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Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System; Proposed Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

RIN 1205–AA66

Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System

AGENCIES: Wage and Hour Division, Employment Standards Administration, and Employment and Training Administration, Labor.

ACTION: Proposed rule; request for comments.

SUMMARY: The Department of Labor is proposing to amend its regulations governing the filing and processing of labor certification applications for the permanent employment of aliens in the United States to implement a new system for filing and processing such applications. The proposed rule would also amend the regulations governing the employer's wage obligation under the H–1B program. The new system would require employers to conduct recruitment before filing their applications directly with an ETA application processing center on application forms designed for automated screening and processing. State Workforce Agencies (SWA's) would provide prevailing wage determinations to employers. Employers would be required to place a job order with the SWA which would be processed the same as any other job order placed by employers. SWA's would no longer be the intake point for submission of applications and would not be involved in processing the applications as they are now in the present system. The combination of prefiling recruitment, automated processing of applications, and elimination of the role of the SWA's in the processing of applications will yield a large reduction in the average time needed to process labor certification applications and are expected to eliminate the need to periodically institute special, resource intensive efforts to reduce backlogs which have been a recurring problem.

DATES: Interested persons are invited to submit written comments on the proposed rule on or before July 5, 2002.

ADDRESSES: Submit written comments to the Assistant Secretary for Employment and Training, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4318, Washington, DC 20210, Attention: Dale Ziegler, Chief, Division of Foreign Labor Certifications.

FOR FURTHER INFORMATION CONTACT: Denis M. Gruskin, Senior Specialist, Division of Foreign Labor Certifications, Employment and Training Administration, 200 Constitution Avenue, NW., Room C–4318, Washington, DC 20210. Telephone: (202) 693–2953 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:

I. Background

The process for obtaining a permanent labor certification has been criticized as being complicated, time consuming and requiring the expenditure of considerable resources by employers, SWA's and the Federal Government. It can take up to two years or more to complete the process for applications that are filed under the basic process and do not utilize the more streamlined reduction in recruitment (RIR) process. The reduction in recruitment process allows employers that request RIR processing to conduct recruitment before filing their applications and these applications are evaluated on the basis of such recruitment.

The redesigned system we envision would require employers to conduct recruitment before filing their applications. Employers would be required to conduct both mandatory and alternative recruitment steps. The alternative steps would be chosen by the employer from a list of additional recruitment steps in the regulations. The employer would not be required to submit any documentation with its application, but would be expected to have assembled supporting documentation specified in the regulations and would be required to provide it in the event its application is selected for audit.

Employers would be required to submit their applications on forms designed for automated processing to minimize manual intervention to an ETA application processing center for automated screening and processing. After an application has been determined to be acceptable for filing, an automated system would review it based upon various selection criteria that would allow applications to be identified for potential audits before determinations could be made. In addition, some applications would be randomly selected as a quality control measure for an audit without regard to the results of the computer analysis.

A complete application would consist of two forms. *An Application for Permanent Labor Certification* form (ETA Form 9089) and a *Prevailing Wage Determination Request* (PWDR) form (ETA Form 9088). The application form would require the employer to respond to 56 items. The majority of the items on the application form would consist of attestations which would require the employer to do no more than check ''yes'', ''no'', or ''NA'' (not applicable) as a response. These attestations and other information required by the application form elicit information similar to that required by the current labor certification process. For example, the employer will have to attest to, such items as: whether the employer provided notice of the application to the bargaining representative or its employees; whether the alien beneficiary gained any of the qualifying experience with the employer; whether the alien is currently employed by the employer; whether a foreign language requirement is required to perform the job duties; and whether the U.S. applicants were rejected solely for lawful job related reasons. (The term ''applicant'' is defined at § 656.3 as an U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Permanent Labor Certification* (ETA Form 9089). The term ''U.S. Worker'' is also defined at § 656.3.) The wage offered on the application form would be required to be to equal to or greater than the prevailing wage determination entered by the SWA on the PWDR form described below. Comments are requested on ETA forms 9088 and 9089 which are published at the end of this NPRM.

The application form, however, would not require the employer to provide a job description, or detailed job requirements. The job description and job requirements would be entered on the PWDR form, which the employer would be required to submit to the SWA for a prevailing wage determination. The SWA would enter its prevailing wage determination on the form and return it to the employer with its endorsement. The employer would be required to submit both forms to an ETA servicing office for processing and a determination.

The employer would not be required to provide any supporting documentation with its application but would be required to furnish supporting documentation to support the attestations and other information provided on the form if the application was selected for an audit. The standards used in adjudicating applications under the new system would be substantially the same as those used in arriving at a determination in the current system.

The determination would still be based on: whether the employer has met the requirements of the regulations; whether there are insufficient workers who are able, willing, qualified and available; and whether the employment of the alien will have an adverse effect on the wages and working conditions of U.S. workers similarly employed.

SWA's would no longer be the intake point for submission of applications for permanent alien employment certification and would not be required to be the source of recruitment and referral of U.S. workers as they are in the present system. The required role of SWA's in the redesigned permanent labor certification process would be limited to providing prevailing wage determinations (PWD). Employers would be required to submit a PWDR form to SWA's to obtain a PWD before filing their applications with an ETA application processing center. The SWA's would, as they do under the current process, evaluate the particulars of the employer's job offer, such as the job duties and requirements for the position and the geographic area in which the job is located, to arrive at a PWD.

The combination of prefiling recruitment, automated processing of applications, and elimination of the SWA's' required role in the recruitment and referral of U.S. workers would yield a large reduction in the average time needed to process labor certification applications and would also eliminate the need to institute special, resource intensive efforts to reduce backlogs which have been a recurring problem.

The proposed labor certification application and PWDR have been designed to be machine readable or directly completed in a web-based environment. Initially, depending upon whether or not a processing fee is implemented, applications will be on forms which can be submitted by facsimile transmission or by mail and will be subject to an initial acceptability check to determine whether the application can be processed. If a fee for processing the application is required, all applications will have to be submitted by mail. (However, as indicated in section IV.E, of the preamble below, the Department cannot promulgate and implement a fee charging rule until Congress passes the necessary authorizing legislation.) In the long-term, ETA will be exploring the possibility of further automating the process so that applications and PWDR's may be submitted electronically to an application processing center whether or not a fee is required to be submitted with an application.

After an application, including the PWDR, has been determined to be acceptable for filing, a computer system will review the application based upon various selection criteria that will allow more problematic applications to be identified for audit. Additionally, we anticipate that some applications will be randomly selected for an audit without regard to the results of the computer analysis as a quality control measure. If an audit has not been triggered by the information provided on the application or because of a random selection, the application will be certified and returned to the employer. The employer may then submit the certified application to the Immigration and Naturalization Service (INS) in support of an employment-based I–140 petition. We anticipate that if an application is not selected for an audit, an employer will have a computer-generated decision within 21 calendar days of the date the application was initially filed.

If an application is selected for an audit, the employer will be notified and required to submit, in a timely manner, documentation specified in the regulations to verify the information stated in or attested to on the application. Upon timely receipt of an employer's audit documentation, the application will be distributed to the appropriate ETA regional office where it will be reviewed by the regional Certifying Officer.

After an audit has been completed, the proposed rule provides that the Certifying Officer can certify the application; deny the application; or order supervised recruitment. If the audit documentation is complete and consistent with the employer's statements and attestations contained in the application, the application will be certified and returned to the employer. If the audit documentation is incomplete, is inconsistent with the employer's statements and/or attestations contained in the application, or if the application is otherwise deficient in some material respect, the application will be denied and a notification of denial with the reasons therefor will be issued to the employer. If an application is denied, the employer will be able to request review of the Certifying Officer's decision by the Board of Alien Labor Certification Appeals (Board or BALCA). Additionally, on any application selected for an audit, the regional Certifying Officer will have the authority to request additional information before making a final determination or order supervised recruitment for the employer's job opportunity in any case where questions arise regarding the adequacy of the employer's test of the labor market.

The supervised recruitment that may be required by the regional Certifying Officer, is similar to the current non-RIR regulatory recruitment scheme under the current basic process which requires placement of an advertisement in conjunction with a 30-day job order by the employer. The recruitment, however, will be supervised by ETA regional offices instead of the SWA's. At the completion of the supervised recruitment efforts, the employer will be required to document in a recruitment report that such efforts were unsuccessful, including the lawful, job-related reasons for not hiring any U.S. workers who applied for the position. After a review of the employer's documentation, the regional Certifying Officer will either certify or deny the application. In all instances in which an application is denied, the denial notification will set forth the deficiencies upon which the denial is based. The employer would be able to seek administrative-judicial review of a denial.

II. Statutory Standard

Before the Immigration and Naturalization Service (INS) may approve petition requests and the Department of State may issue visas and admit certain immigrant aliens to work permanently in the United States, the Secretary of Labor must first certify to the Secretary of State and to the Attorney General that:

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

(b) The employment of the alien will not adversely affect the wages and working conditions of similarly employed United States workers. (8 U.S.C. 1182(a)(5)(A)).

If the Secretary, through ETA, determines that there are no able, willing, qualified, and available U.S. workers and that employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers, DOL so certifies to the INS and to the Department of State, by issuing a permanent alien labor certification.

If DOL cannot make one or both of the above findings, the application for permanent alien employment certification is denied. DOL may be unable to make the two required

findings for one or more reasons, including:

(a) The employer has not adequately recruited U.S. workers for the job offered to the alien, or has not followed the proper procedural steps in 20 CFR part 656.

(b) The employer has not met its burden of proof under section 291 of the Immigration and Nationality Act (INA or Act.) (8 U.S.C. 1361), that is, the employer has not submitted sufficient evidence of its attempts to obtain available U.S. workers, and/or the employer has not submitted sufficient evidence that the wages and working conditions which the employer is offering will not adversely affect the wages and working conditions of similarly employed U.S. workers.

III. Current Department of Labor Regulations

The Department of Labor has promulgated regulations, at 20 CFR part 656, governing the labor certification process for the permanent employment of immigrant aliens in the United States. Part 656 was promulgated under section 212(a)(14) of the INA (now at section 212(a)(5)(A)). 8 U.S.C. 1182(a)(5)(A).

The regulations at 20 CFR part 656 set forth the factfinding process designed to develop information sufficient to support the granting or denial of a permanent labor certification. These regulations describe the nationwide system of public State Workforce Agency offices available to assist employers in finding available U.S. workers and how the factfinding process is utilized by DOL as the basis of information for the certification determination. See also 20 CFR parts 651 through 658, and the Wagner-Peyser Act (29 U.S.C. Chapter 4B).

Part 656 also sets forth the responsibilities of employers who desire to employ immigrant aliens permanently in the United States. Such employers are required to demonstrate that they have attempted to recruit U.S. workers through advertising, through the Federal-State Employment Service/ One-Stop System, and by other specified means. The purpose of the recruitment process is to assure that there is an adequate test of the availability of U.S. workers to perform the work and to ensure that aliens are not employed under conditions that would adversely affect the wages and working conditions of similarly employed U.S. workers.

In brief, the current process for obtaining a labor certification requires employers to actively recruit U.S. workers in good faith for a period of at least 30 days for the job openings for which aliens are sought. The employer's job requirements must conform to the regulatory standards (e.g., those normally required for the job), and employers must offer prevailing wages and working conditions for the occupation in the area in which the job is located. Further, employers may not favor aliens or tailor the job requirements to any particular alien's qualifications.

During the 30-day recruitment period, employers are required to place a three-day help-wanted advertisement in a newspaper of general circulation, or a one-day advertisement in a professional, trade, or business journal, or in an appropriate ethnic publication. Employers are also required to place a 30-day job order with the local office of the State Workforce Agency in the state in which the employer seeks to employ the alien. Alternatively, if employers believe they have already conducted adequate recruitment efforts seeking qualified U.S. workers at prevailing wages and working conditions through sources normal to the occupation and industry, they may request a waiver of the otherwise mandatory 30-day recruitment efforts. This waiver process is generally referred to as involving ''Reduction in Recruitment'' applications. If the employer does not request RIR processing or if the request is denied, the help-wanted advertisements which are placed in conjunction with the mandatory thirty-day recruitment effort direct job applicants to either report in person to the State Workforce Agency office or to submit resumes to the State Workforce Agency.

Job applicants are either referred directly to the employer or their résumés are sent to the employer. The employer then has 45 days to report to the State Workforce Agency the lawful, job-related reasons for not hiring any U.S. worker referred. If the employer hires a U.S. worker for the job opening, the process stops at that point, unless the employer has more than one opening, in which case the application may continue to be processed. If, however, the employer believes that able, willing and qualified U.S. workers are not available to take the job, the application, together with the documentation of the recruitment results and prevailing wage information, are sent to one of the Department's regional offices. There, it is reviewed and a determination is made as to whether or not to issue the labor certification based upon the employer's compliance with the regulations governing the program. If the Department of Labor determines that there are no able, willing, qualified and available U.S. workers, and that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers, we so certify to the INS and the DOS, by issuing a permanent labor certification. See 20 CFR part 656; see also section 212(a)(5)(A) of the Immigration and Nationality Act, as amended (INA).

IV. Discussion of Regulatory Amendments

A. Definitions

We have made several changes to the definitions of the terms used in part 656. With the exception of the change of the definition of the term ''employer,'' substantive changes in definitions are discussed along with substantive changes in the relevant regulatory provisions.

The definition of employer would be amended to reflect the longstanding policy articulated in *Technical Assistance Guide No. 656 Labor Certifications*, issued in 1981 that:

- Persons who are temporarily in the United States, such as foreign diplomats, intracompany transferees, students, exchange visitors, and representatives of foreign information media cannot be employers for the purpose of obtaining a labor certification for permanent employment; and
- Job opportunities consisting solely of job duties that will be performed totally outside the United States, its territories or possessions cannot be the subject of a permanent application for alien employment certification.

B. Schedule A

1. General

Schedule A is a list of occupations for which DOL has precertified job opportunities, having made determinations that qualified U.S. workers are not able, willing, and available, and that alien employment will not adversely affect the wages and working conditions of similarly employed U.S. workers. See 20 CFR 656.10 and 656.22. Certification applications are filed with INS or the Department of State, and those agencies determine whether an individual application has been precertified by DOL.

2. Professional Nurses

We have conformed the general description of aliens seeking *Schedule A* labor certification as professional nurses at § 656.5(a)(1) (currently § 656.10(a)(2)) to the procedures at § 656.15(c)(2)

(currently § 656.22(c)(2)) to indicate that only a permanent license can be used to satisfy the alternative requirement to passing the Commission on Graduates of Foreign Nursing Schools exam that the alien hold a full and unrestricted license to practice professional nursing in the State of intended employment. INS has informed us that it has received applications with temporary licenses or permits filed as supporting documentation to *Schedule A* applications. Our intent in promulgating the current *Schedule A* procedures for professional nurses was to put an end to the pre-1981 practice whereby some nurses entered the United States on temporary licenses and permits, but failed to pass State examinations for a permanent license. As we have stated with respect to this issue, ''it is not in the public interest to grant certification to nurses who will not be able to practice their profession or who will likely limit or otherwise adversely affect the wages or job opportunities for U.S. workers in lower-skilled jobs.'' 45 FR 83926, 83927 (December 19, 1980); see also 20 CFR 656.22(c)(2) (1991).

To be consistent with the description of the other occupational groups on Schedule A, the definition of professional nurse would be moved from the section containing the definitions, at § 656.3 in the current rule, to the section providing a general description of *Schedule A,* at § 656.5 in the proposed rule.

3. Aliens of Exceptional Ability In the Performing Arts

The amendments would remove aliens of exceptional ability in the performing arts from the special handling procedures and include them on *Schedule A* as a separate category. The employer or the alien will have to submit to INS the documentation currently required by 20 CFR 656.21a(a)(1)(iv)(A)(*1*) through (a)(1)(iv)(A)(*6*) of the current regulations. Current recruitment requirements consisting of an advertisement or a statement from the union, if customarily used as a recruitment source in the area or industry, will no longer be required. As a practical matter, under 20 CFR 656.21a, once we determined that an alien was of exceptional ability in the performing arts, certification was issued in virtually all such cases. INS can make this determination as readily as DOL. Such determinations are similar to determinations Immigration Officers make for aliens of exceptional ability in the sciences and arts under Group II of *Schedule A.* In both cases a determination has to be made whether or not the alien's work during the past year and intended work in the United States will require exceptional ability.

Aliens of exceptional ability in the sciences or arts comprise Group II of *Schedule A.* We have delegated the determination whether an alien beneficiary of a labor certification application qualifies for *Schedule A* to the Immigration and Naturalization Service (INS). *Schedule A* applications are filed with the INS; not with the Department of Labor. The current and proposed regulations provide that the *Schedule A* determination of the INS shall be conclusive and final. Therefore the employer may not make use of the administrative review procedures in Part 656. The INS, however, in the process of making its *Schedule A* determination may request an advisory opinion as to whether an alien is qualified for the *Schedule A* occupation from the Division of Foreign Labor Certifications.

We have also concluded, based on the small number of applications submitted on behalf of aliens of exceptional ability in the performing arts and experience in evaluating the required recruitment reports submitted in conjunction with such applications, that there are few performing artists, whether alien beneficiaries or U.S. workers, who can satisfy the standards to qualify as an alien of exceptional ability in the performing arts as defined in the regulations. Consequently, the admission of the few aliens who may qualify as aliens of exceptional ability in the performing arts will not have an adverse effect on the wages and working conditions of U.S. performing artists.

C. Schedule B

Schedule B is a list of occupations for which we determined that U.S. workers are generally able, willing, qualified and available, and that the wages and working conditions of United States workers similarly employed will generally be adversely affected by the employment of aliens in the United States in such occupations. (See 20 CFR 656.11(a) and 23(a) and (b)). The current regulations require that a waiver must be obtained to receive certification of *Schedule B* jobs. A request for a waiver must be filed along with the application to obtain a certification for an occupation listed on *Schedule B.*

We propose to eliminate *Schedule B,* because program experience indicates that it has not contributed any measurable protection to U.S. workers. Once an employer files a *Schedule B* waiver, the application is processed the same as any other application processed under the non-RIR, basic process. Whether or not an application for a *Schedule B* occupation is certified is dependent on the results of the basic labor market test detailed in § 656.21 of the current regulations.

D. General Instructions

1. Expansion of Posting Requirement

The posting regulation at § 656.10(d)(ii) in the proposed rule has been expanded to require in addition to a posting a notice of the *Application for Permanent Labor Certification* (ETA Form 9089), that the employer must publish the posting in any and all in-house media, whether electronic or printed, in accordance with the normal procedures generally used in recruiting for other positions in the employer's organization. Employers must also be prepared to provide documentation of the posting requirements in the event of an audit.

2. Ability to Pay and Place the Alien on the Payroll

The current regulations and *Application for Alien Employment Certification* form (ETA 750) require that the employer document that it ''has enough funds available to pay the wage or salary offered the alien'', and that ''(t)he 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''. We propose to eliminate these provisions from the regulations and the *Application for Alien Employment Certification* form, since our examination of these issues is a duplication of the examination of the employer's financial standing and the ability to place the alien on the payroll undertaken by the INS when it processes the employer's petition. Moreover, these provisions are also unnecessary because the underlying issues could still be addressed because we are proposing to retain the provision in the current regulations that ''(t)he job opportunity has been and is clearly open to any qualified U.S. worker.'' If the employer is not in a position to pay the alien and/or place him or her on the payroll, it is not offering a job opportunity that is clearly open to U.S. workers.

E. Fees

The Appendix to the FY 2001 Budget of the United States states that ''(l)egislation will be proposed that would authorize the Secretary of Labor to collect fees from employers for the certification of certain aliens as eligible workers under the Immigration and Nationality Act.'' Although specific legislation has not been proposed to

implement the fee charging language in the President's budget, the proposed rule contains a provision outlining how fee charging would be implemented if it becomes law. If this occurs, the final rule would require employers to submit a fee with their applications. A charge of $30.00 would be imposed if a check in payment of the fee is not honored by the financial institution on which it is drawn. The existence of any outstanding ''insufficient funds'' checks would be grounds for returning applications for alien employment certification to the employer as unacceptable for processing. Receipt of any ''insufficient funds'' checks while the application is being processed would be grounds for denying the application. Receipt of any ''insufficient funds'' checks after an application has been certified would be grounds for revoking the certification. If an application is returned to the employer because it was incomplete, the employer would be able to request a refund of the fee or resubmit the application.

Fees would also be required for *Schedule A* and Sheepherder applications which are submitted to INS for adjudication.

If legislation authorizing the Secretary of Labor to collect fees from employers for the certification of immigrant workers is not passed by the time a Final Rule is to be published, the proposed fee provisions will not be included in the Final Rule.

F. Applications for Labor Certification for Schedule A Occupations

1. PWDR Required to File Schedule A Applications With INS

Employers would be required to submit the required processing fee, a completed PWDR endorsed by the SWA, and a completed *Application for Alien Employment Certification* form to the appropriate INS office. The current *Application for Alien Employment Certification* form (ETA 750) requires employers to enter the offered rate of pay and to certify that the wage offered equals or exceeds the prevailing wage. Since the application form no longer contains the offered wage, employers would be required to submit a completed and endorsed PWDR as well as the application form in Schedule A cases to the appropriate INS office.

2. Aliens of Exceptional Ability in the Performing Arts

As explained above, the proposed rule would remove aliens of exceptional ability in the performing arts from the special handling procedures and include them on *Schedule A* and the documentation currently required by 20 CFR 656.21a(a)(1)(iv)(A)(*1*) through (a)(1)(iv)(A)(*6*) of the regulations would be required to be submitted to INS by the employer or the alien beneficiary.

