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**Labor Certification Process for the
Permanent Employment of Aliens in the
United States**

DEPARTMENT OF LABOR

Employment and Training
Administration

20 CFR Part 656

Labor Certification Process for the
Permanent Employment of Aliens in
the United States

AGENCY: Employment and Training
Administration, Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Employment and Training Administration of the Department of Labor proposes to amend its regulations relating to certification of immigrant aliens for permanent employment in the United States. The amendments are intended to clarify some apparent ambiguities in the regulations; to make the regulations easier to read, and to reflect the experience of the Employment and Training Administration in administering 20 CFR Part 656 since its promulgation in 1977.

DATES: Interested persons are invited to submit written comments on this proposed rulemaking on or before March 24, 1980.

ADDRESS: Send written comments to: David O. Williams, Administrator, United States Employment Service, Employment and Training Administration, United States Department of Labor, Suite 8000—Patrick Henry Building, 601 "D" Street, N.W., Washington, D.C. 20213.

FOR FURTHER INFORMATION CONTACT: Mr. Aaron Bodin, Chief, Division of Labor Certifications, Office of Technical Support, United States Employment Service, Employment and Training Administration, United States Department of Labor, Suite 8410—Patrick Henry Building, 601 "D" Street, N.W., Washington, D.C. 20213. Telephone: 202-376-6295.

SUPPLEMENTARY INFORMATION:

The Employment and Training Administration (ETA) of the Department of Labor (DOL) is proposing to amend its regulations at 20 CFR Part 656, for clarification, and to reflect ETA's experience in administering Part 656 since its effective date of February 18, 1977. See 42 FR 3441 (January 18, 1977). ETA's regulations for the certification of immigrant aliens for permanent employment in the United States are issued pursuant to section 212(a)(14) of the Immigration and Nationality Act (Act). 8 U.S.C. 1182(a)(14).

*Permanent Alien Employment
Certification Process*

Before the Department of State and the Immigration and Naturalization Service (INS) 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)(14).

If DOL determines that there are no able, willing, qualified, and available U.S. workers, and that permanent employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers, DOL so certifies to INS and to the Department of State, by issuing a permanent 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 any of one or more reasons, including, but not limited to:

(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 Part 656.

(b) The employer has not met its burden of proof under section 291 of the Act (8 U.S.C. 1361), that is, the employer has not submitted sufficient evidence of 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. With respect to the burden of proof, section 291 of the Act (8 U.S.C. 1361) states, in pertinent part, that:

Whenever any person makes application for a visa or any other document 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) DOL through its own knowledge and experience, finds that U.S. workers are available and/or that an adverse effect on similarly employed U.S.

workers will result, and the employer has not met the burden of rebutting DOL's finding or findings.

Department of Labor Regulations

DOL has promulgated regulations at 20 CFR Part 656 governing the labor certification process described above for the permanent employment of immigrant aliens in the United States. Part 656 was promulgated pursuant to an implements section 212(a)(14) of the Act (8 U.S.C. 1182(a)(14)).

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. They describe the potential of the Federal-State system of public employment offices 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 601-604, 621, and 651-658; and 29 U.S.C. Chapter 4B.

Part 656 also sets forth the responsibilities of employers who desire to permanently employ immigrant aliens 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 public employment service system, and by other specified means. The purpose is to assure an adequate test of the availability of U.S. workers to perform the work, and to insure that aliens are not employed under conditions adversely affecting the wages and working conditions of similarly employed U.S. workers.

The rulemaking proposed in this document will not change the elements of the program discussed above, which adequately implement the mandate in section 212(a)(14) of the Act (8 U.S.C. 1182(a)(14)). The financial and other impact of this proposed rulemaking is not so great as to require a regulatory analysis. See 44 FR 5576 (January 26, 1979). The paragraphs that follow discuss the amendments proposed by this document.

Discussion of Proposed Amendments

Dieticians

The American Dietetic Association has petitioned ETA to delete dieticians from the list of precertified occupations on Schedule A. ETA has communicated with the American Hospital Association, the U.S. Office of Personnel Management, and the public employment service system to determine the availability of U.S. dieticians to meet the nation's needs.

These agencies indicate that there are sufficient able, willing, qualified, and available dietitians nationwide to meet the needs of U.S. employers. Therefore, the Administrator of the U.S. Employment Service has proposed that dietitians be removed from *Schedule A*. This proposed rule would amend § 656.10(a)(1)(i) by deleting the term "Dietetics."

Physical Therapists

There appears to be a continued shortage of qualified physical therapists to meet the nation's needs. For that reason, it is proposed that this occupation will continue to be on *Schedule A*. However, the American Physical Therapy Association (APTA), in evaluating the credentials of alien physical therapists, has found that the aliens frequently have not completed all the courses necessary for State licensure, and must take additional courses in the United States to be permitted to sit for licensing examinations. The APTA recommends that the aliens be eligible to take the physical therapy licensure examination in the State of intended employment prior to the labor certification. This does not appear to be unduly burdensome since a license is necessary to practice in this field. The proposed rule would amend § 656.10(a) to require that the alien physical therapist be eligible to sit for the licensing examination in the State of intended employment. Since educational qualifications would be included in licensability, and since some States do not require a baccalaureate degree for practice in physical therapy, the requirement of a baccalaureate degree for this occupation would be removed. As documentation of *Schedule A* eligibility, § 656.22 would be amended to require the alien physical therapist to submit with the application for certification a signed statement or letter from the physical therapy licensing authority in the State of intended employment, stating that the alien has met all the requirements necessary to take that State's physical therapy licensing examination.

Physicians (and Surgeons)

The proposed amendments would alter somewhat the certification procedures for physicians and surgeons. In geographic areas certified by the Secretary of Health, Education, and Welfare (HEW) as shortage areas for the alien's medical specialty, the job opportunity would be on the precertification list, *Schedule A*. The normal recruitment requirements would not apply to such job opportunities.

While Congress found in section 2(c) of the Health Professions Educational Assistance Act of 1976 (42 U.S.C. 292 note) that there is a sufficient number of physicians and surgeons in the United States as a whole, it found further in section 2(a)(3) of that Act (42 U.S.C. 292 note) that there are many geographic areas in the United States in which there are inadequate numbers of health professions personnel to meet health care needs. Congress directed DOL and HEW to work together so that DOL could make equitable determinations with regard to applications for permanent labor certification by alien graduates of foreign medical schools. By adding some physicians and surgeons to *Schedule A* (but only for areas where their medical specialty is in short supply), HEW and DOL expect to fill some of the health care needs of those geographic areas.

Under the proposal, a signed statement from the appropriate Regional Health Administrator, Public Health Service Regional Office, Department of HEW (RHA), or the RHA's designee, would be required as documentation of physician and surgeon *Schedule A* eligibility. RHAs are the chief officials of the regional offices of the Public Health Service in HEW. 44 FR 21711; April 11, 1979. The appropriate RHA is the one in whose region the job opportunity is located. Addresses for the RHAs will be included in the regulations.

