

### § 656.31

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 employer or alien's agent, therefore, may petition an Immigration or Consular Officer to request a duplicate from a Certifying Officer.

[45 FR 83933, Dec. 19, 1980, as amended at 56 FR 54930, Oct. 23, 1991]

### § 656.31 Labor certification applications involving fraud or willful misrepresentation.

(a) If possible fraud or willful misrepresentation involving a labor certification is discovered prior to a final labor certification determination, the Certifying Officer shall refer the matter to the INS for investigation, shall notify the employer in writing, and shall 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, the Certifying Officer shall continue to process the application.

(b) 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 shall be halted until the judicial process is completed. The Certifying Officer shall notify the employer of this fact in writing and shall send a copy of the notification to the alien, and to the Department of Labor's Office of Inspector General.

(c) 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 shall not deny the labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this part.

(d) 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 shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent

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by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

### § 656.32 Fees for services and documents.

(a) No Department of Labor or State job service agency employee shall charge a fee in connection with the filing, determination, reconsideration, or review of applications for labor certification. Such employees, on request, shall advise applicants on the completion of applications and on procedures set forth in this part without charge. No charge shall be made for the issuance or transmission of a labor certification.

(b) The Department of Labor's regulations under the Freedom of Information Act at 29 CFR part 70 on the Examination and Copying of Labor Department Documents provide that fees may be charged for special searching and copying services. These fees shall be applicable to requests to the Department for copies of documents in the custody of the Department which were produced pursuant to this part, except for official copies of labor certification documents.

### Subpart D—Determination of Prevailing Wage

### § 656.40 Determination of prevailing wage for labor certification purposes.

(a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage as required by § 656.21(b)(3), shall be determined as follows:

(1) Except as provided in paragraphs (c) and (d) of this section, if the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*, 29 CFR part 4, the prevailing wage shall be at the rate required under the statutory determination. Certifying Officers shall request the assistance of the DOL Employment Standards Administration wage specialists if they need assistance in making this determination.

(2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

(i) The 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. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages; or

(ii) If the job opportunity is covered by a union contract which was negotiated at arms-length between a union and the employer, the wage rate set forth in the union contract shall be considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it shall be considered the "prevailing wage" for labor certification purposes.

(b) For purposes of this section, except as provided in paragraphs (c) and (d), "similarly employed" shall mean "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."

(c) 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 a related or affiliated nonprofit entity; a nonprofit research organization; or a Governmental research organization, the prevailing wage level shall only take into account

employees at such institutions and organizations in the area of intended employment.

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

(i) *Institution of higher education* is defined in section 101(a) of the Higher Education Act of 1965. Section 101(a), 20 U.S.C. 1001(a) (1999), 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 for the granting of preaccreditation status, and the Secretary 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 hospitals and medical or research institutions) 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

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and/or applied research, or a U.S. Government entity whose primary mission is the performance or promotion of basic 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 potential 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 *nonprofit organization or entity* within the meaning of this paragraph is one that is qualified as a tax exempt organization under Section 501(c)(3), (c)(4) or (c)(6) of the Internal Revenue Code of 1986, 26 U.S.C. 510(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.

(d) With respect to a *professional athlete* as defined in section 212(a)(5)(A)(iii)(II) of the Immigration and Nationality Act, when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations shall be 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.

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

[45 FR 83933, Dec. 19, 1980, as amended at 63 FR 13767, Mar. 20, 1998; 65 FR 80238, Dec. 20, 2000]

### Subpart E—Petitioning Process for Federal Research Agencies

SOURCE: 63 FR 13767, Mar. 20, 1998, unless otherwise noted.

#### § 656.50 Petitioning process.

(a) Federal research agencies seeking to have prevailing wages determined in accordance with § 656.40(c)(2) shall file a petition with the Director, U.S. Employment Service.

(b) The procedures and information to be included in the petition shall be in accordance with administrative directives issued by ETA that will specify the procedures to be followed and information that shall be filed in support of the petition by the requesting agency.

(c) The Director shall make a determination either to grant or deny the petition on the basis of whether the petitioning agency is a Federal research agency, whether most researchers at the petitioning agency have a close relationship with teaching as well as research, and whether the employment environment for researchers at the petitioning agency provides significant intangible and nonpecuniary incentives of the nature found at colleges and universities.

(d) Denials of agency petitions may be appealed to the Board of Alien Labor Certification Appeals.

(1) The request for review shall be in writing and shall be mailed by certified mail to the Director, U.S. Employment Service, within 35 calendar days of the date of the determination, that is by the date specified in the Director's determination; shall set forth the particular grounds for the request; and shall include all the documents which