G. Labor Certification Applications for Sheepherders

Procedures for filing applications for Sheepherders in the current regulations are in the special handling procedures at § 656.21(a). The new system does not contain a section on special handling procedures, since we will handle all applications submitted to the Department in the same way. Sheepherder applications will continue to be submitted to INS along with the required processing fee. Employers would have to submit to the appropriate INS officer in addition to the processing fee:

- A completed *Application for Alien Employment Certification* form;
- A completed PWDR endorsed by the SWA; and
- A signed letter or letters from all U.S. employers who have employed the alien as a sheepherder during the immediately preceding 36 months, attesting that 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.

Employers that cannot not meet the requirements to file their applications for sheepherders with INS will be able to file their applications under the revised basic process described below.

H. Basic Process

1. Filing Applications

Employers would be required to file a completed Application for Alien Employment Certification form and a PWDR endorsed by the SWA with a designated ETA application processing center. Supporting documentation that may be requested by the Certifying Officer in an audit letter would not be filed with the application, but the employer would be expected to be able to provide required supporting documentation if its application were selected for audit.

The new system would limit the role of the SWA in the permanent labor certification process to providing PWD's. Prevailing wage determinations are currently made by SWA's after the application has been filed as part of the normal process of reviewing an application and informing the employer of deficiencies therein. In the new process, the employer would still be required to obtain a PWD from the SWA, although the timing would change from a post-filing action to a pre-filing action.

Under the proposed regulations, before filing a permanent application with an ETA application processing center, the employer would submit a PWDR to the SWA. (The ''machine readable'' PWDR would also be used to submit prevailing wage requests for the H–1B and H–2B programs.) The SWA would issue a PWD on the PWDR form and return it to the employer. The fully executed PWDR form would become part of the new application form filed at an ETA application processing center.

2. Processing

Computers would do an initial analysis of the information provided on the ''machine readable'' application form. Applications that could not be accepted for processing because certain information that was requested by the application form was not provided will be returned to the employer. Applications accepted for processing would be screened and would be certified, denied or selected for audit.

Information on the form may trigger a denial of the application or a request for an audit by Federal regional office staff. The application may also be selected for audit on a random basis as a quality control measure. If an application is not denied or selected for audit we anticipate that the application will be certified and returned to the employer within 21 days.

If the application is selected for audit, we will send the employer a letter with instructions to furnish required documentation supporting the information provided on the application form within 21 calendar days of the date of the request. If the requested information is not received in a timely fashion, the application will be denied.

3. Filing Date

Applications accepted for processing will be date stamped. Applications which are not accepted for processing and returned to employer will not be date stamped to minimize the administrative burden, and to discourage employers from filing an application merely to obtain a filing date, which under the regulations of the INS and Department of State becomes the priority date for processing petitions and visa applications, respectively.

Employers will be able to withdraw applications for alien employment certification filed under the current regulations and file an application for the identical job opportunity involved in the withdrawn application under the proposed rule without loss of the filing date.

4. Required Prefiling Recruitment

a. Professional occupations.

Exclusively for the purpose of the permanent labor certification program, the proposed rule defines a professional occupation as an occupation for which the attainment of a bachelor's or higher degree is a usual requirement for the occupation. Employers would be required to adequately test the labor market at prevailing wages and working conditions during the 6-month period preceding the filing of the application. The recruitment steps consist of prescribed mandatory and alternative steps and are designed to reflect what we believe, based on our program experience, are the recruitment methods that are most appropriate to the occupation. The mandatory steps for professional occupations consist of:

- Placement of a job order with the SWA serving the area of intended employment;
- Placement of two advertisements in the Sunday edition of the newspaper of general circulation most appropriate to the occupation and the workers likely to apply for the job opportunity in the area of intended employment; and
- Placement of an advertisement in an appropriate journal in lieu of one Sunday advertisement if the position involves experience and an advanced degree.

Under the current system, the employer may advertise, when a newspaper of general circulation is designated as the appropriate advertising medium, in any newspaper of general circulation. However, our experience has shown that some employers routinely place newspaper advertisements in those newspapers with the lowest circulation and that these publications are often the least likely to be read by qualified U.S. workers. Therefore, in order for the employer's job opening to receive appropriate exposure, the proposed regulation requires that the mandatory advertisements appear in the newspaper of general circulation most appropriate to the occupation and the workers most likely to apply for the job opportunity in the area of intended employment. For example, in a relatively large metropolitan area such as Philadelphia, Pennsylvania or Washington, DC, it would not be appropriate to place an advertisement for a computer professional in a suburban newspaper of general circulation since workers interested in professional jobs consult the metropolitan newspapers in the area of intended employment with the largest circulation rather than the suburban newspapers of general circulation. On the other hand, it would be appropriate to advertise in a suburban newspaper of general circulation for nonprofessional occupations, such as jewelers, houseworkers or drivers.

If the position involves experience and an advanced degree, the proposed regulation requires that the employer place one advertisement in an appropriate professional journal in lieu of one Sunday advertisement. To assure that employers make a current and complete test of the labor market, the mandatory recruitment steps must be conducted at least 30 days, but no more than 180 days, before the application is filed. In addition, the mandatory advertisements must be placed at least 28 days apart.

The employer, as indicated above, would also be required to select three additional pre-filing recruitment steps from among commonly used professional recruitment channels, such as job fairs, job search web sites and private employment agencies. Unlike the mandatory steps, one of the additional recruitment steps may consist solely of activity that takes place within 30 days of the filing of the application.

We are publishing in Appendix A to the preamble a list of occupations for which a bachelor's or higher degree is a usual requirement. The basic list was developed by the Bureau of Labor Statistics (BLS) and was based on its analyses of occupations' usual education and training requirements conducted to produce the *Occupational Outlook Handbook.* The Employment and Training Administration developed a crosswalk to the O*NET, Standard Occupational Classification (SOC) codes. The occupational titles, along with the relevant O*Net-SOC codes and codes which indicate whether the usual degree requirement for the occupation is for a professional degree, doctoral degree, master's degree, work experience plus a bachelor's or higher degree, or a bachelor's degree, are presented in the list we are publishing in Appendix A. We do not plan to codify Appendix A. Additional information about the occupations, including their definitions, can be obtained from O*Net online at *http://online.onetcenter.org.* Commenters are invited to submit comments on the appropriateness of the occupations included on the list published in Appendix A.

b. Nonprofessional Occupations

The proposed rule defines a non-professional occupation as any occupation for which the attainment of a bachelor's or higher degree is not a usual requirement for the occupation. Recruitment for occupations that normally do not require a baccalaureate or higher degree, i.e., non-professional occupations, consists of three mandatory steps: two newspaper advertisements and placement of a job order with the SWA serving the area of intended employment. All three recruitment steps must occur at least 30 days but no more than 180 days, before filing the application. Like recruitment for professional occupations, the advertisements must be placed at least 28 days apart, and must run in the Sunday edition of the newspaper of general circulation most appropriate to the occupation and the workers likely to apply for the job opportunity.

The advertising requirements for both professional and nonprofessional occupations are more extensive than under the current regulations. The difference in advertising requirements between professional and nonprofessional occupations is based on the Department's experience as to how employers advertise for these two broad categories of workers. The Department is interested in receiving comments on the more extensive advertising requirements, and the different advertising requirements for professional and nonprofessional occupations.

5. Newspaper Advertising Requirements

The proposed requirements for the newspaper advertisements are modeled after current regulatory requirements at 20 CFR 656.21(g), except the advertisement must: (1) identify the employer; (2) direct potential job seekers to the employer and not the SWA; and (3) provide a description of the job and its geographical location that is sufficiently detailed to fully inform U.S. workers of the particular job opportunity. Additionally, the wage must equal or exceed the prevailing wage entered on the PWDR by the SWA. Any job requirements listed in the advertisement may not exceed those listed on the PWDR.

6. Recruitment Report

The employer will be required to maintain documentation of the recruitment efforts it has undertaken and the results thereof, including the lawful job-related reasons for rejecting U.S. workers who applied for the job. Recruitment reports may be required in the cases selected for audit and are required in every case in which employers conduct supervised recruitment. Under the current regulations, employers have always had

to report on the lawful job-related reasons why each U.S. worker applying for the job or referred to the employer was not hired. See 20 CFR 656.21(b)(6) in the current regulations. The proposed regulation provides that the employer must prepare a summary report describing the recruitment steps taken and the results, including the number of U.S. applicants, the number of job openings in the job opportunity, the number of applicants hired and, if applicable, the number of U.S. workers rejected summarized by the lawful job reasons for such rejections. The Certifying Officer, however, after reviewing the employer's recruitment report may request the resumes or applications of the U.S. workers who were rejected sorted by the reasons for rejection provided by the employer in its recruitment report.

The proposed rule governing the content of recruitment reports, required for recruitment conducted prior to filing the application by the employer or for supervised recruitment that may be required by the Certifying Officer, would also clarify our position regarding ''qualified'' U.S. workers. We have added the requirements currently found at § 656.24(b)(2)(ii) to the requirements for the recruitment reports required to be submitted by employers on the results of their prefiling and supervised recruitment of U.S. workers. The recruitment requirements thus provide that a U.S. worker may be qualified for the employer's job opportunity even if he/she does not meet every one of the employer's job requirements. The U.S. worker who, by education, training, experience, or a combination thereof, qualifies by being able to perform, in the normally accepted manner, the duties involved in the occupation may not be rejected for failing to meet a specific job requirement. In addition, the U.S. worker is considered qualified, if he/she can acquire during a reasonable period of on-the-job-training, the skills necessary to perform as customarily performed by other U.S. workers similarly employed, the duties involved in the occupation.

7. Job Requirements

a. Business Necessity Standard and Job Duties

The requirement that the employer's job requirements must be those normally required for jobs in the United States would be retained in the new system. Employers, however, would not be able to justify job requirements that exceed those that are normal by use of business necessity. The business necessity standard, currently at 20 CFR 656.21(b), often works to the disadvantage of U.S. workers. This regulation has been difficult to administer and has generated a greater amount of litigation than any other regulatory provision in the current regulations. Since the position for which certification is sought is usually held by an alien worker who is the beneficiary of the application, job requirements tend to be manipulated to favor the selection of the alien. The existing business necessity standard requires the CO to evaluate the unique standards of an employer's business. In highly technical areas this is an extremely difficult undertaking and may be subject to employer manipulation since we are in no position to second guess the employer in such circumstances.

We have concluded that any business necessity standard that may be adopted would present similar problems. Therefore, the proposed rule would not retain a business necessity standard as a justification for employer's job requirements that exceed requirements that are normal to jobs in the United States. However, as discussed below, the case law relating to how the business necessity standard relates to a language requirement is being adopted. Further, any requirements other than those relating to the number of months or years of experience in the occupation or the number of months or years of education or training in the occupation cannot be specified as a job requirement, unless justified in the limited circumstances discussed below.

Accordingly, the proposed rule provides that the job opportunity's requirements cannot exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*Net Job Zones, except in certain limited circumstances, as explained below.

b. Other Job Requirements

Job requirements other than those relating to the number of months or years of experience in the occupation or the number of months or years of training cannot be used unless justified in certain limited circumstances, discussed below.

(1) Previous Employment of U.S. Workers

Other requirements can be justified if the employer employed a U.S. worker to perform the job opportunity with the duties and requirements specified in the application within 2 years of filing the application. ETA's operating experience indicates that the more recently a job existed and was filled by a U.S. worker before the time an application is filed, the more likely it is to involve a job that is clearly open to U.S. workers. In the event of an audit, the proposed rule provides that previous employment of a U.S. worker in an occupation with requirements other than those relating to experience, education and/or training can be documented by furnishing the name of the former employee, and an appropriate combination of the following: job description, resume, payroll records, letter from previous employee and previous recruitment documentation.

(2) Other Requirements Are Normal to the Occupation

Requirements other than those relating to amount of experience and education could be justified if the requirements were normal to the occupation in order for a person to perform the basic job duties and were routinely required by other employers in the industry. The proposed rule provides that employers can document such requirements by providing copies of state and/or local laws, regulations, ordinances; articles; help-wanted advertisements; or employer surveys. Acceptable examples, depending on the occupation, include but are not limited to, professional trade or business licenses, licensing standards, specified typing speed, and the ability to lift a minimum number of pounds.

(3) Foreign Language Requirement

Preventing employers from artificially tailoring job opportunities to fit the unique skills of the incumbent alien has always been a major issue is the labor certification process. Since 1977, we have addressed this through the use of the ''business necessity'' test. For reasons already discussed, we are not utilizing business necessity in the new system. However, with respect to language requirements, which are often used by employers seeking to artificially restrict the job to the incumbent alien, the use of the business necessity standard produced a well-understood and, generally, well-accepted body of law about when and how language requirements can be utilized. The proposed rule incorporates that legal standard.

Consistent with the majority of BALCA decisions, the proposed rule would require that a foreign language requirement cannot be included merely for the convenience of the employer or because it is a mere preference of the employer, co-workers or customers. Although the proposed rule would eliminate any business necessity standard as a means of justifying a

foreign language requirement, the rule would incorporate the existing standards and criteria developed under BALCA case law. Therefore, a foreign language can be based on the nature of the occupation; e.g., translator, or, for example, the existence of the need to communicate with a large majority of the employer's customers or regular contractors who cannot communicate effectively in English. This can be documented by the employer furnishing the number and proportion of its clients contractors who cannot communicate in English, a detailed explanation of why the duties of the position for which certification is sought require frequent contact with and communication with customers or contractors who cannot communicate in English, and why it is reasonable to believe that the foreign language customers and contractors cannot communicate in English.

(4) Combination Occupations

The revised regulation makes two changes to the provision about combination of duties in the current regulation. First, the proposed regulation uses the term ''combination of occupations'' instead of ''combination of duties'' as most jobs require the incumbent to perform a combination of duties. Second, the ability to document the need for a combination of occupations would be limited to two instead of three alternative forms of documentation that can be furnished by the employer to support a combination of occupations under the current regulations. For the reasons explained above in the discussion on the elimination of a business necessity standard, business necessity would no longer be a basis for justifying a job opportunity involving a combination of occupations. Further, the alternative provided in the current regulations for justifying a combination of duties which allows the employer to document that it has normally employed persons for that combination of duties would be replaced with the standard, discussed above, for justifying requirements other than experience and education that are based on the previous employment of a U.S. worker. Accordingly, the revised regulation limits the alternative forms of documentation the employer can furnish to support a combination of occupations to documentation that it employed a U.S. worker for the same combination of occupations involved in the application within 2 years of filing the application and/or that workers customarily perform the combination of occupations in the area of intended employment.

Consistent with our longstanding policy, combination jobs would be classified and prevailing wages determined in the following order: (1) The highest paying occupation; (2) the highest skilled occupation; or (3) the occupation that requires the largest percentage of the applicant's time. The highest paying occupation is considered first in classifying the job opportunity because the prevailing wage for the highest paying occupation has to be offered by the employer in order to conduct a valid test of the labor market for the highest paying occupation involved in the employer's job opportunity. If two or more occupations have the same high prevailing wage, the job opportunity would be classified according to the one that is the most highly skilled. If two or more occupations require the same high level of skill, the combination occupation would be classified in accordance with the one that would require the largest percentage of the incumbent's time.

8. Actual Minimum Requirements

The proposed rule precludes employers including as a requirement for the job opportunity any experience the alien gained working for the employer in any capacity, including working as a contract employee. Since 1977, we have prohibited using experience gained with the employer to be used as qualifying experience except in cases where the alien gained the experience in dissimilar jobs or in instances where it is no longer feasible for the employer to train a U.S. worker. After over 2 decades of administering this regulation, we have concluded there is no material difference in the need to protect U.S. workers if the alien gained the experience in a similar job or a dissimilar job, or if the employer maintains that it is no longer feasible to train another worker for the job involved in the application.

The need to protect U.S. workers stems in large measure from the same reason we are proposing to eliminate business necessity as a justification for exceeding job requirements that are normal to the job in the United States. In situations where the alien encumbers the job opportunity involved in the employer's application, job requirements tend to be manipulated in favor of the alien incumbent to the disadvantage of U.S. workers.

The question of what employing entity is the employer has also presented considerable confusion. To clarify this issue and to maximize protection to U.S. workers we have concluded, consistent with the BALCA decision *In the Matter of Haden, Inc.* (88–INA–245, August 30, 1988), that the definition of employer should be broadly drawn. Accordingly, we propose to define the term ''employer'' to include predecessor organizations, successors in interest, a parent, branch, subsidiary, or affiliate, whether located in the United States or another country. Although ETA has followed *Haden* in administering the current regulations, the Department seeks comments on the proposed definition of employer for administering the provision pertaining to actual minimum requirement at § 656.17(h).

9. Alternative Experience Requirements

We are proposing to eliminate the use of alternative experience requirements as a means of qualifying for the employer's job opportunity for much the same reasons we are proposing to eliminate business necessity and to preclude the employer from including as a requirement for the job opportunity any experience the alien gained working for the employer in any capacity.

As a practical matter, in virtually all instances involving alternative experience requirements the alien beneficiary has been employed, usually by the employer applicant, in a job requiring less than 2 years of training or experience. The Act only allocates 10,000 visas a year to workers immigrating to work in the employment-based preference provided in the Act for such jobs (see 8 U.S.C. 1153(b)(3)(A)(iii)). The visa category for these unskilled jobs is oversubscribed and there is approximately a 4½ year wait for aliens who are waiting to immigrate to work in jobs requiring less than 2 years of training and experience. The other employment-based preferences requiring labor certification are generally not oversubscribed. The primary objective of the employer in specifying alternative experience requirements is to obtain certification for a job opportunity for which visa numbers are currently available. In these cases, as in the situations where business necessity justifications have been proffered, or in instances where the employer maintains the alien gained the experience in a dissimilar jobs or maintains that it is no longer feasible to train another worker for the job involved in the application, there is a need to protect U.S. workers as the job requirements tend to be manipulated to favor the alien beneficiary.

10. Conditions of Employment

The current regulations do not explicitly address conditions of employment, but we consider conditions of employment, such as a

requirement to live in the employer's household or a requirement to work a split shift, an important element of working conditions. Generally, unusual working conditions can be justified if the employer can document that they are normal to the occupation in the area and industry. The one exception to this rule is for live-in household domestic service workers. Because of the past history of program abuse involving the filing of large numbers of accommodation cases motivated primarily by the desire to obtain permanent resident alien status for the alien beneficiary and not by legitimate employment needs, the proposed rule would incorporate the standards and criteria that have been developed by BALCA case law to determine when a live-in requirement for a household domestic service workers is acceptable.

Therefore, live-in requirements are acceptable for household domestic service workers only if the employer can demonstrate that 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 baby sitters, and/or a detailed listing of the frequency and length of absences of the employer from the home.

The proposed rule would also retain the filing and documentation requirements at 20 CFR 656.21(a) for live-in household domestic service workers that have been in the permanent labor certification regulations since 1977 to minimize program abuse and abuse of the alien, such as the requirement that a signed copy of the contract must be provided to the alien and documentation of the alien having 1 year's prior experience in the occupation and are described below in greater detail.

11. Layoffs

The current regulations do not specifically require employers to consider potentially qualified U.S. workers who may have been laid off within a reasonably contemporaneous period of time of the filing of the labor certification application by the employer. However, it has always been our position that Certifying Officers have the authority to consider the availability of these workers under § 656.24(b)(2)(i) and (iii) of the current regulations. Under § 656.24(b)(2)(i), the Certifying Officer may determine whether there are other appropriate sources of workers from which the employer should recruit or might be able to recruit U.S. workers. Section 656.24(2)(iii) provides that in determining whether U.S. workers are available, the Certifying Officer shall consider as many sources as are appropriate. The proposed rule would provide Certifying Officers with broad authority to designate other sources of recruitment where the employer would be required to recruit for U.S. workers.

Accordingly, the proposed rule would require employers, if there has been a layoff in the area of intended employment within 6 months of the filing of the application, to attest to and document notification and consideration of potentially qualified U.S. workers involved in the layoff and the results of such notification.

12. Alien Influence Over Job Opportunity

When an employer seeks labor certification for an alien who is in a position to unduly influence hiring decisions or who has such a dominant role in, or close personal relationship with the employer and/or employer's business that it is unlikely that the employer would replace the alien with a qualified U.S. applicant, BALCA decisions allow the Certifying Officer to determine that the job opportunity has not been clearly open to any qualified U.S. worker.

The leading BALCA decision, *Modular Container Systems, Inc.* (89–INA–228, July 16, 1991), articulates several factors that should be considered by Certifying Officers to determine whether or not the job opportunity is bona fide or clearly open to U.S. workers. The proposed rule incorporates this requirement. The proposed rule specifies what documentation the employer must be prepared to furnish to enable the Certifying Officer to evaluate the employer's application in light of the factors articulated by BALCA in *Modular Container Systems.* These factors include whether the alien:

- Is in the position to control or influence hiring decisions about the job for which labor certification is sought;
- Is related to the corporate directors, officers or employees;
- Was an incorporator or founder of the company;
- Has an ownership interest in the company;
- Is involved in the management of the company;
- Is one of a small number of employees;
- Has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and
- Is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operations without the alien.

I. Optional Special Recruitment and Documentation Requirements for College and University Teachers

Procedures for filing applications for college and university teachers in the current regulations are in the special handling procedures at 20 CFR 656.21(a). As indicated above, the new system does not provide for any special handling procedures. All applications we receive will be processed in the same way, although there may be some differences depending upon the occupation, in the attestation and documentation requirements. Consequently, procedures for filing applications on behalf of college and university teachers would be in a separate section. The documentation requirements for filing applications for college and university teachers would remain much the same as under the current regulation. The revised regulations, however, would specifically recognize current operating practice that employers that cannot or choose not to satisfy the special recruitment procedures for college and university teachers may avail themselves of the basic process in the new system.