The signed statement from the RHA would certify that the alien will be employed as a physician (or surgeon) in a geographic area which has been designated by the Secretary of Department of Health, Education, and Welfare (HEW) as a *Health Manpower Shortage Area* for the alien's medical specialty, or has been identified otherwise by the Secretary of HEW as having an insufficient number of physicians in the alien's medical specialty, in accordance with section 906 of Health Professions Education Assistance Act (8 U.S.C. 1182 note).

As with all *Schedule A* applications, the application forms and other documentation would be filed directly with the Immigration and Naturalization Service (INS) or with a Consul of the Department of State.

Physicians and surgeons on *Schedule A* still would have to meet, as a prerequisite for labor certification, the educational and/or testing requirements in section 212(a)(32) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(32)) or section 602(a) of the Health Professions Educational Assistance Act of 1976, as amended (8 U.S.C. 1182 note). The regulations with respect to physicians and surgeons, both

those on and not on *Schedule A*, also would be amended to clarify the changes made to the educational and/or testing requirements for physicians and surgeons by section 307(q)(1) and (3) of the Health Services Extension Act of 1977 (Title III of Public Law 95-83; 8 U.S.C. 1182 note).

Professional Nurses

It is proposed that professional (also known as "registered") nurses be added to *Schedule A* for geographic areas where HEW has found that a shortage of such nurses exists for the alien's nursing setting. As with physicians and surgeons on *Schedule A*, the applicant would have to obtain a signed statement from the appropriate RHA documenting that there is a shortage of professional nurses in that area for that type of nursing setting.

The rationale for *Schedule A* precertification for job opportunities in shortage areas for particular nursing settings is similar to that for physicians and surgeons. As stated above, Congress has found that some geographic areas of the United States have significant shortages of health professions personnel. The proposed amendment would recognize those shortages by allowing limited predeterminations as to the availability of and lack of adverse effect to United States workers.

Also under the proposed amendments, all alien professional nurses seeking permanent labor certifications, both those nurses on and not on *Schedule A*, would have to document passage of the Commission on Graduates of Foreign Nursing Schools (COGNFS) examination or an equivalent written State licensing examination for professional nurses. It has been determined that employment of alien professional nurses who have not passed these examinations adversely affects the wages and/or working conditions of similarly employed U.S. workers. Recent statistics have shown that a very small percentage of alien nurses pass State professional nursing examinations after they are admitted into the United States. Many of those not passing the examinations are seeking and accepting employment below the professional status for which they entered the United States, tightening the job market for U.S. workers in those occupations. See 20 CFR § 656.11(a)(30).

DOL believes that the COGNFS examination for professional nurses provides an adequate test of the qualifications of aliens for labor certification purposes.

The COGNFS is an independent, non-profit organization established at the

behest of the Division of Nursing, Bureau of Health Manpower, Department of Health, Education, and Welfare, which also had become concerned over the increasing number of foreign nurse graduates in the United States, who could not achieve State licensure. The COGFNS developed this examination to test the capabilities of foreign professional nurses in all the area of nursing for which American nurse graduates are responsible, and to afford an objective estimate of their ability to pass licensure examinations in the United States. The examination is given in April and October of each year, in the United States and approximately 30 other countries throughout the world. Further information may be obtained from the Commission on Graduates of Foreign Nursing Schools (COGFNS), 3624 Market Street, Philadelphia, PA 19104.

COGFNS has stated that the last date for filing to take its April 1980 examination is January 2, 1980, and it is anticipated that the results of the examination will be issued by July 1, 1980.

References to HEW

References in these proposed regulations to the Department of (and Secretary of) Health, Education, and Welfare, may be changed in the final rule to the Department of Health and Human Services. See §§ 509 and 601(a) of the Department of Education Organization Act (20 U.S.C. 3508 and 3401 note), Public Law 96-88, 93 Stat. 668, 695, and 696.

Intracompany Transferees

Aliens seeking *Schedule A* precertification as intra-company transferees will have to evidence more completely their attachment to the international corporation or organization employing them and the truly international character of their employer. Currently, aliens who were employed as managers or executives by an international corporation or organization for one year may under certain conditions obtain *Schedule A* precertification.

The use of *Schedule A*, Group IV, by aliens who are in reality investors is inappropriate. See 8 CFR § 212.8(b)(4). DOL has observed that Group IV has been used at times by alien investors, and by U.S. branches or offices set up by foreign businesses primarily to facilitate immigration. For these reasons, the regulation at § 656.10(d) would be amended to more clearly set forth the requirement that evidence be presented to show that the alien was employed by the employer for at least one year

outside the United States. The employer also would have to have been doing business in the United States for at least one year prior to submission of the permanent alien labor certification application. Additionally, the alien beneficiary of the certification would have to be qualified for an "L-1" visa (temporary nonimmigrant intracompany transferee) as a manager or executive. See 8 U.S.C. 1101(a)(15)(1); and 8 CFR § 214.2(1).

General Filing Instructions

Section 656.20 would be expanded from an introductory statement to a statement of general filing instructions applicable to all applications for alien labor certification, including those on the predetermination *Schedules A* and *B* and occupations designated for special handling. Certain requirements applying to all applications, and currently in § 656.21(b), will be transferred to this section.

A new § 656.20(b)(2) standardizes the attorney notice of appearance procedure with INS practice. Notices of appearance by attorneys for aliens and employers will be submitted on INS Form G-28. See 8 CFR § 292.4(a). This will clarify whether particular attorneys are representing the employer and/or the alien in application for certification.

DOL has found that a bona fide test of the availability of U.S. workers cannot take place where the alien beneficiary or the alien's attorney or representative participates in the interview(s) or consideration of U.S. workers seeking the job offered to the alien. Additionally, in some situations, Certifying Officers have reported that some employers have utilized unusual interviewing or consideration procedures for job opportunities involving job offers to aliens. For example, the attorney for the employer or alien or some nonpersonnel official would conduct the interview and participate in the consideration of U.S. workers applying for the job.

To standardize further attorney practice in labor certification procedures with that before the Department of Justice's Board of Immigration Appeals, persons suspended or disbarred from practice before that Board pursuant to 8 CFR § 292.3 would not be permitted to act as an attorney, agent, or representative for an employer and/or an alien in labor certification matters.

The application form for alien labor certification has for a number of years required documents submitted in languages other than English to be accompanied by an accurate translation into English. This provision would now be included specifically in the regulations.

Basic Labor Certification Application Process

Except for applications involving occupations on *Schedule A* or occupations designated for special handling (described below), the basic labor certification application process in § 656.21 would continue to be followed. Many of the provisions now in § 656.21 will be retained. Some, as discussed above, have been moved to § 656.20. The new provisions are discussed below.

The regulations now state that the job opportunity must not be described with unduly restrictive job requirements in the employer's recruitment or application. Thus, the job requirements shall be, in part, those normally required for the job in the United States, and shall not include requirements for a language other than English, unless adequately documented as arising from business necessity.

A requirement that the worker live on the employer's premises would have to be proved by adequate documentation of business necessity.

