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

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

RIN 1205–AA66

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

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (DOL) is amending its regulations governing the filing and processing of labor certification applications for the permanent employment of aliens in the United States to implement a new system for filing and processing such applications. The new system requires employers to conduct recruitment before filing their applications. State Workforce Agencies (SWAs) will provide prevailing wage determinations to employers, but will no longer receive or process applications as they do under the current system. Employers will be required to place a job order with the SWA, but the job order will be processed the same as any other job order. Employers will have the option of filing applications electronically, using web-based forms and instructions, or by mail.

DATES: *Effective Date:* This final rule is effective on March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

FOR FURTHER INFORMATION CONTACT: PERM Help Desk, Division of Foreign Labor Certification, Employment and Training Administration, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210. Telephone (202) 693–3010 (this is not a toll free number). Questions may be sent via e-mail to the following address ''*PERM.DFLC@dol.gov.* We encourage questions to be submitted by e-mail, because the Division of Foreign Labor Certification intends to post responses to frequently asked questions on its Web site *(http://www.ows.doleta.gov/foreign/)* and e-mail submission of questions will facilitate thorough consideration and response to questions.

SUPPLEMENTARY INFORMATION

I. Introduction

On May 6, 2002, the Department published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) to amend its regulations for the certification of permanent employment of immigrant labor in the United States. The NPRM also proposed amending the regulations governing employer wage obligations under the H–1B program. 67 FR 30466 (May 6, 2002). Comments were invited through July 5, 2002.

II. Statutory Standard

Before the Department of Homeland Security (DHS) may approve petition requests and the Department of State (DOS) may issue visas and admit certain immigrant aliens to work permanently in the United States, the Secretary of Labor must certify to the Secretary of State and to the Secretary of Homeland Security:

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

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

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

If DOL can not make both of the above findings, the application for permanent alien employment certification is denied.

III. Current Department of Labor Regulations

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

Part 656 sets forth the responsibilities of employers who desire to employ immigrant aliens permanently in the United States. Part 656 was recently amended through an Interim Final Rule effective on August 20, 2004, which added measures to address a backlog in permanent labor certification applications waiting processing. 69 FR 43716 (July 21, 2004). When this final rule refers to the ''current regulation,'' it refers to the regulation in 20 CFR part 656 as published in April 2004 and amended by 69 FR 43716.

The current process for obtaining a labor certification requires employers to file a permanent labor certification application with the SWA serving the area of intended employment and, after filing, to actively recruit U.S. workers in good faith for a period of at least 30 days for the job openings for which aliens are sought.

Job applicants are either referred directly to the employer or their résumés are sent to the employer. The employer has 45 days to report to either the SWA or an ETA backlog processing center or regional office the lawful job-related reasons for not hiring any referred qualified U.S. worker. If the employer hires a U.S. worker for the job opening, the process stops at that point, unless the employer has more than one opening, in which case the application may continue to be processed. If, however, the employer believes able, willing, and qualified U.S. workers are not available to take the job, the application, together with the documentation of the recruitment results and prevailing wage information, is sent to either an ETA backlog processing center or ETA regional office. There, it is reviewed and a determination made as to whether to issue the labor certification based upon the employer's compliance with applicable labor laws and program regulations. If we determine there are no able, willing, qualified, and available U.S. workers, and the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers, we so certify to the DHS and the DOS by issuing a permanent labor certification. See 20 CFR part 656 (April 2004) as amended by 69 FR 43716 (July 21, 2004); see also section 212(a)(5)(A) of the INA, as amended.

IV. Overview of the Regulation

This final rule deletes the current language of 20 CFR part 656 and replaces the part in its entirety with new regulatory text, effective on March 28, 2005. This new regulation will apply to all applications filed on or after the effective date of this final rule. Applications filed before this rule's effective date will continue to be processed and governed by the current regulation, except to the extent an employer seeks to withdraw an existing application and refile it in accordance with the terms of this final rule.

On December 8, 2004, the President signed into law the Consolidated Appropriations Act, 2005. This

legislation amends Section 212(p) of the INA, 8 U.S.C. 1182(p), to provide that:

(3) The prevailing wage required to be paid pursuant to (a)(5)(A), (n)(1)(A)(i)(II) and (t)(1)(A)(i)(II) shall be 100 percent of the wage determined pursuant to those sections.

(4) Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3 the difference between the two levels offered, adding the quotient thus obtained to the first level, and subtracting that quotient from the second level.

The 100 percent requirement is consistent with this final rule. The Department will be preparing guidance concerning the implementation of the 4 levels of wages.

The process for obtaining a permanent labor certification has been criticized as being complicated, time consuming, and requiring the expenditure of considerable resources by employers, State Workforce Agencies and the Federal government. The new system is designed to streamline processing and ensure the most expeditious processing of cases, using the resources available.

The new system requires employers to conduct recruitment before filing their applications. Employers are required to place a job order and two Sunday newspaper advertisements. If the application is for a professional occupation, the employer must conduct three additional steps that the employer chooses from a list of alternative recruitment steps published in the regulation. The employer will not be required to submit any documentation with its application, but will be expected to maintain the supporting documentation specified in the regulations. The employer will be required to provide the supporting documentation in the event its application is selected for audit and as otherwise requested by a Certifying Officer.

This final rule also provides employers with the option to submit their forms either electronically or by mail directly to an ETA application processing center. A number of commenters indicated they wanted the option of filing electronically. Since January 14, 2002, employers have been allowed to submit Labor Condition Applications (LCAs) electronically under the nonimmigrant H–1B program, which has been very successful. Similarly, we expect electronic filing of applications for permanent alien employment certification to be successful and to be used by the overwhelming majority of employers filing applications. Employers will receive more prompt adjudication of their applications than would have been the case under a system that permitted only submission of applications by facsimile transmission or by mail. The new form—*Application for Permanent Employment Certification* (ETA Form 9089)—has been designed to be completed in a web-based environment and submitted electronically or to be completed by hand and submitted by mail.

The preamble to the proposed rule indicated that, initially, if a processing fee was not implemented, employers would be allowed to submit applications by facsimile transmission or by mail. DOL, however, has decided employers will not be permitted to submit applications by facsimile. Our experience with facsimile transmission under the H–1B program has been considerably less than optimal. It should also be noted employers do not have such an option under the current regulations for the permanent labor certification program.

To accommodate electronic filing, a complete application will consist of one form. The new form, ETA Form 9089, will contain additional ''blocks'' to be marked by the employer to acknowledge that the submission is being made electronically and that information contained in the application is true and correct. We have developed a customer-friendly Web site *(http://www.workforcesecurity.doleta.gov/foreign/)* that can be accessed by employers to electronically fill out and submit the form. The Web site includes detailed instructions, prompts, and checks to help employers fill out the form. The Web site also provides an option to permit employers that frequently file permanent applications to set up secure files within the ETA electronic filing system containing information common to any permanent application they file. Under this option, each time an employer files an ETA Form 9089, the information common to all of its applications, *e.g.*, employer name, address, etc., will be entered automatically, and the employer will have to enter only the data specific to the application at hand.

Electronic submission and certification requires ETA Form 9089 be printed out and signed by the employer immediately after DOL provides the certification. A copy of the signed form must be maintained in the employer's files, and the original signed form must be submitted to support the Immigrant Petition for Alien Worker (DHS Form I–140).

Because we do not yet have the technology to satisfy the statutes that deal with electronic signatures on Government applications—the Government Paperwork Elimination Act (44 U.S.C. 3504 n.) and/or the Electronic Records and Signatures in Global and National Commerce Act (E–SIGN) (15 U.S.C. 7001—7006)—we are not implementing either of these statutes in this final rule. In the event such technology becomes available in the future, we will modify the electronic process for filing and certifying applications for permanent alien employment to comply with these statutes, and will provide appropriate notice(s) and instructions to employers. We view it as inadvisable to delay the electronic filing and certifications system while we develop this additional technology. When the statutes that deal with electronic signatures are implemented, all electronic filings will require such signatures. We are, however, implementing use of a PIN/Password system in the interim.

As indicated above, a complete application will consist of a single form: ETA Form 9089. The majority of the items on the application form consist of questions that require the employer to check Yes, No, or NA (not applicable) as a response. These questions and other information required by the application form elicit information similar to that required by the current labor certification process. For example, the wage offered on the application form must be equal to or greater than the prevailing wage determination provided by the SWA. The application form also requires the employer to describe the job and specific skills or other requirements.

The employer will not be required to provide any supporting documentation with its application but must maintain and, when requested by the Certifying Officer, furnish documentation to support its answers, attestations and other information provided on the form. The standards used in adjudicating applications under the new system will be substantially the same as those used in arriving at a determination in the current system. The determination will still be based on: whether the employer has met the procedural requirements of the regulations; whether there are insufficient U.S. workers who are able, willing, qualified and available; and whether the employment of the alien will have an adverse effect on the wages and working conditions of U.S. workers similarly employed.

Many commenters were concerned about the potential for fraud, misrepresentation, and non-meritorious applications in an attestation-based system. Some, but not all, of the measures we have taken to minimize these problems, include: a review of applications, upon receipt, to verify the existence of the employer and to verify the employer has employees on its payroll, and the use of auditing techniques that can be adjusted as necessary to maintain program integrity. The concerns about fraud and the measures we will implement to address such concerns are discussed below in greater detail.

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

The combination of pre-filing recruitment, providing employers with the option to complete applications in a web-based environment, automated processing of applications including those submitted by mail, and elimination of the SWA's required role in the recruitment process will yield a large reduction in the average time needed to process labor certification applications. The redesigned system should also eliminate the need to institute special resource-intensive efforts to reduce backlogs, which have been a recurring problem.

After ETA's initial review of an application has determined that it is acceptable for processing, a computer system will review the application based upon various selection criteria that will allow problematic applications to be identified for audit. Additionally, as a quality control measure, some applications will be randomly selected for audit without regard to the results of the computer analysis. DOL has incorporated identifiers into the processing system, which are used to select cases for audit based upon program requirements. In some instances, DOL will be confirming specific information with employers.

If an application has not been selected for audit, and satisfies all other reviews, the application will be certified and returned to the employer. The employer must immediately sign the application and then submit the certified application to DHS in support of an employment-based I–140 petition. We anticipate an electronically filed application not selected for audit will have a computer-generated decision within 45 to 60 days of the date the application was initially filed.

If an application is selected for audit, the employer will be notified and required to submit, in a timely manner, documentation specified in the regulations to verify the information stated in or attested to on the application. Upon timely receipt of an employer's audit documentation, it will be reviewed by ETA personnel. If the employer does not submit a timely response to the audit letter, the application will be denied. If the audit documentation is complete and consistent with the employer's statements and attestations contained in the application, and not deficient in any material respect, the application will be certified the employer will be notified. If the audit documentation is incomplete, is inconsistent with the employer's statements and/or attestations contained in the application, or if the application is otherwise deficient in some material respect, the application will be denied and a notification of denial with the reasons therefore will be issued to the employer. However, on any application, the CO will have the authority to request additional information before making a final determination.

The CO may also order supervised recruitment for the employer's job opportunity, such as where questions arise regarding the adequacy of the employer's test of the labor market. The supervised recruitment that may be required is similar to the current regulations for recruitment under basic processing, which requires placement of advertisements in conjunction with a 30-day job order by the employer. The recruitment, however, will be supervised by ETA COs instead of the SWAs. At the completion of the supervised recruitment effort, the employer will be required to document in a recruitment report the outcome of such effort, whether successful or not, and if unsuccessful, the lawful job-related reasons for not hiring any U.S. workers who applied for the position. Upon review of the employer's documentation, the CO will either certify or deny the application.

In all instances in which an application is denied, the notification will set forth the deficiencies upon which the denial is based. The employer will be able to seek administrative-judicial review of a denial by the Board of Alien Labor Certification Appeals (BALCA).

Excepted Occupations in Team Sports

The preamble to the NPRM made no mention of the special procedures used in processing applications on behalf of certain aliens to be employed in professional team sports. Those special procedures have been in place for over 25 years and it was not our intent to modify those procedures as a result of this rulemaking. Employers filing applications on behalf of aliens to be employed in professional team sports will continue to use the existing special procedures and will continue to file their applications using the *Application for Alien Employment Certification* (ETA 750). ETA intends to issue a directive detailing the procedures to be followed in filing applications on behalf of aliens to be employed in professional team sports.

V. Discussion of Comments on Proposed Rule

We received a total of 195 comments from attorneys, educational institutions, individuals, businesses and SWAs. Most of the commenters were critical of one or more of the changes, and suggested alternatives and improvements. Some commenters suggested abandonment of the proposed system entirely.

A. Fraud, Program Abuse, and Non-Meritorious Applications

Many commenters expressed concerns about the potential for fraud, program abuse, and the filing of non-meritorious applications in an attestation-based system. Some commenters suggested a two-tier system for processing applications to address an expected increase in fraudulent or non-meritorious applications.

1. Concerns About Fraud, Program Abuse, and Non-Meritorious Applications

Numerous commenters believed the proposed system would be more susceptible to fraud and non-meritorious applications than the current system. The Federation for American Immigration Reform (FAIR) was of the opinion the review process in the proposed rule would not meet the legal standard in INA section 212(a)(5)(A). A couple of commenters emphasized the need to provide for meaningful enforcement.

A SWA noted its application cancellation and withdrawal rate of 15 percent, and stated the incidence of fraud and abuse of the current system suggests a need for tighter controls, rather than a process that relies on employer self-attestations. Another SWA expressed concern that many instances of fraud would not be apparent to the CO, who would be relatively unfamiliar with the situation in individual states.

A DOL employee expressed concern about the increasing number of permanent applications not supported by an actual job location or position, or for which there is no bona fide employer signature. The commenter also believed the pre-filing recruitment would increase opportunities for employers to avoid hiring qualified U.S. workers.

Several commenters expressed concern about the lack of hands-on review. These commenters included the American Council of International Personnel (ACIP), the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), FAIR, and various SWAs. ACIP believed the proposed rule's audit and enforcement procedures would not act as effective deterrents to fraud and misrepresentation. The AFL–CIO considered a thorough manual review of labor certification applications to be, at times, the sole protection of American workers. One commenter suggested DOL impose penalties similar to those used in the H–1B program, such as civil money penalties and debarment from the labor certification program, for employers who file fraudulent applications.

We believe commenters exaggerate the current system's ability to identify fraud and underestimate the new system's ability to deter it. We agree with the commenters that fraud is a serious problem. As a result of our program experience, we envision a review of applications, upon receipt, to check among other things, the bona fides of the employer. Additionally, we intend to aggressively pursue means by which to identify those applications that may be fraudulently filed.

Our initial review will verify whether the employer-applicant is a bona fide business entity and has employees on its payroll. For example, the employer's tax identification number could be crosschecked with available off-the-shelf software used by credit-reporting agencies; we may also use off-the-shelf commercial products such as the American Business Directory or similar compendiums of employers in the U.S. We also intend to conduct checks to ensure the employer is aware that the application was filed on its behalf. Finally, we intend to explore means of coordination with the SWAs, which retain responsibility for making prevailing wage determinations, in order to avail ourselves of state expertise regarding the local employer community and the local labor market.

Regarding the imposition of civil money penalties and other penalties, we are not imposing such penalties in this final rule. We have concluded that before making such fundamental changes in the program we should publish proposed penalties for notice and comment in another NPRM.

We plan to minimize the impact of non-meritorious applications by adjusting the audit mechanism in the new system as needed. We have the authority under the regulations to increase the number of random audits or change the criteria for targeted audits. As we gain program experience, we will adjust the audit mechanism as necessary to maintain program integrity. We also note that under section 656.21(a) the CO has the authority to order supervised recruitment when he or she determines it to be appropriate.

2. Proposals for a Two-Tier System

Several commenters believed the automated processing under the new system would lead to a flood of non-meritorious applications that would clog the system. ACIP, for example, worried a large increase in fraudulent applications could lead to long backlogs and possibly an oversubscription of visa numbers. To address the potential flood of non-meritorious applications, ACIP, the American Immigration Lawyers Association (AILA), and others proposed a two-track system for processing applications. Many proponents of a two-track system observed by devoting fewer resources to readily approvable applications, DOL could devote more resources to more problematic cases.

The proposals for a two-track system varied, but all envisioned a category of employers or jobs that would qualify for special treatment. Three universities proposed creating a class of ''registered'' or ''established'' users, whose applications would be exempt from random audit but who would have to file annual reports with DOL. Two of these commenters explained how established users could be identified: Employers could submit an application form to DOL, which could review the employers' history of labor certification filings. The two commenters pointed to the blanket L program, run by DHS, and the J–1 program, run by the Department of State, as examples of how such a program could work. A third university suggested alternatives to the random audit of what it referred to as the ''automated electronic labor certification request method.'' One alternative was to implement an Established Users Program whereby university, non-profit research, and government institutions could be trained and certified in the submission of electronic labor certification requests. Another alternative was to require these institutions to submit an annual report to DOL based on pre-determined specifications.

ACIP also referenced the blanket L and J visas and proposed that attestation-based filing be reserved for two categories of applications that would qualify for a ''pre-certification track.'' One category would focus on the employer and the employer's track record with DOL; this would include employers who showed they were good-faith users of the system by meeting certain specified criteria. The other category would focus on the nature of the occupation and shortages in the economy; this would include occupations listed on an updated *Schedule A*. Applications in either of these two categories would have no specific recruitment requirements. All other applications would be processed on a ''standard'' track; these applications would have requirements similar to, but less than, the current requirements for Reduction in Recruitment (RIR) processing.

Two high-tech companies supported ACIP's call for a pre-certification procedure for established users. One also recommended only publicly traded companies be allowed to use an attestation-based system because these companies would be far less likely to file fraudulent applications.

Another commenter favored a two-tier system that categorized applications based on their job requirements. Tier 1 would be reserved for applications that contained no special skills, no experience exceeding the specific vocational preparation (SVP) level for the position, etc. Tier 1 applications would be filed according to the procedures outlined in the proposed rule. All other applications would fall into Tier 2, and would be filed according to the procedures for basic processing under current regulations.

AILA recommended integrating an RIR option into the new system, to accommodate employers that conduct ongoing recruitment for multiple openings, and that might fail to satisfy the recruitment requirements outlined in the proposed rule. To do this, DOL

would need to set standards in three areas: RIR eligibility, recruitment requirements, and reporting recruitment results. AILA suggested recruitment be required over only a 2 or 3 month period.

AILA also proposed expanding *Schedule A* to include a special group for labor shortages by geographic area, to respond to acute labor shortages in a timely manner. AILA was of the opinion that substantial data on job openings in particular labor market areas could be extracted from the attestation-based applications, and this data could be used to determine when and where labor shortages occur or disappear.

The single-track, attestation-based system outlined in the proposed rule was designed to ensure the most expeditious processing of cases, using the resources available. We do not believe a two-track system would result in significant, if any, savings of time and resources. Proponents of a two-track system provide no statistical evidence of potential savings gained by establishing a pre-certification track. Any savings may be offset by the costs of establishing and administering a two-track system. They may also be offset by an increase in the amount of resources needed to process the ''second'' track of cases.

Most of the proposals for a two-track system envision fewer, if any, recruitment requirements for one category of employers or applications. Under ACIP's proposal, all applications would have fewer recruitment requirements than they would have under the proposed regulations. Were we to adopt any one of these proposals, the Secretary of Labor would be unable to carry out the statutory obligation to certify that no U.S. qualified workers are available. For example, under an established users program, employers could qualify on the basis of their history of filings. However, an employer's past practice has no bearing on whether qualified U.S. workers are available for the current job opening. Additionally, economic conditions may change radically over time, which would justify a different approach to assess whether qualified U.S. workers were available. Further, because the proposed system is new and contains new recruitment requirements, at least for the first few years there would be no appropriate past practice to review. Comparisons to the L and J programs are also inappropriate. Both of these programs involve temporary visas, and neither depends upon the unavailability of U.S. workers.

Finally, all of the suggestions for a two-track system do more than modify the proposed rule; they envision a different approach to case processing than the approach outlined in the proposed rule. Some of the proposals for a two-track system and Established Users program are fairly detailed; others are less clear. None of the proposals could be adopted as described in the comments. We do not believe the arguments made in favor of a two-track system are sufficiently compelling to justify formulating a new proposed rule.

Some of the proposals for a two-track system envision aggressive management of *Schedule A*, to reflect more current shortages in the labor market. We believe it would be inappropriate to make changes to *Schedule A* in this final rule. However, it may be productive to consider whether we could create a more flexible *Schedule A* in the future. See our discussion of *Schedule A* in Section D below.

B. Role of the State Workforce Agencies

Under the proposed system, SWAs will no longer receive or review applications. They will, however, continue to provide PWDs.

1. Loss of State Workforce Agency Expertise

Many commenters expressed concerns about the loss of SWA expertise on local labor markets as a result of centralized processing.

A few commenters felt the revised process would not be more efficient because the additional workload associated with cases pulled for audit would exceed the resources available to the COs and would result in backlogs. Another commenter felt the shift in workload from the SWAs to the COs would place unnecessary burdens on COs who may not have extensive knowledge of local labor markets or experience in navigating the various state employment service systems.

Another commenter contended the proposed rule failed to consider that many employers, unfamiliar with the labor certification process and without the assistance of attorneys or representatives, routinely file incorrect or incomplete applications. This commenter envisioned that without the benefit of the SWA's expertise, the increase in correspondence between employers and regional offices would lead to backlogs similar to those under the current system.

FAIR recommended the following revisions:

- Give COs discretion to forward any labor certification application selected for audit to a SWA for confirmation;
- Authorize SWAs, based on a ''reasonable-basis'' complaint from the public or on their own information and belief, to require an audit of any application within the SWA's jurisdiction; and
- Require notices posted pursuant to 20 CFR 656.10(d) to include the name, address, and contact information for the local SWA where a complaint may be filed.

The AFL–CIO viewed limiting the role of the SWA to providing PWDs as a severe deficiency of the new system that would lead to increased fraud and abuse.

Because of resource constraints, among other things, state processing adds considerable time to the processing of applications in the current system. We believe we can retain the benefits of state labor market expertise without having state staff processing applications and thereby save significant processing time and expense.

We view centralized application processing as a customer-friendly change that will simplify the labor certification application process, remove duplicative efforts that occur at the state and Federal levels, and result in greater consistency in the adjudication of cases.

We believe the COs possess sufficient knowledge of local job markets, recruitment sources, and advertising media to administer the program appropriately. We have acquired much expertise during our administration of the current system and expect to maintain this expertise under the new system. Currently, we assess the adequacy of the recruitment before making a final determination in each case. We will be making similar judgments under the new system in the course of making determinations on the labor certifications, auditing applications and in overseeing any supervised recruitment.

Guam requested it be allowed to continue its current role in processing labor certifications. We do not believe Guam's circumstances are so unique that it must have a role in processing the applications to protect the wages and working conditions of U.S. workers. Its role under the current permanent labor certification regulations is no different than of the other states and territories that have a role in the current permanent labor certification program.

2. Job Bank Orders

One commenter inquired how DOL intends to verify job order referrals with SWA staff, screen résumés received while conducting supervised recruitment, verify layoffs have not occurred in the last 6 months in the area of intended employment, verify the employer is a bona fide employer with

an active Federal Employer Identification Number (FEIN), and answer employer questions and provide technical assistance. The commenter recommended the continued involvement of SWAs in conducting supervised recruitment for employers in their states.

Another commenter was concerned the proposed rule does not specifically authorize states to reject illegal specifications in job orders or make it clear the SWA has this authority. Therefore, this commenter recommended DOL add a provision to reinstate the ban against illegal job duties and requirements, and to make it clear that employers who refuse to delete illegal duties or requirements will not be allowed to submit their application.

Still another commenter noted under the proposed rule all jobs must be listed in a Job Bank, which will result in an increased burden on the SWAs. The commenter suggested if user fees are not required, the Federal government should cover this additional cost as part of the alien labor certification process. The commenter also recommended: (1) Using the SWA's résumé unit staff to process these Job Bank orders after the current backlog decreases, and (2) tracking labor certification applications to monitor employers' recruiting efforts.

Under the new regulation, job orders submitted under § 656.17(e) will be indistinguishable from any other job orders placed by employers. Referrals will be handled the same way they are handled for other job orders, which may vary from state to state. Under supervised recruitment, applicants will be directed to respond to the CO. Issues regarding layoffs are addressed in the preamble discussion of § 656.17(k).

The general instructions in this final rule, at 20 CFR 656.10(c) provide the employer must certify the conditions of employment listed on the *Application for Permanent Employment Certification* (Form ETA 9089). These attestations include certifying the job opportunity does not involve unlawful discrimination and the terms, conditions, and occupational environment are not contrary to Federal, state, or local law. Furthermore, although not specified in this final rule, the SWA can not accept job orders that are not acceptable under the Employment Service Regulations in 20 CFR parts 651 through 658.

We have not determined whether any additional funds will be provided for any increased expenses resulting from employers submitting job orders under the recruitment provisions at 20 CFR 656.17(e) of this final rule. It should be noted, however, all such activities are within the scope of the Wagner-Peyser Act, that processing job orders required under this final rule are covered by existing Wagner-Peyser grants, and we are not required to provide additional funds to the SWAs.

C. Definitions, for Purposes of This Part, of Terms Used in This Part

The proposed rule made several changes in § 656.3 to the definitions of the terms used in part 656.

1. Definition of the Area of Intended Employment

The proposed rule defines an ''area of intended employment'' as the area within normal commuting distance of the place (address) of intended employment. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area because there may be widely varying factual circumstances among different areas. If the place of intended employment is within a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of intended employment; however, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not be deemed automatically to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling in identifying the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside the MSA or PMSA (or CMSA). We acknowledge that the terminology CMSAs and PMSAs are being replaced by the Office of Management and Budget (OMB). However, we will continue to recognize use of these area concepts as well as their replacements.

One commenter touched on the definition of area of intended employment in its discussion of alternate published surveys used to document the prevailing wage (see our discussion of prevailing wages below). The commenter noted that some surveys list data for only the CMSA or for a region of a state. While recognizing these surveys may include employers from outside the normal commuting distance, the commenter felt it was highly unlikely that prevailing wage rates are that sensitive to commuting distance.

We reject the proposal to allow data from broader geographical areas because our program experience indicates that wage rates vary with commuting distance.

2. Definition of the Employer and Employment

The definition of employer in the proposed rule reflected longstanding DOL policy, and has been modified to ensure that persons who are temporarily in the United States can not be employers for the purpose of obtaining a labor certification. In addition, the definition of employment has been modified to specify that job duties performed totally outside the United States can not be the subject of a permanent application for alien employment certification.