Whether employers file applications on behalf of college and university teachers under the special recruitment procedures or the basic process, they are required to be able to document, if requested by the Certifying Officer, that the alien was found to be more qualified than any U.S. worker who applied for the job opportunity. The Act requires, in the case of members of the teaching profession, that U.S. workers have to be equally qualified with respect to the alien beneficiary to be considered by the employer for the job opportunity for which certification is sought. See 8 U.S.C. 1182(a)(5)(A).

J. Live-in Household Domestic Service Workers

Applications for household domestic service occupations would be filed, as in the current rule, under the revised basic process. Most of the documentation requirements for live-in household domestic service workers are unchanged from the current requirements contained in the current regulation at § 656.21(a)(3)(i) and (ii). However, some of the information that was previously required to be provided in item 20 of Form ETA 750, Part A, Statement for Live-at-Work Job Offers will no longer be collected on the application, but employers will be required to furnish that information if their applications are audited. This information includes a description of the residence, the number of individuals living in the household and their ages in the case of persons under the age of 18, and a statement as to whether or not free board and a private room not shared by another person will be provided to the alien. The employer would be required to attest on the application form that it will maintain all required documentation and, in the event of an audit, the employer will be required to submit this documentation to ETA, as well as the other documentation that is required for all occupations under the basic labor certification process.

K. Audit Letters

Under the current regulations, if a Certifying Officer determines that a certification cannot be issued, a Notice of Findings (NOF) must first be issued to the employer notifying it of the specific reasons for which the Certifying Officer intends to deny the application. Issuing a NOF and analyzing employers responses is probably the most time consuming aspect of the current labor certification system. The proposed rule does away with NOF's.

As indicated above, after an application has been determined to be acceptable for filing, a computer system would review it based upon various selection criteria that would allow applications to be identified for an audit. Additionally, as a quality control measure, the regulations provide that some applications could be randomly selected for audit without regard to the results of the computer analysis. Audit letters would be, for the most part, standardized, computer generated documents, stating the documentation that must be submitted by the employer. The proposed regulation would provide, in virtually all instances where an employer could be required to submit documentation in support of its attestations, the type of documentation the employer would be required to maintain and furnish in the event of an audit. Employers would be expected to have assembled and have a hand in all documentation necessary to support their applications before they are submitted.

If the employer did not mail the requested documentation within 21 days of the date of the audit letter, the application would be denied and the administrative-judicial review procedures provided for in the proposed rule would not be available. We have concluded that 21 days is sufficient time for employers to respond to audit letters because, as indicated above, the regulations indicate what documentation employers will be required to assemble, maintain and submit to respond to an audit letter. Extensions would not be granted to respond to audit letters. Failure to provide required documentation in a timely manner would be deemed a material misrepresentation to dissuade those small number of employers that conceivably may file applications without complying with all the documentation requirements from filing such applications. Further, failure to timely provide documentation would constitute a refusal to exhaust available administrative remedies and the administrative-review procedures would not be available.

If the requested documentation is submitted on time, the Certifying Officer would review the documentation submitted by the employer under the proposed standards in § 656.24 of this part.

As discussed below in the section on labor certification determinations, if the Certifying Officer determines that the employer materially misrepresented documentation requirements due to a failure to provide required documentation pursuant to § 656.21(a)(3)(ii) of this part, or otherwise determines a material misrepresentation was made with respect to the application for any reason, the employer may be required to conduct supervised recruitment pursuant to section 656.21 of this part in future filings of labor certification applications for a period of 2 years. Commenters are invited to suggest items that can be added to the application form that would be helpful in identifying applications that may involve fraud and abuse.

Before making a final determination in accordance with the standards in § 656.24 of this part, the Certifying Officer could request supplemental documentation or require the employer to conduct supervised recruitment. A request for supplemental documentation could include a request for certain limited information not specified in the regulations, but that should be readily available to the employer. For example, if an application under review involves a job opportunity for a specialty chef, the Certifying Officer could request a copy of the restaurant's menu to aid in determining whether there was a *bona fide* job opening available for a specialty chef.

Once the Certifying Officer has reviewed all requested information, the Certifying Officer will issue a final determination granting or denying the application.

L. Supervised Recruitment

1. General

In any case where the Certifying Officer determines it to be appropriate, post-filing supervised recruitment may be ordered. This would include cases selected for audit and cases where serious questions arise about the adequacy of the employer's test of the labor market. It is anticipated, however, that the decision to order supervised recruitment will usually be based on labor market information. Supervised recruitment would operate much like the non-RIR recruitment under the current basic process at § 656.21, except that the recruitment efforts would be directed by the Certifying Officer and not by the SWA, as is the case under the current system.

2. Recruitment Sources

The advertisement requirements would be more detailed and rigorous than for pre-application recruitment. The advertisement would be required to be approved by the Certifying Officer before publication and the Certifying Officer would direct where it would be placed. We anticipate that Certifying Officers would, based on their broad knowledge of the labor market and experience in evaluating recruitment results placed in various newspapers, direct employers where to place advertisements. The advertisement would direct applicants to send resumes or applications to the Certifying Officer and would be required to include a summary of the employer's minimum job requirements. The Certifying Officer, as in the current rule, would have broad authority to designate other sources of workers where the employer should recruit for U.S. workers. The broad authority of the Certifying Officer to determine if there are other appropriate sources of workers where the employer should have recruited or might be able

to recruit U.S. workers would be moved from the determination process at 20 CFR 656.24 in the current regulations, to the section on supervised recruitment in the proposed rule at 20 CFR 656.21.

3. Recruitment Report

At the completion of the supervised recruitment efforts, the employer will be required to document that its efforts were unsuccessful, including documenting the lawful job-related reasons for not hiring any U.S. workers who applied for the position. As explained above, employers have always been required to report on the lawful job-related reasons why each U.S. worker applying for the job or referred to the employer was not hired under the current regulation at 20 CFR 656.21(b)(6). This would be a specific requirement that employers would have to address in the employer report on supervised recruitment. The current regulation at 20 CFR 656.21(j) specifying the content of recruitment reports is potentially confusing in that it does not agree with the current requirement at 20 CFR 656.21(b)(6). In the present regulations employers only have to provide the lawful job related reasons for not hiring each U.S. workers interviewed. The other requirements for the employer's recruitment are much the same as in the current regulations. The employer would be required to report the number of U.S. workers who applied for the position, the number of workers interviewed, the names and addresses of the U.S. workers interviewed for the job opportunity, and the job title of the person who interviewed the workers.

We are taking the same position on who is a qualified U.S. worker in the supervised recruitment process as we took in our discussion of the issue for the prefiling recruitment process. A U.S. worker may be qualified even if he/she does not meet every one of the employer's job requirements. U.S. workers would be considered qualified if the U.S. workers, by education, training, or a combination thereof, qualify by being able to perform, in the normally accepted manner, the duties involved in the occupation. U.S. workers would be considered qualified if they could acquire, during a period of reasonable on-the-job training, the skills necessary to perform as customarily performed by other workers similarly employed, the duties involved in the occupation. Rejection of such workers based solely on lack of familiarity with some particular subsidiary job duty will not be permitted.

M. Labor Certification Determinations

1. Referral of Applications to the National Office for a Determination and Specification of Applications to be Handled in the National Office

The provisions that applications involving special or unique problems may be referred to the National Certifying Officer by the Regional Certifying Officer and that certain types of applications or specific applications be handled in the National Office have been deleted because they are no longer necessary. Under the existing regulations there are specific provisions governing the processing of an individual application through the SWA's and the ETA regional offices. The current regulations specify, depending upon the geographic location of the employer, which applications would be processed and reviewed by the various Certifying Officers. Accordingly, there was a need for provisions in the regulations to provide the authority for regional Certifying Officers to refer applications to the National Office or for the National Office to have the authority to direct that certain types of applications or specific applications be handled in the national office. Under the new system the SWA's will no longer be involved in case processing and the proposed regulations do not specify which applications will be reviewed by the various Certifying Officers, including the National Certifying Officer. Therefore, specific provisions are not required in the regulations to govern referrals by regional Certifying Officers of applications involving unique or special problems to the National Certifying Officer, or for the National Office to direct that certain types of applications or specific applications be handled in the ETA National Office.

2. Designation of Recruitment Sources

The determination process has been revised to reflect that all fact finding will have been completed by the time the Certifying Officer makes a determination. Consequently, the broad authority of the Certifying Officer to designate other appropriate recruitment sources from which the employer should recruit for U.S. workers is deleted from the determination process and included in the section detailing the operation of supervised recruitment in the new system at § 656.21.

3. Qualified U.S. Workers

As indicated above, consistent with the provisions in the regulations governing the content of recruitment reports that must be completed by employers whether they conduct prefiling or supervised recruitment, the section on determinations would be revised to provide that, alternatively, the U.S. worker is qualified if he/she can acquire during a reasonable period of on-the-job training, the skills necessary to perform the duties involved in the occupation, as customarily performed by other U.S. workers similarly employed.

4. Material Misrepresentations

As indicated above, if a Certifying Officer determines that the employer materially misrepresented it had complied with all documentation requirements due to a failure to provide required documentation pursuant to § 656.21(a)(3)(ii) of this part, or otherwise determines a material misrepresentation was made with respect to the application for any reason, the employer may be required to conduct supervised recruitment pursuant to section 656.21 of this part in future filings of labor certification applications for a period of 2 years.

5. Reconsideration

The present regulations are silent with respect to the availability of motions for reconsideration after a Final Determination. Historically, Certifying Officers sometimes honored such motions but generally treated them as requests for review and transmitted the matter to the ALJ.

In order to address this matter, the regulation is amended to specifically provide that while motions for reconsideration before the Certifying Officer may be filed, the Certifying Officer may, in his/her complete discretion, choose to treat the motion as a request for review.

N. Board of Alien Labor Certification Appeals Review, Consideration and Decisions

1. Only Employer Can Request Review

The current regulations provide that if a labor certification is denied, a request for review of the denial may be made to the Board of Alien Labor Certification Appeals, by the employer and by the alien, but in the case of the alien, only if the employer also requests such a review. Only an employer can file *An Application for Alien Employment Certification.* Moreover, the employer can withdraw its application at any time. In view of the primacy of the employer in the labor certification process, we have concluded that it makes little sense to allow an alien to also file an appeal and are proposing to only authorize employer appeals.

2. Time Allowed to File Requests for Review

Consistent with the objective of streamlining and reducing processing time, the proposed rule would reduce the time to file a request for review to 21 calendar days from the 35 days specified in the current regulations. The Department believes that 21 days is sufficient time for an employer to file a request for review.

3. Aliens of Exceptional Ability in the Performing Arts

All references to aliens of exceptional ability in the performing arts would be deleted from the sections in the proposed rule detailing the procedures for filing requests for review and from the procedures to be followed by the Board in considering appeals and issuing decisions, since aliens of exceptional ability in the performing arts would be moved to *Schedule A.* The proposed rule would provide, as does the current rule, that the *Schedule A* determination of INS shall be conclusive and final.

4. Amicus Briefs

The provisions for *amicus briefs* for cases involving college and university teachers and aliens of exceptional ability in the performing arts would also be deleted from the sections of the proposed rule detailing the procedures to be followed in filing requests for review and the procedures to be followed by the Board in considering appeals and issuing decisions. Provisions for *amicus briefs* would no longer be applicable to aliens of exceptional ability in the performing arts, since they would be on *Schedule A* and *Schedule A* determinations of the INS are conclusive and final. Specific provisions for *amicus briefs* are no longer necessary in the case of college and university teachers because BALCA, in practice, accepts such briefs from any party that wishes to file one. The current language implies that BALCA would accept *amicus curiae* briefs only in cases involving college and university teachers and aliens of exceptional ability in the performing arts.

5. Copies of Appeal File

In the interest of providing improved customer service, the revised regulation would provide that the Certifying Officer shall send a copy of the Appeal File to the employer in lieu of only a copy of the index to the Appeal File to the employer. This would obviate the need for the employer to examine the Appeal File at the office of the Certifying Officer. The named alien beneficiary of the labor certification would not receive a copy of the appeal file for much the same reasons he or she would not be allowed to file a request for review as discussed above.

6. Elimination of Remands

The current regulations provide that the Board may remand cases to a Certifying Officer for further consideration or fact-finding and determination. We anticipate that cases processed under the new system would be sufficiently developed by the time they get to the Board that there should be no need to remand a case to a Certifying Officer. The proposed regulation authorizes the BALCA to either affirm or reverse the Certifying Officer's decision, but makes no provision for remands.

O. Validity and Invalidation of Labor Certifications

Substitution of Alien Beneficiaries

We published an interim final rule on October 23, 1991, effective November 22, 1991, which limited the validity of labor certifications to the specific alien named on the labor certification application. (See 56 FR 54925, 54930.) This interim final rule had the effect of eliminating the practice of allowing the substitution of alien beneficiaries on approved labor certifications. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky* v. *Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating that portion of the interim final rule which eliminated substitution of labor certification beneficiaries. The order had the effect of reinstating the Department's previous practice of allowing substitution of alien beneficiaries on approved labor certifications.

Although the regulation was never conformed to the District Court order, we reinstated the practice of allowing the substitution of alien beneficiaries on approved labor certifications. Subsequently, operational responsibility for substituting alien beneficiaries on approved labor certifications was delegated to INS. INS issued a memorandum on March 7, 1996, Subject: *Substitution of Labor Certification Beneficiaries*, to implement the delegation of the responsibility for substituting labor certification beneficiaries to the Service. On March 22, 1996, ETA issued a Field Memorandum (FM) to its Regional Administrators informing them that all requests for substitution received after the date of the FM were to be returned to the employer with instructions to file the request with INS along with a copy of the I–140 preference petition. The proposed rule would return the regulatory provisions detailing the scope of the certification at 20 CFR 656.30(c)(1) and (2) to read the same as they did before November 22, 1991. As before the Interim Final Rule, the regulation does not mention substitution.

P. Revocation of Approved Labor Certifications

We propose to provide Certifying Officers with limited authority to revoke labor certifications within 1 year of the date the labor certification is granted or before a visa number becomes available to the alien beneficiary, whichever occurs first. The proposed rule lists the steps that may be taken by the Certifying Officer, who issued the certification, or an authorized person acting on his or her behalf, in consultation with the National Certifying Officer, to revoke the certification if the Certifying Officer finds that the certification was improvidently granted.

The proposal also provides that an employer may file an appeal with BALCA if it first files timely rebuttal evidence in response to the Certifying Officer's Notice of Intent to Revoke and the Certifying Officer determines that the certification should be revoked.

Q. Prevailing Wages

1. PWDR

We propose to standardize the PWD process through the use of the PWDR form. Before submitting a labor certification application under the new system, the employer will be required to submit the new PWDR form to the SWA in the State where the work will be performed. The PWDR form would require information from the employer that would allow the SWA to make the required determination of the prevailing wage for the job opportunity for which certification is sought. Specifically, the proposed form would require the employer to indicate the location of the job opportunity in terms of city or county and state, the title of the job and a description of the duties to be performed, the education, training, and/or experience required for the job, including any special requirements.

Upon receipt of a PWDR form, the SWA would review it and would determine the occupational classification and the area of intended employment. The SWA would then enter its determination on the PWDR form and return it with its endorsement

to the employer. The PWDR form may then be submitted in support of a permanent labor certification application. The SWA determination would include a State agency tracking number unique to that particular determination that would be used by ETA for program management purposes. The determination would also include the occupational code assigned to the job, the specific prevailing wage level determined by the SWA and the source of that information, the level of skill of the job in the case of those determinations made using the wage component of the Occupational Employment Statistics (OES) survey, and the date upon which the determination was made. If there is no collective bargaining agreement that would set the prevailing wage for the position, the employer will have the option of submitting an alternative wage survey or other source data for which the employer wishes the SWA to approve as a determinant of the prevailing wage in response to that specific request.

2. Validity Period of PWD

We are proposing that the SWA must specify the validity period of PWD on the PWDR form, which in no event shall be less than 90 days or more than 1 year from the determination date entered on the PWDR. Employers filing LCA's under the H–1B program must file their labor condition application within the validity period. Since employers filing applications for permanent labor certification can begin the required recruitment steps required under the regulations 180 days before filing their applications, they must initiate at least one of the recruitment steps required for a professional or nonprofessional occupation within the validity period of the PWD to rely on the determination issued by the SWA.

3. Collective Bargaining Agreement, Davis Bacon Act and Service Contract Act

Under the current regulations at § 656.40 the first order of inquiry for a SWA in determining the prevailing wage is to determine if the employer's job opportunity is in an occupation which is subject to a wage determination in the area under the Davis Bacon Act (DBA) or the McNamara-O'Hara Service Contract Act (SCA). If there is a prevailing wage under one of those statutes in the area of intended employment it must be used as the prevailing wage whether or not the employer has a Government contract in the area of intended employment. We are proposing to amend the prevailing wage regulation so that the first order of inquiry by the SWA in determining prevailing wages will be to determine whether or not the employer's job opportunity is covered by a union contract which was negotiated at arms length between a union and the employer. If the job opportunity is covered by such a contract it will be the prevailing wage for labor certification purposes.

The BALCA decision in *El Rio Grande on behalf of Galo M. Narea* (1998–INA–133, February 4, 1998; Reconsideration July 28, 2000) has prompted us to review the requirement for use of DBA and SCA wage determinations in making prevailing wage determinations for the permanent alien labor certification program. As explained more fully below, BALCA, in *El Rio Grande*, held that it has jurisdiction to review challenges to PWD's based on an SCA wage determination.

The use of DBA and SCA statutory wage determinations first appeared in the permanent labor certification regulations in 1967 (see 32 FR 10932). The use of DBA and SCA wage determinations in the permanent labor certification was in large measure prompted by concerns for administrative convenience. The SCA and DBA wage determinations were viewed as a convenient source of wage determinations that could be used for labor certification purposes. At that time, wage surveys were not as numerous, comprehensive and well developed as they are now.

On October 31, 1997, ETA in General Administrative Letter No. 2–98; Subject: *Prevailing Wage Policy for Nonagricultural Immigration Programs*, stated it had determined that the most efficient and cost effective way to develop consistently accurate prevailing wage rates is to use the wage component of the Bureau of Labor Statistics' expanded Occupational Employment Statistics (OES) program. The OES is based on the Standard Occupational Classification System (SOC), which will be used by all Federal statistical agencies for reporting occupational data. The OES provides arithmetic means by occupation and relevant geographic area for use in making prevailing wage determinations in the labor certification program.

There are marked differences in the way prevailing wages are determined under the DBA and SCA programs. The first order of inquiry in making SCA and DBA wage determinations is the wage paid to the majority (more than 50 percent) of the workers in a particular classification. See 29 CFR parts 1 and 4. Under SCA, if there is no rate paid to the majority, the median is ordinarily used rather than the mean. The regulations for the SCA program at 29 CFR 4.51(c) also provide that in those instances in which a wage survey for a particular locality may result in insufficient data, the prevailing wage may be established through a ''slotting'' procedure whereby wage rates for an occupational classification are based on a comparison of equivalent or similar job duty and skill characteristics between the classification studied and those for which no survey data is available. Under the OES system, if the data obtained for an occupation are insufficient, larger areas are used in aggregating wage data so that an appropriate arithmetic mean can be determined. Operational difficulties are also encountered in applying DBA and SCA statutory wage determinations because they are based on a different occupational classification system than the SOC. Further, SCA wage determinations frequently do not contain levels within an occupation, while the OES survey data furnished to ETA and the SWA's provides two levels of wages for every occupation.

We have concluded that it makes little sense to make determinations based on different statistical measures arrived at through inconsistent methodologies in determining prevailing wages mandatory for the permanent labor certification program. Accordingly, the proposed rule deletes the provision requiring that DBA and SCA wage determinations must be used in determining prevailing wages. Employers will, however, have the option to use current DBA and SCA wage determinations in addition to using the arithmetic mean provided by the wage component of the Occupational Employment Statistics Survey and employer provided wage information in accordance with the proposed provision at section 656.40(b)(4) of this part.

Surveys used to arrive at DBA wage determinations are not conducted by BLS, but by the Wage and Hour Division. Rather than sample surveys, they are universe surveys and data is sought on all projects in the area for a particular type of construction—ordinarily building construction, heavy construction, highway construction, and residential construction. The prevailing wage is determined based on the rate paid the majority, or if there is no majority, the arithmetic mean, of workers employed in the occupation based on wage data from the peak workweek for each project during the survey period (ordinarily 1 year), thereby allowing duplicated counting of

workers. Since these procedures are significantly different than those set forth in GAL 2–98 cited above, and do not provide an arithmetic mean of all of the workers in the occupation in the appropriate geographic area, we are considering the appropriateness of use of Davis-Bacon surveys in the permanent labor certification program.

We invite comment on the appropriate use of the surveys conducted to arrive at DBA and SCA wage determinations.

Although the proposed rule for determining prevailing wages does not contain a provision about the use of DBA and SCA wage determinations, we are aware that the regulations may be changed after review of the comments. Therefore, as a result of the *El Rio Grande* decision, the proposed rule for the prevailing wage panel review of prevailing wage determinations, discussed below, contains provisions for review of determinations involving DBA or SCA wage determinations.

We are also proposing changes similar to those discussed above to § 655.731 of the regulations under the H–1B program. The INA requires that the wages paid to an H–1B professional worker be the higher of the actual wage paid to workers in the occupation by the employer or the prevailing wage for the occupational classification in the area of employment. The H–1B regulations incorporate the language of 20 CFR 656.40 (as suggested by H.R. Conference Report, No. 101–95, October 26, 1990, page 122) and provide employers filing applications the option of obtaining a PWD from the SWA, using an independent authoritative source, or using another legitimate source as provided by § 655.731(a)(2)(iii)(B) and (C) of the H–1B regulations. See also § 655.731(b)(3). Thus we are proposing changes to the H–1B regulations similar to the ones we are proposing to § 656.40 of the regulations governing the determination of prevailing wages for the permanent labor certification program.