When an employer recruits U.S. workers for a job, the statement of an employer preference, such as "10 years experience preferred" or "Knowledge of German language preferred," can deter otherwise available, able, willing, and qualified U.S. workers from applying for the job. In that sense, statement of an unduly restrictive employer preference can obstruct a bona fide recruitment effort as much as unduly restrictive job requirement. Employer or customer preference or convenience is not sufficient to prove business necessity. Business necessity is something the absence of which would undermine the essence of the business operation. The regulation would be clarified to prohibit unduly restrictive employer preferences expressed in recruitment to the same extent as unduly restrictive job requirements.

Previously, the Certifying Officers have specified what they consider to be a bona fide effort by an employer to recruit U.S. workers for the job opportunity within its own organization or among visitors to its premises. Employees of and visitors to the employer, while perhaps not interested or qualified for the job offered the alien, may know of U.S. workers who are interested and qualified. The regulations would clarify the specific manner by which notices of the job opportunity are to be posted within the employer's organization. The employer would continue to be required to conduct other appropriate recruitment efforts.

Currently, the regulations have been interpreted to require two forms of printed advertising for the job opportunity. One is published over the employer's name and directs workers to report to the employer. The other is published over the name of the local office of the State employment service and directs workers to report to that office for referral to the employer. The regulations would be simplified to require only one type of advertisement, over both the names of the local office of the State employment service and the employer, directing workers to report to the employment service for referral to the employer. The manner and extent of such an advertising effort, to result in a bona fide recruitment effort, would be specified in the regulation and are to a great extent the same as the current regulations.

Two other provisions will be added to reduce the backlog of cases in local employment service and ETA regional offices and speed up determinations on applications. Applications which are inactive for 45 days in local office files due to the failure of the employer or alien to provide requested documentation, will be returned to the employer. If the employer resubmits the application, it will be considered a new application for filing purposes. Also, except for the occupations on *Schedule B* (20 CFR § 656.11), the Certifying Officer may reduce some of the recruitment efforts otherwise required, for good cause shown.

Occupations Designated for Special Handling

A new § 656.21a would be added, dealing with occupations for which the basic labor certification application procedures are inappropriate and which are not on *Schedule A* or *B*. For now, these occupations are college and university teachers, aliens represented to be of exceptional ability in the performing arts, and shearherders.

For college and university teacher positions, the employer would have to document that it went through a competitive recruitment and selection process, as defined in the proposed regulation. Other evidence of the alien's qualifications, similar to that required in the basic application process, would have to be submitted.

For job offers to aliens represented to have exceptional ability in the performing arts, the documentation of the alien's ability essentially would be similar to that in the current regulations.

Alien shearherders who have lawfully and continuously been employed in the United States for at least 33 of the 36 months immediately preceding the

application would be permitted a simplified application procedure. All that would have to be filed would be a completed application form and signed statements from the alien's employers during that period, attesting to the employment. Shearherder applications for permanent alien labor certification, where the alien has the requisite experience shearherding in the United States, would be filed directly with INS or with a Consul of the Department of State, *not with DOL or a State employment service*. This proposed regulation would not affect applications for temporary employment of aliens as shearherders, which must be filed pursuant to Subpart C of 20 CFR Part 635.

Schedule A Application Process

The changes to § 656.22 with respect to *Schedule A* applications for job opportunities as physicians and surgeons, professional nurses, and intra-company transferees have been discussed above.

Aliens of exceptional ability in the sciences or arts (except the performing arts) are now in Group II of *Schedule A*. The documentation requirement for such applicants would be eased by allowing the applicants greater flexibility in choosing the evidence they submit in support of applications. The language in the regulation also would be clarified and other technical changes would be made.

Schedule B Application Process

Schedule B lists occupations for which the Administrator has predetermined there are sufficient able, willing, qualified, and available U.S. workers, or that employment of aliens would adversely affect the wages and working conditions of similarly employed U.S. workers. The occupations on *Schedule B* are listed at § 656.11, and the documentation requirements to apply for waivers of the predetermination are at § 656.23.

It is proposed to amend § 656.23 to permit applicants to submit rebuttal evidence to the Certifying Officer in response to a proposed determination ("*Notice of Findings*") denying the application. Currently, only applications not on *Schedule A* or *B* are afforded the opportunity to rebut the certifying officer's proposed findings. As is currently in effect, appeals from final determinations of Certifying Officers from denials of *Schedule B* waivers may be made to the DOL Office of Administrative Law Judges.

Labor Certification Determinations

Section 656.24(b)(1) would be amended to clarify the standard by which a Certifying Officer determines whether the requirements of the regulations have been met. A limited right to excuse a partial failure to comply with the regulations would be granted the Certifying Officers. Employers and aliens would be expected to comply strictly with each applicable requirement of Part 656, unless the regulations expressly state otherwise. Compliance with the regulations is necessary to adequately test the labor market for U.S. workers and to determine adverse effect on U.S. workers. This provision does not apply to applications filed with INS or a State Department Consul under *Schedule A* or for permanent employment as a shearherder.

Procedures Following a Labor Certification Determination

Currently, a proposed denial of an application for labor certification is sent to the employer on a *Notice of Findings* form. The employer is permitted to submit rebuttal evidence (and if the employer does so, the alien may also do so) to the Certifying Officer. 20 CFR § 656.25.

Section 656.25 now would be clarified to state that failure to submit timely rebuttal evidence not only makes the *Notice of Findings* automatically the final decision of the Secretary, but also constitutes a failure to exhaust available administrative remedies, and denies the applicant any further administrative review within DOL. Similarly, failure to file a timely request for administrative review from an adverse *Final Determination* (after rebuttal) would constitute a refusal to exhaust available administrative remedies. All findings in the *Notice of Findings* not rebutted would be deemed admitted.

Administrative-Judicial Review of Denials of Labor Certifications

It is proposed that all appeals from *Final Determinations* by Certifying Officers would be made to Administrative Law Judges, rather than to either Administrative Law Judges or Hearing Officers as at present. Additionally, § 656.26 would be amended to speed up the review process, by shortening the current 30-day briefing period to 21 days. It has been found that many of the briefs have been submitted early enough at present to meet this proposed requirement. To accommodate individuals filing by mail from greater distances, documents would be deemed filed when mailed or

delivered to the Administrative Law Judge.

Publication of Administrative Law Judge Decisions

At present, a number of Administrative Law Judges in the Office of Administrative Law Judges hear and decide appeals from denials of applications for permanent alien labor certification. Since the Administrative Law Judges hear and decide cases independently of DOL and each other, divergent opinions on the same issues, all of which may be reasonable, have been issued. To provide uniform guidance to the public and to the Certifying Officers as to their responsibilities under the regulations, a system of published decisions would be established in a new § 656.27a. The Office of Administrative Law Judges of DOL would designate specific Administrative Law Judge decisions to be printed and published. The Administrator, U.S. Employment Service, will provide the Certifying Officers with copies of all such published decisions.

Technical and Clarifying Amendments

Other technical and clarifying amendments are proposed to be made to 20 CFR Part 656, and are reflected in the proposal below.

