for a reasonable period of no more than three years, based upon any action that was prohibited at the time the action occurred, upon determining the employer, attorney, or agent has participated in or facilitated one or more of the following:

(i) The sale, barter, or purchase of permanent labor applications or certifications, or any other action prohibited under §656.12;

(ii) The willful provision or willful assistance in the provision of false or inaccurate information in applying for permanent labor certification;

(iii) A pattern or practice of a failure to comply with the terms of the Form ETA 9089 or Form ETA 750;

(iv) A pattern or practice of failure to comply in the audit process pursuant to §656.20;

(v) A pattern or practice of failure to comply in the supervised recruitment process pursuant to §656.21; or
(vi) Conduct resulting in a determination by a court, DHS or the Department of State of fraud or willful misrepresentation involving a permanent labor certification application, as referenced in §656.31(e).

(2) The Notice of Debarment shall be in writing; shall state the reason for the debarment finding, including a detailed explanation of how the employer, attorney or agent has participated in or facilitated one or more of the actions listed in paragraphs (f)(1)(i) through (v) of this section; shall state the start date and term of the debarment; and shall identify appeal opportunities under §656.26. The debarment shall take effect on the start date identified in the Notice of Debarment unless a request for review is filed within the time permitted by §656.26. DOL will notify DHS and the Department of State regarding any Notice of Debarment.

(g) False statements. To knowingly and willfully furnish any false information in the preparation of the Application for Permanent Employment Certification (Form ETA 9089) or the Application for Alien Employment Certification (Form ETA 750) and any supporting documentation, or to aid, abet, or counsel another to do so is a Federal offense, punishable by fine or imprisonment up to five years, or both under 18 U.S.C. 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S.C. 1546 and 1621.

[72 FR 27946, May 17, 2007]

§ 656.32 Revocation of approved labor certifications.

(a) Basis for DOL revocation. The Certifying Officer in consultation with the Chief, Division of Foreign Labor Certification may take steps to revoke an approved labor certification, if he/she finds the certification was not justified. A labor certification may also be invalidated by DHS or the Department of State as set forth in §656.30(d).

(b) Department of Labor procedures for revocation. (1) The Certifying Officer sends to the employer a Notice of Intent to Revoke an approved labor certification which contains a detailed statement of the grounds for the revocation and the time period allowed for the employer’s rebuttal. The employer may submit evidence in rebuttal within 30 days of receipt of the notice. The Certifying Officer must consider all relevant evidence presented in deciding whether to revoke the labor certification.

(2) If rebuttal evidence is not filed by the employer, the Notice of Intent to Revoke becomes the final decision of the Secretary.

(3) If the employer files rebuttal evidence and the Certifying Officer determines the certification should be revoked, the employer may file an appeal under §656.26.

(4) The Certifying Officer will inform the employer within 30 days of receiving any rebuttal evidence whether or not the labor certification will be revoked.

(5) If the labor certification is revoked, the Certifying Officer will also send a copy of the notification to the DHS and the Department of State.

Subpart D—Determination of Prevailing Wage
§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) Application process. The employer must request a PWD from the NPC, on a form or in a manner prescribed by OFLC. Prior to January 1, 2010, the SWA having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009. On or after January 1, 2010, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with sec. 212(t) of the INA. Unless the employer chooses to appeal the center’s PWD under §656.41(a) of this part, it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

(b) Determinations. The National Processing Center will determine the appropriate prevailing wage as follows:

(1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between the union and the employer, the wage rate set forth in the CBA agreement is considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it is considered the “prevailing wage” for labor certification purposes.

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(3) of this section, of the wages of workers similarly employed in the area of intended employment. The wage component of the DOL Occupational Employment Statistics Survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (g) of this section.

(3) If the employer provides a survey acceptable under paragraph (g) of this section that provides a median and does not provide an arithmetic mean, the prevailing wage applicable to the employer’s job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.

(4) The employer may utilize a current wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR part 1, or the McNamara-O’Hara Service Contract Act, 41 U.S.C. 351 et seq.

(c) Validity period. The National Processing Center must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a prevailing wage rate provided by the NPC, employers must file their applications or begin the recruitment period required by §§656.17(e) or 656.21 of this part within the validity period specified by the NPC.

(d) Similarly employed. For purposes of this section, similarly employed means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the occupational category can not be obtained in the area of intended employment, similarly employed means:
(1) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(e) Institutions of higher education and research entities. In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment for an employee of an institution of higher education, or an affiliated or related nonprofit entity, a nonprofit research organization, or a Governmental research organization, the prevailing wage level takes into account the wage levels of employees only at such institutions and organizations in the area of intended employment.