4. Elimination of 5 Percent Variance

We are proposing to eliminate a provision from the existing regulations governing the requirements for paying the prevailing wage for the occupation and area. Under § 656.40(a)(2)(i), the wage set forth in a labor certification application is considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. That is, the employer is considered to meet the prevailing wage requirement as long as it offers to pay 95% of the prevailing wage as determined by the SWA. The rationale for this provision, which has been in the Department's permanent program regulations since 1977, was that it was not always possible to determine an average rate of wages with exact precision. Before January 1, 1998, when we implemented the use of the wage component of the OES survey, SWA's usually obtained prevailing wage information by purchasing available published surveys or by conducting ad hoc telephone surveys of employers in the area of intended employment likely to employ workers in the occupational classification involved in an employer's labor certification application. Since the statistical precision of these methods varied greatly, we believed it was necessary to allow some variance in the rate offered by the employer.

The wage component of the OES survey is conducted by the Bureau of Labor Statistics (BLS) and, with the exception of the decennial Census, is the most comprehensive survey conducted by an agency of the Federal government. The OES program conducts a yearly mail survey designed to produce estimates of employment and wages for specific occupations. The OES program collects data on wage and salary workers in non-farm establishments in order to produce employment and wage estimates for over 750 occupations by geographic area and by industry. Estimates based on geographic areas are available at the National, State, and Metropolitan Area levels. The OES program surveys approximately 400,000 establishments per year, taking three years to fully collect the sample of 1.2 million establishments. This total covers over 70 percent of the employment in the U.S. Due to the comprehensive nature of the survey and the resulting degree of statistical precision with regard to the results thereof, we believe that it is no longer necessary to provide the 5% variance authorized under the existing labor certification regulations at § 656.49(a)(2)(i), and the H–1B regulations at §§ 655.731(a)(2)(iii) and 655.731(d)(4).

5. Employer-Provided Wage Data

The proposed rule directs SWA's to consider the use of employer-provided wage data in the absence of a PWD obtained through a collective bargaining agreement negotiated between the union and the employer.

In all cases where the employer submits a survey or other wage data for which it seeks acceptance, the employer would be required to provide the SWA with enough information about the survey methodology, including such items as the sample frame size and source, sample selection procedures, and survey job descriptions, to allow the SWA to make a determination about the adequacy methodology used to conduct the survey in accordance with guidance issued by the ETA National Office. The function of the SWA in these instances is merely to determine if the employer-provided survey is adequate and acceptable. ETA's National Office will provide guidance to be used in evaluating the statistical methodology used in producing the employer provided survey. The role of the SWA is not to determine whether the employer provided survey is more or less accurate than the prevailing wage information provided by the OES survey. If the employer-provided data is found to be acceptable, the specific wage rate obtained from that source will be determined to be the prevailing wage in responding to that particular request. We will continue our existing policy of not considering the issuance of a PWD based upon the acceptance of employer-provided wage data for a specific job opportunity as superseding the OES wage rate for subsequent requests for PWD's in the same occupation and area, since such determinations are made on a case-by-basis. For example, the job description in the employer provided survey may not be general enough to apply to all employers that employ workers in the occupation for which certification is being sought in a particular instance in the area of intended employment.

The proposed rule would also provide that if the employer-provided data is found not to be acceptable, the SWA's response to the employer must include the specific reasons why it is not acceptable (e.g., the geographic area covered by the survey is broader than that which is necessary to obtain a representative sample), and must provide the employer with the appropriate prevailing wage rate as derived from the OES survey data. Employers will have an opportunity to provide one supplemental filing that must be considered by the SWA. If the SWA finds the survey unacceptable after considering the supplemental information it must provide the employer the reasons why the supplemental information does not make the survey acceptable.

The employer after receiving notification that the survey it provided for the SWA's consideration will be able to file a new request for a prevailing wage determination, or appeal under § 656.41.

6. Use of Median

Another change we are proposing is to permit an additional measure of central tendency to be used in determining prevailing wages. Specifically, we are proposing that employers be allowed to submit alternative sources of wage data that provide a median wage rate for an occupational classification.

Under the current regulations, at § 656.40(a)(2)(i), the prevailing wage is defined as:

(t)he average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers.

This process yields an arithmetic mean rate of wages. We propose to allow employers to submit alternative sources of wage data that provide the median wage rate, but do not provide the arithmetic mean of wages of U.S. workers employed in the area of intended employment. The median of a data set is the middle number when the measurements are arranged in ascending (or descending) order. Allowing the use of alternative sources of wage data that provide median wage rates would also increase the pool of published data available for the employer to use in obtaining valid prevailing wage surveys. Therefore, we propose to allow the use of median wage rates as the basis for determining the applicable prevailing wage under § 656.40 of the permanent labor certification regulations, and under § 655.731(b)(3)(iii).

7. Definition of Similarly Employed

We are proposing an additional change in the H–1B and permanent labor certification regulations to the definition of ''similarly employed'' for purposes of determining the pool of workers to be included in a survey conducted to arrive at the applicable prevailing wage rate. The existing regulations, at § 656.40 (b), provide that ''similarly employed'' means:

Having substantially comparable jobs in the occupational category in the area of intended employment, except that, if no such workers are employed by employers other than the employer applicant in the area of intended employment, ''similarly employed'' shall mean:

(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.''

Essentially the same language is also in the H–1B regulations at § 655.731(a)(2)(iv).

Under the current regulations, the survey area should be expanded or similar jobs considered only if there are no other employers of workers with substantially comparable jobs in the area of intended employment other than the employer applicant. The proposed regulatory language would alter this construct to be more in line with the SWA's operational practice of generally expanding the area included in the survey whenever a representative sample of workers with substantially comparable jobs in the area of intended employment cannot be obtained, even if there are, in fact, one or more other employers in area who employ such workers. The original language was promulgated at a time when SWA's generally conducted ad hoc surveys to determine prevailing wages. As a means to conserve resources, SWA's were instructed to expand the geographic scope of the survey only if there were no other employers other than the employer applicant employing workers with substantially comparable jobs in the area. As a means to ensure the confidentiality of the data, BLS will not publish reportable wage data where the sample frame is such that participating employers could readily be identified. It would be much more difficult for BLS to get employers to participate in the survey if an iron-clad guarantee of confidentiality could not be assured. Therefore, reportable wage data are only published and available for alien certification purposes if a representative sample of similarly employed workers in the area of intended employment can be obtained. For these reasons, we are proposing to amend the regulations to provide that the area covered by a survey should be expanded any time it is not possible to obtain a representative sample of similarly employed workers in the area of intended employment.

8. Issues Specific to H–1B Program

a. Transition of H–1B Workers From Inexperienced to Experienced

After further experience with the H–1B program, we have realized that as a result of the 3-year LCA issued under the current regulations, a prevailing wage determination for an employee who is inexperienced and cannot work without close supervision when originally hired may be applicable for 3 years, despite the fact that the employee is likely to begin working independently well before the end of the 3-year period. We therefore propose to amend § 655.731(a)(2) to provide that where a survey that is the basis for a prevailing wage determination contains more than one wage rate for the occupational classification, the employer is required to pay the H–1B workers at least the applicable wage for the work performed. In other words, as an entry-level worker gains experience and is able to work independently, the applicable prevailing wage would be the wage from the same survey for workers who work independently. Since at all times the prevailing wage would be the applicable rate from the survey that was the basis for the initial wage determination, we believe this is consistent with the statutory mandate that the prevailing wage be based on the best information available as of the time of filing the application.

b. Appeals by Employees and Other Interested Parties

We are also considering providing employees and other interested parties the right to appeal determinations of the prevailing wage made by ETA at the request of the Administrator of the Wage and Hour Division under § 655.731(d). Although we consider this to be a procedural matter not requiring notice and comment under the Administrative Procedure Act, we are seeking comments on the advisability of providing such appeal rights and the methodology to be used in administering appeals that may be made by interested parties other than employers. Commenters are invited to submit comments on these issues.

R. ETA Prevailing Wage Panel

Currently, SWA's provide PWD's to employers that wish to file applications to obtain alien workers under the H–1B (professionals in specialty occupations), H–1C (registered nurses at eligible health care facilities), and H–2B (nonagricultural temporary labor) nonimmigrant programs, and the labor certification process for the permanent employment of aliens in the United States. Under GAL 2–98, employers intending file applications under one of the nonimmigrant programs can only challenge the PWD through the Employment Service Complaint System (ESCS). See 20 CFR 658, subpart E. Employers that intend to file applications in the permanent alien labor certification program, on the other hand, may file appeals about SWA PWD's directly with the Certifying Officers. The challenges filed directly with Certifying Officers tend to be resolved more quickly than those filed in the ESCS. The existence of these two different systems of dealing with prevailing wage challenges has proven

to be confusing to employers, needlessly complicated, and time consuming. The resulting confusion on the part of employers is understandable since the prevailing wage methodology to determine prevailing wages for all programs is based on the regulation governing the determination of prevailing wages for the permanent program at 20 CFR 656.40.

The current structure in place for administering the PWD process and handling prevailing wage challenges has caused some inconsistency in the issuance of PWD's and the response to prevailing wage challenges. There are currently 9 Certifying Officers who provide oversight to the SWA's within their jurisdiction over the day-to-day operations involved in the issuance of prevailing wages to employers. Each of the 9 Certifying Officers have responsibility for resolving such challenges submitted by employers wishing to file permanent applications for alien employment certification.

To improve customer service and to enhance consistency in the day-to-day administration of the PWD process and in the resolution of challenges to PWD's, we propose to establish a prevailing wage panel (PWP) to adjudicate all complaints, arising from the PWD process. This would include, in the case of the H–1B program, not only those challenges that may be filed in response to the initial receipt of a PWD by the employer from a SWA, but also those instances when the Administrator of the Wage and Hour Division receives a PWD from ETA in the course of an enforcement action under to 20 CFR 656.731(d)(2). In those instances where the Wage and Hour Administrator obtains a prevailing wage from ETA, we anticipate that the Administrator when he/she informs the employer of the RD's determination, will also inform the employer that it may appeal the determination through the PWP and the procedures for filing such appeals.

By centralizing the review process in a single adjudicative body, we hope to increase the consistency of the decisions and establish clearly defined precedents governing the issuance of PWD's and the standards governing the use of alternative sources of wage data submitted by employers. We anticipate that the PWP will deal primarily with prevailing wage challenges arising from SWA determinations rejecting alternative sources of wage data. We anticipate that such challenges arising from the use of OES prevailing wage data will involve primarily, if not exclusively, questions as to whether the job was coded properly in terms of the occupational classification and the level of skill applied, and on whether the survey was based on the appropriate geographical area.

The size and composition of the PWP will be determined by the Chief, Division of Foreign Labor Certifications, and is subject to change depending upon the volume and complexity of employer challenges to be considered. We propose that the staffing of the panel may include SWA and Federal staff with experience in the prevailing wage determines area, and may also include specialists in survey methodology, PWD's, and occupational analysis and classification.

We are proposing that the employer must request, in writing, review of a PWD by the PWP in writing within 21 calendar days of the date the SWA issued the determination. The appeal must be mailed to the SWA that issued the prevailing wage determination. The appeal must set forth the particular grounds for the request and include copies of any of the materials submitted by the employer to the SWA pertaining to the PWD up until the determination date entered on the PWDR form by the SWA and copies of all the documents received from the SWA concerning the PWD. Failure to file a request for review would constitute a failure to exhaust administrative remedies.

The SWA would then send a copy of the employer's appeal, including any material added by the SWA, to the PWP, and would also send a copy of the appeal file as sent to the PWP to the employer. The employer would be able to furnish or suggest directly to the PWP the addition of any documentation that is not among the materials sent to the PWP by the SWA.

The PWP will review the SWA PWD solely on the basis upon which the PWD was made. The employer would have 21 days after receipt of the decision of the PWP to request a review by BALCA.

As explained above, although the proposed prevailing wage regulation deletes the use of DBA and SCA wage determinations, we seek comments on a proposed procedure providing for review of DBA and SCA wage determinations pending analysis of the comments received on the proposed rule. Accordingly, in the event we conclude that SCA and DBA wage determinations should be retained in the regulation, we propose to handle requests for review of PWD's based on DBA and SCA wage rates under the review procedures established by the Employment Standards Administration (ESA) for interested parties to obtain review of such rates at 29 CFR 1.8 and 7, subpart B in the case of DBA wage determinations and at 29 CFR 4.55, 4.56 and 8, subpart B in the case of SCA wage determinations. This procedure would enhance administrative consistency in the administration of the DBA and SCA, and would provide for administrative review in the agency with expertise. The current labor certification regulations and the proposed rule, in relevant part, contain a provision that reads as follows:

> If the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act * * * or the McNamara O'HARA Service Contract Act * * *, the prevailing wage shall be at the rate required under the statutory determination. Certifying Officers shall request the assistance of the DOL Employment Standards wage specialists if they need assistance in making this determination.

Before the decision of BALCA in *El Rio Grande,* it had been our position that Certifying Officers did not have the authority to determine whether or not to use an SCA or DBA wage determination in the labor certification context and that BALCA did not have the authority to review challenges to PWD's based on a SCA wage determinations. In *El Rio Grande,* however, BALCA held that:

> The regulatory language * * * places the ultimate responsibility for the SCA wage determination in a labor certification context on the CO, and only places Wage and Hour Division in an advisory role. Morever, the regulatory framework does not provide employers in labor certification proceedings the right to challenge SCA wage determinations through the Wage and Hour appeal procedures at 29 CFR 4.55, 4.56, and 8.2. Accordingly, we conclude that the Board of Alien Labor Certification appeals has jurisdiction, indeed the obligation, to review challenges to SCA wage determinations made by Cos pursuant to 20 CFR 655.40(a)(1).

Although the Board's decision in *El Rio Grande* did not specifically address DBA wage determinations, it would in all probability be equally applicable to DBA wage determinations, since they are used the same way SCA wage determinations are used in the labor certification regulations and the current review procedures established for DBA wage determinations do not provide employers in labor certification proceedings the right to challenge SCA wage determinations through the appeal procedures at 29 CFR 1.8 and 7, subpart B.

Executive Order 12866: We have determined that this proposed rule is not an ''economically significant regulatory action'' within the meaning of Executive Order 12866. The direct incremental costs employers would incur because of this rule, above business practices required by the current rule of employers that are applying for permanent alien workers

will not amount to $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities. The Department believes that any potential increase in recruitment and recordkeeping costs associated with the proposed rule would be more than offset by the combination of eliminating the role of the SWA's in the recruitment process and, consequently, eliminating the time employer's currently spend in working with SWA's to meet regulatory requirements. Further, the expected large reduction in average processing time to process applications will lead to a reduction in the resources employers spend on processing applications and will eliminate the need of the Department to periodically institute special, resource intensive efforts to reduce backlogs which have been a recurring problem under the current process. Any cost savings realized, however, will not be greater than $100 million. Public comment is requested on this issue.

While it is not economically significant, the Office of Management and Budget (OMB) reviewed the proposed rule because of the novel legal and policy issues raised by this rulemaking.

Regulatory Flexibility Act: The proposed rule would only affect those employers seeking immigrant workers for permanent employment in the United States. We have notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995: This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996: This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. It will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132: This proposed rule will not have a substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, we have determined that this rule does not have sufficient federalism implications to warrant the preparation of a summary impact statement.

Assessment of Federal Regulations and Policies on Families: The proposed regulation does not affect family well-being.

Paperwork Reduction Act

Summary:. This NPRM contains revised paperwork requirements at sections 655.731, 656.10, 656.14, 656.15, 656.16, 656.17, 656.18, 656.19, 656.21, 656.24 , 656.26, 656.40 and 656.41. The revised paperwork requirements are necessary to implement a streamlined system to process and adjudicate applications for permanent labor certification.

Published at the end of this NPRM are two forms that would be required to implement the streamlined process for the permanent labor certification program. One form is the *Prevailing Wage Determination Request* (PWDR) (ETA Form 9098) and the other is be the *Application for Permanent Labor Certification* (ETA Form 9099). Supporting documentation would not have to be submitted with an application, but employers would be required to assemble and maintain required supporting documentation and be able to produce such documentation in the event of an audit by an ETA Certifying Officer.

Need: The design and implementation of a streamlined permanent labor certification process that will yield a large reduction in the average time required to process labor certification applications requires revised paperwork requirements and the design and implementation of forms that are designed for automated processing.

Respondents and frequency of response: Employers submit applications for permanent labor certification when they wish to employ an immigrant alien worker. ETA estimates, based on its operating experience that in the upcoming year employers will file approximately 121,300 applications for alien employment certification and 121,300 PWDR's'(including an estimated 5,300 applications filed with the INS on behalf of aliens who qualify for *Schedule A* or who are immigrating to work as sheepherders) for a total burden of just over 357,835 hours (121,300 PWDR's × .75 hour + 121,300 applications for permanent labor certification × 2.2 hours = 357,835 hours).

Additionally, the Department estimates that 61,825 H–1B employers will file PWDR's with the SWA's to obtain prevailing wage determinations pursuant to provisions of 20 CFR 656.40 that have been incorporated into the regulations setting the forth H–1B employers' wage obligations at 20 CFR 655.731. This results in an additional annual burden of 46,369 hours (61,825 × .75 hours) or a total annual burden of 137,344 hours for the PWDR. The total annual burden for the PWDR and the Application for Permanent Labor Certification amounts to 404,204 hours.

The Department estimates that the total annual burden for all information collections in the proposed rule amounts to 557,429 hours. Employers filing applications for permanent alien labor certification come from a wide variety of industries. Salaries for employers and/or their employees who perform the reporting and recordkeeping functions required by this regulation may range from several hundred dollars to several hundred thousand dollars where the corporate executive office of a large company performs some or all of these functions themselves. Absent specific wage data regarding such employers and employees, respondent costs were estimated in the proposed rule at $25 an hour. Total annual respondent hour costs for all information collections are estimated at $13,935,725 (557,429 × $25.00).

The Department estimates that the 5000 employers will be required to conduct supervised recruitment. The Department estimates that cost of an advertisement over all types of publications and geographic locations will average $500.00 for a total annual burden of $2,500,000.

Request for comments: The public is invited to provide comments on the revised information collection requirements so that the Department of Labor may:

(1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimates of the burdens of the

collections of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including through the use of automated, electronic, mechanical or other technological collection techniques; e.g., permitting electronic submission of responses.

Written comments should be sent to the Assistant Secretary for Employment and Training, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4318,Washington, DC 20210, Attention: Dale Ziegler, Chief, Division of Foreign Labor Certifications. Comments should be received by July 5, 2002.

The collections of information in this notice of proposed rulemaking contain revised paperwork requirements currently approved under OMB control number 1205–0015 and the revisions have been submitted to OMB for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Copies of the information collection request submitted to OMB may be obtained by contacting Ira Mills, Departmental Clearance Officer. Telephone: (202) 693–4122 (this is not a toll free number), or E-Mail: *Mills-Ira@dol.gov.*

Catalogue of Federal Domestic Assistance Number: This program is listed in the *Catalogue of Federal Domestic Assistance* at Number 17.203, ''Certification for Immigrant Workers.''

List of Subjects in 20 CFR Parts 655 and 656

Administrative practice and procedure, Agriculture, Aliens, Crewmembers, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Guam, Health professions, Immigration, Labor, Longshore and harbor work, Migrant labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Students, Unemployment, Wages, Working conditions.

Appendix A to the Preamble—Education and Training Categories by O*Net-SOC Occupation

Note: Appendix A will not be codified in the Code of Federal Regulations when a final regulation is published.