Some commenters touched on the definition of ''employer.'' A DOL employee proposed amendments to the definition of employer to address situations in which all workers at the place of employment are independent contractors and the creation of an employee position is contingent on the granting of a labor certification. The commenter was concerned the term ''worker'' in subparagraph (1) could be construed to include independent contractors, and wanted to amend the regulation to make it unambiguous that the job opening must be for an employee position, not an independent contractor position. Specifically, the commenter proposed to either amend the regulation to add the phrase ''that has an employer-employee relationship with its workers'' or change ''a full-time worker'' to ''a full-time employee'' or change the definition of ''job opportunity'' to read ''a job opening for an employee'' instead of ''a job opening for employment.''

In this final rule, the definition of employer has been clarified by removing from the first sentence the phrase ''full-time worker'' and adding the phrase ''full-time employee'' in lieu thereof. Further, a sentence has been added to the definition to underline that a certification can not be granted for an *Application for Permanent Employment Certification* filed on behalf of an independent contractor.

A SWA recommended including holders of temporary visa types (*i.e.,* B—visitor's visa) on the list of persons who are temporarily in the United States and, therefore, are not included in the definition of employers for the purpose of obtaining a labor certification.

We agree that the list should include persons on a B visa. Therefore, this final rule adds visitors for business or pleasure to the list of persons who are temporarily in the United States and who can not be employers for the

purpose of obtaining a labor certification.

3. References to the Immigration and Naturalization Service

This final rule reflects the creation of the Department of Homeland Security and the attendant government reorganization. All references in the proposed rule to the Immigration and Naturalization Service (INS), in the Department of Justice, have been changed to either Department of Homeland Security (DHS) or the United States Citizenship and Immigration Services (USCIS), in the Department of Homeland Security.

4. Definition of the Standard Vocational Preparation and Educational Equivalents

The proposed rule defined the term ''Standard Vocational Preparation (SVP)'' as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. Lapsed time is not the same as work time; for example, 3 months of lapsed time refers to 3 calendar months, not 90 work days. The definition includes a list of SVP levels and the corresponding amount of lapsed time for each.

A university commenter noted the SVP level is for the most part unknown to most employers, and thanked DOL for including the information in the regulations. However, the commenter felt the regulations should also include the table of educational equivalencies used to determine how many years of experience a given degree or course of study is worth. The commenter noted the employer's job requirements can not exceed the SVP level assigned to the job, and complained the SVP values do not adequately reflect the actual amount of experience and education required for specific positions. Citing full professors as an example, the commenter noted the assigned SVP level is 8, which means the employer may require between 4 to 10 years of combined education and experience; however, universities rarely hire anyone who has a Ph.D. (equivalent to 7 years of experience) and only 3 years of experience. A second commenter simply asked that this final rule clarify the O*NET job zones that are referenced in the preamble to the proposed rule at 67 FR at 30472.

With respect to the commenter's concern that the proposed rule does not allow an employer to use job requirements that exceed the SVP level assigned to the occupation, this final rule reinstates a business necessity test for job requirements that exceed the SVP level assigned to the occupation. See our discussion of business necessity below. Revision of the SVP is beyond the scope of this rulemaking.

ETA plans to utilize the guidance provided in the administrative directive Field Memorandum No. 48–94, issued May 16, 1994, Subject: *Policy Guidance on Labor Certification Issues (FM).* In summary, the FM provided that a general associate's degree is equivalent to 0 years SVP, a specific associate's degree is equivalent to 2 years; a bachelor's degree is equivalent to 2 years; a master's degree is equivalent to 4 (2 + 2) years; and, a doctorate is 7 (2 + 2 + 3) years.

In administering this final rule, the *Dictionary of Occupational Titles* (DOT) will no longer be consulted to determine whether the training and experience requirements are normal; O*NET will be used instead. It should be noted, however, the job opportunity's job requirements, unless adequately arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation assigned to the occupation as shown in the O*Net Job Zones. More information about O*NET, including the O*NET job zones can be found at *http://online.onetcenter.org/.*

5. Definition of the State Employment Security Administration

One commenter noted the acronyms ''SESA'' and ''SWA'' are used interchangeably in some parts of the proposed rule; for example, § 655.731(a)(2)(ii)(A)(3) uses SESA. The commenter recommended to avoid confusion, the definition of ''State Employment Security Agency'' be modified to include the phrase ''now known as State Workforce Agency'' before the acronym SWA. As if to underscore the confusion, a second commenter thought the use of SWA in the definition was a typographical error.

We are amending only one section in part 655 subpart H of the Code of Federal Regulations. We use SESA in § 655.731 to be consistent with part 655 subpart H (dealing with H–1B and H–1B1 applications), which references the SESA. However, in Part 656, we use SWA throughout. We have modified the heading of the definition in § 656.3 to read ''State Workforce Agency (SWA), formerly known as the State Employment Security Agency (SESA).''

D. Electronic Filing of Applications

In the Notice of Proposed Rulemaking (NPRM), we proposed that the employer would submit two forms to an ETA application processing center. These forms were designed to be machine readable and we anticipated most employers would submit them by facsimile transmission to an ETA application processing center.

1. Electronic Filing

Many commenters indicated the forms published with the NPRM were not ''user friendly'' because they were designed to be machine readable to facilitate submission by facsimile transmission. Many commenters indicated because of problems during the implementation of the LCA ''Fax-back'' system for H–1B applications, we should not require submission of the form by facsimile transmission. In view of the success of electronic filing of H–1B applications, commenters recommended we use a system based on electronic filing in the redesigned permanent labor certification process.

We have decided to implement the redesigned labor certification process using an electronic filing and certification system. This system is partially modeled after the system used for filing and certifying labor condition applications under the H–1B nonimmigrant program. Employers will also have the option to submit applications by mail.

Under the e-filing option, the *Application for Permanent Employment Certification* (ETA Form 9089) must be completed by the user on-line. The system will assist the employer by checking for obvious errors, and will input the information into an ETA database. This will speed the process of evaluating the application, and help to prevent data entry errors. ETA will accept mailed ''hard copy'' applications from those who either have no access to the internet or simply choose to submit a form completed by hand. Submission of applications by facsimile transmission will not be accepted, because our experience indicates facsimile submissions can not be relied on for consistent, error-free receipt and return of applications. We have determined that average processing time will be considerably shortened if we limit submission of applications to electronic filing or by mail. Applications submitted by mail will not be processed as timely as those filed electronically.

The comments pertaining to user friendliness were considered in designing the electronic filing system and consolidating the *Application for Permanent Employment Certification* and *Prevailing Wage Determination Request* (PWDR) form proposed in the NPRM into a single application form (see discussion below). We believe the

consolidated form addresses virtually all of the issues regarding the lack of ''user friendliness'' of the proposed forms. For example, as suggested by commenters, the items formerly on the PWDR, such as the job description and requirements and prevailing wage determination, are now on the application form.

Employers will, as discussed below in the section on prevailing wages, request a PWD using the form required by the state in which the job is being offered. Information from the state's prevailing wage determination request form, such as the prevailing wage, occupational code, occupational title, state determination number, and the date the determination was made, will be included on the application form. The employer will be expected to retain the state prevailing wage determination form to furnish to the CO if requested to do so in the event of an audit or otherwise.

2. Elimination of the Prevailing Wage Determination Request Form (ETA 9088)

Under the current permanent labor certification program, requests for PWD are made to the SWAs on the various forms the SWAs have developed for employers to use in submitting such requests. The NPRM sought to standardize the process whereby employers make requests to the SWAs for PWD by proposing all requests be submitted on the PWDR. However, after reviewing our experience under the H–1B program with the FAX-based filing system and the comments received on this issue we have decided to implement electronic filing by the use of a consolidated form. The consolidated form includes most of the items proposed for the *Application for Permanent Employment Certification* and the information that would have been provided by the PWDR. This includes the information that the employer would have provided on the PWDR, such as the job description and job requirements, as well as the information that the SWAs would have entered on the PWDR, such as the prevailing wage determination and the SWA tracking number.

Another reason why we have chosen not to require one standardized form be used by employers to submit requests for prevailing wage determinations to the SWAs is because such a requirement would, in effect, impose an unfunded mandate on the SWAs to develop computer systems to support the proposed PWDR. It also became evident that, assuming funding were available to develop the computer systems necessary to support the PWDR, several years would elapse before such systems would be operational in all of the SWAs.

Accordingly, employers will continue the practice of requesting PWD from the SWAs on the various forms developed for this purpose by the SWA.

3. Multiple Beneficiaries

One commenter suggested DOL allow a single application to be used to support multiple vacancies/beneficiaries. Multiple beneficiary applications are discussed under the basic process below.

4. Assistance in Completing the Application Form

Several commenters suggested DOL provide assistance in completing the application form. Among the suggestions were the creation of a toll-free number, an instruction handbook, and detailed instructions on the internet. We hope to make all of these methods available, although some may not be available upon initial implementation of the new system.

5. Recommended Changes to the Application Form

Commenters provided many specific suggestions for both the application form and the instructions. Those suggestions have been reviewed and many have been incorporated into the revised ETA Form 9089 and instructions, which have been submitted to the OMB for approval and follow the final rule. The changes most often requested and our responses are provided below.

- Include on the first page a box for the employer to indicate whether the request is for a *Schedule A* occupation, with instructions reminding the user that, for *Schedule A* occupations, the recruitment sections of the form need not be completed and the form should be submitted directly to USCIS for processing. We have modified the form to include these suggestions.
- Clarify on the form that the ''special requirement process'' includes the optional process for college and university teachers. We removed the ''special requirement process'' item and, under the recruitment section, included the optional process for college and university teachers.
- Change the term ''Education or Training: Highest Level Required'' (see the proposed ETA Form 9088, Item section H) to ''Education and Training: Minimum Level Required.'' We have modified the new form 9089 to include this suggestion.
- We addressed the comments regarding the need to specify technical degrees by adding a blank space identified as ''Other.'' This change allows the degree to be filled in by the employer. The number of technical degrees that commenters wished to have identified was too large to incorporate as a checklist on the application form.
- Change Wage Offer Information (see the ETA Form 9089, section G) to read: Offered Wage Range, From: ____ To: ____. Several commenters indicated the form should ask for a wage range instead of a specific wage rate. We have made this change to clarify that employers can offer a wage range as well as a specific rate as long as the bottom of the wage range (reflected in the ''From'' box) is not below the prevailing wage.
- One commenter requested there be a box on the application form allowing the employer to go directly to supervised recruitment, rather than conduct pre-filing recruitment. We have decided not to provide this option to employers. The supervised recruitment process is lengthy, and is one of the reasons the current system is severely backlogged. Supervised recruitment will be conducted only if ordered by the CO.

E. Schedule A

The proposed rule did not change the general requirements for *Schedule A* pre-certification. It proposed a technical change for the description of Group I professional nurses, specifying that only a permanent, full and unrestricted state license from the state of intended employment may be used as an alternative to passage of the Commission on Graduates of Foreign Nursing Schools examination (CGFNS). It also proposed moving aliens of exceptional ability in the performing arts (included under § 656.21a(a)(1)(iv) of the current regulations) to Group II of *Schedule A.*

We received several comments about the requirements for pre-certification for professional nurses. A number of commenters proposed additional occupations and classes of aliens to be added to *Schedule A.* No commenters objected to moving aliens with exceptional ability in the performing arts to Group II of *Schedule A.*

1. Nurses

As proposed, an employer seeking permanent labor certification for a professional nurse must file, as part of its application with the DHS, documentation the alien has passed the CGFNS examination. Alternatively, the employer may document the alien has a permanent, full and unrestricted license

to practice nursing in the state of intended employment.

A number of commenters suggested changes in the proposed rule that would allow a greater number of nurses to receive certification under *Schedule A.* Several commenters addressed the requirement that foreign-trained nurses must demonstrate passage of the CGFNS examination. One commenter supported the proposed rule's requirements for handling *Schedule A* applications, including the option of documenting that the alien holds a permanent license as an alternative to passage of the examination.

Three commenters mistakenly thought that we were removing passage of the CGFNS examination as a means of certification. This appears to have been a misunderstanding of the preamble to the proposed rule, which stated: ''only a permanent license can be used to satisfy the alternative requirement to passing the [CGFNS] exam'' (see 67 FR at 30469). The proposed rule did not delete passage of the CGFNS examination as documentation of eligibility as a *Schedule A* professional nurse. The only change proposed was to specify that the full and unrestricted state license must be a permanent license. This revision conforms the general descriptions of aliens seeking *Schedule A* certification as professional nurses at § 656.5(a)(2) to the procedures regarding documentary evidence to support a *Schedule A* certification at § 656.15(c)(2).

One commenter requested clarification as to whether the rule requires a CGFNS Certificate or simply evidence of passing the CGFNS nursing skills examination. The commenter noted that successfully passing the CGFNS nursing skills examination results in issuance of a ''pass'' letter. The CGFNS Certificate is only issued if the individual has passed the nursing skills examination, demonstrated English language proficiency (by passing the Test of English as a Foreign Language or a similar exam) and CGFNS has made a favorable evaluation of the individual's nursing credentials. This and another commenter requested the regulation be clarified to specify that passage of the CGFNS nursing examination, and not a CGFNS Certificate, is adequate documentation to satisfy § 656.15(c)(2).

After reviewing the comments, and information from CGFNS, we have modified the proposed rule to require in this final rule a CGFNS Certificate, not merely proof that the alien has passed the CGFNS nursing skills examination. When the current regulation was drafted CGFNS did not issue a Certificate, but instead required applicants to pass a test that evaluated both English proficiency and nursing skills. As such, we understood passage of the CGFNS nursing examination to include both factors. We believe proficiency in English is essential to perform the job duties of a professional nurse in the United States, due to the need to communicate with doctors and patients. The current CGFNS Certificate is analogous to passage of the old CGFNS nursing exam.

Several commenters supported adding a provision allowing alien nurses who pass the National Council Licensure Examination for Registered Nurses (NCLEX–RN), administered by the National Council of State Boards of Nursing (NCSBN), to qualify for *Schedule A.* The commenters contended that because every state requires passage of the NCLEX–RN before issuing a permanent license, proof of passing should be another means to qualify under § 656.5(a)(2). Although the availability of the examination only in the U.S. and its territories had been a burden for foreign-trained applicants in the past, the commenters noted that the NCLEX–RN is being given in more locations abroad and some organizations bring foreign nurses to the U.S. to take the examination.

Our intent in promulgating the existing and proposed *Schedule A* procedures for professional nurses was to put an end to the pre-1981 practice whereby some nurses entered the United States on temporary licenses and permits, but failed to pass state examinations for a permanent license. We have determined that passage of NCLEX–RN examination is consistent with and furthers the policy rationale for allowing CGFNS Certification as an alternative to holding a permanent, full and unrestricted license to practice nursing in the state of intended employment. This final rule includes a provision in § 656.15 allowing certification by demonstrating passage of the NCLEX–RN.

A few commenters noted procedural problems posed by the requirement of a permanent state license in the state of intended employment. Commenters asserted many states will not issue a permanent license until the applicant has a Social Security number, even when the nurse has passed the NCLEX–RN. Because the NCLEX–RN is the final hurdle to the practice of nursing in a state, the commenters urged DOL to allow a foreign nurse to satisfy the permanent license requirement by having a letter from a state nursing board attesting to the nurse having passed the NCLEX–RN and having full eligibility for the RN license, pending receipt of a Social Security card. A commenter noted Alaska and a few other states already follow this practice.

Other commenters identified additional state-imposed obstacles to using the permanent license alternative, including refusal to issue a permanent license until the foreign-trained nurse has arrived in the United States, or requirements for in-state residence, a valid visa, and fingerprint screening. Allowing a foreign-trained nurse to satisfy the permanent license requirement by documenting success on the NCLEX–RN would also alleviate these barriers, according to the commenters.

Two commenters raised a related issue about nurses who hold a permanent license in one state and are the beneficiary of a petition for employment in another state. In this situation, the alien nurse would not have to pass an examination in the second state, but would initially be given a temporary license in order to practice. The commenters maintained this type of temporary license should be distinguished from those situations in which the alien does not have a permanent license in any state. Because it believed that a temporary license in this situation is the functional equivalent of a permanent license, AILA suggested DOL add the following additional alternative to § 656.15(c)(2), to include alien nurses ''who hold a temporary license in the state of intended employment and require no further examination to attain permanent licensure in that state.''

We have decided not to recognize temporary licensure in the state of intended employment. As we have broadened the rule to include passage of the NCLEX–RN as qualifying for *Schedule A,* we believe virtually all alien nurses who have temporary licensure would be covered under this rule. This avoids any need to distinguish between different types of temporary licenses. In addition, the NCSBN indicates several states have passed legislation authorizing Nurse Licensure Compacts, which allow a nurse licensed in his or her state of residence to practice nursing in another state. It is anticipated that most states will pass legislation to authorize the Nurse Licensure Compact, and adopt the mutual-recognition model of nurse licensure. In the event of such legislation being passed, concerns raised by several commenters where an alien nurse is licensed in one state, but is sponsored to practice in another state, would be resolved.

2. Performing Artists

We received several comments supporting the proposal to add performing artists of exceptional ability to Group II of *Schedule A.* No commenters opposed this proposal. Accordingly, this final rule provides that performing artists of exceptional ability are included in Group II of *Schedule A.*

3. Expansion of Schedule A

Several commenters recommended expansion of *Schedule A* to pre-certify certain occupations or classes of aliens.

A high-tech company recommended expanding *Schedule A* occupations to provide for an ''earned'' labor certification for otherwise excluded foreign nationals when beneficial to the U.S. economy. This category would include employees who gained irreplaceable experience on the job, performed unusual combinations of duties or key duties; or who worked for the employer or its subsidiaries for a specified period of time, either within or outside the U.S.; and employees whose efforts had created jobs for U.S. workers. The commenter claimed including these categories under *Schedule A* would not interfere with streamlining and would protect U.S. workers, relieve DOL of its adjudication responsibilities because its burden would be shifted to USCIS Service Centers, and would afford an outlet to a deserving class that would otherwise be denied access to permanent residency under the proposed rule. Similarly, AILA recommended expanding *Schedule A* occupations to accommodate ''special merit'' foreign nationals, including company founders and managers; key employees in managerial, executive, or essential positions in affiliated, predecessor, or successor-in-interest companies; employees who have been employed by a U.S. employer for a certain number of years and gained irreplaceable training and experience in distinct positions; and employees central to the existence of the employer.

Another commenter expressed concern that the proposed rule would adversely affect small businesses by declaring a large number of deserving aliens to be ineligible for labor certification. The commenter pointed to a list of such deserving but ineligible aliens: small business investors; employees in key positions who previously worked for affiliated, predecessor, or successor entities; employees who gained essential experience with the sponsoring employer; employees who are required to perform rare or unusual combinations of duties; and alien workers who are so inseparable from the sponsoring employer the employer would be unlikely to continue in operations without the alien. The commenter urged expanded use of *Schedule A* to cover these classes of aliens who would otherwise be denied access to permanent residency.

All of these comments fail to address the core premise for *Schedule A;* namely, pre-certification of occupations for which there are few qualified, willing, and available U.S. workers. Most of the categories suggested by commenters, such as key employees, employees with special or unique skills, and small business investors are not occupational categories; instead, as admitted by most of the commenters, they are categories of foreign workers. In light of our revisions to § 656.17(h) and (i) regarding job requirements and actual minimum requirements, some foreign workers with special or unique skills might be eligible for labor certification under the basic process. Regarding alien workers who are so inseparable from the sponsoring employer that the employer would be unlikely to continue in operation without the alien, we have long held the position that if a job opportunity is not open to U.S. workers, it is not eligible for labor certification.

In addition to the above-cited categories, AILA proposed that *Schedule A* be revised to clarify the distinction between aliens of extraordinary ability, covered by 8 U.S.C. 1153(b)(1), and aliens of exceptional ability, covered by *Schedule A,* Group II. AILA noted when DOL published the regulations implementing the Immigration Act of 1990 (IMMACT 90), we recognized some aliens may qualify under *Schedule A,* Group II, as aliens of exceptional ability but may not be able to qualify as an alien of extraordinary ability. See 56 FR at 54923 (October 23, 1991). AILA claimed DHS has continued to apply DOL's pre-IMMACT 90 definition of exceptional ability, and has denied eligibility for *Schedule A,* Group II, unless the higher post-IMMACT 90 standard of extraordinary ability can be satisfied. AILA recommended we revise the definition of aliens of exceptional ability in a manner that makes material distinctions between exceptional and extraordinary ability. AILA suggested we develop a checklist of factors to establish exceptional ability analogous to the DHS criteria for aliens of extraordinary ability. AILA also suggested we allow the submission of other ''comparable evidence'' to establish the alien's eligibility as a worker of exceptional ability, and permit exceptional ability aliens with a reasonable plan for job creation to self-sponsor under *Schedule A.* AILA further suggested we add persons with exceptional ability in business to Group II of *Schedule A* because business is a subset of science.

Whether or not a given application or alien beneficiary qualifies for *Schedule A* pre-certification is determined by DHS. We believe the criteria for aliens of exceptional ability in the sciences or arts at § 656.15(d)(1) are clear and do not need to be revised. Except for the recommendation we add a criterion for other comparable evidence of exceptional ability, the commenter made no specific suggestions as to how these criteria should be revised. We do not adjudicate *Schedule A* applications, and DHS rarely contacts our office for advisory opinions on these cases. If, as AILA claims, DHS has failed to adhere to the appropriate regulatory standards in reviewing applications for aliens of exceptional ability, recommendations for procedural changes should be made to DHS, not to DOL.

We have determined that we will not add any new occupations or occupational categories to *Schedule A* in this final rule not included in the Notice of Proposed Rulemaking. To add an occupation to *Schedule A,* we believe it is advisable to issue a proposed rule and provide an opportunity for public comment.

Four university commenters urged DOL to include college and university teachers under *Schedule A.* The commenters claimed because virtually all such cases are certified under the current special handling requirements of § 656.21(a), these occupations should be moved to *Schedule A.* The commenters asserted this would allow DOL to focus its resources on other, less meritorious cases.

We have no evidence of a lack of qualified, willing, and available U.S. workers in the occupation of college and university teacher. Absent evidence of a lack of available workers, we see no compelling reason why this occupational category should be added to *Schedule A.* If a college or university teacher can be considered an alien of exceptional ability in the sciences or arts, such an individual may be eligible for *Schedule A* pre-certification under § 656.5(b)(1). Further, we note special recruitment procedures for college and university teachers are available under this final rule.

AILA also suggested DOL create a provision for *Schedule A* that would incorporate a flexible, just-in-time system for occupation shortages. As

proposed by AILA, DOL would expand the use of technology already inherent in the new system to collect real-world data on job needs in particular job markets. DOL could then allow for flexible opening and closing of a special *Schedule A* group in response to acute, localized labor shortages.

As with the other proposals to expand the categories of workers covered under *Schedule A*, the just-in-time system proposed by AILA would require additional rule making. We are also unsure whether data would be available to successfully implement such a system. While we anticipate the automated system will capture data regarding occupations being sponsored for labor certification, it is not clear all occupations being sponsored for labor certification are experiencing a lack of available workers.

4. Prevailing Wage Determination Requirement

Two commenters objected to the rule's requirement that an employer must obtain a prevailing wage determination for *Schedule A* occupations. One commenter asserted the current regulations do not require a prevailing wage determination for professional nurses, and this practice should continue. Similarly, AILA reasoned the wage determination requirement was unwarranted and would impose an unnecessary burden on the employer and the SWAs. AILA also contended DOL has already determined that hiring of foreign workers for *Schedule A* occupations will not depress wages for U.S. workers. As an alternative, AILA suggested DOL amend the application form to include an attestation that the employer is filing a *Schedule A* application, and then add language exempting the employer from the requirement of obtaining a SWA-issued prevailing wage. According to AILA, DHS requires an employer offer letter or similar documentation describing the position and offered wage.

This final rule retains the prevailing wage requirement for a number of reasons. First, the employer has always been required to certify that it is offering at least the prevailing wage for the occupation. Second, the current as well as the proposed regulation require an Immigration Officer to determine whether the employer and alien have complied with § 656.10, General Instructions, including whether the employer has attested to the conditions listed on the *Application for Permanent Employment Certification* form (ETA 9089), which includes a requirement the employer attest it is offering at least the prevailing wage. Third, the fact DHS asks for documentation describing the position and offered wage has nothing to do with whether the employer is actually offering the prevailing wage.

5. Technical Correction

We have corrected the reference at the end of the first paragraph in § 656.5, *Schedule A* from § 656.19 to § 656.15.

F. Elimination of Schedule B

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

A few commenters addressed the proposed change. Two commenters supported the elimination of *Schedule B.* Both of these commenters pointed out *Schedule B* occupations require little or no experience, and employees can be trained quickly to perform them. Two commenters opposed the elimination of *Schedule B* and suggested eliminating the *Schedule B* waiver instead.

We can not maintain *Schedule B* without a provision for a waiver. *Schedule B* is a list of occupations in which there generally are sufficient U.S. workers who are able, willing, qualified and available. It is not a blanket determination there are sufficient workers for the occupations on *Schedule B* in every area of intended employment in which employers may wish to employ foreign workers. Therefore, there must be a waiver for employers located in areas in which the general determination may not apply. Accordingly, this final rule does not contain a provision for *Schedule B* occupations.

G. General Instructions

General instructions for filing applications, representation, attestations, notice, and submission of evidence are provided in § 656.10.

1. Financial Involvement

One commenter noted alien beneficiaries, not employers, drive the labor certification process. The commenter suggested this final rule require documentation of the employer's financial involvement, or, alternatively, prohibit employers, agents, or attorneys from requiring aliens to pay the costs of the labor certification process and provide for penalties for imposing these costs on the alien beneficiary.

While the suggestion to have the employer provide documentation of financial involvement may be of some merit, it was not included in the NPRM, and is a major departure from past practice; consequently, we believe we would have to issue a new proposed rule before we could promulgate a rule requiring such documentation. We believe it is more important to issue a final rule at this time to achieve the benefits under this final rule than to substantially delay realization of such benefits that would result by the issuance of another NPRM.

It should be noted, however, evidence that the employer, agent, or attorney required the alien to pay costs could be used under the regulation at § 656.10(c)(8) to determine whether the job has been and clearly is open to U.S. workers.