Development of Proposed Rulemaking: Regulatory Impact

This proposed rulemaking document was prepared under the direction and control of Mr. David O. Williams, Administrator, U.S. Employment Service, Employment and Training Administration, U.S. Department of Labor, Washington, D.C.

The economic and other impact of this proposed rule is not so significant as to require the development of a regulatory analysis. See 44 FR 5576 (January 26, 1979).

Proposed Rulemaking

Accordingly, it is proposed to amend Part 656 of Chapter V of Title 20, Code of Federal Regulations, as follows:

§ 656.2 [Amended]

1. Section 656.2 is amended by adding the bracketed citation "[8 U.S.C. 1361]" at the end of paragraph (b).

2. Section 656.10 is amended as follows:

(a) By deleting and reserving paragraphs (a)(1)(i) and (a)(2)(i);

(a) By revising the introductory paragraph, paragraph (a)(3), and paragraph (d); and by adding a new paragraph (a)(4); to read as follows:

§ 656.10 Schedule A.

The Administrator, United States Employment Service (Administrator), has 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 pursuant to § 656.22 of this Part.

Schedule A

(a) * * *

(3) Health care occupations:

(i) 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.

(ii) Aliens who will be employed as physicians (or surgeons) in a geographic area which has been designated by the Secretary of Department of Health, Education, and Welfare (HEW) as a *Health Manpower Shortage Area* for the alien's medical specialty, or has been identified otherwise by the Secretary of HEW as having an insufficient number of physicians in the alien's medical specialty. In accordance with section 906 of Health Professions Education Assistance Act (8 U.S.C. 1182 note).

(iii) Aliens who will be employed as professional nurses in a geographic area which has been designated by the Secretary of HEW as a *Professional Nursing Shortage Area*, or aliens who will be employed as professional nurses in a geographic area which has been identified by the Secretary of HEW as having an insufficient number of professional nurses for the type of nursing setting in which the alien will work. (This paragraph (a)(3)(iii) applies only to applications for certification filed on or after July 1, 1980.)

(4) Definitions of Group I occupations:

(i) "Physical therapists" means persons who apply 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) "Physician (or surgeon)" is defined in § 656.50 of this Part.

(iii) "Professional nurse" is defined in § 656.50 of this Part.

(d) Group IV:

(1) Aliens who have been admitted to the United States in order to work in, and who are currently working in, managerial or executive positions with the same international corporations or organizations with which they were continuously employed as managers or executives outside the United States for one year before they were admitted.

(2) Aliens outside the United States who will be engaged in the United States in managerial or executive positions with the same international corporations or organizations with which they have been continuously employed as managers or executives outside the United States for the immediately prior year.

(3) For the purposes of this paragraph (d), the international corporation or organization must have been established and doing business in the United States for a period of at least one year prior to the submission of the application for the alien to qualify under *Schedule A*, Group IV. For the purposes of this paragraph (d), "doing business" shall mean a regular, systematic, and continuous course of conduct, including both the solicitation of business and the provision of goods and/or services by the employer, and shall not be limited to the mere presence of an agent or office in the United States of the international corporation or organization.

3. Section 656.11 is amended as follows:

(a) By italicizing the term "*Schedule B*" wherever it appears; and

(b) By deleting the colon at the end of the introductory paragraph and inserting in lieu thereof a period and an additional sentence, to read as follows:

§ 656.11 Schedule B.

* * *. An employer seeking a labor certification for an occupation listed on *Schedule B* may apply for a labor certification pursuant to § 656.23 of this Part.

4. Section 656.20 is amended as follows:

(a) By redesignating paragraph (d) as paragraph (g);

(b) By revising the section heading and paragraphs (a), (b), and (c); and by adding new paragraphs (d), (e), and (f); to read as follows:

§ 656.20 General filing instructions.

(a) A request for a labor certification on behalf of any alien who is required by the Act to become 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) through (4) of this section, an application for a labor certification shall be filed pursuant to this section and § 656.21 of this Part.

(2) An employer seeking a labor certification for an occupation designated for special handling shall apply for a labor certification pursuant to this section and §§ 656.21a of this Part.

(3) An alien seeking labor certification for an occupation listed on *Schedule A* may apply for a labor certification pursuant to this section and § 656.22 of this Part.

(4) An employer seeking a labor certification for an occupation listed on *Schedule B* shall apply for a labor certification pursuant to this section and §§ 656.21 and 656.23 of this Part.

(b)(1) Aliens and employers may have agents apply for labor certifications on their behalf. The alien and/or the employer shall sign a statement that the agent is representing the alien and/or employer and that the alien and/or employer takes full responsibility for the accuracy of any representations made by the agent.

(2) Aliens and employers may have attorneys represent them. Each attorney shall file a notice of appearance on Immigration and Naturalization Service (INS) Form G-28, naming the attorney's client or clients. Whenever, under this Part, any notice or other document is required to be sent to an employer or alien, the document shall be sent to their attorney or attorneys who have filed notices of appearance on INS Form G-28, if they have such an attorney or attorneys.

(3)(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 adequately consider the qualifications of 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)(3)(iii) of this section.

(ii) The employer's representative who interviews or considers U.S. workers for the job offered to the alien shall 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.

(4) No person under suspension or disbarment from practice before the United States Department of Justice's Board of Immigration Appeals pursuant to 8 CFR § 292.3 shall be permitted to act as an agent, representative, or attorney for an employer and/or alien under this Part.

(c) Job offers filed on behalf of aliens on the *Application for Alien Employment Certification* form must clearly show that:

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

(2) The wage offered equals or exceeds the prevailing wages determined pursuant to § 656.40 of this Part, and that the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work;

(3) 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;

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

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

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

(i) Vacant because the former occupant is on strike or 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;

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

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

(d) If the application involves labor certification as a physician (or surgeon), the labor certification application shall include the following documentation:

(1)(i) Documentation which shows clearly that the alien has passed Parts I and II of the National Board of Medical Examiners Examination (NBME), or the Visa Qualifying Examination (VQE) offered by the Educational Commission for Foreign Medical Graduates (ECFMG); or

(ii) Documentation which shows clearly that:

(A) The alien was on January 9, 1977, a doctor of medicine fully and permanently licensed to practice medicine in a State within the United States;

(B) The alien held on January 9, 1977, a valid specialty certificate issued by a constituent board of the American Board of Medical Specialties; and

(C) The alien was on January 9, 1977, practicing medicine in a State within the United States; or

(iii) The alien is a graduate of a school of medicine accredited by a body or bodies approved for the purpose by the United States Commissioner of Education (regardless of whether such school of medicine is in the United States).

(e) If the application is filed on or after July 1, 1980, and involves labor certification as a professional nurse, the labor certification application shall include documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (COGNFS) Examination or an equivalent written State registered/professional nursing licensing examination.

(f) Whenever any document is submitted to a State or Federal agency pursuant to this Part, the document either shall be in the English language or shall be accompanied by a written translation into the English language, certified by the translator as to the accuracy of the translation and his/her competency to translate.