BILLING CODE 4510–30–P

Education and Training Categories by O*NET-SOC Occupation

Code	Education and training category
1	1st professional degree
2	Doctoral degree
3	Master's degree
4	Work experience plus bachelor's or higher degree
5	Bachelor's degree

O*NET-SOC code	O*NET-SOC title	Education & training category code
21-2011.00	Clergy	1
23-1011.00	Lawyers	1
29-1011.00	Chiropractors	1
29-1021.00	Dentists, General	1
29-1022.00	Oral and Maxillofacial Surgeons	1
29-1023.00	Orthodontists	1
29-1024.00	Prosthodontists	1
29-1041.00	Optometrists	1
29-1051.00	Pharmacists	1
29-1061.00	Anesthesiologists	1
29-1062.00	Family and General Practitioners	1
29-1063.00	Internists, General	1
29-1064.00	Obstetricians and Gynecologists	1
29-1065.00	Pediatricians, General	1
29-1066.00	Psychiatrists	1
29-1067.00	Surgeons	1
29-1081.00	Podiatrists	1
29-1131.00	Veterinarians	1
19-1020.01	Biologists	2
19-1021.01	Biochemists	2
19-1021.02	Biophysicists	2
19-1022.00	Microbiologists	2
19-1023.00	Zoologists and Wildlife Biologists	2
19-1041.00	Epidemiologists	2
19-1042.00	Medical Scientists, Except Epidemiologists	2
19-2011.00	Astronomers	2
19-2012.00	Physicists	2
25-1021.00	Computer Science Teachers, Postsecondary	2
25-1022.00	Mathematical Science Teachers, Postsecondary	2
25-1032.00	Engineering Teachers, Postsecondary	2
25-1041.00	Agricultural Sciences Teachers, Postsecondary	2
25-1042.00	Biological Science Teachers, Postsecondary	2
25-1043.00	Forestry and Conservation Science Teachers, Postsecondary	2

25-1052.00	Chemistry Teachers, Postsecondary	2
25-1054.00	Physics Teachers, Postsecondary	2
25-1071.00	Health Specialties Teachers, Postsecondary	2
25-1121.00	Art, Drama, and Music Teachers, Postsecondary	2
15-2021.00	Mathematicians	3
15-2031.00	Operations Research Analysts	3
15-2041.00	Statisticians	3
19-3031.01	Educational Psychologists	3
19-3031.02	Clinical Psychologists	3
19-3031.03	Counseling Psychologists	3
19-3032.00	Industrial-Organizational Psychologists	3
19-3041.00	Sociologists	3
19-3051.00	Urban and Regional Planners	3
19-3091.01	Anthropologists	3
19-3091.02	Archeologists	3
19-3093.00	Historians	3
19-3094.00	Political Scientists	3
21-1012.00	Educational, Vocational, and School Counselors	3
21-1014.00	Mental Health Counselors	3
21-1022.00	Medical and Public Health Social Workers	3
21-1023.00	Mental Health and Substance Abuse Social Workers	3
25-1072.00	Nursing Instructors and Teachers, Postsecondary	3
25-4011.00	Archivists	3
25-4012.00	Curators	3
25-4021.00	Librarians	3
29-1121.00	Audiologists	3
29-1123.00	Physical Therapists	3
29-1127.00	Speech-Language Pathologists	3
11-1011.01	Government Service Executives	4
11-1011.02	Private Sector Executives	4
11-2011.00	Advertising and Promotions Managers	4
11-2021.00	Marketing Managers	4
11-2022.00	Sales Managers	4
11-3011.00	Administrative Services Managers	4
11-3021.00	Computer and Information Systems Managers	4
11-3031.01	Treasurers, Controllers, and Chief Financial Officers	4
11-3031.02	Financial Managers, Branch or Department	4
11-3040.00	Human Resources Managers	4
11-3041.00	Compensation and Benefits Managers	4
11-3042.00	Training and Development Managers	4
11-3061.00	Purchasing Managers	4
11-3071.01	Transportation Managers	4
11-3071.02	Storage and Distribution Managers	4
11-9031.00	Education Administrators, Preschool and Child Care Center/Program	4
11-9032.00	Education Administrators, Elementary and Secondary School	4
11-9033.00	Education Administrators, Postsecondary	4
11-9041.00	Engineering Managers	4
11-9111.00	Medical and Health Services Managers	4
11-9121.00	Natural Sciences Managers	4

11-9151.00	Social and Community Service Managers	4
13-1111.00	Management Analysts	4
23-1021.00	Administrative Law Judges, Adjudicators, and Hearing Officers	4
23-1022.00	Arbitrators, Mediators, and Conciliators	4
23-1023.00	Judges, Magistrate Judges, and Magistrates	4
27-3021.00	Broadcast News Analysts	4
11-3051.00	Industrial Production Managers	5
11-9021.00	Construction Managers	5
11-9141.00	Property, Real Estate, and Community Association Managers	5
13-1021.00	Purchasing Agents and Buyers, Farm Products	5
13-1022.00	Wholesale and Retail Buyers, Except Farm Products	5
13-1023.00	Purchasing Agents, Except Wholesale, Retail, and Farm Products	5
13-1031.01	Claims Examiners, Property and Casualty Insurance	5
13-1051.00	Cost Estimators	5
13-1071.01	Employment Interviewers, Private or Public Employment Service	5
13-1071.02	Personnel Recruiters	5
13-1072.00	Compensation, Benefits, and Job Analysis Specialists	5
13-1073.00	Training and Development Specialists	5
13-2011.01	Accountants	5
13-2011.02	Auditors	5
13-2021.01	Assessors	5
13-2021.02	Appraisers, Real Estate	5
13-2031.00	Budget Analysts	5
13-2041.00	Credit Analysts	5
13-2051.00	Financial Analysts	5
13-2052.00	Personal Financial Advisors	5
13-2053.00	Insurance Underwriters	5
13-2071.00	Loan Counselors	5
13-2072.00	Loan Officers	5
13-2081.00	Tax Examiners, Collectors, and Revenue Agents	5
15-1021.00	Computer Programmers	5
15-1031.00	Computer Software Engineers, Applications	5
15-1032.00	Computer Software Engineers, Systems Software	5
15-1051.00	Computer Systems Analysts	5
15-1061.00	Database Administrators	5
15-1071.01	Computer Security Specialists	5
15-1081.00	Network Systems and Data Communications Analysts	5
15-2011.00	Actuaries	5
17-1011.00	Architects, Except Landscape and Naval	5
17-1012.00	Landscape Architects	5
17-1021.00	Cartographers and Photogrammetrists	5
17-1022.00	Surveyors	5
17-2011.00	Aerospace Engineers	5
17-2021.00	Agricultural Engineers	5
17-2041.00	Chemical Engineers	5
17-2051.00	Civil Engineers	5
17-2061.00	Computer Hardware Engineers	5
17-2071.00	Electrical Engineers	5
17-2072.00	Electronics Engineers, Except Computer	5

17-2111.01	Industrial Safety and Health Engineers	5
17-2111.02	Fire-Prevention and Protection Engineers	5
17-2111.03	Product Safety Engineers	5
17-2112.00	Industrial Engineers	5
17-2121.01	Marine Engineers	5
17-2121.02	Marine Architects	5
17-2131.00	Materials Engineers	5
17-2141.00	Mechanical Engineers	5
17-2151.00	Mining and Geological Engineers, Including Mining Safety Engineers	5
17-2161.00	Nuclear Engineers	5
17-2171.00	Petroleum Engineers	5
19-1011.00	Animal Scientists	5
19-1012.00	Food Scientists and Technologists	5
19-1013.01	Plant Scientists	5
19-1013.02	Soil Scientists	5
19-1031.01	Soil Conservationists	5
19-1031.02	Range Managers	5
19-1031.03	Park Naturalists	5
19-1032.00	Foresters	5
19-2021.00	Atmospheric and Space Scientists	5
19-2031.00	Chemists	5
19-2032.00	Materials Scientists	5
19-2041.00	Environmental Scientists and Specialists, Including Health	5
19-2042.01	Geologists	5
19-2043.00	Hydrologists	5
19-3011.00	Economists	5
19-3021.00	Market Research Analysts	5
19-3092.00	Geographers	5
21-1021.00	Child, Family, and School Social Workers	5
21-1091.00	Health Educators	5
21-1092.00	Probation Officers and Correctional Treatment Sp	5
21-2021.00	Directors, Religious Activities and Education	5
25-1191.00	Graduate Teaching Assistants	5
25-2011.00	Preschool Teachers, Except Special Education	5
25-2012.00	Kindergarten Teachers, Except Special Education	5
25-2021.00	Elementary School Teachers, Except Special Education	5
25-2022.00	Middle School Teachers, Except Special and Vocational Education	5
25-2023.00	Vocational Education Teachers, Middle School	5
25-2031.00	Secondary School Teachers, Except Special and Vocational Education	5
25-2032.00	Vocational Education Teachers, Secondary School	5
25-2041.00	Special Education Teachers, Preschool, Kindergarten and Elementary	5
25-2042.00	Special Education Teachers, Middle School	5
25-2043.00	Special Education Teachers, Secondary School	5
25-9021.00	Farm and Home Management Advisors	5
25-9031.00	Instructional Coordinators	5
27-1011.00	Art Directors	5
27-1021.00	Commercial and Industrial Designers	5
27-1022.00	Fashion Designers	5
27-1025.00	Interior Designers	5

27-3022.00	Reporters and Correspondents	5
27-3031.00	Public Relations Specialists	5
27-3041.00	Editors	5
27-3042.00	Technical Writers	5
27-3091.00	Interpreters and Translators	5
27-4032.00	Film and Video Editors	5
29-1031.00	Dietitians and Nutritionists	5
29-1071.00	Physician Assistants	5
29-1122.00	Occupational Therapists	5
29-1125.00	Recreational Therapists	5
29-2011.00	Medical and Clinical Laboratory Technologists	5
33-3021.03	Criminal Investigators and Special Agents	5
39-9032.00	Recreation Workers	5
39-9041.00	Residential Advisors	5
41-3021.00	Insurance Sales Agents	5
41-3031.01	Sales Agents, Securities and Commodities	5
41-3031.02	Sales Agents, Financial Services	5
41-9031.00	Sales Engineers	5
53-2011.00	Airline Pilots, Copilots, and Flight Engineers	5
53-2012.00	Commercial Pilots	5

Education & Training Category Code	
1	First professional degree. Completion of the academic program usually requires at least 6 years of full-time equivalent academic study, including college study prior to entering the professional degree program.
2	Doctoral degree. Completion of the degree program usually requires at least 3 years of full-time equivalent academic work beyond the bachelor's degree.
3	Master's degree. Completion of the degree program usually requires 1 or 2 years of full-time equivalent study beyond the bachelor's degree.
4	Work experience, plus a bachelor's or higher degree. Most occupations in this category are managerial occupations that require experience in a related nonmanagerial position.
5	Bachelor's degree. Completion of the degree program generally requires at least 4 years but not more than 5 years of full-time equivalent academic work.

BILLING CODE 4510–30–C

Accordingly, we propose that parts 655 and 656 of Chapter V of Title 20 of the Code of Federal Regulations to be amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas.

1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 323, Pub. L. 103–206, 107 Stat. 2149; Title IV, Pub. L. 105–277,112 Stat. 2681; Pub. L. 106–95, 113 Stat. 1312 (8 U.S.C. 1182 note); and 8 CFR 213.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub. L 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; sec 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and Title IV, Pub. L. 105–277, 112 Stat. 2681.

Subparts J and K issued under 29 U.S.C. 49 *et. seq.*; and sec 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*

2. Amend § 655.731 as follows:

a. Revise paragraph (a)(2);

b. Redesignate paragraphs (b)(3)(iii)(B)(*2*) and (*3*) as paragraphs (b)(3)(iii)(B)(*3*) and (*4*), respectively;

c. Add new paragraph (b)(3)(iii)(B)(*2*);

d. Redesignate paragraphs (b)(3)(iii)(C)(*2*) and (*3*) as paragraphs (b)(3)(iii)(C)(*3*) and (*4*), respectively;

e. Add new paragraph (b)(3)(iii)(C)(*2*);

f. Revise paragraph (d)(2); and

g. Remove paragraph (d)(4).

The revisions and additions are to read as follows:

§ 655.731 What is the first LCA requirement, regarding wages?

* * * * *

(a) * * *

(1) * * *

(2) The *prevailing wage* for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. Where the survey which is the basis for the prevailing wage determination contains more than one wage for the occupational classification, the employer shall pay the H–1B nonimmigrant(s) at least the applicable wage from the survey for the work performed. For example, if an H–1B nonimmigrant initially is an inexperienced worker who cannot work independently, and later the H–1B nonimmigrant is able to work independently, the employer, where applicable, shall pay at least the wage for such independent work as set forth in the survey that was the basis for the initial prevailing wage determination. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a State Employment Security Agency (SESA), an independent authoritative source, or other legitimate sources of wage data. One of the following sources shall be used to establish the prevailing wage:

(i) A collective bargaining agreement which was negotiated at arms-length between a union and the employer which contains a wage rate applicable to the occupation; or

(ii) If the job opportunity is in an occupation which is not covered by paragraph (a)(2)(i) of this section, the prevailing wage shall be the arithmetic mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(*2*), and (b)(3)(iii)(C)(*2*) of this section. The prevailing wage rate shall be based on the best information available. The Department believes that the following prevailing wage sources are, in order of priority, the most accurate and reliable:

(A) *SESA determination.* Upon receipt of a written request for a prevailing wage determination, the SESA will determine whether the occupation is covered by a collective bargaining agreement which was negotiated at arms length, and, if not, determine the arithmetic mean of wages of workers similarly employed in the area of intended employment. The wage component of the Bureau of Labor Statistics Occupational Employment Statistics survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey. If an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a prevailing wage determination, the SESA will follow § 656.40 of this chapter and other administrative guidelines or regulations issued by ETA. The SESA shall specify the validity period of the prevailing wage determination which in no event shall be for less than 90 days or more than 1 year from the date of the determination.

(*1*) An employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application within the validity period of the prevailing wage as specified on the Prevailing Wage Determination Request form (ETA FORM 9088). Any employer desiring review of a SESA prevailing wage determination, including judicial review, shall follow the appeal procedures at § 656.41 of this chapter. Employers which challenge a SESA prevailing wage determination under § 656.41 must obtain a ruling prior to filing an LCA. In any challenge, the Department and the SESA hall not divulge any employer wage data which was collected under the promise of confidentiality. Once an employer obtains a prevailing wage determination from the SESA and files an LCA supported by that prevailing wage determination, the employer is deemed to have accepted the prevailing wage determination (as to the amount of the wage) and thereafter may not contest the legitimacy of the prevailing wage determination by filing an appeal with the Prevailing Wage Panel (see § 656.41 of this chapter), or in an investigation or enforcement action.

(*2*) If the employer is unable to wait for the to produce the requested prevailing wage for the occupation in question, or for the Prevailing Wage Panel and/or the Board of Alien Labor Certification Appeals to issue a decision, the employer may rely on other legitimate sources of available wage information as set forth in paragraphs (a)(2)(ii)(B) and (C) of this section. If the employer later discovers, upon receipt of the prevailing wage determination from the SESA, that the information relied upon produced a wage that was below the prevailing wage for the occupation in the area of intended employment and the employer was paying below the SESA-determined wage, no wage violation will be found if the employer retroactively compensates the H–1B nonimmigrant(s)

for the difference between wage paid and the prevailing wage, within 30 days of the employer's receipt of the prevailing wage determination.

(*3*) In all situations where the employer obtains the prevailing wage determination from the SESA, the Department will accept that prevailing wage determination as correct (as to the amount of the wage) and will not question its validity where the employer has maintained a copy of the SESA prevailing wage determination. A complaint alleging inaccuracy of a SWA prevailing wage determination, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of a SESA prevailing wage determination. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

(C) *Another legitimate source of wage information.* The employer may rely on other legitimate sources of wage data to obtain the prevailing wage. The other legitimate source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(C) of this section. The employer will be required to demonstrate the legitimacy of the wage in the event of an investigation.

(iii) For purposes of this section, ''similarly employed'' means ''having substantially comparable jobs in the occupational classification in the area of intended employment,'' except that if a representative sample of employers in the occupational category cannot be obtained in the area of intended employment, ''similarly employed'' means:

(A) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(B) 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.

(iv) A prevailing wage determination for LCA purposes made pursuant to this section shall not permit an employer to pay a wage lower than that required under any other applicable Federal, state or local law.

(v) Where a range of wages is paid by the employer to individuals in an occupational classification or among individuals with similar experience and qualifications for the specific employment in question, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage rate.

(vi) The employer shall enter the prevailing wage on the LCA in the form in which the employer will pay the wage (i.e., either a salary or an hourly rate), except that in all cases the prevailing wage must be expressed as an hourly wage if the H–1B nonimmigrant will be employed part-time. Where an employer obtains a prevailing wage determination (from any of the sources identified in paragraph (a)(2)(i) and (ii) of this section) that is expressed as an hourly rate, the employer may convert this determination to a yearly salary by multiplying the hourly rate by 2080. Conversely, where an employer obtains a prevailing wage (from any of these sources) that is expressed as a yearly salary, the employer may convert this determination to an hourly rate by dividing the salary by 2080.

(vii) In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment in the case of an employee of an *institution of higher education or an affiliated or related nonprofit entity, a nonprofit research organization, or a Governmental research organization* as these terms are defined in 20 CFR 656.40(e), the prevailing wage level shall only take into account employees at such institutions and organizations in the area of intended employment.

(viii) An employer may file more than one LCA for the same occupational classification in the same area of employment and, in such circumstances, the employer could have H–1B employees in the same occupational classification in the same area of employment, brought into the U.S. (or accorded H–1B status) based on petitions approved pursuant to different LCAs (filed at different times) with different prevailing wage determinations. Employers are advised that the prevailing wage rate as to any particular H–1B nonimmigrant is prescribed by the LCA which supports that nonimmigrant's H–1B petition. The employer is required to obtain the prevailing wage at the time that the LCA is filed (see paragraph (a)(2) of this section). The LCA is valid for the period certified by ETA, and the employer must satisfy all the LCA's requirements (including the required wage which encompasses both prevailing and actual wage rates) for as long as any H–1B nonimmigrants are employed pursuant to that LCA (§ 655.750). Where new nonimmigrants are employed pursuant to a new LCA, that new LCA prescribes the employer's obligations as to those new nonimmigrants. The prevailing wage determination on the later/subsequent LCA does not ''relate back'' to operate as an ''update'' of the prevailing wage for the previously-filed LCA for the same occupational classification in the same area of employment. However, employers are cautioned that the actual wage component to the required wage may, as a practical matter, eliminate any wage-payment differentiation among H–1B employees based on different prevailing wage rates stated in applicable LCAs. Every H–1B nonimmigrant is to be paid in accordance with the employer's actual wage system, and thus to receive any pay increases which that system provides.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(B) * * *

(*2*) Reflect the median wage of workers similarly employed in the area of intended employment if the survey provides such a median and does not provide a weighted average wage of workers similarly employed in the area of intended employment;

* * * * *

(C) * * *

(*2*) Reflect the median wage of workers similarly employed in the area of intended employment if the survey provides such a median and does not provide a weighted average wage of workers similarly employed in the area of intended employment;

* * * * *

(d) * * *

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, and the employer desires review, including judicial review, the employer shall challenge the ETA prevailing wage only by filing a request for review with the Prevailing Wage Panel (PWP) under § 656.41(a) of this chapter within 21 calendar days of the employers receipt of the prevailing wage determination from the Administrator. If the request is timely filed, the decision of ETA shall be inoperative until the PWP issues a determination on the employer's appeal. If the employer desires review, including judicial review, of the decision of the PWP, the employer shall make a request for review of the determination by the Board of Alien Labor Certification Appeals (BALCA) under § 656.41(e) of this chapter within 21 days of the receipt of the decision of the PWP. If a request for review is timely filed with the BALCA, the determination by the PWP shall be inoperative until the BALCA issues a determination on the employer's appeal. In any challenge to the wage determination, neither ETA

nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.

* * * * *

3. Part 656 is revised to read as follows:

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

Subpart A—Purpose and Scope of Part 656

Sec.

656.1 Purpose and scope of part 656.
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.
656.14 Fees.
656.15 Applications for labor certification for *Schedule A* occupations.
656.16 Labor certification applications for sheepherders.
656.17 Basic labor certification process.
656.18 Optional special recruitment and documentation procedures for college and university teachers.
656.19 Live-in household domestic service workers.
656.20 Audit letters.
656.21 Supervised recruitment.
656.24 Labor certification determinations.
656.25 Board of Alien Labor Certification Appeals review of denials of labor certification.
656.26 Board of Alien Labor Consideration Appeals review of denials of labor certification.
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 certifications involving fraud or willful misrepresentation.
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 ETA Prevailing Wage Panel review of prevailing wage determinations.

Authority: 8 U.S.C. 1182(a)(5)(A), 1189(p)(1); 29 U.S.C. 49 *et seq.;* section 122, Pub. L. 101–649, 109 Stat. 4978; and Title IV, Pub. L. 105–277, 112 Stat. 2681.

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) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain 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 Attorney General 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: Division of Foreign Labor Certifications, Office of Workforce Security, Department of Labor, Washington, DC 20210.

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

(a)(1) *Description of the Act.* The Immigration and Nationality Act (Act) (8 U.S.C. 1101 *et seq.*) regulates the admission of aliens into the United States. The Act designates the Attorney General and the Secretary of State as the principal administrators of its provisions.

(2) The Immigration and Naturalization Service (INS) performs most of the Attorney General's functions under the Act. See 8 CFR 2.1.

(3) The consular offices of the Department of State throughout the world are generally the initial contacts for aliens in foreign countries who wish to come to the United States. These offices determine the type of visa for which aliens may be eligible, obtain visa eligibility documentation, and issue visas.

(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)(1) *Role of the Department of Labor.* The 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 must be excluded unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General 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 issue labor certifications in two instances: For the permanent employment of aliens; and for temporary employment of aliens in the United States classified under 8 U.S.C. 1101(a)(15)(H)(ii), under the regulations of the Immigration and Naturalization Service at 8 CFR 214.2(h)(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 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), registered nurses (H–1C 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)(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.

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

Administrative Law Judge means a Department of Labor official appointed under 5 U.S.C. 305.

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 Labor Certification (ETA Form 9089).

Application means an *Application for Alien Employment Certification form and Prevailing Wage Determination Request* form submitted by an employer (or its agent) in applying for a labor certification under this part.

Application for Alien Employment Certification Form (ETA Form 9089) means the form, which in addition to the *Prevailing Wage Determination Request* form (see definition below), must be submitted by the employer to an ETA application processing center to apply for a labor certification under this part. The *Application for Alien Employment Certification* form requires the employer to respond to attestations and to provide other information necessary to assess the employer's compliance with program requirements.

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, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not 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).

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 any order of any court or of the Board of Immigration Appeals suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law.

Attorney General means the chief official of the U.S. Department of Justice or the designee of the Attorney General.

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

Chief Administrative Law Judge means the chief official of the Office of Administrative Law Judges of the Department of Labor.

Division of Foreign Labor Certifications means the organizational component within the Employment and Training Administration (defined below) which 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 to Section 212(a)(5)(A) of the Immigration And Nationality Act, as amended.

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 Alien Employment Certification.*

(2) Job opportunities consisting solely of job duties that will be performed totally outside the United States, its territories or possessions cannot be the subject of a permanent application for alien employment certification.