2. Representation

a. Attorneys and Agents

The NPRM did not propose any modifications to the provision in the current regulation at 20 CFR 656.20(b)(1) (found in this final rule at 656.10) that allows employers and aliens to be represented by agents or attorneys. However, two attorneys urged we eliminate representation of employers and/or aliens by agents as provided in the current regulation. The commenters advanced three reasons for their recommendations. They maintained that:

- Allowing representation by agents was contrary to statutes in all 50 states prohibiting the unauthorized practice of law;
- Unlicensed agents are the ones most prone to perpetuate fraud on the Department of Labor and clutter the labor certification processing system with frivolous or poorly prepared cases; and
- DOL should issue a regulation similar to the one issued by DHS at 8 CFR 292 that governs the representation of employers and aliens before the DHS.

Amending the regulations at 20 CFR 656.10(b) as proposed by the commenters would be a major departure from our longstanding practice allowing representation by attorneys and agents, and may have serious consequences for those individuals who are now allowed to represent employers and/or aliens in the capacity of an agent. We believe it would be prudent before making such a major change in our longstanding practice and procedures to issue another

proposed rule and consider the comments we would receive on the proposal.

b. Notice of Entry of Appearance (Form G–28)

Another commenter recommended employers as well as attorneys be required to sign the Notice of Entry of Appearance (Form G–28). The commenter maintained not requiring the employer to sign the Form G–28 encourages fraudulent practices, as employers at times have no knowledge of the labor certification application or of the attorney purporting to represent them.

The labor certification process provided by this final rule does not require a Form G–28 if the employer is represented by an attorney. Requiring a Form G–28 would be incompatible with the electronic filing system provided for in this final rule. Elimination of the G–28 will not inhibit or impede efforts to combat fraud. Under this final rule, employers will be required to sign in section N of the *Application for Permanent Employment Certification* an employer declaration which, among other things, states the employer has designated the agent or attorney identified in section E of the application form to represent it, and by virtue of its signature, takes full responsibility for the accuracy of any representations made by the employer's attorney or agent.

c. Retention of Documents by Attorney

One attorney believed some immigration attorneys admonish their employer-clients to retain the enumerated recruitment documents for their records but not supply the documents to the attorney so the attorney can maintain plausible deniability for any document violation. The commenter recommended the attorney of record should be required to maintain copies of recruitment documents so he or she may be held accountable for the content of the application form. We believe it is sufficient under this final rule that the employer will be required to furnish recruitment documentation in the event of an audit or as otherwise required by a CO.

3. Attestations

Two commenters challenged the proposal in the NPRM to remove the regulatory requirements that the employer attest to the ability to pay the wage or salary offered to the alien worker and to place the alien on the payroll on or before the date of the alien's entrance into the United States. We have been informed that DHS is planning to amend its regulation at 8 CFR 204.5(g), which currently focuses on the ability to pay the proffered wage in the course of processing the employment-based immigrant petition, to require evidence focusing on the bona fides of the employer.

DHS does not have a regulation that focuses specifically on the employer's ability to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States. Ability to pay and the ability to place the alien on the payroll are not necessarily the same. An employer can be fiscally solvent but it may not be realistic, for example, to expect the plant or restaurant that is in the planning stage or under construction at the time the application is filed to be completed when the alien or U.S. worker is available to be employed in the certified job opportunity.

After reviewing the comments and considering DHS' planned revisions to its regulation, we have concluded that, in an attestation-based program where in the majority of cases the employer's supporting documentation will not be available to the reviewer, it is appropriate to require the employer to attest to its ability to pay the alien and to place the alien on the payroll. It should also be noted the employer's ability to place the alien on the payroll is not addressed by DHS regulations.

Similarly, although rejection of U.S. workers for lawful, job-related reasons is dealt with in the regulation section on the recruitment report, and although the permanent full-time nature of the job opportunity, and required documentation is included in the definition of ''employment,'' we have concluded it would be beneficial in the context of an attestation-based system to add certifications addressing these issues. We have revised the final rule accordingly.

4. Notice

a. Expansion of Notice Requirement

Several commenters addressed the expansion of the posting requirement to require, in addition to posting a notice of the filing of the ETA Form 9089 in conspicuous places at the employer's place of employment, the employer publish the posting in any and all in-house media, whether electronic or printed, in accordance with the normal procedures generally used in recruiting for other positions in the employer's organization.

Several commenters expressed concerns about the expansion of the posting requirement in the NPRM. One commenter expressed the view the information in proposed § 656.10(d)(3) informing employees how they can furnish documentary evidence bearing on the application to the CO is not in accordance with normal recruitment procedures.

AILA stated employers do not normally post via in-house media for certain positions, such as senior or executive positions, because of confidentiality concerns. AILA suggested DOL amend the rule to provide that an employer post internally through any and all media normally used for other similar positions. A large employer asserted publishing an employment posting in any and all in-house media is extraordinarily broad and could be construed to include training films, publicity postings, and a myriad of unrelated and unhelpful venues. This employer suggested the requirement in § 656.10(d)(ii) of the proposed rule be changed to read ''(i)n addition, the employer must publish the posting in accordance with the normal procedures used for the recruitment of other positions in the employee's organization,'' thereby assuring that regular and accepted industry practices are followed in the labor certification process.

Three universities were of the view the expanded posting requirements would not yield many applicants for highly specialized research and faculty positions. One university indicated it posted jobs in on-line and in-house publications normally read by current or potential employees. However, it did not publish faculty and academic research positions at those locations, as it did not see any positive result from doing so.

A SWA supported expanding the posting requirement to include any and all in-house media. The SWA noted its experience indicated employment postings are poorly presented and often virtually invisible on employer bulletin boards.

Another SWA noted the current posting requirement has not provided any applicants for job openings, and noted the expanded posting requirement does not provide any incentive for current employees to refer friends or relatives to the employer. The SWA recommended that employers should be encouraged to include a finder's or referral fee in the posted notice.

With respect to the comment concerning the requirements at § 656.10(d)(3) in the proposed and final rule concerning the furnishing of documentary evidence bearing on the application, § 656.10(d)(3) was drafted to implement the statutory requirement

provided by Section 122(b) of IMMACT 90 that provided for the current notice requirement and provided, in relevant part, ''any person may submit documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions with respect to the employment of alien workers and co-workers).'' It should also be noted the provision at § 656.10(d)(3) is similar to the provision in the current regulation at 20 CFR 656.20(g)(3).

With respect to comments regarding the occupations subject to the posting requirement and the requirement the employer post internally through any and all media, it should be understood, as indicated above, the notice requirement in the regulations has been a statutory requirement since the passage of IMMACT 90. Section 122(b)(1) of IMMACT 90 provides no certification may be made unless the employer-applicant, at the time of filing the application, has provided notice of the filing to the bargaining representative or, if there is no bargaining representative, to employees employed at the facility through posting in conspicuous places. In our view, Congress' primary purpose in promulgating the notice requirement was to provide a way for interested parties to submit documentary evidence bearing on the application for certification rather than to provide another way to recruit for U.S. workers. See 8 U.S.C. 1182 note.

Because the notice requirement is statutory, we do not believe that exceptions to the notice requirement could be based on the occupation involved in the application. As one SWA noted, printed postings on bulletin boards under the current regulation at 20 CFR 656.20(g) are poorly presented and often virtually invisible. The posting regulation at § 656.10(d)(1)(ii) in this final rule provides, in relevant part, the posting must be published in any and all in-house media in accordance with the normal procedures used for the recruitment of other similar positions. For example, we would not expect a posting in a publication devoted to health and safety issues if job vacancies were not normally included in that publication.

With respect to the recommendation by one SWA employee that employers should be required to include a finder's or referral fee, we believe it is inappropriate to provide such an incentive under the posting regulations, because, as indicated above, the posting requirement is not designed to be a recruitment vehicle. We have, however, included referral incentives as one of the options employers may use in recruiting for professional workers in § 656.17(e)(1)(ii) of this final rule.

b. Notice for Schedule A Applications

AILA questioned our basis for requiring employers to comply with the notice requirement for applications filed with DHS on behalf of *Schedule A* occupations. AILA pointed out that *Schedule A* occupations are by definition those for which DOL has already determined that there are not sufficient U.S. workers who are able, willing, qualified, and available for the occupations listed, and the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the employment of aliens. Therefore, no recruitment is required for *Schedule A* applications, and the adjudication of such applications has been placed by the DOL under the jurisdiction of DHS. AILA indicated it would serve no purpose for employers of *Schedule A* applications to provide notice, and DOL should consider eliminating the unnecessary posting burden for employers.

We have concluded employers must comply with the posting requirement to file applications under *Schedule A* with DHS. As we point out above, the statute provides no certification can be issued unless the employer has provided the required notice. Second, as stated previously, in our view Congress' primary purpose in promulgating the notice requirement was to provide a means for persons to submit documentary evidence bearing on the application. This could, for example, include documentation concerning wage or fraud issues. Requiring employers to provide notice of their *Schedule A* applications is consistent with the practice under the current regulation at 20 CFR 656.20(g)(1). We have required employers to provide notice in connection with their *Schedule A* applications since the passage of IMMACT 90. See 56 FR at 54924.

c. Wage Range and Inclusion of Wage in Notice

AILA noted the NPRM proposed that items required to be included in the recruitment advertisement (§ 656.17(f)), including the wage offered, must also be included in the notice. AILA maintained the salary ''is often not provided by most employers when using 'in house media' or is simply referred to by a grade level.'' AILA also maintained an employer should be able to use a salary range in the posting as long as the bottom of the range meets the prevailing wage.

AILA also said, after analyzing the interplay between §§ 656.21(b)(6), 656.21(g)(6), and 656.21(g)(8) under the current regulations, they construed the ''no less favorable than offered the alien'' language in § 656.21(g)(8) to require the employer to advertise a wage offer no less than the alien's wage when initially hired; assuming, of course, the wage offer also meets or exceeds the prevailing wage.

Employers can use a wage range in the required notice. It is longstanding DOL policy that the employer may offer a wage range as long as the bottom of the range is no less than the prevailing rate. See page 114 of *Technical Assistance Guide No. 656 Labor Certifications* (TAG). However, the prevailing wage, which provides the floor for the wage range, must be the prevailing wage at the time the recruitment was conducted for the application for which the employer is seeking certification, not the prevailing wage when the alien beneficiary was initially hired.

The advertising requirements at § 656.17(f) of this final rule no longer include wage or salary information; however, the wage offered must be included in the notice. The regulations implement the statute, which provides ''no certification may be made unless the applicant for certification has at the time of filing the application, provided notice of the filing.'' Because the ETA Form 9089 includes the offered wage, the employer must include in the notice the wage offered to the alien beneficiary at the time the application is filed. Alternatively, the employer may include a salary range in the notice, as long as the bottom of the range is no less than the prevailing wage rate. The wage paid to the alien when initially hired is irrelevant.

5. Timing and Duration of the Notice

A few comments addressed when notice must be provided and the duration of the notice if it is accomplished by posting at the employer's facility.

a. When the Notice Must Be Provided

AILA indicated the requirement in the NPRM that the notice must be posted between 45 and 180 days before filing the application was confusing in light of the recruitment provisions at § 656.17(d) of the NPRM, which requires recruitment be undertaken not less than 30 days or more than 180 days before filing the application. AILA

recommended the timing of the notice be consistent with the other ''advertising'' requirements. Another commenter also recommended that notices of filing be posted 30 to 180 days prior to filing the application.

As explained above, the notice requirement is primarily a medium to obtain documentary evidence bearing on the application. We have concluded it makes little sense to require notice be provided 45 days before the application is filed when employers have 6 months to complete the recruitment required under the regulations. Further, making the time frames consistent with the timing requirements for conducting recruitment in § 656.17(e) would make the program easier to administer and reduce the potential for confusion and error on the part of employers filing applications for permanent alien employment certification. Accordingly, this final rule provides notice should be provided between 30 and 180 days before filing the ETA Form 9089.

b. Duration of the Notice

Two commenters observed the NPRM proposed the period the notice must be posted be increased from 10 consecutive days to 10 consecutive business days. One commenter indicated this increase was reasonable because it would maximize viewing by U.S. workers. This commenter also noted the notice requirement had been expanded to require posting in any and all in-house media, whether electronic or printed, but the proposed rule did not specify for how long. The commenter suggested the additional in-house media ''advertising'' be required for 10 days. We agree and the final rule provides that notice provided by posting to the employer's employees at the facility or location of employment must be posted for 10 consecutive business days. Posting in any in-house media, whether electronic or printed, should be posted for as long as other positions in those media are normally posted.

6. Notice to Certified Collective Bargaining Representative

The AFL–CIO maintained when a union has been certified as a collective bargaining representative for workers employed by the employer-applicant, the new regulations should require the union receive notice when a labor certification application is filed. Moreover, the union should be consulted to ascertain if there was an organizing campaign or other labor disturbance, because the employer may be attempting to thwart union efforts by replacing U.S. workers with foreign workers. The interests of workers seeking to exercise their rights to organize and bargain are indisputably harmed when employers attempt to pack bargaining units with foreign workers during an organizing campaign. For that reason, the AFL–CIO believed the regulations should include a requirement that DOL obtain certification from the National Labor Relations Board (NLRB) that there is no labor dispute as defined in the DHS operating instructions at 287.3. The AFL–CIO noted this definition of a labor dispute is broader than that described under the permanent labor certification regulations. The commenter also proposed if such a labor dispute arises after the labor certification is filed, the employer should be required to inform DOL. The AFL–CIO maintained DOL should also find a way for a union representing workers in the same occupation for which a foreign labor certification application was filed to have a formal and substantial role in the process.

This final rule provides, pursuant to Section 122(b)(1) of IMMACT 90, and similar to the current regulations, that notice of the filing of the labor certification application must be given by the employer to the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's locations in the area of intended employment.

We proposed no substantive changes to our current regulations regarding the showing the employer must make with respect to a labor dispute. Our program experience has not brought to light any reason why the current regulations should be changed. This rule has been in effect for over 20 years and our operating experience with this provision has demonstrated it is adequate for the protection of U.S. workers. Moreover, because our program experience points to the adequacy of the current regulations with respect to labor disputes, we are reluctant to make any changes to the labor dispute regulation that may not be compatible with our efforts to streamline the labor certification process.

With respect to having the employer inform us of a labor dispute after the labor certification is filed, we do not believe such a provision will be necessary in the new system. In the new system, we do not contemplate in the majority of cases any significant delay between the filing of a labor certification and its adjudication thus notice is not necessary.

With respect to finding a way for the unions representing workers in the same occupation to have a formal and substantial role in the process, the AFL–CIO did not provide any suggestions as to what such a role would be beyond the statutory notice requirement or the suggestion that the union should be consulted to ascertain whether there was an organizing campaign or other labor disturbance the employer may be attempting to thwart by replacing U.S. with foreign workers, which we have commented on above. Accordingly, this final rule makes no provision for unions to have a formal role in the labor certification process other than what was provided in the proposed rule.

7. Inclusion of Posting Requirements in Recruitment Advertisement

A SWA found the proposed expansion of posting provisions to be insufficient to provide workers with a complaint system. The SWA maintained the rule needs a mechanism to balance what the commenter views as employer bias in favor of foreign workers and against U.S. worker interests. The SWA recommended requiring that the wording of at least one of the mandatory recruitment advertisements under proposed § 656.17(d) conform to the language of the in-house posting, thereby giving U.S. workers who may be interested in or qualified for jobs offered to aliens the opportunity to submit complaints to DOL. This recommendation could be qualified by an exception for employers who can document programs to train and develop U.S. workers for the types of positions submitted for alien labor certification. On the topic of complaints, another SWA recommended the final rule enable an applicant to file a grievance against an employer within 30 days of an interview. This SWA further suggested the employer give each applicant a comment card for DOL's use if a complaint is filed.

Regarding the suggestion to include the notice information in one of the required recruitment advertisements at § 656.17(e), we do not believe this is appropriate. As described above, this final rule implements the statutory notice provision consistent with Congress' intent. To require employers to place statutory notice requirements in their recruitment advertising would be counterproductive, as it would alert U.S. workers to the likelihood that the employer had selected an alien worker for the advertised job opportunity. Consequently, U.S. workers would likely be reluctant to expend the time and resources to apply for jobs for which they believe the employer has pre-selected the alien beneficiary of a labor certification application.

With respect to the SWA's comment suggesting we implement a grievance system against the employer, the commenter did not explain how such a system would work or what role we would play in the process. We will accept documentary evidence about labor certification applications and consider the evidence in deciding whether or not to certify. We do not believe any more formal process is needed.

8. Retention of Documents

The Notice of Proposed Rulemaking did not contain any specific record retention requirements. Record retention requirements were implicit in the NPRM since it was stated, for example, in the preamble that ''(t)he employer would not be required to provide any supporting documentation with its application but would be required to furnish supporting documentation to support the attestations and other information provided on the form if the application were selected for audit.'' See 67 FR at 30466. In discussing the audit process it was indicated employers would be expected to have assembled and have on hand all documentation necessary to support their applications before they were submitted. 67 FR at 30475.

Additionally, the changes to the revocation regulation discussed below strengthen the need for specific record retention requirements in this final rule. As discussed below, because this final rule allows certifications to be revoked if the certification was not justified, a time limit has not been placed on the authority of the Certifying Officer to revoke a labor certification. It is also our understanding that DHS may want to review the employer's supporting documentation in the course of processing the Form I–140 petition or for the purpose of investigating possible violations of the Immigration and Nationality Act. On the other hand, it would not be reasonable to require employers to maintain supporting documentation indefinitely.

To resolve these competing considerations, in § 656.10(f), this final rule requires employers to retain supporting documentation for 5 years from the date the *Application for Permanent Employment Certification* is filed with the Department. Currently, it takes approximately 5 years to obtain a labor certification and an approved I–140 petition.

H. Fees

The proposed rule contains a provision outlining how fees would be implemented in the event Congress passes legislation implementing the fee-charging language in the President's Fiscal Year 2005 Budget.

We received a variety of comments on the proposal to collect fees to process applications for alien employment certification. Most of the commenters supported fees only if they were reasonable, related to actual costs, and used solely for the labor certification program. One commenter opposed any fees that would seem to impose a penalty on hiring aliens. At least one commenter supported fees as long as services were delivered timely. Some commenters supported fees only if they could be implemented in conjunction with electronic filing.

Two commenters opposed the imposition of fees. One commenter objected because DOL has never imposed fees in the past. Another commenter, who characterized DOL's role in the labor certification process as adversarial, felt it was inappropriate to pay fees to a hostile agency.

This final rule does not currently provide for collection of fees because legislation has not been passed that would allow DOL to collect fees and use the proceeds to process applications for alien labor certification. However, in the event Congress does pass such legislation, DOL will provide adequate notice and reserves the right to collect program fees within this rule.

I. Labor Certification Applications for Schedule A Occupations

1. Filing Requirements

The only modification made to the proposed filing requirements for *Schedule A* applications was to require the employer to file only one form, the ETA Form 9089, rather than two.

2. Documentation Requirements for Nurses

As discussed above, proof of passage of the CGFNS examination will not qualify an alien for *Schedule A* certification under the new system; a CGFNS Certificate will be required instead. However, passage of the NCLEX–RN examination will also qualify an alien for *Schedule A* certification. Accordingly, § 656.15(c) of this final rule provides that an employer seeking a *Schedule A* labor certification as a professional nurse must file, as part of its labor certification application, documentation the alien has a CGFNS Certificate, has passed the NCLEX–RN exam, or holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment.

3. Documentation Requirements for Aliens of Exceptional Ability

We received no comments objecting to the documentation requirements for aliens of exceptional ability in the sciences or arts. Therefore, the requirements in the NPRM are incorporated into this final rule.

J. Labor Certification Applications for Sheepherders

We received no comments on the proposed regulations for sheepherders. The only modification made to the proposed filing requirements for sheepherders is to require the employer to file only one form, the ETA Form 9089, rather than two.

K. Basic Process

1. Filing Applications

Employers will be required to file a completed ETA Form 9089 electronically or by mail with a designated ETA application processing center. Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

Supporting documentation will not have been filed with the application, but the employer must provide the required supporting documentation if its application is selected for audit or if the CO otherwise requests it.

The Department of Labor may issue or require the use of certain identifying information, including user identifiers, passwords, or personal identification numbers (PINS). The purpose of these personal identifiers is to allow the Department of Labor to associate a given electronic submission with a single, specific individual. Personal identifiers can not be issued to a company or business. Rather, a personal identifier can only be issued to a specific individual. Any personal identifiers must be used solely by the individual to whom they are assigned and can not be used or transferred to any other individual. An individual assigned a personal identifier must take all reasonable steps to ensure his or her personal identifier can not be compromised. If an individual assigned a personal identifier suspects, or becomes aware, that his or her personal identifier has been compromised or is

being used by someone else, then the individual must notify the Department of Labor immediately of the incident and cease the electronic transmission of any further submissions under that personal identifier until such time as a new personal identifier is provided. Any electronic transmissions submitted with a personal identifier will be presumed to be a submission by the individual assigned that personal identifier. The Department of Labor's system will notify those making submissions of these requirements at the time of each submission.

The new system will limit the role of the SWA in the permanent labor certification process to providing PWDs. In the new system, the employer will still be required to obtain a PWD from the SWA, although the timing will change from a post-filing action to a pre-filing action.

2. Processing

As explained in the section on fraud and abuse above, applications, at a minimum, will be initially reviewed, on receipt, to verify the employer exists and has employees on its payroll. Applications will be checked to make sure the employer is aware of the application being submitted on its behalf.

3. Filing Date and Refiling of Pending Cases to New System

Commenters addressed the conversion of pending cases to the new system. Two commenters addressed a potential relationship between the proposed rule and Section 245(i) of the INA. There were also comments on how the proposed prevailing wage determination requirement could affect the filing date. One commenter addressed the issue of whether an incomplete application should be date-stamped and accepted for processing.

a. Filing Date

One commenter recommended all applications be date-stamped, instead of only those accepted for processing.

The NPRM made a distinction between cases denied and cases not accepted for processing. We have decided there are no practical differences in the consequences of denying an application compared to returning an application because it is unacceptable. We have abandoned the distinction between cases denied and cases not accepted for processing in the final rule. Under this final rule, incomplete applications will be denied and not processed.

In the preamble to the NPRM (see 67 FR at 30470), we stated applications that are not accepted for processing will not be date-stamped to minimize the administrative burden and to discourage employers from filing incomplete applications merely to obtain a filing date. We do not believe it is unreasonable to require the employer to enter all required information on the application form. Further, employers could immediately refile any application that is rejected for processing, so any delay in obtaining a filing date will be minimal and largely in the employer's control.

(1) Possible Reinstatement of Section 245(i)

Section 245(i) of the INA enables many individuals who qualify for permanent residency to adjust their status to permanent resident in the U.S., rather than having to leave the U.S. and apply at a consulate. One way aliens could qualify for eligibility under Section 245(i) was to have a labor certification application filed on their behalf by April 30, 2001, which was the sunset date for Section 245(i). Commenters were concerned about possible legislation that would reinstate Section 245(i) and believed the proposed procedures for conducting pre-filing recruitment would be so time consuming that many individuals would not be able to file completed applications in time to meet a new filing deadline.

We can not base our decisions about the design of the labor certification process on the possibility of legislative action extending Section 245(i). Moreover, an extension of the Section 245(i) deadline is not relevant to the determination the Secretary of Labor must make under § 212(a)(5)(A) of the INA.

(2) Prevailing Wage Determination Requirement

Sections 656.15 through 656.19 of the proposed rule would require an employer to obtain a PWD from the SWA before filing a labor certification application. One commenter suggested this could delay filing the application if there is disagreement about the prevailing wage. The commenter recommended employers be allowed to submit the application to DOL before receiving the PWD. Another commenter recommended the filing date should be established when the PWDR (ETA Form 9088) is filed with the SWA, rather than when the labor certification application is filed with DOL. A third commenter noted information on the PWDR form, such as the job description and special requirements, also should go to the DHS.

The recommendation to use the date the PWDR is filed with the SWA as the filing date is not practical under this final rule. As indicated above, we will have only one form in the streamlined labor certification system. We have combined the PWDR (ETA Form 9088) with the *Application for Permanent Employment Certification* (ETA Form 9089). Employers will not be submitting a DOL form to the SWAs to obtain a prevailing wage determination. Instead, employers will make a request to the SWAs for a PWD, and will receive the wage determination from the SWA as they do now. This final rule does not require a particular form for employers to submit requests for wage determinations to SWAs or for SWAs to use in responding to requests for wage determinations. Employers will, however, be expected to provide the PWD they received from the SWAs in the event of an audit or other request from the CO.

Further, we do not believe it prudent to depart from our longstanding practice of assigning the filing date at the time an application is accepted. Basing the filing date on the date a request for a PWD is made with the SWA may lead to program abuses. For example, such a change could encourage employers to file more wage requests than needed to obtain an earlier filing date, or encourage employers to file many applications at the end of the year, before the upcoming year's Occupational Employment Statistics (OES) wages are released. Also, due to local variations in the time it takes SWAs to issue wage determinations, the wage determination would be an inconsistent source of a filing date.

b. Refiling of Pending Cases in New System

Several commenters expressed concern about the proposed provisions that would allow employers to withdraw applications for alien employment certification filed under the current regulations and file an application for the identical job opportunity under the proposed rule without loss of the filing date of the original application.

(1) Identical Job Opportunity

One commenter noted because of the proposed elimination of business necessity, elimination of the use of alternative job requirements, and disallowance of experience gained with the employer to be used as qualifying experience, many pending labor certification applications would not be able to be refiled under the proposed rule with identical job qualifications

and salary. This commenter suggested broadening the definition of identical job opportunity to include a job opportunity by the same employer (or its successor in interest) for the same alien in the same field of endeavor, even if the duties, salary, skill level and educational or experience requirements are not identical. Another commenter emphasized an applicant should be able to amend, add, or delete information, such as job duties and requirements, in the new application. The commenter claimed because the employer must recruit under the new regulations, the employer should be able to use the SWA's initial review and make changes.

In determining whether the job opportunity is ''identical'' to the job opportunity as described in the employer's application filed under the current regulations, the employer, alien, job title, job location, and job description must be identical to those in the original application, including any amendments made in response to an assessment notice from the SWA under § 656.21(h) of the regulation as it existed prior to the effective date of this final rule.

We have not broadened the definition of identical job opportunity as suggested by commenters. As discussed below, this final rule provides for requirements based on business necessity, alternate experience requirements, and in certain limited circumstances, to allow experience gained with the employer to be used as qualifying experience. See our discussion of job requirements, alternate experience requirements, and actual minimum requirements below.

(2) Withdrawing and Refiling Cases

One commenter recommended employers not be allowed to withdraw cases from the current system and refile under the new system if recruitment of U.S. workers has already begun. The commenter stated DOL should be consistent with the RIR conversion regulations, which prohibit employers from converting pending applications to RIR if a job order has been filed by the SWA. The commenter also warned that U.S. workers who are willing, qualified, and available would not be referred when the application converts to the new system.