5. Section 656.21 is amended as follows:

(a) By deleting paragraphs (a)(3), (a)(4), and (a)(6);

(b) by redesignating paragraph (a)(5) as a new paragraph (a)(3); and

(c) By revising the introductory text in paragraph (a); by revising paragraph (b) and paragraphs (e) through (i); and by adding new paragraphs (j) and (k); to read as follows:

§ 656.21 Basic labor certification process.

(a) Except as otherwise provided by §§ 656.21a and 656.22 of this Part, an employer who desires to apply for a labor certification on behalf of an alien shall file, in duplicate, a Department of Labor *Application for Alien Employment Certification* form and any attachments required by this Part with the local employment service office serving the area where the alien proposes to be employed. The employer shall set forth on the *Application for Alien Employment Certification* form, as appropriate, or in attachments:

(b) Except for labor certification applications involving occupations

designated for special handling (see § 656.21a of this Part) and *Schedule A* occupations (see §§ 656.10 and 656.22 of this Part), the employer shall submit, as a part of every labor certification application, on the *Application for Alien Employment Certification* form or in attachments, as appropriate, the following clear documentation:

(1) The employer shall document the employer's good faith efforts to recruit U.S. workers without success through the public employment service system and through other labor referral and recruitment sources normal to the occupation:

(i) This documentation shall include documentation of the employer's recruitment efforts for the job opportunity which shall:

(A) List the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade or technical schools; labor unions; and/or development or promotion from within the employer's organization;

(B) Identify each recruitment source by name;

(C) Give the number of U.S. workers responding to the employer's recruitment;

(D) Give the number of interviews conducted with U.S. workers;

(E) Specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and

(F) Specify the wages and working conditions offered to the U.S. workers; and

(ii) The employer shall include also a copy of at least one advertisement, if any, for the job opportunity placed by the employer prior to filing an *Application for Alien Employment Certification* form.

(2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:

(i) the job opportunity's requirements, unless adequately documented as arising from business necessity:

(A) Shall be those normally required for the job in the United States;

(B) Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs;

(C) Shall not include requirements for a language other than English.

(ii) If the job opportunity involves a combination of duties, for example engineer-pilot, the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of

intended employment, and or the combination job opportunity is based on a business necessity.

(iii) If the job opportunity involves a requirement that the worker live on the employer's premises, the employer shall document adequately that the requirement is a business necessity.

(iv) If the job opportunity has been or is being described with an employer preference, the employer preference shall be deemed to be a job requirement for purposes of this paragraph (b)(2).

(3) Except for job opportunities in private households, the employer shall document that it has posted notices of the job opportunity at its place of business:

(i) Notices of the job opportunity posted by the employer shall contain the information required for advertisements by paragraph (g)(3) through (g)(8) of this section, except that they shall direct applicants to report to the employer, not the local employment service office;

(ii) Notices of the job opportunity shall be posted by the employer for at least 10 consecutive business days; shall be clearly visible and unobstructed while posted; and shall be posted in conspicuous places, where the employer's U.S. workers readily can read the posted notice on the way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate proximity of wage and hour notices required by 29 CFR § 516.4 or occupational safety and health notices required by 29 CFR § 1903.2(a).

(4) The employer shall document that its other efforts to locate and employ U.S. workers for the job opportunity, such as recruitment efforts by means of private employment agencies, labor unions, advertisements placed with radio or TV stations, recruitment at trade schools, colleges, and universities or attempts to fill the job opportunity by development or promotion from among its present employees, have been and continue to be unsuccessful. Such efforts may be required after the filing of an application if appropriate to the occupation.

(5) If unions are customarily used as a recruitment source in the area of industry, the employer shall document that they were unable to refer U.S. workers.

(6) The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it

is not feasible to hire workers with less training or experience than that required by the employer's job offer.

(7) If U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons.

(e) The local employment service office shall calculate, to the extent of its expertise using wage information available to it, the prevailing wage for the job opportunity pursuant to § 656.40 of this Part and shall put its finding into writing. If the local office finds that the rate of wages offered is below the prevailing wage, it shall advise the employer to increase the amount offered. If the employer refuses to do so, the local office shall advise the employer that the refusal is a ground for denial of the application by the Certifying Officer; and that if the denial becomes final, the application will have to be refiled at the local office as a new application.

(f) The local employment service office, using the information on job offer portion of the *Application for Alien Employment Certification* form, shall prepare and process an employment service job order:

(1) If the job offer is acceptable, the local office, in cooperation with the employer, then shall attempt to recruit United States workers for the job opportunity for a period of thirty days, by placing the job order into the regular employment service recruitment system.

(2) If the employer's job offer is discriminatory or otherwise unacceptable as a job order under employment service regulations, the local office, as appropriate, either shall contact the employer to try to remedy the defect or shall return the *Application for Alien Employment Certification* form to the employer with instructions on how to remedy the defect.

(g) In conjunction with the recruitment efforts under paragraph (f) of this section, the local office shall place an advertisement for the job opportunity in a newspaper of general circulation or in a professional or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified, and available U.S. workers. The local office shall require the employer to pay the local office in advance for the reasonable cost of having the advertisement published. The employer shall supply the local office with the text of the advertisement for approval prior to its publication, and may request the local office's assistance in drafting the text. The advertisement shall:

(1) Direct applicants to report or send resumes, as appropriate for the occupation to the local employment service office for referral to the employer;

(2) Include a local office identification number and the complete address or telephone number of the local office, but shall not identify the employer;

(3) Describe the job opportunity with particularity;

(4) State the rate of pay, which shall not be below the prevailing wage for the occupation, as calculated pursuant to § 656.40 of this Part;

(5) Offer prevailing working conditions;

(6) State the employer's minimum job requirements;

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

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

(9) Be published for at least 3 consecutive business days.

(h) The employer shall supply the local office with required documentation or requested information in a timely manner. If documentation or requested information is not received within 45 days of the date of the request the local office shall return the *Application for Alien Employment Certification* form, and any supporting documents submitted by the employer and/or the alien, to the employer to be filed as a new application.

(i) The Certifying Officer may reduce the employer's recruitment efforts required by paragraphs (f) and/or (g) of this section, for good cause shown, but no such reduction may be granted for job offers involving occupations listed on *Schedule B*.

(j) The local employment service office shall wait 30 days from the date of the publication of the employer's advertisements for the results of such recruitment. If, after the required recruitment period, the recruitment is not successful, the local office shall send the application, its prevailing wage finding, copies of all documents in the particular application file, and any additional appropriate information (such as local labor market data), to the employment service agency's State office or, if authorized, to the regional Certifying Officer.

(k) An employment service agency's State office which receives an application pursuant to paragraph (j) of this section may add appropriate data or comments, and shall transmit the application promptly to the appropriate Certifying Officer.

6. A new § 656.21a is added to Part 656, to read as follows:

§ 656.21a Applications for labor certifications for occupations requiring special handling.

(a) An employer shall apply for a labor certification to employ an alien as a college or university teacher or an alien represented to be of exceptional ability in the performing arts by filing, in duplicate, an *Application for Alien Employment Certification* form, and any attachments required by this Part, with the local employment service office serving the area where the alien proposes to be employed.