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) which includes the Division of Foreign Labor Certifications.

Employer means: (1) A person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. 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.

(2) Persons who are temporarily in the United States, such as foreign diplomats, intracompany transferees, students, exchange visitors, and representatives of foreign information media cannot be employers for the purpose of obtaining a labor certification for permanent employment.

(3) Job opportunities consisting solely of job duties that will be performed totally outside the United States, its territories or possessions cannot be the subject of a permanent application for alien employment certification.

Immigration and Naturalization Service (INS) means the agency within the U.S. Department of Justice which administers that Department's principal functions under the Act.

Immigration Officer means an official of the Immigration and Naturalization Service (INS) who handles applications for labor certifications under this part.

INS, see ''Immigration and Naturalization Service.''

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

Labor certification means the certification to the Secretary of State and to the Attorney General of the determination by the Secretary of Labor under section 212(a)(5)(A) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(5)(A)):

(1) That there are not sufficient U.S. workers who are able, willing, qualified, and available at the time of an alien's application for a visa and admission to the United States and at the place where the alien is to perform the work; and

(2) That the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Non-professional 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 which:

(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.

*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://online.onetcenter.org/.

Prevailing Wage Determination means the prevailing wage entered on the *Prevailing Wage Determination Request* form by the State Employment Security Agency.

Prevailing Wage Determination Request (PWDR) Form (ETA Form 9088) means the form that must be submitted to the State Employment Security Agency to obtain a prevailing wage determination.

Professional occupation means an occupation for which the attainment of a bachelor's or higher degree is a usual education requirement for the occupation. 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 PWDR form. If the employer is willing to accept an equivalent foreign degree, it must be clearly stated on the PWDR form.

Regional Director, Employment and Training Administration (RD) means the chief official of the Employment and Training Administration (ETA) in a Department of Labor regional office.

Schedule A means the list of occupations set forth in § 656.5 for which we have determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

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.

Level and Time

1—Short demonstration.
2—Anything beyond short demonstration up to and including 30 days.
3—Over 30 days up to and including 3 months.
4—Over 3 months up to and including 6 months.
5—Over 6 months up to and including 1 year.
6—Over 1 year up to and including 2 years.
7—Over 2 years up to and including 4 years.
8—Over 4 years up to and including 10 years.
9—Over 10 years.

State Employment Security Agency (SWA) means the state agency which, under the Wagner-Peyser Act, receives funds to provide prevailing wage determinations to 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 fifty States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam.

United States Worker means any worker who:

(1) Is a U.S. citizen;

(2) Is a U.S. national;

(3) Is lawfully admitted for permanent residence;

(4) Is 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) Is admitted as a refugee under 8 U.S.C. 1157; or

(6) Is granted asylum under 8 U.S.C. 1158.

Subpart B—Occupational Labor Certification Determinations

§ 656.5 Schedule A.

We have determined that there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on *Schedule A* and that 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 alien seeking a labor certification for an occupation listed on *Schedule A* may apply for that labor certification under § 656.19

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 passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or (ii) who hold a permanent, full and unrestricted license to practice professional nursing in the State of intended employment.

(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 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.

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) and (3) 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 may also choose to file under either § 656.17 or § 656.18.

(3) An employer seeking labor certification for an occupation listed on *Schedule A* may 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 may 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 Alien Employment Certification* form: That the attorney or agent is representing the employer and that 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 must be sent to the attorney or agent who has been authorized to represent the employer on the *Application for Alien 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 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 cannot represent the best interests of U.S. workers in the job opportunity. The alien's agent and/or attorney cannot 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 the United States Department of Justice's Executive Office for Immigration Review or the INS under 8 CFR 292.3 is permitted to act as an agent, representative, or attorney for an employer and/or alien under this part.

(c) *Attestations.* The employer must attest to the conditions listed below on the *Application for Alien Employment Certification* form under penalty of perjury under 28 U.S.C. 1746. Failure to attest to any of the conditions listed below results in a denial of the application:

(1) The wage offered equals or exceeds the prevailing wage determined under § 656.40, and the employer will pay the prevailing wage to the alien from the time a petition filed to adjust status under section 245 of the Act is approved, or from the time the alien enters the United States to take up the certified employment after the issuance of a visa by a Consular Officer;

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

(3) The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;

(4) The employer's job opportunity is not:

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

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

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

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

(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 Alien 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 Alien 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 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a). In addition the employer must publish the posting in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of other 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 the in-house media whether electronic or published that were used to distribute notice of the application in accordance with the procedures used for other positions recruitment 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) Any notice of the filing of an *Application for Alien Employment Certification* must:

(i) State that 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 that any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor; and

(iii) Provide the address of the appropriate Certifying Officer.

(4) If an application is filed under § 656.17, the notice must be provided between 45 and 180 days before filing the application, must contain the information required for advertisements by § 656.17(e)(1) through (e)(7), 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)(2), and must include the requirements of 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 paragraphs (d)(3)(i) and (ii) 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 that may be 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 INS office documentary evidence of fraud or willful misrepresentation in a *Schedule A* application filed under § 656.15 sheepherder application filed under § 656.16.

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

§ 656.14 Fees.

(a) *Payment of processing fee.* Employers must submit with their application a check or money order drawn on a financial institution in the United States in the amount of $XXXX, payable in U.S. Currency. A charge of $30.00 will be imposed if a check in payment of the fee is not honored by the financial institution on which it is drawn.

(1) Checks for applications filed with the U.S. Department of Labor under §§ 656.17 and 18 must be made payable to the U.S. Department of Labor.

(2) Checks for applications filed with INS under §§ 656.15 and 17, must be made payable to the Immigration and Naturalization Service.

(b) *Returned (''insufficient funds'') checks.* (1) Existence of any outstanding ''insufficient funds'' check that was submitted for processing an application or for payment of the $30.00 charge imposed for a check submitted in payment of the charge imposed for submission of a check that was not honored by the financial institution on which it was drawn, is grounds for returning any application for alien employment certification to the employer as unacceptable for processing.

(2) Receipt of any ''insufficient funds'' check while the application is being processed is grounds for denying the application.

(3) Receipt of any ''insufficient funds'' checks after an application has been certified results in automatic revocation of the certification, if payment in U.S. funds has not been received within 14 calendar days of date of the notification to the employer of the existence of an ''insufficient funds'' check.

(c) *Returned applications.* If an application is returned to the employer because it is incomplete, the employer may request a refund of the fee or resubmit the application.

§ 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 in duplicate with the appropriate Immigration and Naturalization Service office, not with the Department of Labor or a State Workforce Agency office.

(b) *General documentation requirements.* The *Application for Alien Employment Certification* form must include:

(1) An *Application for Alien Employment Certification* form and a completed PWDR form endorsed by the SWA.

(2) Evidence that notice of filing the application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(f)(3).

(c) *Group I documentation.* An employer seeking labor certification under Group I of *Schedule A* must file, 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 that 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 as a professional nurse (§ 656.5(a)(2)) must file as part of its labor certification application documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment. 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 *Schedule A* labor certification under Group II of *Schedule A* must file 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 that 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 in 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; or

(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 aliens' 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 INS is conclusive and final. The employer, therefore, may not appeal from any such determination under the review procedures at § 656.26.

(f) *Department of Labor copy.* If the alien qualifies for the occupation, the Immigration Officer must indicate the occupation on the *Application for Alien Employment Certification* form. The Immigration Officer then must promptly forward a copy of the *Application for Alien Employment Certification* form, without attachments, to the Director, indicating thereon the occupation, the Immigration Officer who made the *Schedule A* determination, and the date of the determination (see § 656.30 for the significance of this date).

(g) *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 may be considered only under § 656.15.

§ 656.16 Labor certification applications for sheepherders.

(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 Alien Employment Certification form* and a completed PWDR form endorsed by the SWA, directly with a District Office of INS, not with an office of DOL.

(2) A signed letter or letters from each U.S. employers who has employed the alien as a sheepherder during the immediately preceding 36 months, attesting that 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 paragraph (b) of this section 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 Alien Employment* form the occupation, the immigration office which made the determination, and the date of the determination (see § 656.30 for the significance of this date). The Immigration Officer then forwards promptly to the Division of Foreign Labor Certifications copies of the *Application for Alien Employment Certification* form, without the attachments.

(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.* 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, signed by hand, a completed Department of Labor *Application for Alien Employment Certification* form, a completed PWDR form that has been endorsed by the SWA serving the area where the employer proposes the alien will be employed, and the processing fee of $XXXX in accordance with § 656.14. The application must be filed with the DOL servicing office. Supporting documentation that may be requested by the Certifying Officer in an audit letter should not be filed with the application, but the employer must be prepared to furnish required supporting documentation if its application is selected for audit.

(b) *Processing.* (1) Applications are screened and found to be either incomplete, or are certified, denied, or selected for audit. Applications that

cannot be accepted for processing because certain information that was requested by the application form was not provided are returned to the employers.

(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 predetermined selection criteria or may be randomly selected.

(c) *Filing Date.* (1) Applications accepted for processing shall be date stamped.

(2) Applications not accepted for filing and returned to employers shall not be date stamped.

(3) Employers that filed applications under the regulations that were in effect prior to _____, 2002, may refile such cases under the current regulations without loss of the filing date by:

(i) Submitting an application on behalf of an identical job opportunity filed under the regulations that were in effect prior to _____, 2002, if the employer has complied with all of the filing and recruiting requirements of the current regulations; and

(ii) Identifying and withdrawing the application involving the identical job opportunity pending under the regulations effective prior to _____, 2002.

(d) *Required prefiling recruitment.* Except for labor certification applications involving college or university teachers selected to by a competitive recruitment and selection process (see § 656.18), *Schedule A* occupations (see §§ 656.5 and 656.15), and sheepherders (see § 656.16), an employer must attest, depending on whether a professional or nonprofessional occupation is involved in the application, to have 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 six 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 document such recruitment in the event of an audit.

(i) *Mandatory steps.* Two of the steps 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 § 656.16. 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 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.

(B) *Advertisements in newspaper or professional journals.* (*1*) Placing two advertisements in the Sunday edition of the newspaper of general circulation most appropriate to the occupation and the workers likely to apply for the job opportunity in the area of intended employment. There must be a minimum of three consecutive intervening Sundays between publication of the two advertisements and they must satisfy the requirements of paragraph (f)(1) of this section. Documentation of this step can be satisfied by furnishing copies of the tear sheets of the newspaper pages in which the advertisements appeared or proof of publication furnished by the newspaper.

(*2*) If the job involved in the application requires experience and an advanced degree, the employer must, 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 below. 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 for the occupation involved in the application can be documented by providing dated copies of pages from the site which advertise the occupation involved in the application.

(C) *Job search web site other than 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 web site(s) which advertises the occupation involved in the application. Copies of web pages generated in conjunction with the newspaper advertisements required by paragraph (d)(1)(i)(B) of this section cannot serve as document 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 will be conducting 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.

(2) *Non-professional occupations.* If the application is for a non-professional occupation, the employer must at a minimum, conduct two of the following steps within 6 months of filing the occupation. 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.* Placing of two advertisement in the Sunday edition of the newspaper of general circulation most appropriate to the occupation and the workers likely to apply for the job opportunity in the area of intended employment. There must be a minimum of three consecutive intervening Sundays between publication of the two advertisements and the advertisements must satisfy the requirements of paragraph (f)(1) of this section. Placing the newspaper advertisements can be documented in the same way as provided in paragraph (c)(1)(i)(B) for professional occupations.

(e) *Advertising Requirements.* Advertisements placed in Sunday

editions of newspapers of general circulation or in professional journals before filing the Application *for Alien 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) Describe the geographic area involved in the application with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity;

(5) State the rate of pay which must equal or exceed the prevailing wage entered on the PWDR form by the SWA;

(6) Not contain any job requirements which exceed the job requirements listed on the PWDR form; and

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

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

(2) 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. For the purpose of paragraph (e)(2) of this section, 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.

(g) *Job Requirements.* (1) The job opportunity's requirements must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*Net Job Zones.

(2) Requirements other than those relating to the number of months or years of experience in the occupation or the number of months or years of education or training in the occupation cannot be used unless justified in the following circumstances:

(i) The employer employed a U.S. worker to perform the job opportunity with the special requirements within 2 years of filing the application. This could be documented by furnishing the name of the former employee and one or more of the following: Job description, resume, letter from previous employee and/or previous recruitment documentation.

(ii) The other requirements are normal to the occupation for a person to perform the basic job duties and are routinely required by other employers in the industry. Acceptable examples, depending on the occupation, include but are not limited to: Professional trade or business licenses, specified typing speed, and ability to lift a minimum number of pounds. Acceptable documentation that other employers in the industry routinely have such a requirement includes state and/or local laws regulations, or ordinances, articles, help-wanted advertisements, or employer surveys.

(iii) A foreign language requirement cannot be included merely for the convenience of the employer or due to the mere preference of the employer, or customers. A foreign language requirement can be based on the nature of the occupation; *e.g.,* translator, or, for example, the need to communicate with a large majority of the employer's customers or contractors who cannot communicate effectively in English. Acceptable documentation includes:

(A) The employer furnishing the number and proportion of its clients, or contractors who cannot 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 require frequent contact and communication with customers, or contractors who cannot communicate in English and why it is reasonable to believe that the allegedly foreign language customers, employees and contractors cannot communicate in English.

(iv) Combination occupations are acceptable only if the employer has employed a U.S. worker in the combination of occupations for the 2 years immediately before the filing of the application and/or workers customarily perform the combination of duties in the area of intended employment. Combination occupations can be documented by position descriptions and relevant payroll records and/or letters from other employers stating that their workers normally perform the combination of occupations in the area of intended employment.

(3) A job requirement for a bachelor's or higher degree does not have to be justified if:

(i) the occupation involved in the employer's application is on a list of occupations issued by ETA for which a bachelor's or higher degree is required; and

(ii) the education and training requirements for the employer's job opportunity is consistent with the education and training required for the occupation involved in the employer's application.

(h) *Actual minimum requirements.* (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity, and the employer must not have:

(i) Hired workers with less training or experience for jobs similar to that involved in the job opportunity;

(ii) Included as a requirement for the job offer experience which the alien gained working for the employer in any capacity, including working as a contract employee; and

(iii) Paid for any of the alien's education or training necessary to satisfy any of the employer's job requirements.

(2) For purposes of this paragraph (h), the term ''employer'' includes predecessor organizations, successors in interest, a parent, branch, subsidiary, or affiliate, whether located in the United States or another country.

(i) *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 that the requirement is essential to perform in a reasonable manner the job duties as described by the employer and that 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 baby sitters, a detailed listing of the frequency and

length of absences of the employer from the home.

(j) *Layoffs.* (1) If there has been a layoff by the employer applicant in the area of intended employment within 6 months of filing the occupation involving the occupation for which certification is sought or in a related occupation, the employer must document that it has notified and considered all potentially qualified laid off U.S. workers of the job opportunity involved in the application and the results of the notification.

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

(k) *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, the employer in the event of an audit must provide the following documentation:

(1) A copy of the articles of incorporation;

(2) A list of all corporate officers and shareholders of the corporation, their titles and positions in the corporate structure, and a description of their relationship to each other and to the alien beneficiary;

(3) The financial history of the corporation, including the total investment in the corporation and the amount of investment of each corporate officer, incorporator and the alien beneficiary; and

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

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

(a) *Filing requirements.* Applications on behalf of college and university teachers must be filed by submitting a completed *Application for Permanent Employment Certification* form and PWDR form with the appropriate application processing center.

(b) *Recruitment* The employer may recruit for college and university teachers under § 656.17 or be able to document that 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

(iii) 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.

(2) 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;

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

(4) 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 in to a competitive recruitment and selection process.

(d) *Alternative procedure.* An employer that cannot 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 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), that the alien was found to be more qualified than any U.S. worker who applied for the job opportunity.

§ 656.19 Live-in household domestic service workers.

(a) *Filing requirements.* Applications on behalf of live-in household domestic service workers must be filed by submitting a completed *Application for Alien Employment Certification* form and PWDR form endorsed by the SWA with the appropriate application processing center.

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

(1) A statement describing the household living accommodations that must include 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) Whether or not free board and a private room not shared by any other person will be provided to the alien.

(2) Two copies of the employment contract, each signed and dated 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 that 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 that 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 Alien Employment Certification* form.

§ 656.20 Audit letters.

(a) *Issuance of audit letter.* Review of the labor certification application may lead to an audit of the application. Additionally, certain applications may be selected for audit for quality control purposes. If an application is selected for audit, the Certifying Officer issues an audit letter. The audit letter must:

(1) Contain the date on which the audit letter was issued;

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

(3) Specify a date, 21 calendar days from the date of the audit letter by which the required documentation must be submitted and advise that, if the required documentation has not been mailed by certified mail by the date specified:

(i) The application shall be denied;

(ii) Failure to provide required documentation shall be deemed to be a material misrepresentation of the employer's attestation that it has complied with all documentation requirements;

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

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

(4) Certifying Officers may not provide any extensions to the 21 days specified in § 656.20(a)(3).

(b) If documentation is submitted on time, the Certifying Officer reviews that documentation in accordance with the standards in § 656.24.

(c) Before making a final determination in accordance with the standards in § 656.24, the Certifying Officer may:

(1) Request supplemental information and/or documentation; or

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

§ 656.21 Supervised Recruitment.

(a) *Supervised recruitment.* In a case where the Certifying Officer determines it to be appropriate, including determinations made pursuant to § 656.20(a)(3)(ii), post-filing supervised recruitment may be required of the employer.

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

(1) Direct applicants to send resumes or applications for the job opportunity to the Certifying Officer for referral to the employer;

(2) Include a regional office identification number and an address designated by the Certifying Officer, but must not identify the employer;

(3) Describe the job opportunity;

(4) State the rate of pay, which must not be below the prevailing wage for the occupation entered on the PWDR form by the SWA;

(5) Summarize the employer's minimum job requirements which cannot exceed any of the requirements entered on the PWDR form by the employer;

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

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

(c) *Additional or substitute recruitment.* The Certifying Officer may designate other appropriate sources of workers where the employer must recruit for U.S. workers in addition to the advertising described in paragraph (b)(1) of this section.

(d) *Recruitment report.* The employer must provide to the Certifying Officer a 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 21 days of the Certifying Officer's request for such a report. The recruitment report results 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. Documentation of 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 (if any) 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 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 (d)(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.

§ 656.24 Labor certification determinations.

(a) 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; and

(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 (a)(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 the prevailing working conditions, such as hours in the occupation.

(b) The Certifying Officer notifies the employer in writing of the labor certification determination.

(c) If a labor certification is granted, except for a labor certifications for an occupation on *Schedule A* (§ 656.5) or for employment as a sheepherder 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 that the employer may file all the documents with the appropriate INS office.

(d) If the labor certification is denied, the Final Determination form must:

(1) Contain the date of the determination;

(2) State the reasons for the determination;

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

(4) Advise that failure to request review within 21 calendar days, as specified in § 656.26(a), constitutes a failure to exhaust administrative remedies;

(5) Advise that, if a request for review is not made within 21 calendar days, the denial shall become the final determination of the Secretary;

(6) 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

(7) Advise that a new application in the same occupation for the same alien cannot be filed, while a request for review is pending with the Board of Alien Labor Certification Appeals.

(e) If the Certifying Officer determines that the employer made a material misrepresentation that it has complied with all documentation requirements pursuant to § 656.20(a)(ii), or otherwise determines a material misrepresentation was made with respect to the application for any reason, the employer may be required to conduct supervised recruitment pursuant to § 656.21 in future filings of labor certification applications for 2 years.

(f) The employer may request reconsideration at any time within 21 days from the date of insurance of the denial. The Certifying Officer may, in his or her complete 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 or revoked, a request for review of the denial or revocation may be made to the Board of Alien Labor Certification Appeals by the employer. Any employer seeking review of a determination issued under § 656.24, including judicial review, must make a request for such an administrative review in accordance with the procedures provided in this paragraph (a). The request for review:

(i) Must be in writing;

(ii) Must be mailed by certified mail to the Certifying Officer who denied the application within 21 calendar days of the date of the determination, that is, by the date specified on the Final Determination form;

(iii) Must clearly identify the particular labor certification determination from which review is sought; must set forth the particular grounds for the request; and

(iv) Must include all the documents which accompanied the Final Determination form.

(2) 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.

(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, 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 which is not in the Appeal File, but which was submitted before the issuance of the Final Determination form. 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, D.C. 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 21 days to submit or decline to submit any appropriate Statement of Position or legal brief. The Department of Labor 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 the denial of labor certification on the basis of the record upon which the denial of labor certification 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; or

(2) Direct the Certifying Officer to grant the certification; 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 alien, 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'' means the Board of Alien Labor Certification Appeals member or the Board of Alien Labor Certification Appeals panel duly designated to 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) *Validity of labor certifications.* Except as provided in paragraph (d) of this section, a labor certification is valid indefinitely.

(b) *Validation date.* (1) A labor certification involving a job offer is validated as of the date the servicing office date-stamped the application; and

(2) A labor certification for a *Schedule A* occupation is validated as of the date the application was dated by the Immigration Officer.

(c) *Scope of validity.* (1) A labor certification for a *Schedule A* occupation is valid only for the occupation set forth on the *Application for Alien Employment Certification* form and throughout the United States unless the certification contains a geographic limitation.

(2) A labor certification involving a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the *Application for Alien Employment Certification* form.

(d) *Invalidation of labor certifications.* After issuance, a labor certifications is subject to invalidation by the INS 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 an RD or to the Chief, Division of Foreign Labor Certifications, the RD or the Chief, Division of Foreign Labor Certifications, as appropriate, notifies in writing the INS or State Department, 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.* Certifying Officers shall issue duplicate labor certifications only upon the written request of a Consular or Immigration Officer. Certifying Officers shall issue such duplicate certifications only to the Consular or Immigration Officer who submitted the written request. An alien, employer, or an alien's or employer's agent, therefore, may petition an Immigration or Consular Officer to request a duplicate labor certification from a Certifying Officer.

