

§ 656.24

20 CFR Ch. V (4-1-14 Edition)

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 shepherd 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

§ 656.26

20 CFR Ch. V (4-1-14 Edition)

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).

[69 FR 77386, Dec. 27, 2004, as amended at 71 FR 35523, June 21, 2006; 72 FR 27945, May 17, 2007]

§ 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