In establishing a limit on when a pending application may be refiled in the streamlined system, we reviewed our regulation governing when cases filed under the current basic process may be converted to RIR processing. As noted by the commenter, in our final rule regarding conversion of pending cases to RIR applications, we allowed employers to request an RIR conversion up to the point the SWA had placed a job order under § 656.21(f)(1) of the current regulation.

Similarly, the final rule has been revised at § 656.17(d) to provide that an employer may withdraw an existing application, refile under this final rule and retain the original filing date up until the placement of a job order under § 656.21(f)(1) of the current regulations. As indicated in the preamble to the proposed rule for the RIR conversion regulations, it would be incongruous to permit withdrawal and retention of the filing date from an employer who had already commenced the mandated recruitment. If an employer withdraws an existing application after a job order has been placed, the employer may file an application under this final rule for the same job opportunity; however, the original filing date can not be retained. See 65 FR at 46083 and 66 FR at 40586.

A filing date on a withdrawn application can only be used one time to support an *Application for Permanent Employment Certification* filed under this final rule. Such a refiling must be made within 210 days of the withdrawal; the 210-day period is intended to allow time for the employer to conduct the recruitment required by this final rule. If the refiled application is determined not to be identical to the original application in accordance with § 656.17(d), the refiled application will be processed using the new filing date, and the original application will be treated as withdrawn. If the refiled application filed under this final rule is denied, the filing date on the withdrawn application can not be used on another application for permanent employment certification.

(3) Test of the Labor Market

Several commenters discussed retesting the labor market and re-recruiting for the refiled application. The commenters addressed the financial burden of re-recruitment, and backlog reduction.

Three commenters emphasized requiring an employer to undertake another recruitment campaign to comply with the requirements of the streamlined labor certification system is unduly burdensome. The commenters stated it is unfair to require employers to invest more of their resources for retesting the market solely for the purpose of using the new system. AILA contended employers should not be required to expend resources on additional recruitment unless there is a compelling Governmental interest to support additional recruitment.

Two commenters also asserted an employer should be allowed to refile a pending application under the new system without having to re-test the market, if the applicant complied with all the filing and recruiting requirements under the regulations effective at the time it filed the application, to alleviate the backlog of cases. The commenters noted the backlog has prevented many applications that complied with existing rules from being approved.

We do not believe the requirements for refiling cases are burdensome. Employers are not required to refile existing cases under the new system, so if an employer does not wish to incur the expense of additional recruitment efforts, it need not do so. There is no guarantee an employer's prior recruitment effort was an adequate test of the labor market, and additional recruitment would not have been required under the current regulations. It would be administratively unwieldy to have multiple standards for reviewing recruitment information, and would be incompatible with a streamlined system.

We have concluded employers should not obtain the benefits of the new system if they have not complied with all of its requirements.

(4) Transition to the New System

One commenter requested guidance on how applications being prepared for filing under the RIR process would be transitioned to the new system. The commenter requested all labor certification applications that placed advertisements before the effective date of the final rule be allowed to proceed under the standards of regulations in effect when the advertisements were placed, unless the employer elects to proceed under the new system. Another commenter inquired about the transition process and schedule that will be followed to implement the proposal. Specifically, the commenter requested a target implementation date and clear guidance on the transition of cases to the new system. A third commenter noted it is unclear how cases filed under the old regulation will be transitioned. The commenter noted employers will be required to obtain the *Application for Alien Employment Certification* (ETA 750), Part A from the SWA to show documentary proof that the job opportunities are identical. One commenter suggested, to reduce the backlog, DOL eliminate the second phrase of proposed § 656.17(c)(3)(i), ''if the employer has complied with all of the filing and recruiting requirements of the current regulations.'' Another commenter suggested when an employer converts an application to the new system, the employer should

identify whether it has conducted recruitment as a part of the original application. The commenter recommended the converted application be selected for an audit if the original recruitment yielded applicants. The commenter contended DOL should not lose the recruitment information in an application when it converts to the new system.

AILA suggested employers not be required to obtain a new prevailing wage, and the employer should be able to use all supporting documentation submitted with the original application.

As of the effective date of this final rule, all applications for labor certification must be filed in accordance with this final rule. While we will continue to process applications filed under the current regulations, the SWAs will not accept any applications filed under the current regulations after the effective date of this final rule. Because this final rule will not become effective until 90 days after publication in the **Federal Register**, we believe the 90 day delayed effective date for this final rule will provide employers, including those employers contemplating filing RIR applications, with sufficient time to adjust their recruitment programs to the requirements of the new system.

In response to commenters' concerns about how proof of filing under the current regulations will be obtained, the regulation has been revised to provide, that if requested by the CO under § 656.20, the employer must send a copy of the original application together with any amendments to the appropriate ETA application processing center. Specific instructions for the withdrawing of cases that are to be refiled under this final rule, will be posted at *http://workforcesecurity.doleta.gov/foreign/.*

Employers that have already begun supervised recruitment may not refile under this final rule and maintain the original application's filing date. Therefore, the commenter's concern about losing recruitment information when applications are converted is not an issue.

If operating experience indicates further guidance on refiling cases is needed, we will issue to the SWAs and COs a policy directive, which we will publish in the **Federal Register**, outlining in further detail the procedures to be followed in adjudicating such requests.

(5) Priority in Processing Applications

One commenter addressed the priority of applications filed before this final rule's effective date. The commenter believed we should give these pending applications priority in processing because a majority of them would fail to meet the standards contained in the Notice of Proposed Rulemaking.

AILA suggested we process conversion applications ahead of new applications to avoid further delays. AILA asserted many employers will not convert their cases to the new system unless restrictions are changed or the applicants' cases are ''grandfathered.''

We will process applications, including properly refiled applications, in the order in which they were filed under this final rule.

4. Pre-Filing Recruitment Requirements

Under the proposed rule, the employer must recruit during the 6-month period before filing the application. Recruitment for professional occupations consists of a job order and two print advertisements plus three additional steps. Recruitment for nonprofessional occupations consists of a job order and two print advertisements. We specifically invited comment on the advertising requirements, and the different requirements for professional and nonprofessional occupations.

We received more than 40 comments on the proposed recruitment requirements. Comments came from SWAs, employers, attorneys, organizations, and private individuals. The SWAs, FAIR, and the AFL–CIO were supportive, and even suggested additional requirements.

The remaining commenters were generally opposed to the pre-filing recruitment requirements outlined in the NPRM. Commenters objected to the requirements on the grounds that employers would not have enough discretion in their choice of recruitment methods and the requirements were excessive. A number of commenters specifically compared the proposed rule to current RIR requirements. AILA and ACIP, among others, suggested the new requirements be the same as for RIR processing. This, they felt, would allow employers to use real-world recruitment methods and prevent DOL from micro-managing the recruitment process. Other commenters did not specifically mention RIR processing, but stated the proposed requirements were not real-world.

Comparing the requirements in the new system to RIR requirements presents only part of the picture. Employers may use RIR processing only for occupations for which few or no U.S. workers are available. Employers who file under the basic labor certification process have always been required to follow a specific recruitment regimen. In addition, although RIR processing allows the employer more discretion in its recruitment methods than allowed in the proposed regulations, it requires a hands-on, case-by-case review. This type of review is incompatible with a uniform, streamlined system. In this final rule, we have prescribed a recruitment regimen in § 656.17(e) that, based on our program experience, is the most appropriate for all occupations.

a. Job Order and Two Print Advertisements

In addition to the more general comments about the recruitment regimen, we received specific comments about the requirements for a job order and two Sunday print advertisements. With few exceptions, commenters focused on professional occupations and did not specifically address the appropriateness of the requirements for nonprofessional occupations.

(1) Job Order

Relatively few commenters specifically addressed the requirement for a job order. FAIR and the AFL–CIO supported a job order for all occupations. Almost all others who commented on the requirement opposed it, mostly because they felt it was ineffective.

For the past 25 years, employers have been required to place a job order as part of their supervised recruitment efforts. Placing a job order requires no fee, and minimal effort from the employer. SWAs encourage everyone who is unemployed or looking for work to search the Job Bank for openings. We see no compelling reason to delete the requirement for a job order, which reaches a large pool of applicants who are actively seeking work.

(2) Newspaper Advertisements

Very few commenters discussed the requirement for a Sunday advertisement versus a midweek advertisement. One SWA called it an extremely important change, noting many employers deliberately avoid Sunday advertisements because they are more costly and more likely to yield a response.

Many commenters addressed the requirement for two print advertisements. Of these, the vast majority opposed the requirement. Some commenters were concerned about the cost. Most of these commenters worried that a long, detailed advertisement would be far more costly than an RIR-style advertisement. A couple of these commenters also felt that our estimate of

$500 per advertisement was much too low.

A more common objection was that the proposed requirements did not reflect real-world practice. Most of the commenters who objected to print advertisements focused on the high-tech industry, although several referred to university research positions. These commenters, who rely heavily on online advertising, contended newspaper advertisements are ineffective. ACIP, among others, felt that print advertisements were anachronistic. The Society for Human Resource Management (SHRM) stated the most effective and cost-efficient ways to recruit are not through print advertisements, but through alternatives such as notices in job centers and job-search websites. One university felt a journal devoted to the specific academic field was more effective than a newspaper of general circulation. This commenter also believed for jobs requiring experience and an advanced degree, two journal advertisements in two separate months should be allowed in lieu of the two newspaper advertisements. Another university proposed that colleges and universities be allowed to use professional journals, announcements on the websites of professional organizations, mailings to academic peers, and internal human resources websites.

Some of the commenters who favored no print advertisements suggested, in the alternative, only one Sunday print advertisement, consistent with current RIR requirements. SHRM favored one Sunday newspaper advertisement plus the option of either a second Sunday newspaper advertisement or an advertisement with an alternate source appropriate to the occupation and to the workers likely to apply for the job.

AILA raised a concern about advertising for nonprofessional occupations. Noting the major source of recruitment for some nonprofessional jobs is a trade or professional organization or a job fair, AILA proposed that either of these two recruitment sources be allowed in lieu of the second newspaper advertisement.

Commenters did not specifically object to placing Sunday, versus midweek, advertisements, although a couple of commenters who objected to advertising costs noted Sunday advertisements were more costly. SHRM, however, pointed out not all suburban and rural newspapers publish a Sunday edition. Referring to language in the NPRM, SHRM noted it would be appropriate to advertise in a suburban newspaper of general circulation for certain nonprofessional occupations. Therefore, SHRM asked that publication in a newspaper that does not have a Sunday edition be allowed if that newspaper is the most appropriate to the occupation and the workers likely to apply for the job opportunity in the area of intended employment.

A number of commenters objected to the proposed requirement that the two print advertisements be placed at least 28 days apart.

Commenters who compare the cost of print advertising under the proposed rule to the cost under RIR processing make an inappropriate analogy. They use one RIR-style advertisement as the current standard rather than the relatively detailed, three-day advertisement required under basic processing. We believe the cost of two Sunday advertisements is not an unreasonable expense. See our discussion of advertisement contents below for a more comprehensive discussion of cost.

Although commenters claimed newspaper advertisements are highly ineffective, our program experience has shown these arguments are overstated. Unlike other forms of recruitment, newspaper advertisements are appropriate for all job categories. A review of the classifieds, especially Sunday editions, shows that newspaper advertisements are still customary for both high-tech and non-high-tech jobs. Carving out exceptions for employers who prefer to rely on other sources of recruitment is inconsistent with the streamlined system. The requirement that print advertisements appear in the Sunday edition of a newspaper of general circulation most appropriate for the occupation and the workers likely to apply for the job ensures the advertisement will reach the widest possible pool of potentially qualified applicants.

No serious objections were raised to requiring Sunday, in lieu of midweek, advertisements for professional occupations; therefore, this requirement is retained. However, we recognize an exception is needed in limited circumstances. Therefore, this final rule provides in those cases in which advertising in a rural newspaper would be appropriate but for the fact that the newspaper has no Sunday edition in the area of intended employment; the employer may use the edition with the widest circulation in the area of intended employment. However, the employer must be able to document the edition chosen has the widest circulation. This exception applies to rural newspapers only; if a suburban newspaper has no Sunday edition, the employer must publish a Sunday advertisement in the most appropriate city newspaper that serves the suburban area.

We have also concluded there is no compelling reason to require the two Sunday advertisements be 28 days apart. Therefore, we have deleted this requirement. The two advertisements must be placed on different Sundays, but the Sundays may be consecutive. The only timing requirement is the two advertisements (as well as the job order) must be placed more than 30 days but less than 180 days before filing the application.

(3) Professional Journals

A number of commenters addressed the requirement for an advertisement in a professional journal if the job requires experience and an advanced degree. One SWA prevailing wage specialist supported the requirement that professional jobs be advertised in professional journals. This commenter claimed that computer companies' web advertising is easy to post on the internet, print, and then take off the internet. FAIR suggested requiring a professional journal advertisement in addition to the two Sunday newspaper advertisements. FAIR also felt that more restrictive requirements in the job opportunity should require more extensive recruitment. One university, although not specifically addressing the requirement for a journal advertisement, felt a journal devoted to the specific academic field was more effective than newspapers of general circulation. This commenter also felt that for jobs requiring experience and an advanced degree, two journal advertisements in two separate months should be allowed in lieu of the two newspaper advertisements.

On the other hand, at least one commenter felt the journal requirement was excessive. This commenter stated that most labor certification positions are for experienced workers, and many positions in the technology sector require a master's degree; therefore the requirement would apply to a very large number of applications. This commenter also stated that professional journals are a customary source of recruitment only for high-level managerial, executive, and scientific positions; therefore, we should not expand the journal requirement to cover mid-level, journeyman positions. AILA pointed out in some cases there is no appropriate professional journal or it is not industry practice to advertise in a professional journal. At least one commenter objected to a journal advertisement because it was more costly than advertising in a newspaper.

We have concluded although professional journals are an appropriate source of recruitment for many jobs that require an advanced degree, the requirement in the NPRM is too broad. Therefore, this final rule in § 656.17(e)(1)(i)(B)(4) allows the employer discretion in using a professional journal. If a journal advertisement is appropriate for the job opportunity, the employer may choose, but is not required, to use a journal advertisement in lieu of one of the Sunday print advertisements.

b. Additional Recruitment Steps for Professional Occupations

We received numerous comments about the three additional steps required for professional occupations. With few exceptions, commenters opposed either the number of additional steps or the limited list of alternatives.

Most commenters felt requiring three additional recruitment steps was too burdensome, especially on smaller employers. One commenter stated the additional recruitment steps were a drastic increase over RIR requirements. AILA stated DOL had failed to address how much the additional steps would cost and whether they were more effective than the employers' normal recruiting practices. Another commenter felt the additional steps would discourage employers from applying for labor certification. Many commenters recommended eliminating or decreasing the number of additional steps.

A number of commenters felt the list of six additional recruitment steps was too narrow, and employers should have more flexibility to select steps that are consistent with the employer's standard recruiting procedures. Another commenter noted all employers may not be able to take advantage of all six steps; some steps may be too costly and others may not always be available. This commenter suggested that alternate recruitment steps include notification to campus placement offices, postings at continuing education seminars, and recruitment at companies with recent layoffs. Other commenters suggested expanding the list of additional steps to include employee referrals, help-wanted signs, signage on the company building, employee referral programs, other media (such as radio, billboards, or television), print advertisements in any publication (such as local and ethnic papers), searching commercial résumé databases, and open houses. More than one commenter felt a job posting on a newspaper-sponsored job search website should count as an additional step, even though the web posting was made in conjunction with the print advertisement.

A few commenters objected to the time requirements for the additional recruitment steps. AILA noted employers may want to blitz the marketplace in a relatively short period (*e.g.*, 1 to 2 months). AILA also requested clarification concerning when the recruitment steps must be taken.

We recognize not all of the additional recruitment steps are available or appropriate for all employers; however, employers are required to select only three of the additional steps listed in the NPRM. The list of alternatives was based on what our program experience has shown are real-world methods normally used by businesses to recruit workers.

Although we are retaining the requirement for three alternative steps, we agree the list of alternatives is too narrow. Some of the suggested alternatives, such as searches of résumé databases, we have rejected because they are too difficult to verify; however, others are appropriate as well as easily verifiable. Therefore, we have expanded the list of alternatives in § 656.17(e)(1)(ii) of this final rule to include the following forms of recruitment: an employee referral program, if it includes identifiable incentives; a notice of the job opening at a campus placement office, if the job requires a degree but no experience; local and ethnic newspapers, to the extent they are appropriate for the job opportunity; and radio and television advertisements. A sufficient number of the alternatives are free or low in cost so as not to impose an undue financial hardship on the employer.

In addition to expanding the list of alternatives, this final rule incorporates changes to two of the alternatives listed in the NPRM. An online job listing, even if posted in conjunction with a print advertisement, qualifies as an additional recruitment step. The use of a professional or trade organization is still acceptable, but must be documented by copies of pages of newsletters or trade journals containing advertisements for the job opportunity involved in the application.

We believe the additional recruitment steps represent real world alternatives. The overwhelming majority of employers seriously recruiting for U.S. workers would routinely use one or more of the listed additional recruitment steps. Additionally, it should be noted the alternative recruitment steps only require employers to advertise for the occupation involved in the application rather then for the job opportunity involved in the application as is required for the newspaper advertisement. Allowing employers to recruit for the occupation involved in the application should also work to minimize employer costs to conduct special recruitment efforts solely to satisfy the alternative recruitment steps. In sum, we do not believe the cost to employers of the additional recruitment steps will be significant.

The timing requirements in this final rule are the same as those in the NPRM. All additional recruitment steps must be taken within 6 months of filing; however, employers are not required to take a different step each month. Only one of the additional steps may be taken within 30 days of filing.

c. Recruitment for Occupations in Appendix A to the Preamble

In Appendix A to the preamble, we have published a list of occupations for which a bachelor's or higher degree is a customary requirement, and for which the employer must recruit under the standards for professional occupations set forth in § 656.17(e)(1). We are not codifying this list of occupations so that we can appropriately and timely modify it as necessary without having to engage in the rulemaking process.

(1) Definition of Professional and Nonprofessional Occupations

AILA maintained the definition of professional occupation should not be limited to an occupation for which the attainment of a bachelor's degree is a usual requirement because it neglects individuals who gain professional expertise through work experience instead of education. To set the standard between professional and nonprofessional based on whether the person has a bachelor's degree or not is arbitrary and does not reflect the real world or take into account individuals who have gained professional expertise through work experience instead of education. AILA suggested we should create a broader, more realistic definition for professional and nonprofessional occupations, such as an occupation for which the attainment of a bachelor's or equivalent is the usual requirement for the position. The nonprofessional occupation definition should also reflect this more realistic understanding: ''an occupation for which the attainment of a bachelor's or equivalent is not the usual requirement for the position.''

AILA's comments indicate a misunderstanding of how the list of occupations will be applied and include a suggestion for defining a professional occupation we do not have any way to

administer. The list of occupations on Appendix A is a list of occupations for which a bachelor's or higher degree is the usual requirement for entry into the occupation. The fact the alien does not hold a bachelor's degree has no bearing on the recruitment regimen to be followed by employers. The primary purpose of the list of occupations is to provide employers with the necessary information to determine whether to recruit under the standards provided in the regulations for professional occupations or for nonprofessional occupations.

Publishing a list of occupations we consider appropriate for recruiting under the standards for professional occupations provides employers a degree of certainty they would not have if we adopted the proposal advanced by AILA. They proposed to simply define the terms professional and nonprofessional and allow employers to seek to demonstrate the position for which certification is sought meets the regulatory definition of professional or nonprofessional and therefore the employer has chosen the proper recruitment regimen for that position. Certainty is desirable as employers are required to recruit before they file an *Application for Alien Employment Certification*. If the occupation involved in the application is listed on Appendix A, the employer simply follows the recruitment requirements for professional occupations at § 656.17(e)(1). For all other occupations employers can simply recruit under the requirements for nonprofessional occupations at § 656.17(e)(2).

Although the occupation involved in a labor certification application may be a nonprofessional occupation, the regulations do not prohibit employers from conducting more recruitment than is specified for such occupations. Employers that conduct more recruitment than is required will not have their applications denied for that reason. Employers filing applications involving nonprofessional occupations are free to recruit under the requirements for professional occupations if they believe by so doing it will yield more applications from willing, able, and qualified U.S. workers.

With respect to the definition of professional occupation suggested by AILA, we do not have any standards or information that would allow us to make the equivalency determination called for under the definition suggested by AILA. We have never determined in administering the permanent labor certification program what work experience or combination of work experience and education is equivalent to a bachelor's or higher degree.

(2) Presumptions and Preferences

AILA also opposed the publication of the Appendix A listing of occupations, whether it was codified or not, because publishing such a list immediately creates a presumption that the listed occupations are the only occupations that the CO should consider as ''professional.'' AILA noted several ''professional occupations'' that may well require bachelor's degrees or equivalent experience as a minimum requirement, such as highly-trained gourmet chefs, hotel managers, and graphic artists, are not on the list at all. Last, AILA was concerned the list of occupations would be used by DHS for the purpose of classifying occupations into preference categories.

In our view, the only presumption the list of occupations should create is that if the occupation involved in the application is on the list of occupations in Appendix A, employers must follow the recruitment regiment for professional occupations at § 656.17(e) of this final rule. On the other hand, if the occupation is not on the list in Appendix A, the employer is free to use the recruitment regimen for professional occupations if it believes it is likely to bring more responses from, able, willing and qualified U.S. workers than would the recruitment regiment for nonprofessional occupations.

We believe AILA overstates the possibility DHS will use the occupations listed on Schedule A for the purpose of classifying positions into preference categories. Rather, we have every indication the DHS will continue to make preference classifications according to the job requirements that have been entered on the application for the certified job opportunity. Employers will still be free to provide supporting documentation to the DHS during the petition process, as they do now, to demonstrate the alien's work experience is equivalent to a bachelor's or higher degree if they have specified such on the *Application for Permanent Employment Certification*. We also note this list is not intended to be used to qualify an alien for purposes of eligibility under the H–1B and H–1B1 program. It should also be noted the list of occupations is not part of the *Application for Permanent Employment Certification* (Form 9089).

With respect to the several occupations noted by AILA that may well require a bachelor's degree or equivalent experience, it should be recognized the list is based on work done by the Bureau of Labor Statistics (BLS) to describe the educational requirements of occupations that appear in the *Occupational Outlook Handbook*. In an attempt to improve the classification system used to describe the educational requirements of occupations, the BLS conducted an extensive analysis of the education and training required of all 513 occupations in the national-industry matrix for which employment projections are developed by BLS, not just the 250 occupations covered in the *Occupational Outlook Handbook* As stated in Chapter 1 of the 1996 edition of *Occupational Projections and Training Data*:

> The task proved difficult for several reasons, but principally because for most occupations there is more than one way to qualify for a job. For example, registered nurses may obtain their training in bachelor's degree or hospital diploma programs. The challenge was to determine the training category that best reflects the typical conditions and the preference of most employers.

We are not aware of a more comprehensive data base of occupations that require a bachelor's or higher degree as an entry requirement than the one used to develop the list of occupations in Appendix A. The NPRM published May 6, 2002, at 57 FR 30471, provides background on how the list was developed. (See also *Occupational Outlook Quarterly*, Winter 1995–96, Volume 39, Number 4.) Additional information about the occupations, including their definitions, can also be obtained from O*Net online at *http://onetcenter.org.*

(3) Recruiting and Advertising Requirements

AILA and at least one other commenter were concerned that the designation of an occupation as professional or nonprofessional would restrict the ability of the employer to identify specific education and experience requirements when completing the *Application for Permanent Employment Certification* (Form ETA 9089).

The fact an occupation involved in a labor certification application is listed on Appendix A should have no bearing on the minimum job requirements employers specify for the job opportunity. The job requirements listed on the application form will be determined in accordance with sections 656.17(h) and (i) of the final rule that sets forth the standards for determining the appropriate requirements for a job opportunity. It should also be noted the final rule, unlike the proposed rule, provides standards for the use of

''business necessity,'' alternative requirements, and when experience gained with the employer may be used as qualifying experience. Consequently, the final rule does not contain a provision, as was proposed in the NPRM, that a job requirement for a bachelor's or higher degree does not have to be justified if:

- The occupation involved in the employer's application is on a list of occupations from ETA for which a bachelor's or higher degree is the normal entry requirement for the occupation; and
- The education and training requirements for the employer's job opportunity is consistent with the education and training required for the occupation involved in the employer's application.

5. Required Advertisement Contents

Under the proposed rule, employers were required to place advertisements that apprise U.S. workers of the job opportunity, include a description of the geographic area of employment and any travel requirements, and the offered rate of pay. The advertisement must also include the name of the employer and direct applicants to apply to the employer. The proposed rule was drafted to ensure employers conduct an adequate test of the labor market and document that qualified U.S. workers are unavailable for the job opportunity.

We received comments from more than 30 individuals and organizations addressing the proposed language of the advertisement. Most of the commenters objected to the advertising contents as proposed in the regulation. Comments were also submitted by SWAs and FAIR, which generally supported the proposed requirements for advertisements.

a. Level of Specificity

The most common objection to the proposed rule was that it requires too much detail in the print advertisements. Many commenters echoed AILA's arguments that employers rarely place advertisements that contain a full job description, the employer's name, and the offered salary, but instead place general, less-detailed job search advertisements. AILA further questioned whether we had any proof that this level of detail in advertisements has been found to be more effective than employers' standard practices in recruiting U.S. workers. One law firm commented their experience has been that advertisements with long, detailed job descriptions are seen as legal notices rather than as real advertisements, leading potential job applicants to ignore these detailed advertisements. Another commenter voiced a similar opinion, claiming advertisements designed to satisfy labor certification requirements tell the reader the position is not really available. Instead of a detailed job advertisement, several commenters suggested permitting the use of large catch-all advertisements that cover many occupations but do not include much detail regarding each job opportunity. Because many employers already place these types of advertisements, commenters felt our acceptance of them as qualifying recruitments would allow employers to use pre-existing advertisements that encompass the employer's past recruiting efforts. AILA, as well as several individual attorneys, commented that general job advertisements will attract more applicants than job-specific, detailed advertisements. Employers have used these types of advertisements for applications under the RIR process, and many commenters objected that the proposed regulation would make the use of this format impossible.