§ 656.31 Labor certification applications involving fraud or willful misrepresentation.

(a) *Possible fraud or willful misrepresentation.* If possible fraud or willful misrepresentation involving a labor certification is discovered before a final labor certification determination, the Certifying Officer must refer the matter to the INS for investigation, must notify the employer in writing, and must send a copy of the notification to the alien, and to the Department of Labor's Office of Inspector General. If 90 days pass without the filing of a criminal indictment or information, or receipt of a notification from INS that an investigation is being conducted, the Certifying Officer must continue to process the application.

(b) *Criminal indictment or information.* If it is learned that an application is the subject of a criminal indictment or information filed in a court, the processing of the application must be halted until the judicial process is completed. The Certifying Officer must notify the employer of this fact in writing and must send a copy of the notification to the alien, and to the Department of Labor's Office of Inspector General.

(c) *Finding of no fraud or willful misrepresentation.* If a court finds that there was no fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute, the Certifying Officer must not deny the labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons under this part.

(d) *Finding of fraud or willful misrepresentation.* If a court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application is automatically invalidated, processing is terminated, a notice of the termination and the reason therefor is sent by the Certifying Officer to the employer, and a copy of the notification is sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

§ 656.32 Revocation of approved labor certifications.

(a) *Basis for DOL Revocation.* Within 1 year of the date a labor certification is granted or before a visa number becomes available to the alien beneficiary, whichever occurs first, the Certifying Officer who issued it, in consultation with the National Certifying Officer, may take steps to revoke a labor certification, if he/she finds that the certification was improvidently granted.

(b) *DOL procedures for revocation.* (1) The Certifying Officer sends to the employer, and a copy to the alien, a *Notice of Intent to Revoke* an approved labor certification.

(2) The *Notice of Intent to Revoke* must contain 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 21 days of receipt of the notice. The Certifying Officer must consider all relevant evidence presented in deciding whether to revoke the labor certification.

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

(4) The Certifying Officer must send a notice to the employer, with a copy to the alien, informing the employer whether or not the labor certification has been revoked.

(5) If the labor certification is revoked, the Certifying Officer must also send a copy of the notification to the INS.

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

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

Subpart D—Determination of Prevailing Wage

§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) *Application process.* The employer must complete the appropriate sections of the PWDR form and submit it to the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the PWDR form and return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA's prevailing wage determination under § 656.41(a), it submits the PWDR form *and* the *Application for Alien Employment Certification* to the ETA servicing office.

(b) *Determinations.* The SWA determines the prevailing wage as follows:

(1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is in an occupation covered by a collective bargaining agreement (CBA) which 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 in an occupation which is not covered by a

CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraphs (b)(3) of this section, of the wages of workers similarly employed in the area of intended employment. The wage component of the 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 provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity.

(4) The employer may utilize a current DBA or SCA wage determination in the occupation and the area of intended employment as the prevailing wage.

(c) *Validity Period.* The SWA must specify the validity period of the prevailing wage on the PWDR form, which in no event may be less than 90 days or more than 1 year from the determination date entered on the PWDR. To use a SWA PWD, employers must file their applications or begin the recruitment required by §§ 656.17(c) or 656.21 within the validity period specified by the SWA.

(d) *Similarly employed.* For purposes of this section, except as provided in paragraphs (e) and (f) 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 cannot 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 nonprofit entity; a nonprofit research organization; or a Governmental research organization, the prevailing wage level only takes into account the wage levels of employees at such institutions and organizations in the area of intended employment.

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

(i) An *institution of higher education* is 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 that 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 2-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 that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(ii) *Affiliated or related nonprofit entity.* A nonprofit entity (including but not limited to a hospital and a medical or research institution) that is 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.* A research organization that is either a nonprofit organization or entity that is 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) A *non-profit organization or entity* for the purpose of this paragraph (e) means an organization which is 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 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, as 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. Section 212(a)(5)(A)(iii)(II), 8 U.S.C. 1182(a)(5)(A)(iii)(II) (1999), defines a 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, the SWA must consider wage information provided by the employer in making a prevailing wage determination.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the SWA with enough information about the survey methodology, including such items as sample frame size and source, sample selection procedures, and survey job descriptions, to allow the SWA 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 ETA National Office.

(3) The survey submitted to the SWA 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 SWA, 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 SWA.

(4) A prevailing wage determination based upon an employer-provided wage survey is applicable only to the specific action for which the wage determination is issued and does not supersede the prevailing wage rate for an occupation based upon the arithmetic mean provided by the Occupational Employment Statistics program, as applied to other requests for prevailing wage determinations.

(5) If the employer-provided survey is found not to be acceptable, the SWA must inform the employer in writing of the reasons the survey was not accepted.

(6) The employer, after receiving notification that the survey it provided for the SWA's consideration is not acceptable, may file supplemental information as provided in paragraph (h) of this section, file a new request for a prevailing wage determination, 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 SWA informs the employer that its survey is not acceptable, the employer may submit supplemental information to the SWA concerning the skill level of its job opportunity or the survey it provided for the SWA's consideration.

(2) The SWA must consider one supplemental filing about the employer's survey or the skill level the SWA assigned to the job opportunity. If the SWA does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, it must 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.

(i) *Wage cannot be lower than required by any other law.* No prevailing wage determination for labor certification purposes made under this section permits an employer to pay a wage lower than the highest wage required by any applicable Federal, State or local law.

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

Alternative One for § 656.41

§ 656.41 ETA Prevailing Wage Panel review of prevailing wage determinations.

(a) *Review of SWA prevailing wage determinations.* Any employer desiring review, including judicial review, of a SWA prevailing wage determination must make a request for such a review to the ETA Prevailing Wage Panel within 21 calendar days of receiving a determination from the SWA. The request for review must be in writing and mailed by certified mail to the SWA that issued the prevailing wage determination (PWD) within 21 calendar days of the date of the PWD; clearly identify the particular prevailing wage determination 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 SWA up to the date of the PWD received from the SWA, and all the documents the employer received from the SWA concerning the PWD.

(b) *Transmission of request to the panel.* (1) Upon the receipt of a request for review, the SWA must review the employer's request and accompanying documentation and include any material sent to the employer by the SWA up to the date of the PWD that may have been omitted by the employer.

(2) The SWA must send a copy of the employer's appeal, including any material added under paragraph (b)(1) of this section, to the U.S. Department of Labor, ETA Prevailing Wage Panel, Division of Foreign Labor Certifications, 200 Constitution Avenue, NW., Room C–4318 Washington, DC 20210.

(3) The SWA must send a copy of the employer's appeal and any material added by the SWA under paragraph (b)(1) of this section to the employer. The employer may furnish or suggest directly to the ETA Prevailing Wage Panel the addition of any documentation which is not among the materials sent to the ETA Prevailing Wage Panel by the SWA, but which was submitted before the issuance of the prevailing wage determination. The employer must submit such documentation in writing, and shall send a copy to the SWA which issued the PWD.

(c) *Designations.* The size and composition of the ETA Prevailing Wage Panel is determined by the Chief, Division of Foreign Labor Certifications. Staffing of the panel may include both SWA and Federal staff and may include specialists in survey methodology, prevailing wage determinations, and occupational analysis and classification.

(d) *Review on the record.* The ETA Prevailing Wage Panel reviews the SWA prevailing wage determination solely on the basis upon which the prevailing wage determination was made and upon the request for review, and may:

(1) Affirm the prevailing wage determination issued by the SWA;

(2) Modify the prevailing wage determination; or

(3) Remand the matter to the SWA for further action.

(e) *Request for review by BALCA.* Any employer, desiring review, including judicial review, of a determination of the PWP must make a request for review of the determination by the Board of Alien Labor Certification Appeals within 21 calendar days of the receipt of the decision of the ETA Prevailing Wage Panel.

(1) The request for review must be in writing and addressed to the Chairperson of the ETA Prevailing Wage Panel. Upon receipt of a request for review, the Chairperson must immediately assemble an indexed appeal file in chronological order with the index on top followed by the most recent document.

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

(3) The BALCA handles the appeals under §§ 656.26 and 27 of this part.

Alternative Two for § 656.41

§ 656.41 ETA Prevailing Wage Panel review of prevailing wage determinations.

(a) *Review of SWA prevailing wage determinations.* Any employer desiring review, including judicial review, of a SWA prevailing wage determination must make a request for such a review to the ETA Prevailing Wage Panel within 21 calendar days of receiving a determination from the SWA. The request for review must be in writing and mailed by certified mail to the SWA that issued the prevailing wage determination (PWD) within 21 calendar days of the date of the PWD; clearly identify the particular prevailing wage determination 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 SWA up to the date of the PWD received from the SWA, and all the documents the employer received from the SWA concerning the PWD.

(b) *Transmission of request to the panel.* (1) Upon the receipt of a request for review, the SWA must review the employer's request and accompanying documentation and include any material sent to the employer by the SWA up to the date of the PWD that may have been omitted by the employer.

(2) The SWA must send a copy of the employer's appeal, including any material added under paragraph (b)(1) of this section, to the U.S. Department of Labor, ETA Prevailing Wage Panel, Division of Foreign Labor Certifications, 200 Constitution Avenue, NW., Room C–4318 Washington, DC 20210.

(3) The SWA must send a copy of the employer's appeal and any material added by the SWA under paragraph (b)(1) of this section to the employer. The employer may furnish or suggest directly to the ETA Prevailing Wage Panel the addition of any documentation which is not among the materials sent to the ETA Prevailing Wage Panel by the SWA, but which was submitted before the issuance of the prevailing wage determination. The employer must submit such documentation in writing, and must send a copy to the SWA which issued the PWD.

(c) *Designations.* The size and composition of the ETA Prevailing Wage Panel is determined by the Chief, Division of Foreign Labor Certifications. The panel's staff may include both SWA and Federal staff and may include specialists in survey methodology, prevailing wage determinations, and occupational analysis and classification.

(d) *Review on the record.* The ETA Prevailing Wage Panel reviews the SWA prevailing wage determination solely on the basis upon which the prevailing wage determination was made and upon the request for review, and may:

(1) Affirm the prevailing wage determination issued by the SWA;

(2) Modify the prevailing wage determination; or

(3) Remand the matter to the SWA for further action.

(e) *Request for review by BALCA.* Any employer, desiring review, including judicial review, of a determination of the PWP must make a request for review of the determination by the Board of Alien Labor Certification Appeals within 21 calendar days of the receipt of the decision of the ETA Prevailing Wage Panel.

(1) The request for review must be in writing and addressed to the Chairperson of the ETA Prevailing Wage Panel. Upon receipt of a request for review, the Chairperson must immediately assemble an indexed appeal file in chronological order with the index on top followed by the most recent document.

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

(3) The BALCA handles the appeals under §§ 656.26 and 27 of this chapter.

(f) *Review of Wage Determination Involving the Service Contract Act or Davis-Bacon Act.*

(1) Where an employee seeks to challenge a SWA prevailing wage rate that is based on a wage determination issued under either the McNamara-O'Hara Service Contract Act (SCA) or the Davis-Bacon Act (DBA), the employer must either:

(i) Follow the procedures set forth at 29 CFR 4.56 and 29 CFR Part 8, subpart B, where the challenged rate is based on a wage determination issued under the SCA, or

(ii) Follow the procedures set forth at 29 CFR 1.8, 1.9, and 29 CFR Part 7, subpart B, where the challenged rate is based on a wage determination issued under the DBA.

(2) Limitations contained in the regulations as to who may seek review of a wage determination (e.g., 29 CFR 7.2(b)) or the timeliness of such review with regard to certain procurement actions (e.g., 29 CFR 8.6(b)) do not apply to the review of SWA prevailing wage under this paragraph (f).

Signed at Washington, DC, this 24th day of April, 2002.

Emily Stover DeRocco,

Assistant Secretary for Employment and Training.

[The following two forms will not appear in the Code of Federal Regulations.]

BILLING CODE 4510–30–P

U.S. Department of Labor
Employment and Training Administration

OMB Approval:
Expiration Date:

Application Instructions ETA Form 9088 - Prevailing Wage Determination

IMPORTANT: Please read these instructions carefully before completing Form ETA 9088 (Prevailing Wage Determination Request).

Electronic means (i.e. scanning technology) may be used to capture the information on these forms. To ensure the accuracy of readability and avoid rejections, it is preferred that the forms be completed using the ETA 9088 program available from the U.S. Department of Labor's web site at "http://ows.doleta.gov". If you hand-write the form, print legibly in ink using a medium to thick pen. Print only in CAPITAL LETTERS and avoid contact with the edge of the boxes. If you use a typewriter to complete the form, use a font equivalent to 12 - 14 pt. Center each letter in the box and use only CAPITAL LETTERS. Be sure to sign and date the form.

To knowingly and willingly furnish any false information in the preparation of Form ETA 9088 and/or 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 (18 U.S.C. 1001). Other penalties apply as well to fraud or misuse of these documents and to perjury with respect to these forms (18 U.S.C. 1546 and 1621).

Supporting Documents

If either Collective Bargaining Agreement (CBA) or Employer Provided Survey are marked, the appropriate supporting document must be attached when the ETA Form 9088 is submitted. Without these documents the SWA will use OES to make the determination.

When submitting CBAs, please include a note indicting whether the relevant passages of the document are located. Highlighting the table of contents or tabbing the sections is also acceptable.

Employers seeking to utilize the Davis Bacon Act and the Service Contract Act wage determinations should include sufficient documentation to identify the determination relied upon.

Include a copy of all relevant pages for surveys used. Be sure the information includes job descriptions, wages, and the specific area covered by the wages. The information must also provide a description of the methodology used to determine the sample and average stated. Refer to 20 CFR 656.40(g) for the complete requirements.

OMB Notice

Paperwork Reduction Project 1205-0015

Persons are not required to respond to this collection of information unless it displays a current, valid OMB control number. Respondent's obligation to reply to these reporting requirements is mandatory (INA, Section 212 (a) (5) (A)). Public reporting burden for this collection of information is estimated to average 3/4 hour per response, which includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Employment and Training Administration at U.S. Department of Labor * Room C-4318 * 200 Constitution Avenue, NW * Washington, DC * 20210

Examples of how best to fill out Form ETA 9088

A. For optimum accuracy, please print in capital letters and avoid contact with the edge of the box.
The following will serve as an example:

A	B	C	D	E	F	G	H	I	J	K	L	M
N	O	P	Q	R	S	T	U	V	W	X	Y	Z

B. For optimum accuracy, please print carefully and avoid contact with the edges of the box. The following will serve as an example:

1	2	3	4	5	6	7	8	9	0

C. Shade Circles Like This--> ●

Not Like This-->

U.S. Department of Labor
Employment and Training Administration

OMB Approval:
Expiration Date:

Application Instructions ETA Form 9088 - Prevailing Wage Determination

Submission Information

Submit a completed Form ETA 9088 to the State Workforce Agency (SWA) with jurisdiction over the location where the job opportunity is offered. Addresses for the SWA's are available on-line at http://ows.doleta.gov.

Instructions for Section I
Employer's Information

1. **Wage Source Requested**: Enter the source of the wage information from which the employer is requesting a prevailing wage determination. Unless otherwise requested, the state will provide a prevailing wage based on the Occupational Employment Statistics Survey. If an alternative wage source is requested, such as employer provided survey, Service Contract Act, Davis-Bacon Act, or collective bargaining agreement, fill in the appropriate oval. Provide relevant supporting documentation.

2. **Full Legal Name of Employer**: Enter the full legal name of the business, firm, or organization, or, if an individual, enter the name used on legal documents. Some abbreviation may be required for long names.

3. **Federal Employer I.D. Number**: Enter the employer's nine-digit Federal Employer Identification Number (EIN) assigned by the Internal Revenue Service.

4. **Employer's Telephone Number**: Enter the employer's telephone number, area code first. If necessary, enter an extension in the space provided following the slash (/).

5. **Return Fax Number**: ***This question is optional.*** If the technology is available to return the application via facsimile transmission, and you would like the application returned via facsimile, enter the fax number, area code first, to which you want the SWA to send the final determination. This may be the fax number of a person or entity other than the employer (e.g., an attorney or agent). If you want the application mailed, leave the Return Fax Number blank.

6. **Contact/Attorney/Agent's Telephone Number**: ***This question is optional.*** Enter the contact/attorney/agent's telephone number, area code first. If necessary, enter an extension in the space provided following the slash (/). This question MUST be entered if Contact/Attorney/Agent's Name (question 8) is filled in.

7. **Employer's Address**: Enter the address of the employer's principle place of business.

8. **Contact/Attorney/Agent's Name**: Enter the full legal name.

9. **Correspondence Address**: ***This question is optional.*** Enter the address (if different from the Employer's Address initially entered) where correspondence should be sent.

10. **E-mail Address**: ***This question is optional.*** Enter the logon identity portion of the e-mail address on the first line. Enter the ISP provider portion of the e-mail address on the second line. Do not enter the @ symbol. Please note the following example: if an e-mail address is maeve@doleta.gov, the logon identity, maeve, would be entered on the first line while the ISP provider, doleta.gov, would be entered on the second line.

Instructions for Section II
Location of Work

1. **City and State**: Enter the city and state of the physical location where the work will actually be performed.

Instructions for Form ETA 9088 Continued On Next Page...

U.S. Department of Labor
Employment and Training Administration

OMB Approval:
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Application Instructions ETA Form 9088 - Prevailing Wage Determination

PageLink

Enter a six-digit number. this is used to help keep all pages of your form together. It must be the same on all pages of ETA Form 9088. ***If you are completing the form using the program provided by DOL, the PageLink will be entered automatically. If you are completing this form manually, you must enter this number yourself.*** Please do not use numbers like 111111,222222, or 123456. An example of one way to generate a manual page link is to use the time (a combination of the hours, minutes, and seconds) the form is submitted. For example, a form completed and submitted at 1:55 PM would have a PageLink of 015513.

Instructions for Section III
Job Opportunity

1. **Job Title:** Self-Explanatory

2. **Education or Training:** Indicate the minimum diploma, degree, or training for worker to satisfactorily perform the job description.

3. **Field of Study**: Enter the field of study for the above training or education.

4. **Months of Training**: Enter the minimum number of months of training necessary for the worker to carry out the described duties.

5. **Months of Experience**: Enter the minimum number of months of experience necessary for the worker to carry out the described duties.

6. **Field of Experience**: Enter the type of experience necessary for the worker to carry out the described duties.

7. **Job Duties:** Describe the actual work to be performed. Step by step detail description of the duties (work tasks) which make up the job. Avoid technical terms as much as possible. If they must be used, define them. The description needs to include: equipment that will be used, level of supervision that will be provided, and the provision of tools and equipment. Example for Job Title Bookkeeper Supervisor: "Supervise bookkeepers. Ensure their work meets the company quality standards and that they are trained on all new software. Resolve any personnel issues that may arise.

8. **Specific Skills or Other Requirements:** Enter any job-related specific skill or additional requirements necessary to perform the job. If there is a specific minimum level for the skill, include it here. Examples of specific skills include: licenses or permits that are necessary, ability to type 40 words per minute, ability to lift 40 pounds, ability to live on premises, knowledge of a programming language (such as COBOL, C, Java, etc...), and certifications (such as CPR certified, MCSE certified, CPA certified, etc...)

State Agency Prevailing Wage Determination

Do not make any marks in this area, the appropriate State Workforce Agency (SWA) will complete this section.

Prevailing Wage Determination Request

ETA Form 9088
OMB Approval:
Expiration Date:

U.S. Department of Labor
Employment and Training Administration

I. Employer's Information

(1) Wage Source Requested:
*(see instructions for full details) Fill the **ONE** appropriate circle*

Employer	SCA	DBA	CBA
○	○	○	○

(2) Full Legal Name of Employer (use second line only if necessary, otherwise leave blank.)

(3) Federal Employer I.D. Number (9 digits) (EIN from IRS)

(4) Employer's Telephone Number

(5) Return FAX Number (Optional)

(6) Contact/Attorney/Agent's Telephone Number (Optional)

(7) Employer's Address

Number / Street (use second line only if necessary, otherwise leave blank.)

City State Postal Code

(8) Contact/Attorney/Agent's Name - Family name on the first line, Given name then initial on the second line.

(9) Correspondence Address (only use this area if correspondence should be sent to a location other than the Employer's address above.

Number / Street (use second line only when necessary, otherwise leave blank.)

City State Postal Code

(10) Contact/Attorney/Agent's E-mail Address (Optional)

@

II. Location of Work

City State

OMB Notice

Persons are not required to respond to this collection of information unless it displays a current, valid OMB control number. Respondent's obligation to reply to these reporting requirements is mandatory (INA, Section 212 (a) (5) (A)). Public reporting burden for this collection of information is estimated to average 3/4 hour per response, which includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Employment and Training Administration at U.S. Department of Labor * Room C-4318 * 200 Constitution Avenue, NW * Washington, DC * 20210.

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Prevailing Wage Determination Request

ETA Form 9088
OMB Approval:
Expiration Date:

U.S. Department of Labor
Employment and Training Administration

III. Job Opportunity

(1) Job Title

(2) Education or Training: Highest Level Required

Fill Only ONE Circle

○ None ○ High School ○ Technical ○ Vocational ○ Apprenticeship

○ Associate ○ Bachelor ○ Master ○ Doctorate

(3) Field of Study - Leave blank if None or High School

(4) Months of Training

Leave blank if None, High School, Associate, Bachelor, Master, or Doctorate was selected in Question 2.