(1) The employer shall set forth the following on the *Application for Alien Employment Certification* form, as appropriate, or in attachments:

(i) The employer shall submit a statement of the qualifications of the alien, signed by the alien.

(ii) The employer shall submit a full description of the job offer for the alien employment.

(iii) If the application involves a job offer as a college or university teacher, the employer shall submit documentation to show clearly that the employer selected the alien for the job opportunity pursuant to 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 (a)(1)(iii), evidence of the "competitive recruitment and selection process" shall include:

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

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

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

(3) 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;

(B) 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;

(C) Evidence of all other recruitment sources utilized;

(D) A statement of the results of the recruitment described in this paragraph (a)(1)(iii); and

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

(2) Applications which are filed after June 30, 1980, for job opportunities as college and university teachers, shall be filed within twelve months after a selection is made pursuant to a competitive recruitment and selection process.

(iv) If the application is for an alien represented to have exceptional ability in the performing arts, the employer shall submit:

(A) Documentation to show this exceptional ability, such as:

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

(2) Documents showing the alien's work experience during the past year did require, and the alien's intended work in the United States will require, exceptional ability;

(3) 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);

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

(5) Playbills and starbillings;

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

(7) Documents attesting to the outstanding reputation of 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; and

(B) A copy of at least one advertisement placed in a national publication appropriate to the occupation (and a statement of the results of that recruitment) which shall:

(1) Identify the employer's name, address, and the location of the employment, if other than the employer's location;

(2) Describe the job opportunity with particularity;

(3) State the rate of pay, which shall not be below the prevailing wage for the occupation, as calculated pursuant to § 656.40 of this Part;

(4) Offer prevailing working conditions;

(5) State the employer's minimum job requirements;

(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; and

(C) Documentation that unions, if customarily used as a recruitment source in the area or industry, were unable to refer equally qualified U.S. workers.

(3) The local employment service office, upon receipt of an application for a college or university teacher or an alien represented to have exceptional ability in the performing arts, shall follow the application processing and prevailing wage determination procedures set forth in §§ 656.21 (d) and (e) of this Part, and shall transmit a file containing the application, the local office's prevailing wage findings, and any other information it determines is appropriate, to the State employment service agency office, or if authorized by the State office, to the appropriate Certifying Officer.

(4) If the local employment service office transmits the file described in paragraph (a)(3) of this section to the State office, the State office shall follow the procedures set forth at § 656.21(k) of this Part.

(b)(1) An employer shall apply for a labor certification to employ an alien as a shepherd by filing an *Application for Alien Employment Certification* form, and any attachments required by this paragraph (b), directly with a Department of State Consular Officer or with a District Office of INS, not with a local or State office of a State employment service agency, and not with an office of DOL. The documentation for such an application shall include:

(i) A completed *Application for Alien Employment Certification* form, including the Job Offer for Alien Employment, and the Statement of Qualification of Alien; and

(ii) A signed letter or letters from all U.S. employers who have employed the alien as a shepherd during the immediately preceding 36 months, attesting that the alien has been employed in the United States lawfully and continuously as a shepherd, for at least 33 of the immediately preceding 36 months.

(2) An Immigration Officer, or a Consular Officer, shall review the application and the letters attesting to the alien's previous employment as a shepherd in the United States, and shall determine whether or not the alien and the employer(s) have met the requirements of this paragraph (b).

(i) The determination of the Immigration of Consular Officer pursuant to this paragraph (b) shall be 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 of this Part.

(ii) If the alien and the employer(s) have met the requirements of this paragraph (b), the Immigration or Consular Officer shall indicate on the *Application for Alien Employment Certification* form the occupation, the immigration or consular office which made the determination pursuant to this paragraph (b), and the date of the determination (see § 656.30 for the significance of this date). The Immigration or Consular Officer then shall forward promptly to the Administrator copies of the *Application for Alien Employment Certification* form, without the attachments.

7. Section 656.22 is amended as follows:

(a) By redesignating paragraphs (f), (g), and (h) as paragraphs (g), (h), and (i), respectively;

(b) By italicizing the term "*Schedule A*" wherever it appears; and

(c) By revising paragraphs (c) and (d); and by adding a new paragraph (f) to read as follows:

§ 656.22 Applications for labor certifications for "Schedule A" occupations.

(c) Aliens seeking labor certifications under Group I of *Schedule A* shall file as part of their labor certification applications documentary evidence of the following:

(1) Aliens seeking labor certifications under Groups I(1)(i) and I(2)(i) of *Schedule A* (§ 656.11(a)(1)(i) and (a)(2)(i)) shall file as part of their labor certification applications documentary evidence of their degrees and of the equivalence of their degrees to United States granted Ph. D's, master's, or bachelor's degrees, as appropriate.

(2) Aliens seeking *Schedule A* labor certifications as physical therapists (§ 656.11(a)(3)(i)) shall file as part of their labor certification applications 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.

(3) Aliens seeking *Schedule A* labor certifications as physicians (or surgeons) (§ 656.11(a)(3)(ii)) shall file, as part of their labor certification applications, the following:

(i) Documentation required by § 656.20(d) of this Part; and

(ii) A statement signed by the appropriate Regional Health Administrator of the Department of Health, Education, and Welfare (HEW) stating:

(A) That the job opportunity is located within a designated *Health Manpower Shortage Area* for the alien's medical (or surgical) specialty; or

(B) That the job opportunity is located within an area which has an insufficient number of physicians (or surgeons) in the alien's medical specialty.

(4) Aliens seeking *Schedule A* labor certifications as professional nurses (§ 656.11(a)(3)(iii)) shall file as part of their labor certification applications the following:

(i) Documentation required by § 656.20(e) of this Part; and

(ii) A statement signed by the appropriate Regional Health Administrator of the Department of Health, Education, and Welfare (HEW) stating:

(A) That the job opportunity is located within a designated *Professional Nursing Shortage Area*; or

(B) That the job opportunity is located within an area which has an insufficient number of professional nurses for the type of nursing setting in which the alien will practice.

(5) Aliens seeking *Schedule A* labor certification as physicians (or surgeons) or professional nurses, shall request the applicable shortage statements, described in paragraphs (c)(2)(ii) and (c)(3)(ii) of this section, by making a written request to the appropriate Regional Health Administrator of HEW (Addresses of appropriate HEW Regional Health Administrators are listed at § 656.61 of this Part). The written request shall include:

(i) The alien's name;

(ii) The alien's medical (or surgical) specialty, or the nursing setting, as appropriate;

(iii) The complete name and address of the alien's intended employer; and

(iv) The names of the county and State where the job opportunity is located.