In contrast to the commenters who criticized the proposed regulation as requiring too much specificity in the advertisements, a number of commenters expressed concerns that the regulation's language was too vague, and employers would not know what information must be included in the advertisements. Several commenters felt the regulation's use of the term ''apprise'' was ambiguous and could produce confusion among employers. One commenter suggested the proposed regulation's language be changed to reflect that statement of the job title alone is enough, so long as the job title provides enough information to clearly identify the job opportunity. Another commenter inquired whether an employer's recruitment advertisements have to be exact matches with regard to content and salary, or whether they need only match the general terms and conditions of the sponsored position. AILA opined that the regulation's requirement that the advertisement ''describe the vacancy sufficient enough to apprise U.S. workers of the job opportunity'' was too subjective, and proposed an alternative wording of ''provide the occupation, job title, or a description of the position for which certification is sought.''

We believe the proposed regulatory language gives employers flexibility to draft appropriate advertisements that comply, and that lengthy, detailed advertisements are not required by the regulation. The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment; rather, employers need only apprise applicants of the job opportunity. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity. An advertisement that includes a descriptive job title, the name of the employer, and the means to contact the employer might be sufficient to apprise potentially qualified applicants of the job opportunity. Employers need not specify the job site, unless the job site is unclear; for example, if applicants must respond to a location other than the job site (*e.g.*, company headquarters in another state) or if the employer has multiple job sites. If an employer wishes to include additional information about the job opportunity, such as the minimum education and experience requirements or specific job duties, the employer may do so, provided these requirements also appear on the ETA Form 9089.

Employers should note, however, that while they will have the option to place broadly written advertisements with few details regarding job duties and requirements, employers must prepare a recruitment report that addresses all minimally qualified applicants for the job opportunity. If an employer places a generic advertisement, the employer may receive a large volume of applicants, all of whom must be addressed in the recruitment report. Employers placing general advertisements may wish to include a job identification code or other information to assist the employer in tracking applicants to the job opportunity.

b. Advertisement Cost

Several commenters objected to the requirements for the advertisements on the basis of cost, and disagreed with our cost estimate of $500 to place an advertisement that would fulfill the regulation's requirements. AILA commented that suitable advertisements can easily cost over $1,500 each, and would be a significant economic burden for employers. A medical research center commented it has limited funds for advertising, and requiring long advertisements will only benefit publications, not find more qualified workers.

We believe the costs of the mandatory advertisement do not constitute an unreasonable expense. The current regulations already require employers to place advertisements at the employer's expense, whether the employer

conducts recruitment under the auspices of the SWA, or whether the employer submits its application under the RIR process. While Sunday advertising rates are generally higher than rates on other days of the week, the employer may publish a shorter advertisement under this final rule than is required under the current system. Employers also are only required to place two 1-day advertisements, unlike the current system's requirement of a 3-day placement. A representative from DOL contacted major newspapers in various U.S. cities and inquired about advertising rates for Sunday and midweek advertisements. Estimated costs for placing two 10-line Sunday advertisements in these papers ranged from $400 to $1,100, whereas a 3-day midweek advertisement of the same length would cost between $330 and $1,100. The Sunday advertisement costs do not appear to be as high as claimed by the commenters. Further, our program experience is that most 3-day advertisements under the current system are longer than 10 lines, indicating that the two Sunday advertisements will cost less than the 3-day advertisement requirement under the current regulations.

c. Wage Offer in the Advertisement

The vast majority of commenters objected to the inclusion of the wage in the print advertisement. Many contended few real-world employment advertisements include a wage, particularly for professionals and executives. These commenters noted if a salary is included in an advertisement, it is typically for a nonprofessional position and is listed as an hourly amount.

AILA strongly opposed any inclusion of the rate of pay in the advertisement, but proposed if the wage requirement is retained, we allow employers to insert a pay range in the advertisement, provided the bottom of the range is no less than the prevailing wage rate. A number of universities opposed inclusion of the wage, as their normal recruitment efforts often do not include the salary. These commenters noted if the employer wishes to sponsor a foreign worker immediately following the initial recruitment, the employer would not be able to use the advertisements from the original competitive recruitment, as those advertisements would not include the wage. The universities contended that requiring a second round of advertisements merely to include the wage would appear to be punitive. A few commenters noted the wage requirement could create a burden for employers if it is determined the prevailing wage rate used in the advertisement was incorrect and the employer must readvertise with the correct prevailing wage rate. One attorney addressed the issue of confidentiality of salaries, which may vary among the workers in the same position in the same department within the same organization; salary is often discussed last in the interview process and is subject to negotiation. This commenter felt requiring employers to post the offered salary in the advertisement was an unreasonable deviation from the standard practice of professional recruitment.

After review and consideration of both the comments and our program experience reviewing employment advertisements, we have revised this final rule to eliminate the requirement that the wage offer must be included in the advertisement. Lengthy program experience reviewing employment advertisements has indicated that most employment advertisements do not include a wage offer. If an employer chooses to include the wage in the advertisement, the employer may do so; however, inclusion of the wage is not mandatory. If the employer does include a wage in the advertisement, the wage rate must be equal to the prevailing wage rate or higher. Regarding wage ranges, we have not modified the regulation to specifically permit wage ranges; however, consistent with our longstanding policy, the employer may advertise with a wage range as long as the bottom of the range is no less than the prevailing wage rate.

d. Employer's Name in the Advertisement

Commenters also discussed the inclusion of the employer's name in the advertisement. A few commenters claimed requiring employers to include their name on advertisements would conflict with standard practice in many industries, and could lead to disclosure of confidential company information. AILA asserted in certain industries, such as advertising agencies and investment banks, it is routine for employers to place advertisements that do not include the employer's name. AILA suggested as long as the industry, place of employment, and type of position is identified, the employer name need not be included in the advertisement.

FAIR expressed strong support for including the employer's name in the advertisement, asserting most U.S. workers recognize advertisements naming the employer are more likely to represent bona fide openings or vacancies, as opposed to employment advertisements placed for other purposes, such as to test wage rates or identify competitors' key staff. Several SWAs supported inclusion of the employer's name in the advertisement.

Despite the objections of some commenters, the employer's name must appear in the advertisement. Review of employment advertisements clearly indicates the vast majority of these advertisements include the employer's name. The employer's name allows potential applicants to identify the employer, and applicants will be able to better determine if they wish to apply for the advertised position. Applicants also may be unwilling to submit résumés to a blind advertisement, as they can not tell who will receive their résumé. Requiring the employer's name in the advertisement also allows us to match the employer's advertisement to the sponsored job opportunity in the event of an audit. We have concluded these benefits outweigh confidentiality concerns of employers. In addition, we note employers are required by statute to provide notice that the employer is seeking a labor certification for the job opportunity, making it unlikely any of the job information is in fact confidential in nature. See 8 U.S.C. 1182 note.

e. Placement of Advertisement in Newspaper

One commenter recommended the regulation contain language clarifying where in the classified advertisements the advertisement must be placed, to avoid the problem of advertisements being ''buried'' under an inappropriate heading or job title. This commenter noted if an employer places a job advertisement under the wrong keyword or heading, potentially qualified U.S. workers may never see the employer's advertisement. The commenter suggested the regulation be amended to add a requirement that ''the advertisement must be placed where advertisements for the same type of occupation are normally located.''

We have concluded a specific prohibition on buried advertisements need not be included in this final rule. Employers are still required to recruit in good faith and placement of the employer's advertisement under an inappropriate heading or keyword would be considered a failure to make good-faith efforts to recruit U.S. workers. See *H.C. LaMarche Enterprises, Inc.,* (87–INA–607, October 27, 1988)(en banc), *Wailua Associates,* (88–INA–533, June 14, 1989), *Quality Rebuilders Corporation,* (93–INA–144, June 28, 1994). If an application is selected for

audit, we will review the employer's recruitment effort, and if an employer's advertisement were placed under a clearly inappropriate keyword or in the wrong section of the classifieds (such as under ''legal notices,'' rather than ''employment opportunities'' or ''help wanted''), we would conclude the employer's recruitment was not done in good faith and either deny the application or direct the employer to complete additional recruitment under our supervision.

f. Inclusion of Physical Address in the Advertisement

An SWA commenter recommended advertisements be required to include the employer's physical address, in addition to the employer's name. AILA questioned the regulation's requirement that applicants be directed to report to or send résumés to the employer. AILA proposed applicants be directed to report or write to a place, post office box, or e-mail location, and this site need not be the employer's, provided the geographic location of the employer is identified.

As the name of the employer will appear in the advertisement, we see no need to require the employer's physical address in the advertisement. Employers may designate a central office or post office box to receive résumés from applicants, provided the advertisement makes clear where the work will be performed.

g. Inclusion of Posting Requirements in One Advertisement

Another SWA commenter proposed at least one of the mandatory advertisements include the language of the posted notice requirements at § 656.10(d) with respect to furnishing of documentary evidence bearing on the application. The commenter suggested this would provide an opportunity for interested U.S. workers to provide comments or complaints to the DOL, and would balance employers' bias towards the sponsored foreign worker.

This recommendation is inconsistent with this final rule's goal of using the advertisement for recruitment of potentially qualified U.S. workers. Potential job applicants might see the advertisement not as a job opportunity, but as a legal or information notice for the employer, and would be discouraged from applying to the advertisement. Also, a number of other commenters noted advertisements that were clearly for labor certification purposes drew little or no applicants compared to non-labor certification advertisements.

6. Recruitment Report

The final rule continues to provide for pre-filing recruitment, and requires employers to prepare a recruitment report that must be submitted to the CO if requested in an audit or otherwise. The employer's recruitment report must describe the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, summarized by the lawful job-related reasons for such rejections. After reviewing the employer's recruitment report, the CO may request the résumés or applications of the U.S. workers sorted by the reasons they were rejected.

We received comments from 40 individuals and organizations about this section of the proposed regulations.

a. Concerns About Preparing Recruitment Report

Several employers and attorneys and organizations representing employers submitted comments expressing concerns about the feasibility of large companies tracking recruitment results with the level of detail required by the proposed regulation. These commenters recommended employers be allowed to submit an RIR-style recruitment report that would discuss the employer's recruitment in general terms.

ACIP claimed the administrative burden of tracking individual job applications against specific positions would be overly burdensome on the employer, and recommended employers instead be allowed to submit a summary of the employer's overall recruitment results. A high-tech company echoed these comments, and requested the rule be clarified to state that employers need not report on every résumé received and need not track résumés to specific recruitment sources.

AILA asserted the proposed recruitment report's one-job-at-a-time approach is far removed from the business reality of modern businesses, and the proposed rule fails to take into account the added expense for employers to assess job applicants in this fashion. AILA favored adoption of an RIR-style recruitment report, whereby an employer would report the number of openings for the occupation at the beginning and end of the recruitment report, the number of résumés received, the number of applicants interviewed, and the number of hires by the employer for the occupation in the same period. AILA further recommended the level of detail in the employer's recruitment report should depend on whether the employer has recruited for an individual job or recruited for multiple open positions, asserting employers with multiple openings should not have to match every résumé received to an individual job and track its outcome. AILA asserted it was burdensome to require an employer who is constantly recruiting and filing positions to have to summarize the lawful job-related reasons for rejecting each applicant.

In contrast to the recommendations from AILA and ACIP for less-detailed recruitment reports, a union commenter recommended employers be required to submit the recruitment report and copies of applicants' résumés when the application is filed with DOL. FAIR asserted the proposed summary recruitment report fails to provide minimum adequate protection to U.S. worker applicants, who could not determine from the report if they were rejected for legitimate reasons. FAIR proposed employers be required to provide the summary recruitment report to all applicants, with a notice describing how the applicant could file an appeal to the CO. FAIR also recommended the summary recruitment report be subject to the same posting requirements of 20 CFR 656.10(d), so other U.S. workers at the employer's job location are informed about the results of the recruitment process.

A SWA commenter praised the proposed content for the recruitment report, noting under the current RIR process, many large employers avoid providing specific information about numbers of applicants and the employer's reasons for rejecting U.S. workers who apply. This commenter stated large employers claim they have no way to extract position-specific information, because they accumulate résumés from all around the country. The commenter recommended the rule be amended to require applicants to mail their résumés directly to the employer's job site, rather than to a national location, or require employers to include a job identification code with each advertisement, to ensure the employer can match applicants to each job opportunity. This commenter concluded without some type of job-identification system, national employers will make little effort to prepare a breakdown of recruitment results by state and job. Another SWA commenter inquired how the employer's recruitment report would incorporate the results of the job order. The commenter asked if SWAs will be required to provide the employer with a copy of the job order as well as a list of referrals.

The employer has always been required to document that U.S. workers

are unavailable for a sponsored job opportunity. This outcome is compelled by the statutory requirement that the Secretary of Labor certify that qualified U.S. workers are unavailable for the job opportunity. Each application is for a single, specific job opportunity, not for general job opportunities with the employer. Without a nexus between the recruitment report and the application, the Secretary is unable to fulfill the statutory obligation to certify that qualified U.S. workers are unavailable. While it is undoubtedly easier for employers to prepare a general recruitment report that does not track every applicant to a specific position, this type of report is useless for determining whether the employer rejected qualified U.S. workers in favor of the sponsored foreign worker.

We note most of the objections to the recruitment report are based on a comparison of the proposed rule to the type of recruitment report we have accepted under the RIR process. RIR processing rests on a determination there is little or no availability of U.S. workers in an occupation; however, the new system does not contemplate any such front-end determination being made. All applications, including ones for which there may be considerable U.S. worker availability, are treated the same.

In response to numerous comments from employers who receive a large volume of unsolicited resumes, we are not including in the final rule the requirement that the recruitment report identify the individual U.S. workers who applied for the job opportunity. However, the employer retains the responsibility for proving that U.S. workers are not available for the job opportunity. The recruitment report does not impose a new requirement, only a new means by which recruitment information must be submitted when and if we request it. For those employers who run generic help wanted advertisements and are concerned about tracking applicants, employers may run advertisements more closely matched to the relevant labor certification application or include a job code that the employer may use to track responses to the advertisement.

With regard to the recommendations that employers submit copies of the recruitment report and résumés when the application is filed, this proposal is not compatible with the attestation system we have adopted. We believe we can appropriately obtain these materials through the use of the audit letter or other request from the CO. Further, because an employer's failure to submit the recruitment report in response to the audit letter will result in the denial of the employer's application, and may result in the employer being required to undergo supervised recruitment for up to 2 years, we believe employers will have a strong incentive to prepare the recruitment report and promptly submit it if requested during an audit. The employer must provide lawful job-related reasons for rejecting each applicant as part of the recruitment report, which addresses the AFL–CIO's comment that the employer provide a rationale for not hiring U.S. workers who applied for the job opportunity.

FAIR's recommendations are so novel they would require another opportunity for notice and comment before any such rules could be imposed. Moreover, these rules appear to be inconsistent with real-world recruitment practices, in which most employers only tell each applicant the result of his or her individual application. Providing applicants with a report on the decisions made on all applicants to a job opportunity would appear to be problematic due to confidentiality issues.

b. Job Qualification Through Reasonable Period of On-the-Job Training

A few commenters expressed support for the provision in § 656.17(f)(2) of the NPRM, providing that a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training, as a sensible means to protect the interests of U.S. workers. Two SWAs, an attorney, and FAIR supported designating a U.S. worker as qualified if the necessary skills can be acquired during a reasonable period of on-the-job training. FAIR additionally recommended if an occupation has an SVP of 1 year or less, that 1 year be presumptively considered a reasonable period for training, and thus render the labor certification application ineligible for approval if any U.S. workers apply.

A SWA commenter additionally noted many employers will recognize an alien as having the functional equivalent of a college degree, based on a combination of education, training, and experience. This commenter felt employers rarely apply this educational equivalency standard to U.S. workers who apply for the job opportunity, and instead automatically eliminate workers from consideration if their résumés do not list a college degree. The commenter suggested we address this issue when employers reject U.S. workers who lack a college degree.

The overwhelming majority of commenters objected to the proposed language in § 656.17(f)(2) of the NPRM. AILA expressed strong opposition to this proposed language, claiming this rule was derived from DOL's suspicion that employers inflate job requirements when filing labor certifications.

AILA further asserted the proposed rule mandates that every U.S. worker is potentially qualified for a position even if he or she does not meet every minimum requirement, resulting in an over-broad and unmanageable definition of the term ''qualified'' U.S. worker. AILA claimed the proposed rule attempts to reverse the long-accepted rule that an employer may reject a U.S. worker who lacks a stipulated minimum requirement for the position. This would result in a subjective and unmanageable standard of labor certification adjudications and would encourage a substantial volume of litigation over the issue of whether training is feasible.

Requiring employers to consider as qualified U.S. workers who can learn the necessary skills in a reasonable period of on-the-job-training is an important corollary to the long standing regulation, at § 656.24(b)(ii), that provides U.S. workers will be deemed qualified if ''the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed * * *.'' This corollary has been affirmed at the circuit court level in *Ashbrook-Simon Hartley* v. *McLaughlin,* 863 F.2d 410 (5th Cir. 1989), which stated DOL ''can discount * * * job requirements listed by the employer which constitute skills * * * which can be acquired during a reasonable period of on-the job training.''

Most of the commenters erroneously read the proposed rule as stating a U.S. worker who failed to meet the employer's stated minimum requirements, such as educational background, training, or years of employment experience, must be deemed qualified. Under the final rule, as in the current regulations, an applicant's failure to meet the employer's stated minimum requirements is a lawful reason for rejection; however, if a worker lacks a skill that may be acquired during a reasonable period of on-the-job training, the lack of that skill is not a lawful basis for rejecting an otherwise qualified worker. This final rule does not specify what constitutes a reasonable period, as it will vary by occupation, industry, and

job opportunity. The COs are experienced in assessing the qualifications of applicants, and we do not believe this rule will present any difficulty. We disagree with the comments that suggested the rule creates disparate hiring standards for U.S. workers and foreign nationals. Many employers hire applicants with the expectation the applicant will have to undergo some amount of on-the-job training.

Regarding educational equivalencies, we lack adequate information to determine whether a given worker's combination of education, training and experience is the functional equivalent of a college degree. While we are aware some employers will accept a specified degree or its equivalent, we do not see a need to add a requirement that employers consider whether a U.S. worker's experience, training and education is the equivalent of a required degree.

7. Job Requirements

a. Business Necessity Standard and Job Duties

The NPRM proposed retention of the current standard that the employer's job requirements must be those normally required for jobs in the United States and the employer's job requirements must not exceed the number of months or years of training, education and/or experience defined for the SVP level assigned to the occupation as shown in the O*NET. The NPRM also sought to modify the current regulations by eliminating the use of business necessity to justify requirements not normal for the occupation. The NPRM instead proposed that job requirements other than the number of months or years of training, education and/or experience in the occupation would not be permitted unless it could be shown that the employer employed a U.S. worker to perform the job opportunity with the special requirements within 2 years of the filing date of the application, or the special requirements are normal to the occupation.

We received over 50 comments on the proposed elimination of business necessity. Most of the commenters, including AILA and ACIP, were opposed to the proposal. The most common objection was the elimination of business necessity would hurt the economy because the failure to staff positions with qualified workers would prevent employers from meeting marketplace demands and put employers at a competitive disadvantage by causing them to lose out to foreign competitors. One commenter observed the market often demands that new positions be formed or old positions be reformulated, and U.S. businesses should not be hindered by limiting new positions to ones previously held by a U.S. worker. Another commenter, a high-tech employer, viewed the proposal as effectively blocking all emerging technology and evolving positions that did not exist previously.

A few commenters observed that requiring an employer to show it has previously employed a U.S. worker in the position would hurt new companies because these companies may not have had a position open prior to the current position. Other commenters saw the proposal to eliminate business necessity as especially harmful to small businesses that may not have enough work to support more than one person in the position. Some universities noted academic research and original publication would be harmed because a degree and a designated number of years of experience do not capture the full complement of necessary qualifications.

AILA and several others commented there was no factual basis for our rationale for eliminating business necessity. AILA also commented the elimination of business necessity would unjustifiably renounce the legacy of BALCA and the Federal courts, and the proposal ignores a quarter century of cumulative business necessity experience. Another commenter noted the proposed rule contravened the long-held view that ETA would not impose its judgment on business by limiting an employer's actual job requirements for a particular position. SHRM observed the current regulations, coupled with relevant case law, provide U.S. workers with ample protection against illegitimate job requirements. On the other hand, comments by FAIR, a few unions, and SWAs were highly supportive of the proposal to eliminate business necessity, and regarded the proposal as a salutary effort to address employer abuses in the program.

We agree with the majority of commenters that the business necessity standard should be retained in the permanent labor certification program. For the past 25 years, we have permitted employers to use specialized job requirements as long as they could demonstrate their importance to the performance of the job. The administrative difficulties associated with implementation of the business necessity test, although problematic, do not form a sufficient basis for depriving employers of their ability to address legitimate business requirements. While we considered trying to develop a middle ground between the approach in the NPRM and business necessity, commenters did not suggest any solution nor could we identify a middle ground solution. Any alternative to business necessity is likely to be equally subjective, and business necessity is a concept with which we and the employer community are familiar. This final rule marks a return to the status quo by incorporating the standard for business necessity adopted by BALCA in *Information Industries* (88–INA–92, February 9, 1989) (en banc). This final rule provides in § 656.17(h)(1) to establish business necessity an employer must demonstrate the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer.

This final rule also clarifies our long-held position that the regulatory provisions that deal with unduly restrictive requirements and business necessity also apply to unduly restrictive job duties. It has always been our position that applications for labor certification may not describe the job opportunity in an overly restrictive manner, thereby artificially excluding U.S. workers who are minimally qualified for the position. Such restrictions can manifest themselves both as demands that applicants satisfy unnecessary job requirements or they be able to immediately perform every potential job duty, however tangential to the basic occupation.

The O*NET job zones will show the SVP level assigned to the occupation. This final rule provides the job opportunity's duties and requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the SVP level assigned to the occupation as shown in the O*NET job zones. While O*NET may arguably contain broader occupational categories than the DOT, COs have traditionally exercised their judgment in determining whether the job requirements are normally required for the occupation involved in the employer's application and in applying the SVP to specific case situations, and they will continue to make such judgments with O*NET. Employers should be aware that job duties and requirements other than those normal for the occupation must be supported by evidence of business necessity and such evidence will be required in an audit. The language in the NPRM about the justification of a bachelor's or higher degree has been eliminated in this final rule. The inclusion of the business

necessity test, along with the retention of our current policies about what is normally required for the job in the United States, make these provisions unnecessary.

b. Foreign Language Requirement

The NPRM proposed that a foreign language requirement must be supported by a showing that the foreign language was not merely for the convenience of the employer or its customers, but was required based upon the nature of the occupation or the need to communicate with a large majority of the employer's customers or contractors. The use of the business necessity standard for foreign language requirements in the current system produced a well-understood and generally accepted body of case law that has been developed over 2 decades about when and how language requirements can be used. The business necessity standards contained in these established principles were reflected in the proposed rule. Since we are retaining the business necessity standard in the final rule we have modified this final rule in § 656.17(h)(2) by simply providing that a foreign language cannot be included as a job requirement unless it is justified by business necessity.

We received seven comments that specifically addressed the proposed rule on foreign language requirements. FAIR and the AFL–CIO expressed their strong support of the proposed rule. The majority of commenters (employers and attorneys/interest groups representing employers), while generally favoring the proposal, suggested we expand the rule to include other possible business justifications for foreign language requirements. The most frequently cited example was the need to communicate with co-workers or subordinates. AILA, for example, strongly recommended we include the employer's own employees as a potential class of individuals necessitating a language requirement, noting our recognition of the linguistic difficulties of an employer's contractors, but not of the employer's own staff, appeared inexplicable. After careful consideration, we have concluded these comments have merit. Lastly, we think there are working environments where safety considerations would support a foreign language requirement. In some industries and occupations language impediments could contribute to injuries to workers. Accordingly, this final rule adds the need to communicate with co-workers or subordinates to the ways for justifying business necessity for a foreign language requirement. Lastly, we think there are working environments where safety considerations would support a foreign language requirement.

c. Combination Occupations

The NPRM proposed two changes to the current regulations concerning combination of duties. First, it proposed the term ''combination of occupations'' replace ''combination of duties'' because most jobs involve a combination of duties. Second, it proposed a combination of occupations may be justified only by a showing of previous employment of a U.S. worker within 2 years of filing and/or that workers customarily perform the combination of occupations in the area of intended employment. Proof of business necessity, one of three alternative bases to support a combination of duties under current regulations, would not justify a combination of occupations.

We received eight comments on the proposed rule on combination jobs. Two commenters, FAIR and a SWA, supported the proposal. The remaining commenters were opposed to the elimination of business necessity as a basis for justifying a combination of occupations. These commenters maintained the proposed rule would harm U.S. businesses by failing to give employers needed flexibility to merge occupations in a rapidly changing technological and global marketplace. AILA recommended we restore an employer's ability to set forth unusual requirements or combinations of duties via attestation subject to later verification of business necessity in the course of an audit or investigation. Another commenter noted the proposed rule would hurt small employers because many small companies expect their employees to ''multi-task,'' and the smaller the company the more likely an employee would perform a combination of duties.

After careful evaluation, we have determined these concerns are addressed by our decision to retain business necessity in the permanent labor certification program. Therefore, this final rule continues the current standard in § 656.17(h)(3). Combination occupations can be justified in the same way as is presently required for a combination of duties, *i.e.*, the employer must prove it has normally employed persons for that combination and/or workers customarily perform the combination in the area of intended employment and/or the combination job opportunity is based upon a business necessity.

8. Alternative Experience Requirements

We received over 35 comments in response to the proposal to eliminate the use of alternative experience requirements as a means of qualifying for the employer's job opportunity. The vast majority of commenters were opposed to the proposal. These commenters noted alternative experience and educational requirements are a necessary part of recruitment and their elimination would prevent employers from staffing positions in accordance with real-world business practices whereby employers typically interview job candidates and evaluate their skill sets to determine whether the candidate can perform the job. One commenter observed today's résumés do not list past positions, but rather the skills and accomplishments of the individual candidate. ACIP commented that large employers normally use alternative experience or educational requirements when hiring both foreign nationals and U.S. workers because, in their experience, there is more than one possible route to gain the education and skills needed to perform the duties of a position. A university and a high-tech company noted emerging technology and cutting-edge research thrive in an interdisciplinary environment where individuals from seemingly different backgrounds may occupy the same position.

Several commenters observed the proposal seemed counter-productive to protecting the U.S. labor force. AILA and other commenters noted by eliminating alternative requirements, DOL was actually limiting the pool of U.S. workers who may qualify for a position. A few commenters, including AILA, thought it unfair that the proposed rule would prohibit employers from considering any alternative experience possessed by foreign nationals, while at the same time force employers to consider an alternate array of experience and education possessed by U.S. workers, thereby ignoring the reality of the international job market.