(5) Months of Experience

(6) Field of Experience

(7) Job Duties

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***NOTE:* See OMB notice on page 1 of this form.**

Prevailing Wage Determination Request

ETA Form 9088
OMB Approval:
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U.S. Department of Labor
Employment and Training Administration

III Job Opportunity (Continued...)

(8) Specific Skills or Other Requirements

State Agency Prevailing Wage Determination

State Agency's Case/Tracking Number

Occupational Code

Level

Prevailing Wage

$. /

Year Month 2 Weeks Week Hour

Prevailing Wage Source

SCA DBA CBA OES Employer

Determination Date

M M / D D / Y Y Y Y

Expiration Date

M M / D D / Y Y Y Y

State Agency Endorsement

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***NOTE:* See OMB notice on page 1 of this form.**

U.S. Department of Labor
Employment and Training Administration

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Application Instructions ETA Form 9089
Application for Permanent Employment Certification

IMPORTANT: Please read these instructions carefully before completing Form ETA 9089 (Application for Permanent Labor Certification).

These instructions pertain only to applications for Permanent Labor Certification. They are not to be used when filing for Temporary Labor Certifications.

Electronic means (i.e. scanning technology) may be used to capture the information on these forms. To ensure the accuracy of readability and avoid rejections, it is preferred that the forms be completed using the ETA 9089 program available from the U.S. Department of Labor's web site at "http://ows.doleta.gov". If you hand-write the form, print legibly in ink using a medium to thick pen. Print only in CAPITAL LETTERS and avoid contact with the edge of the boxes. If you use a typewriter to complete the form, use a font equivalent to 12 - 14 pt. Center each letter in the box and use only CAPITAL LETTERS. Be sure to sign and date the form.

To knowingly and willingly furnish any false information in the preparation of Form ETA 9089 and/or 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 (18 U.S.C. 1001). Other penalties apply as well to fraud or misuse of these documents and to perjury with respect to these forms (18 U.S.C. 1546 and 1621).

OMB Notice Paperwork Reduction Project 1205-0015

Persons are not required to respond to this collection of information unless it displays a current, valid OMB control number. Respondent's obligation to reply to these reporting requirements is mandatory (INA, Section 212 (a) (5) (A)). Public reporting burden for this collection of information is estimated to average 2 1/5 hour per response, which includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Employment and Training Administration at U.S. Department of Labor * Room C-4318 * 200 Constitution Avenue, NW * Washington, DC * 20210

Submission Information

Submit the completed Form ETA 9089 to an ETA Application Processing Center via mail at the following address: Department of Labor * P.O. Box 13640 * Philadelphia, PA * 19101.

Examples of how best to fill out Forms ETA 9098 and 9099

A. For optimum accuracy, please print in capital letters and avoid contact with the edge of the box.
The following will serve as an example:

A	B	C	D	E	F	G	H	I	J	K	L	M
N	O	P	Q	R	S	T	U	V	W	X	Y	Z

B. For optimum accuracy, please print carefully and avoid contact with the edges of the box. The following will serve as an example:

1	2	3	4	5	6	7	8	9	0

C. Shade Circles Like This--> ●
Not Like This-->

U.S. Department of Labor
Employment and Training Administration

OMB Approval:
Expiration Date:

Application Instructions ETA Form 9089
Application for Permanent Employment Certification

Instructions for Section I
Application Information

1. **Is application a conversion request?** If the application is submitted with the intent of converting a previous application with the same job title, job description, and job requirements to the new system select Yes. Otherwise, select No. **Note** - if Yes is selected, a copy of the previously submitted application and documentary proof of the associated priority date (i.e., official notification letter stating the receipt date) must be submitted as an attachment to the application.

Instructions for Section II
Employer's Information

1. **Full Legal Name of Employer**: Enter the full legal name of the business, firm, or organization, or, if an individual, enter the name used on legal documents. Some abbreviation may be required for long names.

2. **Federal Employer I.D. Number**: Enter the employer's nine-digit Federal Employer Identification Number (EIN) assigned by the Internal Revenue Service.

3. **Employer's Telephone Number**: Enter the employer's telephone number, area code first. If necessary, enter an extension in the space provided following the slash (/).

4. **Return Fax Number**: ***This question is optional.*** If the technology is available to return the application via facsimile transmission, and you would like the application returned via facsimile, enter the fax number, are code first, to which you want the SWA to send the final determination. This may be the fax number of a person or entity other than the employer (e.g., an attorney or agent). If you want the application mailed, leave the Return Fax Number blank.

5. **Contact/Attorney/Agent's Telephone Number**: ***This question is optional.*** Enter the contact/attorney/agent's telephone number, area code first. If necessary, enter an extension in the space provided following the slash (/). This question MUST be entered if Contact/Attorney/Agent's Name (question 8) is filled in.

6. **Employer's Address**: Enter the address of the employer's principle place of business.

7. **Contact/Attorney/Agent's Name**: ***This question is optional.*** Enter the full legal name of a contact.

8. **Correspondence Address**: ***This question is optional.*** Enter the address (if different from the Employer's Address initially entered) where correspondence should be sent.

9. **E-mail Address**: ***This question is optional.*** Enter the logon identity portion of the e-mail address on the first line. Enter the ISP provider portion of the e-mail address on the second line. Do not enter the @ symbol. Please note the following example: if an e-mail address is maeve@doleta.gov, the logon identity, maeve, would be entered on the first line while the ISP provider, doleta.gov, would be entered on the second line.

10. Select Yes or No.

Instructions for Section III
Wage Offer Information

1. **State Agency's Case/Tracking Number**: Enter the case/tracking number assigned by the SWA on the supporting ETA Form 9088.

2. **Offered Wage**: Enter the wage rate offered by the employer. Fill the one appropriate circle to indicate whether the offered wage is to be paid in terms of year, month, two-weeks, week, or hour.

Instructions for Form ETA 9089 Continued On Next Page...

U.S. Department of Labor
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OMB Approval:
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Application Instructions ETA Form 9089
Application for Permanent Employment Certification

Instructions for Section III - Continued...
Wage Offer Information

3. Select Yes or NO.

4. Select Yes, NO, or N/A (not applicable). Use N/A if there are no commissions, bonuses, or other incentives included in the offered wage.

PageLink

Enter a six-digit number. this is used to help keep all pages of your form together. It must be the same on all pages of ETA Form 9088. ***If you are completing the form using the program provided by DOL, the PageLink will be entered automatically. If you are completing this form manually, you must enter this number yourself.*** Please do not use numbers like 111111,222222, or 123456. An example of one way to generate a manual page link is to use the time (a combination of the hours, minutes, and seconds) the form is submitted. For example, a form completed and submitted at 1:55 PM would have a PageLink of 015513.

Instructions for Section IV
Recruitment Efforts Information

1. **Occupation Identification:** Select the statement for the required recruiting efforts. See 20 CFR 656.17 and 656.18 for details.

   * If the Occupation Type is Special Recruitment (e.g., College and University instructional position), you need only complete questions 8 to 13 on this page of the application.
   * If the Occupation Type is Non-professional, you must complete questions 2 to 6 and questions 8 to 13 on this page of the application. You do not need to complete question 7.
   * If the Occupation Type is Professional, you must complete all questions on this page of the application.

2. **Start date for the job order in America's Job Bank:** The begin date for the position as listed in America's Job Bank

3. **Newspaper of General Circulation:** The name of the newspaper the help wanted advertisement was circulated in.

4. Enter the date the advertisement was run in the newspaper or professional journal identified in Question 3.

5. Enter the date the advertisement was run in the newspaper of general circulation identified in Question 6.

6. **Newspaper or Professional Journal:** The name of the newspaper or professional journal in which the second help wanted advertisement was circulated.

7. Enter the dates for at least three of the recruiting efforts listed. Use for professional occupations only.

8. Select the appropriate notice statement.

9. **How many U.S. workers:** Enter the number of U.S. workers that applied for the position

10. Select Yes, No, or N/A (not applicable). If no layoffs occurred, use N/A.

11. Select Yes, No, or N/A (not applicable). If no U.S. workers applied, use N/A.

12. Select Yes or No.

13. Select Yes or No.

Instructions for Form ETA 9089 Continued On Next Page...

U.S. Department of Labor
Employment and Training Administration

OMB Approval:
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Application Instructions ETA Form 9089
Application for Permanent Employment Certification

Instructions for Section V
Designation of Agent/Attorney

1. **Name of Agent or Attorney:** The full name of the agent or attorney. Enter the family (last) name on the first line and the given (first) name and initial on the second line.

2. **Agent's/Attorney's Telephone Number**: A ten-digit telephone number (include the area code). If applicable, use the 4 digits after the slash for the extension.

3. **Agent's/Attorney's Address**: Self-explanatory

4. **E-mail Address**: ***This question is optional.*** Enter the logon identity portion of the e-mail address on the first line. Enter the ISP provider portion of the e-mail address on the second line. Do not enter the @ symbol. Please note the following example: if an e-mail address is maeve@doleta.gov, the logon identity, maeve, would be entered on the first line while the ISP provider, doleta.gov, would be entered on the second line.

5. **Agent's/Attorney's Signature:** The signature of the agent/attorney that is representing the employer. The date the agent's/attorney's signature was affixed to the application should be entered in the space provided. The date should be entered in an MM/DD/YYYY format.

6. **Employer's Signature:** The signature of the employer authorizing the agent/attorney. The date the employer's signature was affixed to the application should be entered in the space provided. The date should be entered in an MM/DD/YYYY format.

Instructions for Section VI
Alien's Information

1. **Full Legal Name of Alien**: The full legal name of the alien for whom the Permanent application is applied.

2. **Country of Alien's Birth**: Enter the country where the alien was born.

3. **Alien's Current Address:** Enter the address where the alien currently resides. If the address is outside the U.S., use the country line.

4. **Current Visa**: Enter the current visa type held by the alien.

5. **Education**: Indicate the highest diploma or degree held by the alien.

6. **Year Obtained**: Enter the year the highest diploma or degree held by the alien was received.

7. **School Where Obtained**: Enter the name of the school at which the field of study was conducted.

8. **Field of Study or Training**: Enter the field of study for the education/training above.

9. **Months of Study or Training**: Enter the number of months of training completed by the alien. Leave this blank if none, high school, associate, bachelor, master, or doctorate was selected for Question 5.

10. **Months of Experience**: If applicable, enter the number of months experience held by the alien in the field of experience identified in Question 11.

11. **Field of Experience:** Enter the alien's field of experience.

12. Select Yes or NO.

13. Select Yes or NO.

Instructions for Form ETA 9089 Continued On Next Page...

U.S. Department of Labor
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Application Instructions ETA Form 9089
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Instructions for Section VI - Continued...
Alien's Information

14. Select Yes or NO. If Yes, enter the date the alien started working for the employer in the space provided.

15. Select Yes, NO, or N/A (not applicable). Use N/A if the position is NOT a household service worker.

Instructions for Section VII
Job Opportunity Information

1. ***Foreign Education Equivalent Acceptable:*** Select Yes or No indicating whether a foreign education equivalent is acceptable.

2. Select Yes or No.

3. Select Yes or NO.

4. Select Yes or NO. If Yes is selected, answer Question 5. Otherwise go straight to Question 6.

5. Select Yes or NO. Only answer this question if Question 4 is answered Yes.

6. Select Yes or No.

7. Select Yes or No.

8. Select Yes or No.

9. Select Yes or No.

Instructions for Section VIII
Declaration of Employer

1. **Name of Hiring of Other Designated Official**: The full legal name of the hiring or authorized official.

2. **Title of Hiring or Other Designated Official**: The title of the hiring or authorized official.

3. **Signature**: The signature of the hiring or authorized official. The date the hiring or authorized official's signature was affixed to the application should be entered in the space provided. The date should be entered in an MM/DD/YYYY format.

For U.S. Government Agency Use Only

Do not make any marks in this area.

Application for Permanent Employment Certification

U.S. Department of Labor
Employment and Training Administration

ETA Form 9089
OMB Approval:
Expiration Date:

I. Application Information

Is this application a conversion request from a previous SWA/DOL Case? ◯ Yes ◯ No

If Yes, attach a copy of the previously submitted application and documentary proof of the associated Priority Date.

II. Employer's Information

(1) Full Legal Name of Employer (use second line only when necessary, otherwise leave it blank.)

(2) Federal Employer I.D. Number (9 digits) (EIN from IRS) -

(3) Employer's Telephone Number - /

(4) Return FAX Number (Optional) -

(5) Contact/Attorney/Agent's Telephone Number (Optional) - /

(6) Employer's Address
Number/Street (use second line only when needed, otherwise leave it blank.)

City State Postal Code

(7) Contact/Attorney/Agent's Name - Optional/Family name on the first line, Given name then initial on the second line.

(8) Correspondence Address - Optional/Only use if correspondence should be sent to a location other than the Employer's or Agent's/Attorney's address.
Number / Street (use second line only when needed, otherwise leave it blank.)

City State Postal Code

(9) Contact/Attorney/Agent's E-mail Address (Optional)

@

(10) Yes ◯ No ◯ Is the employer a closely held corporation or a partnership in which the alien has an ownership interest, or is there a familial relationship between the stockholders, partners, corporate officers, incorporators, and the alien?

III. Wage Offer Information

NOTE- if the offered wage is less than the Prevailing Wage (from the supporting ETA-9088), this application will be denied.

(1) State Agency's Case/Tracking Number

(2) Offered Wage $. **PER** ◯ Hour ◯ Month ◯ Week ◯ Year ◯ Bi-Weekly

Fill the ***one*** appropriate circle for each of thefollowing:

	Yes	No	N/A	
(3)	◯	◯		Do you promise to pay the alien the prevailing wage?
(4)	◯	◯	◯	If the offered wage is based upon commissions, bonuses, or other incentives, do you guarantee to pay the offered wage on a weekly, bi-weekly, or monthly basis?

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***NOTE:* See OMB notice on page 3 of this form.**

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Application for Permanent Employment Certification

U.S. Department of Labor
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ETA Form 9089
OMB Approval:
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IV. Recruitment Efforts Information

(1) Occupation Identification

○ The application is for an occupation which has been identified for **special recruitment processes**.

○ This application is for **non-professional occupations** (those for which a Bachelor's Degree or higher is not normally required) for which, in the 6-month period preceding the filing of the application, the Employer has placed a job order with SWA; two advertisements in the Sunday edition of a newspaper of general circulation in two different months.

○ This application is for **professional occupations** (those for which at least a Bachelor's Degree is normally required) for which the employer has taken the following additional recruitment steps in the 6-month period preceding the filing of the application: a job order placed with SWA; two advertisements in the Sunday edition of a newspaper of general circulation in two different months OR an advertisement in an appropriate professional Journal; at least three of the below.

* If the Occupation Type is Special Recruitment, you need only complete questions 8 to 13 on this page of the application.
* If the Occupation Type is Non-professional, you must complete questions 2 to 6 and questions 8 to 13 on this page of the application. You do not need to complete question 7.
* If the Occupation Type is Professional, you must complete all questions on this page of the application.

(2) Start date for the job order with SWA M M / D D / Y Y Y Y End date for the job order with SWA M M / D D / Y Y Y Y

(3) Name of Newspaper of General Circulation Advertisement Placed With

(4) Date of advertisement identified in Question 3 / /

(5) Date of advertisement identified in Question 6 / /

(6) Name of Newspaper or Professional Journal Advertisement Placed With

(7) For Professional Occupations ONLY, fill in the date, using MM/DD/YYYY format, the job opportunity was advertised through three of the advertising mediums listed below:

Job Fair	/ /	On Campus Recuiting	/ /
Own Web Site Posting	/ /	Trade or Professional Organization	/ /
Job Search Web Site	/ /	Private Employment Firm	/ /

(8) Which of the following is true:

○ There is no bargaining representative, therefore, a notice of this filing has been posted for 10 days in a conspicuous location at the place of employment.

○ Notice of this filing has been provided to the bargaining representative of workers in the occupation in which the alien beneficiary will be

(9) How many U.S. workers applied for the job?

Fill the one appropriate circle for each of the following:

	Yes	No	N/A	
(10)	○	○	○	If a layoff occurred within 6 months immediately preceding the filing of the application, were the U.S workers who performed the majority of the essential duties involved in the job opportunity, who were able, willing, qualified and available for work, offered the job?
(11)	○	○	○	If U.S. workers applied for the job opportunity, were they rejected for lawful, job related reasons?
(12)	○	○		On the date the application was signed or submitted was there a strike, lockout, or work stoppage in the course of a labor dispute in the occupation in which the alien beneficiary would be employed at the place of employment?
(13)	○	○		Has the job opportunity been and is still clearly open to any qualified U.S. worker?

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Application for Permanent Employment Certification

U.S. Department of Labor
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ETA Form 9089
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V. Designation of Agent/Attorney

(1) Name of Agent or Attorney (Family name on the first line, Given name then initial on the second line)

(2) Agent's/Attorney's Telephone Number

(3) Agent's/Attorney's Address
Number / Street (use second line only if necessary, otherwise leave blank.)

City | State | Postal Code

(4) E-mail Address (Optional)

@

I hereby agree to act as the agent/attorney for the applicant listed on page 1 of this application.

(5) Agent's/Attorney's Signature -- DO NOT let signature extend beyond the box.

Date Signed: M M / D D / Y Y Y Y

I hereby designate the above as my agent/attorney.

(6) Employer's Signature -- DO NOT let signature extend beyond the box.

Date Signed: M M / D D / Y Y Y Y

OMB Notice

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Employment and Training Administration, Department of Labor, Room C-4318, 200 Constitution Avenue, NW., Washington, DC 20210. (Paperwork Reduction Project 1205-0015).

DO NOT SEND THE COMPLETED FORM TO THIS OFFICE.

Application for Permanent Employment Certification

U.S. Department of Labor
Employment and Training Administration

ETA Form 9089
OMB Approval:
Expiration Date:

VI. Alien's Information

(1) Full Legal Name of Alien - Optional/Family name on the first line, Given name then initial on the second line.

(2) Country of Alien's birth

(3) Alien's Current Address

Number/Street (use second line only when needed, otherwise leave it blank.)

City | State | Postal Code

Country (Leave blank if in the United States)

(4) Current Visa (If Applicable)

(5) Education or Training: Highest Level Achieved

Fill Only ONE Circle

○ None ○ High School ○ Associate
○ Bachelor ○ Master ○ Doctorate
○ Technical ○ Vocational ○ Apprenticeship

(6) Year Obtained

(7) School Where Obtained

(8) Field of Study or Training - If None or High School leave blank.

(9) Months of Study or Training

Leave blank if None, High School, Associate, Bachelor, Master, or Doctorate was selected in Question 2.

(10) Months of Experience

(11) Field of Experience

Fill the one appropriate circle for each of the following:

	Yes	No	
(12)	○	○	Did the alien beneficiary gain any of the qualifying experience with the employer?
(13)	○	○	Did the employer pay for any of the alien's education or training necessary to satisfy any of the employer's job requirements?
(14)	○	○	Is the alien currently employed by the petitioning employer? If so, please note the start date in the box to the right. → Start Date M M / D D / Y Y Y Y

	Yes	No	N/A	
(15)	○	○	○	If the application is for a live-in household domestic service worker, have the employer and alien executed the required employment contract, and has the employer provided a copy to the alien?

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NOTE: **See OMB notice on page 3 of this form.**

Application for Permanent Employment Certification

U.S. Department of Labor
Employment and Training Administration

ETA Form 9089
OMB Approval:
Expiration Date:

VII. Job Opportunity Information

The specifics of the job opportunity are exactly the same as the Prevailing Wage Determination (ETA Form 9088) used to support this application. The State Agency Tracking number is required in the Wage Offer Section. That Prevailing Wage Determination becomes a part of this application.

Fill the one appropriate circle for each of the following:

	Yes	No	
(1)	◯	◯	Is a foreign educational equivalent acceptable?
(2)	◯	◯	Does the job require the employee to live on the employer's premises?
(3)	◯	◯	Does the job require split-shifts?
(4)	◯	◯	Does your job offer contain any requirements other than those relating to the number of months or years of experience in the occupation or alternative job, or the number of months or years of education or training required?

If YES to Number 4, answer question 5. Otherwise go straight to question 6.

	Yes	No	
(5)	◯	◯	Did you employ a U.S. worker to perform the job opportunity with the same combination of experience, education, skills, abilities, and special requirements as presently required within 2 years of filing the application?
	◯	◯	Is the combination of required experience, education, skills, abilities and special requirements normal to the occupation?
(6)	◯	◯	Is the job offer for full-time, year-round employment?
(7)	◯	◯	Is knowledge of a foreign language required to perform the job duties?
(8)	◯	◯	Does the job opportunity involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship?
(9)	◯	◯	Are the job opportunity's terms, conditions and occupational environment contrary to Federal, State or local law?

To knowingly and willingly furnish any false information in the preparation of Forms ETA 9098 and 9099 and/or any supporting documentation, or to aid, abet, or counsel another to do so is a federal offense, punishable by fine or imprisonment up to fiver years, or both (18 U.S.C. 1001). Other penalties apply as well to fraud or misuse of these documents and to perjury with respect to these forms (18 U.S.C. 1546 and 1621).

VIII. Declaration Of Employer

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury the foregoing is true and correct.

(1) Name of Hiring or Other Designated Official - Optional/Family name on the first line, Given name then initial on the second line.

(2) Title of Hiring or Other Designated Official

(3)

Signature – DO NOT let signature extend beyond the box.

Date Signed: M M / D D / Y Y Y Y

FOR U.S. GOVERNMENT AGENCY USE ONLY:

Certification Stamp

U.S. Department of Labor Case No.

Dateof Certification

Date of Receipt by U.S. Department of Labor

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