(d) Aliens seeking labor certifications under Group II of *Schedule A* shall file as part of their labor certification applications documentary evidence testifying to the current widespread acclaim and international recognition accorded them by recognized experts in their field; and documentation showing that their work in that field during the past year did, and their intended work in the United States will, require exceptional ability. In addition, the aliens must file, as part of their labor

certification applications, documentation from at least two of the following seven groups:

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

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

(3) Published material by or about the alien, relating to the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material;

(4) 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;

(5) Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought;

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

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

(f)(1) Aliens seeking labor certifications under Group IV of *Schedule A* shall meet, at the time of filing the application, the eligibility requirements of the Immigration and Naturalization Act for an L-1 non-immigrant classification as a manager or an executive. See 8 U.S.C. 1101(a)(15)(L); and 8 CFR § 214.2(1). However, persons who are eligible for an L-1 visa on the basis of specialized knowledge, but not managerial or executive experience, do not meet the requirements for Group IV of *Schedule A*. The actual filing of an L-1 visa petition is not required.

(2) Aliens seeking labor certifications under Group IV of *Schedule A* shall file as part of their labor certification applications a written verification of employment statement, signed by an authorized officer of the international corporation or organization which will employ the alien in the United States. The written verification of employment statement shall set forth:

(i) The dates of the alien's employment with the international corporation or organization;

(ii) The name(s) of the components of that employer for which the alien has been and/or is being employed, inside and outside the United States;

(iii) Unless such information has been entered on the *Application for Alien Employment Certification* form, a description of the positions held by the alien within the international corporation or organization, and the dates the alien held each position; and

(iv) The dates the international corporation or organization was established and has been doing business in the United States prior to the submission of the application. The term "doing business" is defined in paragraph (d)(3) of *Schedule A* (§ 656.10(d)(3) of this Part).

8. Section 656.23 is amended by italicizing the term "*Schedule B*" wherever it occurs, and by revising paragraphs (d)(1) and (g), to read as follows:

§ 656.23 Applications for Schedule B occupations; requests for waivers from Schedule B.

(d) * * *

(1) The documentation required by §§ 656.20 (b), (c), (f), and (g) and 656.21;

(g) If the waiver is denied, the regional Certifying Officer shall follow the procedures set forth in paragraphs (c) through (g) of § 656.25 of this Part.

9. Section 656.24 is amended as follows:

(a) By deleting from paragraph (b)(2)(iii) the phrase "as is appropriate" and inserting in lieu thereof the phrase "as are appropriate";

(b) By replacing the semicolon at the end of paragraph (b)(2)(ii) with a period; and

(c) By revising paragraph (b)(1) to read as follows:

§ 656.24 Labor certification determinations.

(b) * * *

(1) The employer has met the requirements of this Part. The Certifying Officer has the discretion to excuse a failure on the part of the employer to comply fully with the requirements of this Part, if the Certifying Officer first determines that the labor market has been sufficiently tested to warrant a finding of unavailability of U.S. workers and lack of adverse effect. The Certifying Officer's excusal of such a failure on the part of an employer shall

be set forth specifically on the *Final Determination* form.

10. Section 656.25 is amended as follows:

(a) By deleting the term "*Determination and Transmittal*" wherever it occurs and by inserting in lieu thereof the term "*Final Determination*"; and

(b) By revising paragraphs (c)(3), (c)(4), and (e) to read as follows:

§ 656.25 Procedures following a labor certification determination.

(c) * * *

(3) Specify a date, 35 calendar days from the date of the *Notice of Findings*, by which documentary evidence and/or argument may be submitted to cure the defects or to otherwise rebut the bases of the determination, and advise that if the rebuttal evidence has not been mailed by certified mail by the date specified:

(i) The *Notice of Findings* shall automatically become the final decision of the Secretary denying the labor certification;

(ii) Failure to file a rebuttal in a timely manner shall constitute a refusal to exhaust available administrative remedies; and

(iii) The administrative-judicial review procedure provided in § 656.26 of this Part shall not be available; and

(4) Quote the rebuttal procedures set forth at paragraphs (d), (e) and (f) of this section.

(e)(1) Documentary evidence to rebut the basis of a *Notice of Findings*, which may include evidence that the defects noticed therein have been cured, shall be mailed by certified mail on or before the date specified in the *Notice of Findings* to the Certifying Officer who issued the *Notice of Findings*.

(2) Failure to file rebuttal evidence in a timely manner shall constitute a failure to exhaust available administrative appellate remedies.

(3) All findings in the *Notice of Findings* not rebutted shall be deemed admitted.

11. Section 656.26 is amended as follows:

(a) By selecting the term "*Determination and Transmittal*" wherever it appears and inserting in lieu thereof the term "*Final Determination*";

(b) By deleting the term "hearing officer" wherever it appears and inserting in lieu thereof the term "Administrative Law Judge"; and

(c) By revising paragraphs (b), (c), and (d) to read as follows:

§ 656.26 Administrative-judicial review of denials of labor certification.

(b)(1) The request for review shall be in writing and shall be mailed by certified mail to the Certifying Officer who denied the application within 35 calendar days of the date of the determination, that is, by the date specified on the *Final Determination* form; shall clearly identify the particular labor certification determination from which review is sought; shall set forth the particular grounds for the request; and shall include all the documents which accompanied the *Final Determination* form.

(2) Failure to file a request for review in a timely manner shall constitute a failure to exhaust available administrative remedies.

(3) If the denial of labor certification involves an application for a job opportunity as a college or university teacher or an application on behalf of an alien represented to be of exceptional ability in the performing arts, the employer may designate the names and addresses of persons or organizations of specialized competence which the employer has asked to submit *amicus* briefs.

(4) Evidence of recruitment not within the record upon which the denial of labor certification was based shall not be included in the request for review.

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

(1) The Appeal File shall be in chronological order, shall have the index on top followed by the most recent document, and shall have numbered pages. The Appeal File shall contain the request for review, the complete application file, an 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 shall send the Appeal File to the Chief Administrative Law Judge, Office of Administrative Law Judges, Suite 700—Vanguard Building, 1111 20th Street, N.W., Washington, D.C. 20036.

(3) In denials involving college and university teachers and aliens represented to be of exceptional ability in the performing arts, two additional copies of the Appeal File shall be sent to the Chief Administrative Law Judge.

(4) The Certifying Officer shall send a copy of the Appeal File to the Solicitor of Labor, Attn: Associate Solicitor for Employment and Training Legal Services, Suite N2101—NDOL, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

(5) Unless the certification was denied by the national Certifying Officer, the Certifying Officer shall send a copy of the Appeal File to the Administrator:

(6) The Certifying Officer shall send copies of the index to the Appeal File to the employer and to the alien. The Certifying Officer shall afford the employer and the alien the opportunity to examine the complete Appeal File at the office of the Certifying Officer, for the purpose of satisfying the employer and the alien as to the contents, and furnishing or suggesting the addition of any documentation which is not in the Appeal File, but which was submitted prior to the issuance of the *Final Determination* form.

(d)(1) An Administrative Law Judge, designated by the Chief Administrative Law Judge, shall afford all parties, including the Solicitor, 21 days to submit or decline to submit any appropriate Statement of Position or legal brief. The Department of Labor shall be represented solely by attorneys within the Office of the Solicitor of Labor. In the cases of denials involving college and university teachers and aliens represented to be of exceptional ability in the performing arts, if the employer has designated a person or organization, which the employer has asked to submit an *amicus* brief, the Administrative Law Judge shall afford the person or organization 21 days to submit an *amicus* brief. Briefs, statements, and *amicus* briefs submitted pursuant to this paragraph shall be deemed timely if either mailed or delivered to the Administrative Law Judge on or before the end of the 21-day period set forth in this paragraph.