Several commenters, including AILA, a high-tech employer, and a few universities, disagreed with DOL's statement in the NPRM that alternative requirements are a phenomenon of lesser-skilled positions. Other commenters stated the NPRM was drawn more broadly than necessary to address DOL's concerns about individuals circumventing the Other Worker visa quota limits. These commenters suggested DOL deal directly with the Other Worker problem by examining whether an alternative requirement was bona fide, reasonable,

and/or normal for the occupation and not by eliminating alternatives altogether.

An immigration law firm pointed out the issue of alternative requirements was addressed by BALCA in the *Matter of Francis Kellogg,* (94–INA–465, February 2, 1998) (en banc). *Kellogg* adopted a reasonable solution that required the employer to accept any and all experience that would reasonably prepare an applicant for the position and not permit an employer to accept only the specific related experience the alien might have, without regard to whether the other experience would prepare the applicant for the position in question. This commenter observed DOL has never implemented the rationale expressed by BALCA in *Kellogg* on a nationwide basis.

Six commenters supported the elimination of the alternate experience requirement. Several SWAs stated that alternative experience requirements enabled foreign workers to easily qualify for available job openings and should be eliminated. FAIR commented that alternative requirements have almost always been used by employers to disguise what are really unskilled jobs as skilled positions in order to promote alien relatives and cronies ahead of law-abiding U.S. applicants. The AFL–CIO said alternative requirements allowed employers to tailor job requirements to the qualifications and experience of the foreign worker rather than the requirements of the job.

We are persuaded by the majority of commenters that there may be legitimate instances when alternative job requirements, including experience in a related occupation, can and should be permitted in the permanent labor certification process. However, we do not agree that proposed § 656.17(g)(4)'s limitations on what an employer may require as an alternative experience requirement must be consistent with the definition of related occupation in § 656.17(j) of the NPRM, because these two sections have distinctly different purposes. Section 656.17(j), now (k) addresses the qualifications of U.S. workers laid off by the employer-applicant. Section 656.17(g), now (h), on the other hand, addresses the qualifications of the alien beneficiary and is designed to prevent an employer from allowing the alien beneficiary to benefit from training and/or experience opportunities not offered to U.S. workers.

Under § 656.17(h)(4) of this final rule, an employer may specify alternative requirements provided the alternative requirements meet the criteria set forth by BALCA in the *Kellogg* case. In *Kellogg,* BALCA indicated that alternative requirements and primary requirements must be substantially equivalent to each other with respect to whether the applicant can perform the proposed job duties in a reasonable manner. There may also be other equally suitable combinations of education, training or experience which could qualify an applicant to perform the job duties in a reasonable manner, but which the employer has not listed on the application as acceptable alternatives. Therefore, even when the employer's alternative requirements are substantially equivalent but the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, the alternative requirements will be considered unlawfully tailored to the alien's qualifications unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.

9. Actual Minimum Requirements

Under the proposed rule, employers would be prohibited without exception from requiring any experience gained by the alien while working for the employer in any capacity, including working as a contract employee or for an overseas company.

DOL received over 40 comments on the proposal to prohibit any experience gained with the employer. The vast majority of commenters, including AILA and ACIP, were opposed to the proposed rule. The objection most frequently made was the proposed rule would significantly harm American businesses and have a chilling effect upon U.S. workers and the economy. These commenters believed the proposed rule would force talented foreign nationals to change employment because they would be unable to obtain permanent residence through their long-term employer. Losing these employees after a substantial investment would undermine the employer's competitive edge because the employees would likely be lost to competing businesses. Several commenters specifically stated the proposed rule inadvertently encourages a system in which only entry level or new employees could be sponsored for labor certification. One university commented the proposal would eliminate the ability of colleges and universities to retain exemplary post-docs, junior researchers, faculty members, and other highly skilled employees who would end up leaving the universities for jobs in industry. Another commenter stated the proposed rule would in particular penalize large medical research centers.

AILA commented that our rationale for the proposed rule lacked supporting statistics, citations, or evidence, empirical or otherwise. ACIP commented that DOL's justification undermined the economic viability of American employers who provide the jobs. These commenters and others recommended the longstanding exceptions to the current rule be retained. In particular, AILA commented that BALCA in *Delitizer Corp. of Newton* (88–INA–482, May 9, 1990)(en banc) already established a mechanism to protect U.S. workers in this situation. In *Delitizer,* BALCA listed a number of factors that could be analyzed, such as the relative job duties and supervisory responsibilities, job requirements, and the positions of the jobs in the employer's hierarchy, to determine whether the alien's experience with the employer should be allowed. Some commenters contended that experience gained on the job should be allowed when it is infeasible for the employer to train a new worker.

Other commenters objected to the inclusion of contract employees within the scope of the proposed rule. One commenter observed that many U.S. companies hire start-up contract employees whom they train and who grow with the business. One commenter stated the inclusion of contract employees was difficult to understand because contracting employers who place contract employees at another firm are, by definition, separate employers.

Relatively few commenters supported the proposed change. These commenters, including FAIR, the AFL–CIO, and several SWAs, complained that U.S. workers had been disadvantaged by the current regulations because employers are not required to recruit for the positions until after the aliens received the full benefit of employer-provided training and experience.

A few commenters proposed DOL take a middle position and retain in some form the exceptions contained in the current regulations. One of these commenters suggested experience gained on the job should be allowed if the alien obtained the experience in a materially different position. Another commenter suggested an exception be made for businesses with 100 or more employees.

a. Dissimilar Jobs

We have concluded that some modification to the proposed rule should be made to accommodate the

legitimate interests of the business community. The inclusion of exceptions to the ban on using experience gained on the job in the 1977 regulations reflected our view that employers filing for labor certification may very well be able to show appropriate instances when the prohibition should not be applied. We agree with the commenters that if the jobs are truly distinct, U.S. workers are not denied training opportunities unfairly gained by foreign nationals with the same employer. Foreign workers, including those working as contractors, are not being trained on the job when they are gaining experience in a truly different job. However, in our experience, the specific *Delitizer* criteria are unnecessarily complex and in practice difficult to administer.

In order to reconcile these competing considerations, this final rule in § 656.17(i) allows the employer to show the alien was hired in or contracted to work in a different job for the employer, but the employer must prove the job in which the alien gained the experience is not substantially comparable to the job for which certification is being sought. A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

b. Infeasibility to Train

With respect to the second exception, we note the ''infeasibility to train'' argument is rarely claimed in practice. Consequently, we have concluded the reinstatement of this exception in this final rule will have little programmatic or operational impact, would acknowledge the legitimate interests of the business community, and would not be inconsistent with our longstanding interpretation of our statutory mandate.

c. Definition of Employer

Concerning the definition of ''employer,'' the proposed rule adopted the position taken by BALCA in *Matter of Haden, Inc.* (88–INA–245, August 30, 1998). We proposed that employer be defined more broadly to include predecessor organizations, successors in interest, a parent, branch or subsidiary, or affiliate, whether located in the U.S. or another country. The comments that spoke to this issue were overwhelmingly negative, particularly with regard to DOL's intention to include overseas employment. One commenter characterized the proposed change as harsh and inflexible. Other commenters pointed out that the broad prohibition against experience obtained overseas would have a wide-ranging negative economic and competitive impact. These commenters asserted many large companies have a global workforce and move talent and personnel as necessary, and the proposed rule would shut U.S. doors to global talent by precluding promotion from within the organization. One commenter claimed excluding experience gained by the alien while working for an affiliate company abroad would actually harm U.S. workers by forcing multinational corporations to consolidate research, development, and manufacturing jobs overseas, instead of transferring these positions to the U.S.

With regard to the prohibition of experience gained with an acquired company, a commenter noted in most instances there is no relationship between the acquiring and acquired company; consequently, the alien has no expectation that he or she would have greater qualifications for the eventual job than an employee working anywhere else. This commenter also observed the proposed rule would impede business expansion and that one of the most valuable tangible assets of a business acquisition is the talent and creative energy of the employees in the acquired company. One SWA expressed concern about the administration of the proposal and questioned how DOL would be able to track and/or separate the different legal relationships (predecessor organizations, successors in interest, etc.) enumerated in the proposed rule.

There were a few commenters that supported the proposed change. FAIR commented it is entirely appropriate for U.S workers to ''pierce the corporate veil'' in the contemporary workplace and commended DOL for adopting the *Haden* standard, which bars permanent certification where a position requires proprietary training or knowledge that only a foreign employee of the employer possesses.

After reviewing the comments, we agree the proposed definition of employer was too broad. Consequently, this final rule in § 656.17(i)(5)(i) has been simplified to provide an employer is ''an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.'' The simpler definition will be easier to administer and strikes an appropriate balance between the legitimate interests of the U.S. business community and DOL's statutory mandate to protect U.S. workers.

10. Layoffs by the Employer

The proposed rule provided that, if there has been a layoff by the employer-applicant in the area of intended employment within 6 months of filing the application, either in the occupation for which certification is sought or in a related occupation, the employer must document it has notified and considered all potentially qualified laid-off U.S. workers of the job opportunity involved in the application and the results of the notification.

For the purposes of § 656.17(j) in the NPRM (§ 656.17(k) of this final rule), a ''related occupation'' is any occupation that requires workers to perform a majority of the essential duties involved in the occupation for which certification is sought.

Several commenters had concerns about proposed § 656.17(j) and discussed issues such as industry and statewide layoffs, CO's knowledge of the layoffs, laid off U.S. workers, contract employees, and the definitions of ''related occupation,'' ''similar jobs,'' ''contract employees,'' and ''layoffs.''

a. Industry and Statewide Layoffs

Two commenters addressed industry or statewide layoffs. A SWA prevailing wage specialist stated Item 10 of Part IV (Recruitment Efforts Information) of the ETA Form 9089 implies the layoffs were only the employer's layoffs. One commenter questioned how the CO would monitor layoffs by other employers as well as the employer-applicant's layoffs.

Under this final rule, the employer-applicant is required to document it has notified and considered only those workers it laid off, not those workers laid off by other employers. The employer must attest on the application form to whether it has laid off employees in the occupation involved in the application in the past 6 months. We do not believe it is reasonable to place such requirements on employer-applicants with respect to workers laid off by other employers in the area of intended employment.

It should be noted that under § 656.21, if the employer is directed to complete supervised recruitment, the CO may take notice of industry layoffs in directing the employer to make additional recruitment efforts; however, the petitioning employer is not required to make attestations about layoffs by other employers in the industry or area of intended employment. This is consistent with our past practices.

b. Knowledge of Layoffs

One commenter questioned how the CO would know whether there were

layoffs if the employer does not inform the CO directly. We note the employer must attest on the application whether it has laid off workers in the occupation in the 6 months immediately prior to filing the application. Further, our program experience has shown that COs are able to determine whether an employer has laid off workers by relying on various sources of information such as Worker Adjustment and Retraining Notification (WARN) notices, newspaper articles, and internet search tools.

c. Laid-off U.S. Workers

One commenter recommended the employer be required to document that all of its laid-off workers (who are actively seeking work) are employed. The commenter indicated the minimum standard for protection of U.S. workers would be to require the employer to document that all of its laid-off U.S. workers (who are actively seeking work) are now employed and working at a wage that is equal to or higher than the prevailing wage rate on the ETA Form 9089.

The final rule requires the employer to document only that it notified and considered potentially qualified U.S. workers. Employers must document they offered the position to those laid-off workers who are able, willing, and qualified for the job opportunity and the results of their consideration of such workers.

Employers are not required to document that all of their laid-off employees are actively seeking work, or have obtained employment at a wage that is equal to or higher than the prevailing wage on the ETA Form 9089. It is not feasible to require an employer to document that its laid-off workers are currently employed and the wages at which the workers are currently employed. For example, laid-off staff may be unreachable, and may be unwilling to cooperate with former employers seeking information about their current employment or salary.

d. Contract Workers

A commenter noted the proposed rule provides an opportunity to require that, when a consulting firm submits a permanent alien labor application, the sponsored workers can not be sent to firms where they would replace U.S. workers. The commenter suggested DOL add a section to the rule requiring consulting firms to document they are not referring workers to a place of employment at which U.S. workers have been laid off from positions similar to the position the foreign worker will occupy.

We are not adding a provision to this final rule requiring consulting firms to document that they are not referring workers to a place of employment at which U.S. workers have been laid off from similar positions. Although this suggestion has merit, we have concluded such a marked departure from current policy and practice should be the subject of another NPRM before it is implemented. We will consider it in future rulemaking to amend the permanent labor certification program.

It should be noted if the employer-applicant is a consulting firm, it, as must any other employer, must attest to any layoffs of its staff in the sponsored occupation in the 6 months prior to filing. We also note contract staff of the employer-applicant are not employees, and need not be included in any assessment of qualifications of laid off U.S. workers.

e. Definition of Related Occupation

One commenter inquired whether § 656.17(j)(2)'s definition of ''related occupation'' was inconsistent with § 656.17(h)'s ban on experience gained with the employer, and suggested DOL redefine related occupation to resolve this inconsistency.

AILA objected to the proposed definition of related occupation. Because the definition includes any occupation that requires workers to perform a ''majority of the essential duties,'' AILA questioned why an employer must consider a worker qualified if he or she can only perform a majority of essential duties of the position offered. AILA contended many of the essential skills may constitute less than half of the job duties, but are required for performing the job. AILA stated DOL's new standard for recruiting U.S. workers, including laid off workers, renders meaningless the longstanding principle that the employer use minimum entry requirements on a labor certification.

We do not consider employment in a different but related occupation, as defined in § 656.17(k), to be inconsistent with § 656.17(i)'s limits on experience gained with the petitioning employer, as these two sections have distinctly different purposes. Section 656.17(k) addresses the qualifications of U.S. workers laid off by the employer-applicant. Section 656.17(i), on the other hand, addresses the qualifications of the alien beneficiary and is designed to prevent an employer from providing the alien beneficiary with training opportunities not offered to U.S. workers. In addition, we note due to the changes made to § 656.17(h) and (i) of this final rule (§ 656.17(g) and (h) of the NPRM), employers may be able to specify experience in a related occupation as qualifying for the job opportunity. See our discussion of alternate experience requirements and actual minimum requirements above.

With regard to the definition of related occupation, some commenters erroneously believed DOL would deem any laid-off employee in a related occupation, who can perform the majority of the job duties, to be qualified. The regulation does not state workers in a related occupation are qualified for the job opportunity, only the employer must notify those workers and consider whether they are qualified.

Similar to the determinations that have to be made under §§ 656.17(g) and 656.24(a)(2)(i), a U.S. worker will be deemed qualified only if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed; or if the U.S. worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training. If audited, an employer may be required to document the lawful job-related reasons for not hiring U.S. workers laid off in a related occupation for the job opportunity for which certification is sought.

f. Definition of Layoff

One commenter suggested DOL expand the term ''layoff'' to include layoff or reduction-in-force or downsizing. The commenter warned employers might attest that the term layoff does not apply to their personnel actions, for example, if workers voluntarily resign and the company reorganizes so the job no longer exists.

We have modified this final rule to clearly define, for purposes of § 656.17(k), a layoff is any involuntary separation of one or more workers without cause or prejudice. This definition includes, but is not limited to, personnel actions characterized by an employer as reductions-in-force, restructuring, or downsizing.

11. Alien Influence and Control Over the Job Opportunity

The proposed rule provided that, if the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners and the alien, the employer must furnish documentation that would allow the CO

to determine whether the job has been and is clearly open to U.S. workers.

a. Number of Employees

Two commenters recommended adding an attestation on the ETA Form 9089 regarding the number of employees. The commenters noted if the alien is one of a few employees, the job may not be open to U.S. workers.

We agree with the comments addressing the possible influence of the alien as one of a small number of employees, and we have added the *Modularsesa Modular Container Systems'* (89–INA–228, July 16, 1991) (en banc) criterion of whether the alien is one of a small number of employees to the regulation at § 656.17(l) (§ 656.17(k) in the NPRM–67 FR at 30474). This factor was listed in the preamble to the proposed rule, but was not included in the regulation at § 656.17(l). We have also added a question to the ETA Form 9089 that asks for the number of employees in the area of intended employment.

b. Familial Relationship Between Alien and Employer

AILA commended DOL for the proposed rule's limitations regarding a beneficiary's ownership interest in the company or familial relationship with the stockholders or the owners. AILA noted, however, a familial relationship alone should not invalidate the job opportunity, and suggested the regulations allow the employer to provide evidence on the issue of undue influence and bona fide job opportunity beyond the topics listed.

In determining whether the job is subject to the alien's influence and control, we will evaluate the totality of the employer's circumstances, using the *Modular Container Systems* criteria listed in the preamble to the proposed rule (see 67 FR at 30474). No single factor, such as a familial relationship between the alien and the employer or the size of the employer, shall be controlling.

c. Ability To Pay the Salary for the Position

One commenter contended questions about the employer's ability to pay should not be eliminated. The commenter stated in cases where the job itself is in question (*e.g.*, there may not be a real company or the employer has been in business for years without any employees), the question of the ability to pay the salary for the labor certification position might become significant in reviewing the case. The commenter suggested a section be added to the proposed rule that specifically addresses the nonexistent or marginal employer. This section, the commenter recommended, should mirror General Administrative Letter No. 1–97, dated October 1, 1996, *Subject: Measures for Increasing Efficiency in the Permanent Labor Certification Process* (GAL 1–97), and state jobs that did not exist before the alien was offered the position may be considered not truly open to U.S. workers unless the employer can clearly demonstrate a change in business operation caused the position to be created after the alien was hired.

As addressed in our discussion of the employer's ability to pay above, we believe the employer's obligation to document and attest that the job is open to U.S. workers provides the CO with sufficient basis to inquire whether an employer is able to pay the offered salary and to place the alien on the payroll and to deny the application on the basis that the job is not truly open to U.S. workers if the employer does not furnish the appropriate documentation. We also noted DHS will assess the employer's financial status as part of the immigrant visa process, and we do not see a need to request duplicative information from the employer. Further, we note GAL 1–97, Change 1, dated May 11, 1999, does not state jobs that did not exist before the alien was offered the position may be considered not truly open to U.S. workers. We have determined such a provision is not realistic with respect to the requirements and operations of newly formed business entities. Consequently, we have not included the language proposed by the commenter in this final rule.

12. Multiple-Beneficiary and National Applications

Under both the current and proposed rules, a separate application must be filed for each alien beneficiary. Two commenters suggested changing the scope of the applications. ACIP and AILA suggested DOL establish a procedure under which one application could be used for multiple beneficiaries. AILA also suggested DOL establish a system for national applications.

a. Multiple-Beneficiary Applications

ACIP believed employers with multiple job openings within the same occupational classification should be allowed to file a single application for multiple positions with unnamed alien beneficiaries. Under the current system, the employer submits individual applications for each alien beneficiary, but often uses exactly the same evidence to support each of the applications. The current process burdens the employers with preparation and submission of multiple applications—identical except for the details concerning the alien beneficiary—and burdens DOL with review of such duplicative applications. A multiple-beneficiary application process would reduce the burden on both the employer and DOL without compromising the protection of U.S. workers afforded under the current system.

AILA recommended DOL consider establishing a procedure under which a single ETA form could be used for a number of openings for the same position. The employer would designate the number of openings and the number of alien beneficiaries on the ETA Form 9089, and would also submit information for each alien beneficiary. DOL would adjudicate the filing as one case, thereby increasing efficiency and avoiding inconsistent results.

Creating a new category of application would conflict with our goal of streamlining processing. This would create more duplication at DOL, and would require development of new regulations, criteria, and means of reviewing such applications.

However, the need for a multiple beneficiary application is largely obviated by the option provided employers by the e-filing process that permits employers who frequently file permanent labor certification applications to set up secure files within the ETA electronic filing system containing information common to any permanent application they may wish to file. As explained above, under this option, each time an employer files an ETA Form 9089, the information common to all of its applications, *e.g.* employer name and address, etc. will be entered automatically, and the employer will have to enter only the data specific to the application at hand.

b. National Applications

AILA recommended DOL consider establishing a procedure for national labor filings. We have concluded it would be inappropriate to authorize national applications. Even if the suggestion could be considered a logical outgrowth of the proposed rule, the concept of a national application appears to conflict with several existing sections of the regulations. While workers in a given occupation may be unavailable in much of the U.S., there often are local or regional areas in which qualified workers are available in that occupation. A national certification could result in the placement of an alien worker in a geographic area that has many available workers in the sponsored occupation. Consequently, a

national certification could adversely affect the wages and working conditions of U.S. workers in the area of actual employment. Additionally, we note certifying national applications using a national average wage could have an adverse effect on the wages of U.S. workers in the occupation, as this wage would be lower than the local wage rate in many areas of employment. Finally, occupations for which there is a national shortage may be appropriately considered for inclusion on *Schedule A.* See our discussion of *Schedule A* above.

L. Optional Special Recruitment and Documentation Procedures for College and University Teachers

The only modification made to the proposed regulations for the optional recruitment and documentation procedures for college and university teachers in this final rule was to revise § 656.18(a) to reflect the elimination of the proposed *Prevailing Wage Determination Request* form and certain elements being incorporated back into the *Application for Permanent Labor Certification.*

Other commenters recommended the expansion of the optional recruitment procedures for college and university teachers to include additional occupations. These recommendations are discussed below.

1. Expansion of the Optional Recruitment Procedures To Include Additional Occupations

a. Inclusion of High-Level Positions

Some commenters urged DOL to expand the scope of § 656.18 beyond college and university teaching positions. A large employer noted the proposed regulation continues the dichotomy between labor certifications for colleges and universities and labor certifications for other employers, under which universities and colleges can select the best qualified candidate while other employers must select a ''minimally qualified'' candidate. This commenter was of the opinion it was no more important in academia than in U.S. industry to pick the best-qualified candidate. The commenter suggested DOL either eliminate the special procedures for academia, or expand § 656.18 to include ''high-level and research positions'' within private companies.

We cannot eliminate the special procedures for academia or expand § 656.18 to include high level and research positions as suggested by the commenter. The current regulations implement the October 20, 1976 amendments to the INA, which provided, as a limited exception to the generally applicable rule, that in the case of aliens who are members of the teaching profession or of exceptional ability in the sciences or arts, the U.S. worker must be equally qualified with respect to the alien. Thus, we cannot expand the scope of § 656.18 to include high-level and research positions within private companies. As noted above in our discussion of *Schedule A,* aliens of exceptional ability in the sciences or arts are included on *Schedule A.*

b. Inclusion of Primary and Secondary School Teachers

A few of the commenters urged DOL to expand the category of college and university teachers to include primary and secondary school teachers. These commenters cited the growing shortage of primary and secondary school teachers in both public and private institutions as more teachers reach retirement, the difficulty in attracting and retaining qualified teachers, and the need for the best and brightest teachers at the pre-college level.

A law firm contended the failure to include primary and secondary teachers in the same category as college and university teachers was unlawful. Citing the INA provisions on certification of U.S. workers, this commenter maintained the Secretary of Labor must certify the availability of ''equally qualified'' rather than ''qualified'' U.S. workers in the case of an alien who is a ''member of the teaching profession,'' and noted the term ''profession'' is defined in the INA to include ''* * *teachers in elementary or secondary schools, colleges, academies, or seminaries.'' The commenter maintained DOL must apply the same certification requirements for both college and university teachers and for elementary and secondary teachers.

The commenter cited a BALCA decision *(In the Matter of Dearborn Public School on Behalf of Anthony Bumbaca,* (91–INA–222, December 7, 1993) to support the argument there is a conflict between the DOL regulations and the plain language of the statute. According to the commenter, BALCA cited an unpublished decision of the United States District Court for Alaska *(Mastroyanis* v. *U.S. Department of Labor,* No. A 98–089 Civil (D.C. AK. May 5, 1989)), which found DOL's regulations limiting the application of the ''equally qualified'' standard to college and university teachers and not applying it to a secondary school teacher were in conflict with the plain language of the INA.

With respect to expanding § 656.18 to include primary and secondary teachers, we have reviewed the statute, the legislative history, and the *Mastroyanis* decision, and have determined not to apply the court's language in Federal court districts outside the District of Alaska. As indicated above, the equally qualified language was added to Section 212(a)(14) (now Section 212(a)(5)(A)(i)) by the INA amendments of 1976. The Judiciary Committee of the House of Representatives stated on passage of the bill that:

> The committee believes the Department of Labor has impeded the efforts of colleges and universities to acquire outstanding educators or faculty members who possess specialized knowledge or a unique combination of administrative and teaching skills. As a result, the legislation included an amendment to section 212(a)(14) [now 212(a)(5)(A)], which required the Secretary of Labor to first determine that ''equally qualified'' American workers are available in order to deny a labor certification for members of the teaching profession * * *. (See H. Rep. No. 1553, 94th Cong., 2d Sess. 11 (Sept. 15, 1976))

In addition, Congressman Eilberg stated during the debate on the amendments to the INA the new language was intended to apply to teachers only at the college and university level.

> Another provision contained in this legislation would address the serious problem that has confronted a large number of colleges and universities in this country. That provision—contained in an amendment to the labor certification section of the Immigration and Nationality Act (section 212(a)(14))—would require the Secretary of Labor to determine that ''equally qualified'' American teachers are available in order to deny a labor certification.

(See 122 Cong. Rec., Part 126, p. 33633 (Sept. 29, 1976))

Reasonably, contemporaneously and consistent with this stated Congressional intent on January 18, 1977, we promulgated regulations to implement the amendment (42 FR 3440 (January 18, 1977)). In the preamble to that rule, we stated we were responding to comments on the proposed rule submitted by the House Committee on Immigration, Citizenship, and International Law, which commented that the provision with respect to teachers was intended by Congress to apply only to educators at the college and university level, not to all members of the teaching profession. This interpretation of the equally qualified provision, which is in the current regulations and the proposed rule, is unchanged for purposes of this final rule because it is more in accord with Congressional intent than the above comments and better serves to protect

U.S. workers from adverse effects than would an expansion of the category to teaching jobs at the elementary and secondary school levels.

M. Live-in Household Domestic Service Workers

Most of the documentation requirements for live-in household domestic service workers are unchanged from the requirements contained in the current regulation. However, certain documentation required on the ETA 750 form will no longer be collected during the application process; instead the regulations provide that employers will be required to supply this documentation if their labor certification applications are audited or as otherwise requested by a CO. Employers will be required to maintain all required documentation and, in the event of an audit or CO request, the employer will be required to submit this documentation to DOL, as well as any other documentation required in order to complete the review.