(1) The organizations listed in this paragraph (e) are defined as follows:

(i) Institution of higher education means an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965. Section 101(a) of that Act, 20 U.S.C. 1001(a)(2000), provides an institution of higher education is an educational institution in any state that:

(A) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;

(B) Is legally authorized within such state to provide a program of education beyond secondary education;

(C) Provides an educational program for which the institution awards a bachelor's degree or provides not less than a two-year program that is acceptable for full credit toward such a degree;

(D) Is a public or other nonprofit institution; and

(E) Is accredited by a nationally recognized accrediting agency or association or, if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary of Education for the granting of preaccreditation status, and the Secretary of Education has determined there is satisfactory assurance the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(ii) Affiliated or related nonprofit entity means a nonprofit entity (including but not limited to a hospital and a medical or research institution) connected or associated with an institution of higher education, through shared ownership or control by the same board or federation, operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

(iii) Nonprofit research organization or Governmental research organization means a research organization that is either a nonprofit organization or entity primarily engaged in basic research and/or applied research, or a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. 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. It may include research and investigation in the
sciences, social sciences, or humanities.

(2) Nonprofit organization or entity, for the purpose of this paragraph (e), means an organization qualified as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6) (26 U.S.C. 501(c)(3), (c)(4) or (c)(6)), and which has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

(f) Professional athletes. In computing the prevailing wage for a professional athlete (defined in Section 212(a)(5)(A)(iii)(II) of the Act) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage (see Section 212(p)(2) of the Act). INA Section 212(a)(5)(A)(iii)(II), 8 U.S.C. 1182(a)(5)(A)(iii)(II) (1999), defines “professional athlete” as an individual who is employed as an athlete by—

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

(g) Employer-provided wage information. (1) If the job opportunity is not covered by a CBA, or by a professional sports league’s rules or regulations, the NPC will consider wage information provided by the employer in making a PWD. An employer survey can be submitted either initially or after NPC issuance of a PWD derived from the OES survey. In the latter situation, the new employer survey submission will be deemed a new PWD request.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the NPC with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the NPC to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC national office.

(3) The survey submitted to the NPC must be based upon recently collected data.

(i) A published survey must have been published within 24 months of the date of submission to the NPC, must be the most current edition of the survey, and the data upon which the survey is based must have been collected within 24 months of the publication date of the survey.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted to the NPC.

(4) If the employer-provided survey is found not to be acceptable, the NPC will inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for NPC consideration is not acceptable, may file supplemental information as provided by paragraph (h) of this section, file a new request for a PWD, or appeal under §656.41.

(h) Submittal of supplemental information by employer. (1) If the employer disagrees with the skill level assigned to its job opportunity, or if the NPC informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer may submit supplemental information to the
NPC.

(2) The NPC will consider one supplemental submission about the employer's survey or the skill level the NPC assigned to the job opportunity or any other legitimate basis for the employer to request such a review. If the NPC does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, it will inform the employer of the reasons for its decision.

(3) The employer may then apply for a new wage determination or appeal under §656.41 of this part.

(i) Frequent users. The Secretary will issue guidance regarding the process by which employers may obtain a wage determination to apply to a subsequent application, when the wage is for the same occupation, skill level, and area of intended employment. In no case may the wage rate the employer provides the NPC be lower than the highest wage required by any applicable Federal, State, or local law.

(j) Fees prohibited. No SWA or SWA employee may charge a fee in connection with the filing of a request for a PWD, responding to such a request, or responding to a request for a review of a SWA prevailing wage determination under §656.41.


§ 656.41 Review of prevailing wage determinations.

(a) Review of NPC PWD. Any employer desiring review of a PWD made by a CO must make a request for such review within 30 days of the date from when the PWD was issued. The request for review must be sent to the director of the NPC that issued the PWD within 30 days of the date of the PWD; clearly identify the PWD from which review is sought; set forth the particular grounds for the request; and include all the materials pertaining to the PWD submitted to the NPC up to the date of the PWD received from the NPC.

(b) Processing of request by NPC. Upon the receipt of a request for review, the NPC will review the employer's request and accompanying documentation, and add any material that may have been omitted by the employer, including any material the NPC sent the employer up to the date of the PWD.

(c) Review on the record. The director will review the PWD solely on the basis upon which the PWD was made and, upon the request for review, may either affirm or modify the PWD.

(d) Request for review by BALCA. Any employer desiring review of the director's determination must make a request for review by the BALCA within 30 days of the date of the Director's decision.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the director made his/her affirmation of the PWD.

(2) The request for review must be in writing and addressed to the director of the NPC making the determination. Upon receipt of a request for a review, the director will assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The director will send the Appeal File to the Office of Administrative Law Judges, BALCA. The
BALCA handles the appeals in accordance with §§656.26 and 656.27.

[73 FR 78069, Dec. 19, 2008]