§ 656.27 [Amended]

12. Section 656.27 is amended by deleting the term "hearing officer" wherever it appears and inserting in lieu thereof of the term "Administrative Law Judge."

13. A new § 656.27a is added to Part 656 to read as follows:

§ 656.27a Published decisions.

(a) From time to time, the Office of Administrative Law Judges shall designate decisions of an Administrative Law Judge (or previous decisions of Hearing Officers) under §§ 656.26 and/or 656.27 of this Part to be printed and published. The Office of Administrative Law Judges will arrange to make such decisions available for sale to the general public.

(b) The Administrator shall provide to all Certifying Officers copies of all decisions published pursuant to paragraph (a) of this section.

§ 656.28 [Amended]

14. Section 656.28 is amended as follows:

(a) By deleting the term "*Determination and Transmittal*" wherever it occurs and inserting in lieu thereof the term "*Final Determination*";

(b) By deleting from paragraph (b)(1) the words "preference or"; and

(c) By replacing the semicolon at the end of paragraph (b)(3) with a period.

§ 656.31(a) [Amended]

15. Section 656.31 is amended by deleting the phrase "of this referral" from the first sentence in paragraph (a).

§ 656.40 [Amended]

16. Section 656.40 is amended by deleting the phrase "if the job opportunity is an occupation" and inserting in lieu thereof the phrase "if the job opportunity is in an occupation."

17. Section 656.50 is amended as follows:

(a) By deleting the definitions of the terms "*Determination and Transmittal* form," "Hearing Officer," "Labor certification," and "Local employment service office";

(b) By italicizing the term "*Notice of Findings*"; and

(c) By inserting the following definitions alphabetically:

§ 656.50 Definitions, for the purposes of this Part, of terms used in this Part.

"Administrative Law Judge" means a Department of Labor official designated by the Chief Administrative Law Judge to preside at DOL administrative hearings.

"Assistant Secretary" means the Assistant Secretary of Labor for Employment and Training, the chief official of the Employment and Training Administration.

"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, disbaring, or otherwise restricting him or her in the practice of law.

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

"*Final Determination* form" means the form used by the Certifying Officer to

notify employers of labor certification determinations, which was formerly known as the "Determination and Transmittal form."

"HEW" means the U.S. Department of Health, Education, and Welfare.

"Labor certification" means the certification to the Secretary of State and to the Attorney General of the determination by the Secretary of Labor pursuant to section 212(a)(14) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(14)):

(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.

"Local employment service office" and "local office" mean an office of a State employment service agency (also known as a State job service), which serves a particular geographic area within a State. Unless specified otherwise in this Part, the local office performing the functions required by this Part shall be the local employment service office serving the area where the job opportunity is located.

"Occupation designated for special handling" means an occupation, described at § 656.21a of this Part, for which DOL has determined that special labor market tests are appropriate.

"Physicians (and/or surgeons)" means persons who apply the art and science of medicine or surgery primarily in patient care to the diagnosis, prevention, and treatment of human diseases, disorders of the mind, and pregnancy. This definition includes persons practicing medicine, surgery, osteopathy, psychiatry, and ophthalmology. The physician or surgeon may specialize in treating a specific area of the body, or a particular disease, sex, or age group.

"Professional nurses" means persons who apply the art and science of nursing, which reflects comprehension of principles derived from the physical, biological, and behavioral sciences. Professional nursing generally includes the making of clinical judgments concerning the observation, care, and counsel of persons requiring nursing care; and administering of medicines and treatments prescribed by the

physician or dentist; the participation in activities for the promotion of health and the 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, and medicine. This definition includes only those occupations within Occupational Group No. 075 of the *Dictionary of Occupational Titles* (4th ed.)

"Regional Health Administrator" means the chief official of the Public Health Service Regional Office, Department of HEW, in each HEW region, or the Regional Health Administrator's designee. The addresses of the appropriate Regional Health Administrators for *Schedule A* employment as a physician (or surgeon) or nurse are listed at § 656.61 of this Part.

"Secretary of Health, Education, and Welfare (HEW)" means the chief official of the United States Department of Health, Education, and Welfare (HEW) or the Secretary of HEW's designee.

"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.

18. Subpart F is amended by revising its heading to read as follows:

Subpart F—Addresses

19. New §§ 656.61 and 656.62 are added to read as follows:

§ 656.61 Addresses of Regional Health Administrators, Public Health Service Regional Office, of HEW.

For the purposes of § 656.22(c)(2), (3), and (4) of this Part, the addresses of the appropriate Regional Health Administrators for each State are as follows:

Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): Regional Health Administrator, Department of HEW, J. F. Kennedy Federal Building, Government Center, Boston, MA 02203.

Region II (New York, New Jersey, Puerto Rico, and the Virgin Islands): Regional Health Administrator, Department of HEW, 26 Federal Plaza, New York, NY 10007.

Region III (Delaware, the District of Columbia, Maryland, Pennsylvania, and West Virginia): Regional Health Administrator, Department of HEW, P.O. Box 13710, (3535 Market Street. Do not use street address for mailing purposes.), Philadelphia, PA 19101.

Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee): Regional Health Administrator, Department of HEW, 101 Marietta Tower, Atlanta, GA 30323.

Region V (Illinois, Indiana, Michigan, Ohio and Wisconsin): Regional Health Administrator, Department of HEW, 300 South Wacker Drive, Chicago, IL 60606.

Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, and Texas): Regional Health Administrator, Department of HEW, 1200 Main Tower Building, Dallas, TX 75202.

Region VII (Iowa, Kansas, Missouri, and Nebraska): Regional Health Administrator, Department of HEW, Federal Office Building, 601 East 12th Street, Kansas City, MO 64106.

Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming): Regional Health Administrator, Department of HEW, Federal Office Building, 1961 Stout Street, Denver, CO 80294.

Region IX (Arizona, California, Guam, Hawaii, and Nevada): Regional Health Administrator, Department of HEW, Federal Office Building, 50 United Nations Plaza, San Francisco, CA 94102.

Region X (Alaska, Idaho, Oregon, and Washington): Regional Health Administrator, Department of HEW, Arcade Plaza Building, 1321 Second Avenue, Seattle, WA 98101.

§ 656.62 Locations of Immigration and Naturalization Service Offices.

For the purposes of §§ 656.21a(b) and 656.22 of this Part, the locations of INS offices in the United States are listed at 8 CFR § 100.4.

Part 656 [Amended]

20. Wherever they appear in Part 656, the following terms shall be amended to appear in italics:

- (a) *Application for Alien Employment Certification;*
- (b) *Schedule A;*
- (c) *Schedule B;*
- (d) *Notice of Findings;*
- (e) *Final Determination;* and
- (f) *Dictionary of Occupational Titles and D.O.T.*

Signed at Washington, D.C. this 17th day of January 1980.

Ray Marshall,
Secretary of Labor.

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