1. Modifications to the Proposed Rule

We have made two modifications to the proposed rule in this final rule. First, we have made a technical change to the regulations at § 656.19(a) to clarify, consistent with the general instructions at § 656.10(a)(1), that applications for live-in household domestic service workers must be filed under the basic process at § 656.17. Second, we have changed the language in § 656.19(b)(1)(iv) of the proposed regulation from ''whether or not'' a private room and board will be provided to ''that'' a private room and board will be provided, to eliminate an apparent inconsistency with § 656.19(b)(2)(ix), which requires a statement that the employer will provide a private room and board at no cost to the worker.

2. Oversight and Audit of Domestic Service Worker Applications

We received very few comments on the issue of live-in household domestic service workers under § 656.19. One commenter stressed the need for comprehensive auditing of this category of alien workers. Another commenter recommended retaining the SWAs to manage the application process because their staff could be fully dedicated to managing these applications promptly and reducing the current backlog. We anticipate applications submitted on behalf of domestic service workers will be carefully reviewed at ETA's application processing centers. While SWAs are no longer involved in the processing of applications, the SWAs are always free to provide any information they feel appropriate about job offers for live-in domestic workers. As indicated in our discussion of the audit letter process below, we have retained the flexibility to adjust auditing emphasis, as necessary, under this final rule.

3. One (1) Year Experience Requirement

Some commenters suggested maintaining the requirement in the current regulations for live-in domestic workers to have at least 1 year of work experience with someone other than the employer-applicant. One commenter observed, prior to this requirement, applications for alien employment certification were filed on behalf of professionals (*i.e.*, doctors, lawyers, etc.) with no experience in domestic service occupations as a quick way to get into the U.S.

We agree with the commenters who proposed live-in domestic workers should have at least 1 year of paid experience in the occupation. For more than 25 years, we have required proof of 1 year of full-time, paid experience for live-in domestic workers to ensure the alien knows the demands unique to household domestic service work, has some attachment to the occupation, and will likely continue working in this occupation after arrival in the U.S. Our experience has shown persons not previously employed in the occupation for a reasonable length of time generally do not remain in that employment in the U.S. Therefore, we have retained this requirement in the final rule. This requirement does not correlate to the minimum training and/or experience required to perform the job and should not be shown as a requirement for the job opportunity.

N. Audit Letters

We proposed to eliminate the current procedure of issuing Notices of Findings (NOFs). Section 656.20 of the proposed rule provides for the issuance of audit letters, which will be primarily standardized computer-generated documents. This section also provides that the CO's review of a labor certification application may lead to an audit, or other request by the CO, and certain applications also may be selected for audit for quality control purposes. If an application is selected for either reason, the CO will issue an audit letter.

We received approximately 50 comments on the proposed audit letter procedure from SWAs, attorneys, academic employers, and other organizations. Only one commenter suggested retaining the existing NOF procedure. Most of the commenters recommended clarifications or changes to the proposal, including clarification about how audits would be targeted, extension of the 21 day period for reply to an audit letter, and inclusion of specific requirements as to how the audit letters should be delivered to the applicants. Several commenters also discussed the consequences of failure to respond to an audit letter, with most opposing a presumption of a material misrepresentation.

1. Elimination of the Notice of Findings and Contents of the Audit Letter

AILA stated the proposed audit system would leave employers with no reasonable procedure through which they can obtain help in correcting deficiencies or receive guidance on what the CO views the deficiency to be. The absence of a NOF process would in particular hurt employers not represented by counsel. Such employers may have their applications denied because of a single mistake. AILA urged DOL to consider either restoring the NOF or expanding the audit process to allow an audit to be used to identify and resolve labor certification mistakes and deficiencies.

AILA further asserted a standardized, computer-generated audit letter would be essentially useless for the employer, because it would not tell the employer what documentation is truly needed or indicate to the employer if there was a particular problem with the application that needed to be addressed by the submission of additional evidence.

One commenter stated unless the audit letters are drafted on an individual basis and do not rely on boilerplate language, they qualify as data collections under the Paperwork Reduction Act and will require OMB clearance. This would be true, according to the commenter, both for a list of standard templates or situations in which the regional office drafts its own set of templates, as long as the data collector is used more than 10 times in a year.

Another commenter suggested changing the text of the proposed regulation to read: ''Request supplemental information and/or documentation; *and/or* require the employer to conduct recruitment under * * *'' (emphasis added) to ensure the CO can both request additional documentation and simultaneously require the employer to conduct supervised recruitment.

We believe the system outlined in this final rule is more transparent and user-friendly than the current process. The regulations indicate what documentation employers are required

to assemble, maintain, and submit to respond to an audit letter. (Also see 67 FR at 30466 and 30475). We believe a prudent employer would gather the documentation before filing the application and have it available in anticipation of a possible audit. Further, employers will be able to contact DOL if they have questions about the audit letter. It should be considerably easier for employers to prepare an acceptable response to an audit letter than to rebut a NOF.

An audit letter will not be a ''fishing expedition'' as characterized by AILA. We will only request information necessary to make a determination on a specific case or to monitor the system effectively. Not all audit letters will request the same amount of information from employers. Some audit letters will be directed toward specific deficiencies in the employer's application. Others will be issued for general quality control purposes. Both types of audits are necessary to maintain the integrity of the labor certification system.

With respect to one commenter's contention that the audit letters will require OMB clearance, we have concluded the audit letters to be used under this final rule will be within the scope of 5 CFR 1320.4(a)(2) and 1320.4(c), which exclude information collected pursuant to an audit from a ''collection of information'' as defined at 5 CFR 1320.3(c). Because the audit letters are not considered a collection of information, they do not require OMB clearance.

One commenter suggested changing the regulatory language to ensure the CO can request supplemental information and simultaneously require supervised recruitment. No change is warranted because a determination as to whether supervised recruitment is required would not be made until the initial required documentation that the employer must submit in response to the audit letter is received and reviewed.

2. Criteria for Audits

Some commenters stated DOL should establish and publish criteria for when audit letters would be issued. AILA, among other commenters, criticized the proposed rule for not containing any criteria for audits, and contended the type of criteria that might flag a case for audit should be specified so that employers may have a reasonable expectation of the factors that might lead to an audit.

Other commenters, however, opposed making the audit process predictable. FAIR stated immigration attorneys and consultants will quickly be able to learn how to avoid audit triggers by checking a ''safe'' pattern of responses, and thus will manipulate the computer-scanned review process. Another commenter stated employers, attorneys, or their consultants will soon learn to make entries on the application that will pass the scrutiny of the audit process.

Some commenters suggested specific audit criteria. One commenter suggested that 100 percent of applications pertaining to live-in household domestic service workers should be audited, to avoid worker abuse. The AFL–CIO suggested a number of triggers.

Two commenters were concerned that a job already filled by the alien beneficiary would be considered encumbered, and this factor would be important, and perhaps controlling, in prompting an audit. Another commenter stated this would create a particular burden for academic employers.

We believe making the process predictable would defeat the purpose of the audits. Further, we want to retain the flexibility to change audit criteria, as needed, to focus on certain occupations or industries when information leads us to believe program abuse may be occurring in those areas. For these reasons, we are not including audit criteria in this final rule.

The AFL–CIO made a number of suggestions for criteria to use in selecting applications for audit, such as a history of unfair labor practices, workforce composition, or, layoffs in the past 6 months. Currently, when we become aware of such issues, they are considered in determining whether to issue a NOF. Similarly, under the new system, if we become aware of similar issues, they will be considered in determining whether to issue individualized audit letters. It should also be noted employers are required to indicate on the application form whether there is a strike, lockout, or work stoppage in the course of a labor dispute in the occupation in which the alien beneficiary would be employed at the place of employment. Regarding encumbered positions, the fact the job for which the application is filed is encumbered is not a controlling factor in prompting an audit because the overwhelming percentage of these jobs are encumbered.

We anticipate using random-sampling techniques to produce a representative sample of the entire universe of applications. In addition, we will target for audit other applications that appear to have problematic issues. We do not believe it is appropriate to include sampling standards in this final rule because we want the flexibility to change them over time to reflect what we learn through our administration of the program.

3. Sending and Responding to the Audit Letter

Some commenters supported the proposed 21 day time limit for applicants to produce documentation. One commenter stated anyone who had prepared for the application would be able to produce proof, but that 21 days was not enough time to assemble false documentation.

Other commenters were concerned that audit letters would be delayed in the postal system. AILA stated because DOL typically sends its decisions by U.S. mail, they may take from 3 to 10 days to arrive at the employer's or attorney's office. Two academic commenters stated the audit letter should be sent as quickly as possible by fax or e-mail in addition to U.S. mail. Other commenters urged the letters be sent by certified mail, not standard U.S. mail, with one claiming a confirmed delivery requirement is not an unreasonable burden to place on DOL.

To account for possible delays in mail delivery, and for other delays caused by circumstances beyond the control of the employer, we have extended the response time to 30 days. Employers' responses must be sent within the 30-day time limit, but need not be received by DOL by that date. As stated in the preamble to the proposed rule, the employer is expected to have assembled the documentation required before filing the application. None of the commenters stated this expectation is unreasonable.

One commenter stated some records may be purged in the state systems after a short period of time, such as 30 or 60 days, making it impossible to retrieve information by the time an audit is requested.

The *Application for Permanent Employment Certification* requires the employer to provide the start and end date of the job order on the application form to document the job order has been placed. Gathering additional information on the job order from the SWA will not be necessary; therefore, no extension of the response time is warranted for this purpose.

One commenter urged that absent allegations of fraud or misrepresentation, a 90-day limit from the date of the certification decision should be established for when DOL can issue an audit letter. Otherwise, an employer may have obtained an I–140 from the DHS based on an approved labor certification and be proceeding through the adjustment of status process

with the DHS when the audit letter is issued. Another commenter noted the rule provides no guidance on the length of time an employer must maintain documentation. Because the proposed rule authorizes revocation of a labor certification, the commenter recommended DOL specify the time period in which an audit letter may be sent, so employers do not mistakenly assume that once a certification is granted they no longer need to maintain the documentation.

The commenter's proposal that audit letters must be issued no more than 90 days after the certification date is unnecessary. This final rule clearly states audit letters are issued before a final determination is made under § 656.24.

Regarding the retention of supporting documentation, as discussed above such documentation must be maintained for five years from the date of filing.

4. Extensions

Several commenters supported allowing extensions of time to respond to audit letters. AILA stated not allowing extensions under any circumstances is too harsh. Other commenters also supported extensions in appropriate circumstances. One commenter stated the elimination of any possibility of extension of time would deny employers due process.

We have concluded it would be appropriate for this final rule to provide that COs may in their discretion, for good cause, grant one extension up to 30 days for the employer to provide requested documentation.

5. Penalties for Failure To Respond Timely to the Audit Letter

The proposed rule authorized a CO to deem an employer's failure to submit ocumentation in response to an audit letter a material misrepresentation of the employer's attestations that it complied with all documentation requirements. As proposed, if the CO determines a material misrepresentation was made, the employer may be required to undergo supervised recruitment.

Some commenters objected to the proposed rule's definition of a material misrepresentation. One commenter maintained the rule should clarify the definition of ''material misrepresentation'' as used in § 656.20(a)(3)(ii) and recommended DOL use the common law definition of the term to develop the rule definition.

ACIP stated the presumption of material misrepresentation if the 21 day deadline is missed is unduly harsh for good-faith employers and an insufficient deterrent to those trying to defraud the system. ACIP suggested that instead DOL adopt fines and penalties for various levels of misrepresentation similar to those employed in the H–1B context. Another commenter suggested consequences similar to those in the LCA program used in connection with H–1B filings. A SWA recommended that failure to submit information in a timely way be penalized by barring the employer from refiling for at least 6 months.

One commenter stated the automatic presumption of a material misrepresentation is unreasonable. AILA stated the rule's presumption of material misrepresentation ''violates fundamental precepts of fairness.'' AILA noted the audit letter may not be received, the employer may be on vacation, or the response may be lost in transit. After reviewing the comments, we have decided failure to provide supporting documentation will not be deemed a material misrepresentation. Instead, this final rule provides in § 656.20(a)(3) that failure to provide required documentation in response to an audit letter will result in denial of the pending application and may result in an order to conduct supervised recruitment under sections 656.20(b) or 656.24(e) in future filings of labor certification applications. Several commenters mistakenly asserted an employer's failure to provide supporting documentation when requested in an audit letter would invariably result in an order to conduct supervised recruitment for a period of two years; however, we believe it is more reasonable to provide the CO with discretion to review the circumstances in each case to determine whether this penalty will be imposed. For this reason, both §§ 656.21(a) and 656.24(f) state the employer ''may'' be required to conduct supervised recruitment, not that an employer ''shall'' be required to conduct supervised recruitment.

With respect to the recommendations by some commenters to impose fines and penalties (such as debarment of an employer) similar to those employed in the H–1B program, we have concluded that before making such fundamental changes we should publish any fines and penalties we may be considering for notice and comment in a proposed rule. Therefore, we have not included any new fines or penalties in this final rule.

O. Supervised Recruitment

The proposed rule provides in any case in which the CO considers it to be appropriate, post-filing supervised recruitment may be required of the employer. The supervised recruitment will be directed by the CO.

We received approximately 20 comments on this proposal. Commenters suggested the criteria for when a CO may require supervised recruitment should be made more specific. Several commenters questioned whether the CO would have the information and resources necessary to adequately supervise the recruitment. A few commenters discussed the details of the supervised recruitment process itself, including the time limits for an employer to respond to a request from the CO for a report on the supervised recruitment. One commenter questioned the effectiveness of supervised recruitment in general and suggested abandonment of supervised recruitment.

1. Criteria for Requiring Supervised Recruitment

AILA claimed the proposed regulations do not set out any standards or guidelines for when and in what circumstances a CO may order supervised recruitment. The commenter stated this will lead to inconsistent practices. Another commenter contended the proposed rule was unclear about whether supervised recruitment may be required outside the audit process. If so, the criteria used to make the determination should be specified. If not, the text of the proposed rule should be amended to remove the word ''including'' from § 656.20(a)(3)(ii).

One commenter noted the preamble to the proposed rule stated supervised recruitment could be required on the basis of labor market information. However, the commenter suggested there was a potential conflict between the layoff provisions of the proposed rule and the rule's preamble concerning the type of labor market information the CO could rely upon to order supervised recruitment. According to the commenter, the layoff provision (§ 656.17(k) of this final rule) refers to a layoff by the employer applicant, while the preamble includes strongly worded language that the CO may rely upon generic labor market information, including information about layoffs by other companies within the same industry or geographic region.

One commenter noted if the CO believes there is worker availability at the time of adjudication, the CO can order a current test of the labor market although there was no worker availability when the application was filed. The commenter indicated an employer should have the right to request a retest of the labor market in those situations where U.S. workers were available at the time it conducted a test of the labor market. This is

particularly a problem when there has been a lengthy interval between the filing of the application by the employer and the adjudication by the CO and labor market conditions have changed in the interim.

Under the final rule at § 656.21, post-filing supervised recruitment may be ordered in any case where the CO deems it appropriate. As we stated in the preamble to the proposed rule, we anticipate the decision to order supervised recruitment will usually be based on labor market information. However, it is impossible to determine in advance every reason why supervised recruitment may be appropriate. We do not wish to limit the authority of the COs in this regard.

We see no conflict between the layoff provisions of § 656.17(k) (§ 656.17 (j)(1) of the NPRM) and the preamble to the NPRM concerning the type of labor market information the CO may consider in ordering supervised recruitment. While the layoff provision addresses a required part of the employer's recruitment process, layoffs in the area of intended employment may indicate additional recruitment is needed to make an adequate test of the labor market. The main point of the preamble language in our discussion of the layoff provisions is to indicate the proposed rule requiring employers to consider workers they have laid off within a reasonably contemporaneous period of time is consistent with our longstanding position that COs have the authority to consider such workers. See §§ 656.24(b)(2) and 656.24(b)(2)(iii) in the current regulations.

2. Resources of the Certifying Officer

Several commenters questioned whether the CO would have the resources necessary to conduct supervised recruitment. One SWA recommended the proposal to have the CO conduct supervised recruitment should be deleted, because of the lack of resources on the part of the CO. Two SWAs said the COs may not have the capacity to process large volumes of cases requiring supervised recruitment. One SWA stated that given the number of applications filed annually and the small number of regional offices, there was reason for concern about the extent to which regional office staff will be able to assist employers, or to continue to supply the same level of service currently supplied by state and local offices.

Administrative decisions about the way DOL allocates resources are outside the scope of this rule. Therefore, this final rule does not specify how resources shall be used. However, we do believe the COs will be able to handle whatever supervised recruitment is required.

3. Knowledge of the Certifying Officer

Several SWAs felt the CO would not have adequate knowledge of local labor market conditions, experience with the details of state employment service systems, or knowledge of local newspapers. One SWA stated DOL would need to set up an information conduit with the SWAs so DOL will have the necessary information to conduct supervised recruitment. Another SWA stated the knowledge and experience of the SWAs with respect to labor conditions will be entirely ignored under the proposed system, and the rules offer no guidelines by which DOL would be able to make determinations that U.S. workers could acquire the skills of a particular job for a particular employer in a particular area.

The knowledge of the CO and coordination with the SWA is covered in our discussion of the role of the SWA in Section B above. Regarding the lack of guidelines for determining whether U.S. workers could acquire the skills for a particular job opportunity, see our discussion of on-the-job training above.

4. Supervised Recruitment Process

One commenter contended the proposed rule fails to place limits on the CO's ability to designate appropriate sources of workers where the employer must recruit. The commenter claimed there must be some limits imposed on the amount of recruitment required, to avoid multiple rounds of recruitment and even different types of recruitment in different parts of the country, depending on what the CO believes is appropriate.

Two commenters suggested time limits should be established for the CO to approve advertisements, stating that time limits are particularly important when the employer is required to publish in the next-available publication. Another commenter stated supervised recruitment should be required to be completed within 60 days or the application be denied. AILA stated in light of the potential for the CO to require extensive supervised recruitment, the proposed 21 day response period is not sufficient. AILA urged DOL to adopt a longer response period, or, at a minimum, give the CO discretion to extend the 21 day period.

ACIP stated the proposed rule mandates outdated recruitment methods that studies have shown are ineffective at finding qualified workers. This commenter recommended DOL-supervised recruitment be eliminated, and RIR be made the standard for all labor certification applications.

One commenter noted advertising is required prior to filing an application. Because supervised recruitment will take place after filing, the commenter believed the advertising under supervised recruitment will be needlessly repetitive, and could create conflicting descriptions and requirements of the job between the first unsupervised round of advertising and the second supervised round of advertising.

We will not place limits on the CO's authority to designate appropriate sources for recruiting U.S. workers. However, we agree the CO should notify the employer of all appropriate recruitment sources at the outset of the recruitment process, so employers will not be required to go through multiple rounds of recruitment. By and large, this is not a problem under the current system. As we gain more experience with the program, we will issue administrative guidance if appropriate.

There are no statutory requirements that we approve advertisements within any specified time frame; therefore, this final rule does not impose any time limits by which the CO must approve advertisements. One commenter suggested all recruitment be completed within 60 days. We will not impose an overall time limit for the recruitment process; however, we do believe there should be limits at various stages of the process so we can attain closure in the case. This final rule imposes the following time limits: the employer must supply a draft advertisement to the CO for review and approval within 30 days of being notified that supervised recruitment is required. As directed in the letter from the CO approving the advertisement, the employer must advise the CO when the advertisement will be published. The employer must provide to the CO a detailed written report of the employer's supervised recruitment within 30 days of the CO's request for such a report (§ 656.21(e)). This final rule provides in the event required documentation or information is not provided within the 30 days of the date of the CO's request, the CO will deny the application. However, COs in their discretion, for good cause shown, may grant one extension to any request for documentation or information.

The commenter's concern that post-filing supervised recruitment will be needlessly repetitive is misplaced. Post-filing supervised recruitment routinely occurs under the current system; *e.g.*, after a NOF or when an employer's request for RIR processing is denied. Changes in job descriptions and

requirements are routinely needed to correct deficiencies in the original test of the labor market. Program experience has shown these types of changes do not create confusion among employers or job seekers.

Regarding the suggestion that DOL-supervised recruitment be eliminated, we think supervised recruitment is a reasonable quality control measure in an attestation-based system.

5. Technical Correction

We have made a technical correction in § 656.21(b), which now reads: ''If placed in a newspaper of general circulation, the advertisement must be published for 3 consecutive days, one of which must be a Sunday; or, if placed in a professional, trade, or ethnic publication, the advertisement must be published in the next available published edition.''

P. Labor Certification Determinations

1. Referral of Applications to the Division of Foreign Labor Certification

The Notice of Proposed Rulemaking did not provide for referral of applications presenting special or unique problems to the National Certifying Officer for determination, or for the possibility of directing that certain types of applications or specific applications be handled in the national office as provided for in the current rule. We have concluded, however, it would be prudent to retain similar authority in this final rule. Accordingly, this final rule provides for the handling of permanent labor certification applications in certain circumstances at § 656.24(a). We have determined the handling of certain applications in the national office is a matter of agency procedure under the Administrative Procedure Act.

2. Comments on Determination Process

The commenters focused on four issues: able and qualified U.S. workers, time to file requests for reconsideration, whether new information could be included in requests for reconsideration, and material misrepresentations.

a. Able and Qualified U.S. Workers

Comments on able and qualified U.S. workers are essentially covered in our discussion of the recruitment report above. Employers, as well as the CO, must consider a U.S. worker qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.

b. Time to File Requests for Review and Reconsideration

The proposed rule would have reduced the time for an employer to file a request for reconsideration of a denied labor certification application from 35 calendar days to 21 days. Two commenters emphasized the reduction should be eliminated. AILA maintained 21 days is insufficient time to prepare a request for reconsideration because the CO may in his or her discretion treat it as a request for review. Therefore, we agree as much time has to be given to preparing a request for reconsideration as to preparing a request for review.

As with other 21 day deadlines in the proposed rule, we have increased this period from 21 to 30 days in this final rule. We believe this increase in time is warranted because requests for reconsideration may be treated as a request for review by the CO. Additionally, final determinations may be delayed in the mails, and circumstances may arise that are beyond the control of the employer.

c. Submittal of New Information in Reconsideration Requests

One commenter pointed out the proposed rule did not specify whether an employer may submit new information when making a request for reconsideration. The commenter favored allowing employers to provide new information in the request for reconsideration.

Practice under the current regulations does not contemplate consideration of new evidence in requests for reconsideration. This final rule merely codifies the current practice.

d. Material Misrepresentation

If the CO determines the employer made a material misrepresentation with respect to the application for any reason, the employer may be required to conduct supervised recruitment in future filings of labor certification applications for up to 2 years.

As noted above, this final rule has been revised to provide that failure to provide supporting documentation will not automatically be deemed a material misrepresentation. The final rule states that failure to provide supporting documentation in response to an audit letter may result in supervised recruitment under § 656.21(a) or § 656.24(e). Accordingly, § 656.24(f) of this final rule has been revised to provide that the employer may be required to conduct supervised recruitment pursuant to § 656.21 in future filings of labor certification applications for up to 2 years, if the CO determines that the employer substantially failed to produce supporting documentation, or the documentation was inadequate, or a material misrepresentation was made with respect to the application, or it is appropriate for other reasons. It should be noted, however, a CO may determine that supervised recruitment should be conducted, although the 2-year period for which an employer was required to conduct supervised recruitment has expired, for reasons unrelated to those supporting the original supervised recruitment requirement.

Three commenters recommended stricter penalties for material misrepresentations, including debarment.

Since we did not propose stricter penalties in the proposed rule, the final rule does not provide for any such penalties, such as debarment. As indicated above, we have concluded that before making major changes with respect to the imposition of penalties, we should publish any penalties we may be considering for notice and comment in a proposed rule. We will consider the imposition of stricter penalties in any future rulemakings involving the permanent labor certification program.

We have also decided not to make supervised recruitment mandatory for up to 2 years if the CO determines the employer made a material misrepresentation with respect to an application. Such a requirement would result in a determination of how resources would be allocated in the future, possibly resulting in a loss of flexibility to target audits in accordance with program experience, resources, and volume of applications to process.

Q. Board of Alien Labor Certification Appeals Review, Consideration, and Decision Process

1. Technical Changes

Technical Changes were made to § 656.27 to conform to § 656.41 which provides a request for review of a prevailing wage determination of a CO may be made to the Board of Alien Labor Certification Appeals (BALCA) within 30 days of the date of the decision of the CO. Section 656.27 specifically provides that BALCA must review the denial of a labor certification under § 656.24, a revocation of certification under § 656.32, or an affirmation of a prevailing wage determination issued by the SWA under § 656.41.

2. Comments on Proposed Rule

We received six comments on §§ 656.26 and 656.27 regarding the role of BALCA under the proposed system. The comments dealt with three issues: elimination of remands, the time allowed for filing requests for review, and enforcement.

a. Elimination of Remands

We received three comments opposed to the proposal to eliminate BALCA's authority to remand cases to a CO for further consideration or fact-finding and determinations. AILA maintained eliminating BALCA's authority to remand a case would violate the Administrative Procedure Act (APA), which requires every adjudicatory decision to be accompanied by a statement of findings and conclusions. Removing BALCA's remand capability will violate basic, fundamental due process rights by removing the right of parties to be given notice and an opportunity to be heard concerning government decisions affecting their interests. AILA also noted we provided no basis for our stated reason for eliminating remands in the NPRM; namely, that cases would be sufficiently developed by the time they got to BALCA. AILA indicated its experience was just the opposite, and it is not uncommon for BALCA to reverse a CO's decision and then remand the case because it had insufficient information in the record to simply approve it.

Another commenter was of the opinion that cases under the proposed labor certification system will be less developed than they are in the current system when they reach BALCA, as the new system will eliminate assessment letters by the SWAs and NOFs, increasing the chance that cases will need further development when they are reviewed by BALCA.

One commenter indicated if BALCA does not have remand capability, cases involving good faith but inadequate recruitment will be denied instead of being remanded for additional recruitment as they would be in the current system.

After reviewing all of the comments, we have concluded BALCA should not have authority to remand cases to the CO. The processing model that underlies this rule does not contemplate the type of interchange between the employer and the Certifying Officer that is reflected in the current process; thus, it is not apparent what the Certifying Officer would do if a case were ''remanded.'' Accordingly, the final rule does not allow for remands.

b. Time Allowed to File Request for Review

All those who commented on the issue opposed the proposal to reduce the time allowed for an employer to file a request with BALCA for review of a denial or revocation of certification from 35 to 21 days. One commenter noted the reduced time may result in more cases being refiled because of missed filing dates for requesting review. AILA expressed the view that allowing 21 days to file a request for review would not allow sufficient time to craft a proper request for review in light of the time lost in the mail between issuance of a denial and its receipt by an employer. AILA recommended the 35-day period provided in the current regulations to file a request for review be retained.

Another commenter noted one major purpose of the new system is to provide a mechanism for the adjudication of labor certifications, and observed employers are required to meet various 35-day deadlines throughout the current regulations. This commenter suggested to make the entire system responsive, DOL should consider specific time limits for completing its review.

As with the other 21 day deadlines in the proposed rule, we have increased the time allowed to file a request for review to 30 days in this final rule. We believe the time that may be lost in the mail and the time and effort to craft a request for review justifies such an increase. We have concluded 30 days should be sufficient time to file requests for review because employers should have the factual material to support a request for review readily at hand.

We have decided not to impose deadlines on our review activity. There is no statutory requirement that we complete our review activity within a specified period of time. Further, we do not have control over the allocation of resources that might be necessary to adequately respond to an increase in the number of applications filed by employers.

c. Only Employer Can Request Review

We received no comments opposing our proposal that only employers be allowed to request review of a denial or revocation of a labor certification. Accordingly, this final rule provides, as did the NPRM, that only the employer may request review of a denial or revocation of a certification.

d. Debarment of Employers

The AFL–CIO believed in cases where employers using the labor certification program violate labor and employment laws, they should be debarred from using the permanent labor certification program for a period of years. We have concluded providing for a penalty such as debarment should not be made without publishing it for notice and comment in a proposed rule. Therefore, we are not making the requested change in this final rule.

R. Validity of and Invalidation of Labor Certification: Substitution of Alien Beneficiaries and Issuance of Duplicate Labor Certifications

1. Substitution of Alien Beneficiaries

The proposed regulations would conform the provisions of 20 CFR 656.30(c) to the decision of the U.S. Court of Appeals for the District of Columbia in *Kooritzky* v. *Reich*, 17 F.3rd 1509 (DC Cir. 1994) and DOL's operating practice after the U.S. Court of Appeals decision striking down the no substitution rule.

Our program experience, however, indicates the current practice of allowing substitution of alien beneficiaries on approved labor certifications may provide an incentive for fraudulent labor certification applications to be filed with the Department. For example, labor certifications have been submitted on behalf of nonexistent employers, submitted without the knowledge of the employer, or submitted on behalf of employers who are paid for the use of their name. In many cases, the named alien on the application may be fictitious or the same named alien may be used on many labor certification applications. Once an application is certified, it can be marketed to an alien who is willing to pay a considerable sum of money to be substituted for the named alien on the certified application.

The sale, barter or purchase of labor certifications is not condoned or approved by the Department. The Department has concluded the secondary market in approved labor certifications that has developed merely to facilitate the entry of an alien who is willing to pay a substantial sum of money to obtain permanent resident status is not consistent with the purpose of the labor certification statute at section 212(a)(5)(A) of the INA and the Department's labor certification regulations at 20 CFR part 656. The Department will be exploring in the near future regulatory solutions to address this issue. In the interim, we plan to implement the measures described in this final rule to check the bona fides of the employer applicant.

We received a few comments in support of allowing substitution of alien beneficiaries.

2. Issuance of Duplicate Labor Certifications

AILA requested DOL revise the process for obtaining copies of approved labor certifications. Currently, the employer, alien, or agent may request a copy of the approved labor certification only through DHS or a Consular Officer.

AILA stated it understood DOL needs to ensure labor certifications are safeguarded from fraudulent uses, but noted the current process takes an inordinately long time. We agree with AILA that a more efficient system for issuing duplicate labor certifications can be developed without losing existing safeguards to prevent the fraudulent use of duplicate certifications. Therefore, this final rule amends the existing regulation at § 656.30(e) by adding an additional means of requesting a duplicate labor certification. The CO may issue a duplicate labor certification to a Consular or Immigration Officer at the request of the employer or the employer's attorney. The employer's request for a duplicate labor certification must be addressed to the CO who issued the labor certification. The employer's request must (1) contain documentary evidence from the Consular or Immigration Officer that a visa application or visa petition, as appropriate, has been filed and (2) include a Consular Office or DHS tracking number.

S. Labor Certification Applications Involving Fraud or Willful Misrepresentation

Most of the comments on the section of the proposed rule dealing with labor certification applications involving fraud or willful misrepresentation have been discussed above.

The proposed regulation carried over the provisions of the current regulations and included an alternative provision that provided ''(i)f 90 days pass without * * * receipt of a notification from [DHS] that an investigation is being conducted, the CO must continue to process the application.'' However, we are broadening this section to encompass investigations being conducted by other appropriate authorities.

We received two comments about the procedures to be followed with respect to applications that are referred to DHS for investigation. AILA was under the impression that processing of applications would be suspended indefinitely, pending a formal notification from DHS as to whether it will be pursuing a formal prosecution; however, this is not the case. The proposed rule clearly provided that processing is continued if 90 days pass without the filing of a criminal indictment or information, or without being advised by DHS that an investigation is being conducted.

FAIR believed the proposed regulation providing for a 90-day suspension of processing (as in the current regulations) should be eliminated. FAIR maintained it is arbitrary to expect investigations sufficient for criminal investigation or civil suits to be completed in 90 days. FAIR's comments are consistent with our program experience in administering the current regulation requiring processing of an application that has been referred to DHS. In the overwhelming majority of cases, DHS does not provide us with any information as to what action it may have taken with respect to the application we referred for investigation. Our experience indicates it may take DHS longer than 90 days to investigate a matter involving possible fraud or misrepresentation and to determine whether to file a criminal indictment or information. Due to the concerns expressed about fraud by many commenters, and because it is conceivable another investigatory agency could be investigating a matter referred for investigation, this final rule provides that after a matter is referred to DHS for investigation, if 90 days pass without the filing of a criminal indictment or information, or receipt of a notification from DHS or any other investigatory body that an investigation is being conducted or that it intends to start an investigation in the foreseeable future, the CO may continue to process the application.

In light of the general concerns voiced about fraud by commenters we have deleted the requirement that if a matter is referred to the DHS for investigation, the CO must notify the employer, and send a copy of the notification to the alien. Such notification may undermine the purpose of the investigation.

T. Revocation of Approved Labor Certifications

Under the proposed rule, the CO would have limited authority to revoke labor certifications within 1 year of the date the certification was granted or before a visa number becomes available to the alien beneficiary, whichever occurs first (see § 656.32 in this final rule). The proposed rule specified the steps the CO who issued the certification, in consultation with the Chief, Division of Foreign Labor Certification, would have to take to revoke a labor certification improvidently granted.

Several commenters urged DOL to reconsider this provision. Most of the commenters objected to the provision either in whole or in part. Some felt the provision was unnecessary because sufficient enforcement measures are currently in place. Others felt revocation should be limited to cases involving fraud or willful misrepresentation. Most of the commenters asked DOL to articulate the procedural and substantive standards under which certification could be revoked.

1. Criteria for Revoking Labor Certifications

Many commenters requested we develop standards and criteria for revoking labor certifications and define ''improvidently granted.'' Some of these commenters also expressed concern that employers would have no certainty in the workplace unless they knew the criteria by which this provision will be enforced.

A few commenters suggested the only valid reason for revoking a labor certification once it has been granted is if the employer had submitted a fraudulent application or willfully misrepresented its case. One commenter suggested DOL should not be allowed to revoke a labor certification based upon layoffs or changes in market conditions after the certification. Another commenter stated there are innumerable reasons why a visa might not be received within 1 year, including increasing delays at the DHS and U.S. consulates, and that it is unfair to have the fate of an application depend on circumstances beyond the control of the petitioner and beneficiary.

After reviewing all the concerns expressed about possible fraud in the permanent labor certification program by commenters, we have determined it would be inappropriate for Certifying Officers to have only a limited right to revoke a labor certification. Therefore, this final rule provides that a labor certification can be revoked if the Certifying Officer finds the labor certification was not justified, instead of improvidently granted as would have been provided by the proposed rule. This change in the final rule will allow the CO to revoke a labor certification for any ground that would have resulted in a denial of the *Application for Permanent Employment Certification,* whether unintentional or willful.

2. Time Limit for Revocation

One commenter pointed out the time limit for revocation should not be ''until

the visa number becomes available,'' because all employment-based preferences are now current. This commenter suggested the limit should be ''until the I–140 is approved'' or ''until the I–485 is filed'' or ''until a change of status is granted.'' In addition, FAIR urged us to eliminate the 1-year limit on revocation.

We have determined since this final rule will provide the Certifying Officer with the authority to take steps to revoke a labor certification for fraud and willful misrepresentation, obvious errors, or for grounds or issues associated with the labor certification process, there should not be any time limit on the authority of the Certifying Officer to revoke a labor certification.

3. Consultation With National Certifying Officer

We have also determined that a provision in the regulations for consultation with the National Certifying Officer before steps to revoke be taken by the Certifying Officer is not necessary since communication and oversight of application processing and granting of certifications will be greatly enhanced under the new permanent labor certification system. Applications for permanent employment certification will not be processed in regional offices, but in two ETA application processing centers. The Directors of the ETA application processing centers will report directly to the Chief, Division of Foreign Labor Certification rather than to regional administrators. Accordingly, this final rule does not provide that steps to revoke a labor certification have to be taken in consultation with the National Certifying Officer. Provision for such consultation, if it is necessary, can be provided for administratively.

U. Prevailing Wages

The NPRM proposed a number of changes to the regulations governing the determination of prevailing wages. These changes apply to both the permanent labor certification program and the H–1B and H–1B1 nonimmigrant programs. The specific changes are discussed below.

1. Application Process

The NPRM proposed to standardize the prevailing wage determination process by requiring employers to submit a PWDR to the SWA on a standardized form, the ETA Form 9088. A number of commenters had questions about the contents of the ETA Form 9088. Most questions concerned how changes would be made to the job description and how the ETA Form 9088 would be matched to the *Application for Permanent Employment Certification* (ETA Form 9089).

As explained in our discussion to consolidate the ETA 9088 and ETA 9089 into a single application form, under this final rule, the employer will request a prevailing wage determination using the form required by the state where the job opportunity is located. Information from the proposed PWDR form, such as the prevailing wage, occupational code and level of skill, job title, state prevailing wage tracking number, and the date the determination was made will be included on the ETA Form 9089. The state workforce agency PWDR form must be retained by the employer, and will be submitted only if the application is selected for an audit or as requested by the CO.

2. Prevailing Wage Determination Response Time

A few commenters stated the proposed rule should incorporate various time limits for the processing of PWDR's.

One commenter expressed concern that the proposed rule favors the OES survey over published salary surveys, because it will most likely take longer for an employer to get a PWD if the employer relies on a published salary survey. As a result, employers would be pushed into using the OES survey to obtain an earlier immigrant visa priority date for their employees.

We are not imposing specific timeframes on SWAs for making their PWD, as recommended by several commenters. Because there is no set level of resources for funding this activity, and because it is unclear how many challenges and requests for PWD will be received, we believe imposing specific timeframes would be inappropriate. We anticipate SWAs will operate in as expeditious a manner as is possible.

Regarding the concern that a PWD based on employer-provided surveys will take longer than determinations based on OES surveys, we believe the difference is warranted. It takes SWA staff much longer to complete a determination based upon employer-provided wage data. A determination based on an alternative survey requires a review by the SWA of the statistical methodology used in conducting the survey, including a determination as to whether the survey data is based upon a representative sample.

3. Validity Period of Prevailing Wage Determinations

A few commenters requested DOL address the validity period for PWDs. One commenter questioned allowing SWAs to establish validity periods between 90 and 365 days. The commenter stated employers could not be expected to conduct and complete recruitment within 90 days of receipt of a PWD, particularly when involved in ongoing recruitment for multiple positions. The commenter urged DOL to amend the proposed rule so all PWDs remained valid for at least 1 year.

Another commenter asked about the validity period for a PWD based on the Davis Bacon Act (DBA), Service Contract Act (SCA), a collective bargaining agreement (CBA), or an employer-provided or published survey. A SWA strongly recommended all prevailing wage determinations, whether based on the OES, DBA, SCA, a CBA, or employer-provided or published survey, be valid for the same amount of time.

This final rule makes no substantive changes with respect to validity dates as proposed in the NPRM. The SWA must specify the validity of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the date of the determination. Employers are required to file their applications or commence the required pre-filing recruitment within the validity period specified by the SWA.

One commenter believed the proposed rule was ambiguous about the prevailing wage to be paid to employees who immigrate based on a permanent labor certification. The commenter stated it appears that the intent of the proposed rule was for the prevailing wage to be paid upon the employee's immigration or adjustment of status, but it was unclear whether the wage to be paid is the prevailing wage determined pursuant to § 656.40 or the prevailing wage at the time of immigration or adjustment of status.

With respect to this last comment, we note the employer must certify on the ETA Form 9089 (see item N.1 under Employer Declaration) as follows: ''The offered wage equals or exceeds the prevailing wage and the employer will pay the prevailing wage from the time permanent residency is granted or from the time the alien is admitted to take up the certified employment''. This is essentially the same policy expressed on page 34 of *Technical Assistance Guide No. 656 Labor Certifications.*

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

The proposed rule eliminated the mandatory use of DBA and SCA wages, where applicable. Several commenters, including some SWAs and AILA, supported this proposal. These

commenters felt the DBA and SCA were suitable for government contracts but not for other situations, and the OES was a more realistic basis for making a PWD. Labor unions and other commenters, on the other hand, believed the proposed approach would undercut protections for U.S. workers.

The AFL–CIO and the Laborers' International Union of North America (LIUNA) contended that, despite DOL's assertions to the contrary, the proposed approach would decrease administrative convenience for SWAs and DOL. The International Brotherhood of Bricklayers and Allied Craftworkers added administrative convenience was but one reason for using the DBA and SCA wage determinations, the other being to ensure offers of employment do not undercut local wages.

The AFL–CIO also disputed DOL's assertion that BALCA's decision in *El Rio Grande on behalf of Galo M. Narea* (1998–INA–133, February 4, 1998; Reconsideration July 28, 2000) compelled DOL to reconsider its practice of using DBA and SCA wage determinations for alien labor certifications. The AFL–CIO argued BALCA's reference in *El Rio Grande* to the availability of ''other information'' that was a better source for determining prevailing wages than the SCA did not justify a change in DOL practice, and maintained determinations based on the SCA wage are more reliable than those based solely on OES wages.

The International Union of Operating Engineers (IUOE) and LIUNA pointed to DOL presentations and public information describing the strengths and weaknesses of the OES survey and the National Compensation Survey (NCS) to support its argument that the NCS is superior to OES. The IUOE noted problems with using the OES survey: OES data does not provide occupational work levels, use of OES data results in the underestimation of wages of workers in seasonal jobs, and OES data does not include fringe benefit data. The IUOE also suggested employers would choose the methodology that produced the lowest wage rates. LIUNA identified other concerns about the OES survey's reliability, capacity for determining median and mean wages, and ability to collect data for work levels. LIUNA also provided specific examples in which OES wages would undercut the SCA or DBA wage determinations.

The AFL–CIO defended use of the DBA, stating that DBA surveys produce a true ''prevailing wage,'' that is, a wage rate paid more frequently to workers employed in the same job than any other wage rate paid in the same locality. LIUNA added DBA ''universe'' surveys of the construction trades are more reliable than the OES survey because DBA surveys collect wage data not only by job classification, but by type of construction job, which varies widely.

One SWA supported condensing surveys into collective bargaining-derived wages and OES-derived wages. However, the commenter cautioned that until OES could provide coverage for more occupations, particularly in domestic service, SCA determinations should continue.

Two commenters agreed with the provision in the proposed rule that employers be allowed to use DBA and SCA wage rates as alternatives to OES wages. AILA asked the final rule specify that SCA and DBA wages be prima facie evidence of the prevailing wage, should the employer choose to rely on either of these two sources.

We have concluded that, while the use of DBA and SCA as wage data sources of first resort should be eliminated as proposed, employers should have the option of using this data at their discretion. We believe the continued mandatory use of SCA and DBA determinations would continue to complicate the operation of the prevailing wage system because of the differing occupational taxonomies between OES and DBA/SCA.

The suggestion that SCA determinations be retained because SCA wages are more ''accurate'' is not compelling. In many instances SCA determinations are based upon data from the NCS. While the NCS is an excellent, albeit very expensive, source of wage data based on on-site data collection by trained staff, it is limited in scope. Only about 450 occupations in approximately 85 geographic locations are covered, and not all occupations are included in each geographic area. Thus, the NCS is inadequate as a sole source for prevailing wages for the permanent labor certification program, which must deal with a myriad of occupations across the nation. In addition, SCA wage determinations start with data from the NCS, but also incorporate OES data. The SCA also uses a concept known as ''slotting'' when determining a wage for an occupation/area combination for which they have no data. In slotting, wage rates for an occupational classification are based on a comparison of equivalent or similar job duties and skill characteristics between the classification studied and those for which no survey data is available. It would be difficult, if not impossible, to segregate those SCA surveys that are ''better;'' i.e., purely NCS-based from those that use slotting. We do not believe retaining this level of complexity in the prevailing wage determination process is warranted.

We have adopted AILA's recommendation that if an employer chooses to rely on a SCA or DBA wage, that wage generally will be considered prima facie evidence of the prevailing wage. The SWA will not question the employer's use of the SCA or DBA survey as long as it is applied in an appropriate manner. However, should an employer attempt to apply a SCA or DBA wage in an inappropriate manner (e.g., by using the wrong occupational classification, geographic area, or level of skill), the SWA will not accept it as an alternative to the OES wage. At that point, the employer will be free to challenge the SWA's rejection of the SCA or DBA determination by requesting a review by the Certifying Officer.

5. Elimination of 5 Percent Variance

The overwhelming majority of the commenters opposed the proposed elimination of the 5 percent variance. Much of the opposition was driven by the commenters' viewpoint that a margin of error is required when dealing with large surveys, such as the OES survey, that consolidate various sampling points for simplification and are based on historical data that may not represent present market conditions. Commenters believed a variance is needed to compensate for sampling errors, to enable employers to take into account varying levels of worker experience and qualifications, and to allow employers to tailor wages to current economic conditions.

FAIR and a SWA prevailing wage specialist supported the proposed elimination of the 5 percent variance. Two other commenters suggested the variance be increased to incorporate discretionary bonuses and commissions that are included as part of the wages paid in OES surveys. Two commenters requested clarification on whether the regulations eliminate the 5 percent variance for employer-conducted wage surveys and other published surveys.

Several commenters emphasized that eliminating a variance may compel employers to pay foreign workers more than U.S. workers. A university medical center commented the 5-percent variance amounted to a substantial part of its limited funding. Another university observed that elimination of the variance would result in decreased hiring of post-doctoral research fellows.

A few commenters stated a 5 percent variance was essential for the nonprofit sector, given the absence of realistic prevailing wage figures for nonprofit

organizations in current surveys. These commenters alleged that, because DOL has not created a separate wage system database for nonprofits, institutions should be allowed to use private surveys. A few academic institutions also requested DOL recognize alternative wage surveys.

Some commenters predicted a rise in complaints and disputes over PWDs, resulting in increased work for SWAs. Other commenters viewed the elimination of the variance as an unfair burden on small businesses struggling to meet current wage determinations and that they will be unable to remain competitive.

Evaluation of these comments has been rendered unnecessary by the enactment of the Consolidated Appropriations Act of 2005 which amended the INA (Section 212(p)(3), 8 U.S.C. 1182(p)(3)) to require, ''the prevailing wage required to be paid pursuant to (a)(5)(A), (n)(1)(A)(i)(II) and (t)(1)(A)(i)(II) shall be 100 percent of the wage determined pursuant to those sections.'' Therefore, the Department must eliminate the practice of allowing a 5 percent variance of the wage actually paid.

6. Skill Levels in Prevailing Wage Determinations

a. Number of Skill Levels

The NPRM generated considerable comments concerning the fact that the OES wage surveys provide only two levels of wages. Many commenters criticized the OES survey for arbitrarily dividing salary data into two wage levels. Several commenters (including AILA and ACIP) suggested existing OES wage data would be more useful if the number of wage levels were expanded to appropriately differentiate among various occupational groupings.

Evaluation of these comments is rendered unnecessary by the enactment of the Consolidated Appropriations Act of 2005 which amended the INA (Section 212(p), 8 U.S.C. 1182(p)) to provide:

> Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3 the difference between the two levels offered, adding the quotient thus obtained to the first level, and subtracting that quotient from the second level.

b. Inconsistency Among State Workforce Agencies in Assigning Skill Levels

Several commenters alleged there was inconsistency among SWAs in assigning wage levels. To address this issue, we have provided training sessions to SWA staff involved in making PWDs. We have also issued several policy directives to inform SWA staff and other interested parties how the regulations governing the prevailing wage process should be interpreted on this particular issue. We will continue to issue guidance to the field as necessary, including guidance concerning the requirements of the recently enacted legislation.

c. Academic Institutions

A few universities felt the criteria currently used by SWAs to differentiate between Level I and Level II wage level positions, as well as OES survey methodology were inappropriate for academic settings. According to the commenters, for academic positions, OES data are inapplicable because (1) occupational ranking is a foundational element, (2) advanced degrees do not necessarily correlate with practical experience, and (3) entry-level personnel operate with a great degree of independence and little supervision. Several academic institutions also challenged the SWA's automatic designation of Level II to jobs that require an advanced degree.

Evaluation of these comments is rendered unnecessary by the enactment of the Consolidated Appropriations Act of 2005 which amended the INA (Section 212(p), 8 U.S.C. 1182(p)) and mandates the use of 4 levels.

7. Employer-Provided Wage Data

Some commenters applauded DOL's proposal to consider employer-provided alternative wage surveys, and offered alternative surveys they felt DOL should promote for use in determining prevailing wages.

ACIP requested DOL clarify what survey methodologies would be acceptable and what latitude employers would be allowed in using published surveys, particularly regarding survey data gathered for uses other than alien labor certification. Both AILA and ACIP remarked the responsibility for determining whether an employer-provided survey is suitable should not rest with the SWA. ACIP requested DOL authorize SWAs to automatically accept applicable surveys if they had been submitted and approved for use in previous applications.

ACIP also recommended the Bureau of Labor Statistics (BLS) be considered a viable source for prevailing wages for cases in which the job classification is included in the BLS survey. ACIP contended SWAs currently reject the BLS survey as a prevailing wage source primarily because the data include only one skill level for each occupation, and the survey uses a median wage rather than a weighted average. However, ACIP observed this one-wage level BLS survey provides more accurate prevailing wage rate estimates for a given occupation than the two-level OES system.

ACIP criticized the OES survey for violating DOL standards for acceptable employer-provided surveys. Therefore, ACIP requested that such flexibility be afforded employers; *e.g.*, that employers be allowed to use mathematical modeling to generate data for the current timeframe or for a particular location. Similarly, AILA also considered the OES survey to be flawed because it includes discretionary bonuses, commissions, cost-of-living allowances, incentive pay, and piece rates, all of which are contrary to DOL's protocol for determining prevailing wages. Furthermore, AILA criticized the OES survey for failing to provide a weighted average or median of wages, and for listing the number of workers that fit into pre-defined wage ranges rather than including specific salaries of each surveyed worker.

AILA suggested that in cross-industry surveys, DOL should also endorse the use of other reliable surveys. One commenter suggested any standard published survey should be accepted so that employers do not need to wait for extended periods to get their surveys reviewed.

One commenter urged DOL to distinguish between employer-generated and independent surveys, stating only credible independent surveys ought to be recognized, along with prevailing wage surveys conducted by reputable employers. Another commenter opposed the use of employer-provided alternative surveys unless the employer could guarantee that the surveys were as accurate as the current OES data. One commenter expressed the view that SWA personnel were not qualified to review employer-provided wage data.

We do not agree with the comments from AILA and ACIP suggesting responsibility for determining the suitability of employer-provided surveys be taken away from the SWAs. SWAs have historically had a direct role in determining the prevailing wage for each application filed under the permanent labor certification program. This role has always encompassed not only the application of DBA or SCA or

CBA wage determinations, but also review of any employer-provided alternative wage data. Even though the SWAs will no longer process individual labor certification applications under the new system, employers will continue to request SWA review of alternative sources of wage data under the nonimmigrant programs administered by DOL. This will require DOL to fund and maintain individuals with the necessary expertise at the SWA level. At this time, we consider continuing the SWA role in the prevailing wage determination process useful in maintaining the integrity of the labor certification program and to permit the Secretary of Labor to fulfill her statutory responsibility to certify that the employment of the alien will not adversely affect the wages and working conditions of workers similarly employed. However, it is possible that the results of our audit experience under the streamlined labor certification system and the program experience we will obtain may provide information that will help us to determine whether the role of the SWA in reviewing employer-provided surveys and in other aspects determining prevailing wages should be modified or eliminated.

We will continue to provide training opportunities and materials to the appropriate SWA staff on a periodic basis, and will issue administrative policy clarification and procedural guidance as necessary to insure the prevailing wage determination process operates efficiently and consistent with established policies and procedures.

Similarly, we reject the suggestion that alternative sources should not be permitted because SWA personnel are not qualified to gauge the statistical acceptability of surveys. On the contrary, SWA personnel involved in the prevailing wage determination process are individuals with expertise in this program area.

We believe as long as the employer-provided survey meets the criteria outlined in § 656.40(g) of the regulations, or that were described in section J of GAL 2–98 or other guidance issued by ETA, the survey should be accepted by the SWA. It would be extremely difficult, if not impossible, to make any blanket determinations as to what published surveys are or are not credible and independent, or which employers are believed to be reputable or not.

With respect to the suggestion by ACIP that previously submitted and approved surveys be automatically accepted for future applications, we believe that even if the use of a particular survey has been approved in the past, the SWA will still be required to do some minimal review to ensure the survey is being applied appropriately with regard to the occupational classification, geographic area, level of skill, etc. in the current application. However, we encourage SWAs to maintain records of approved surveys and to keep the review of previously accepted surveys to the absolute minimum necessary, without an extensive review of the statistical methodology and other factors that are not likely to differ across multiple reviews of the same survey.

We have accepted ACIP's recommendation that SWAs should accept those BLS surveys that include only one skill level for each occupation and use a median wage rather than a weighted average. A private survey that provides one overall average for an occupation is acceptable under the new system (as it is under the current system). If the survey contains usable wage data for varying levels of skill or responsibility within the occupation, then the appropriate wage level must be used. The SWAs should be following the same policy with respect to BLS surveys as with any other employer-provided wage data submitted for review. We will furnish appropriate guidance to the SWAs so they will accept BLS surveys, as well as private surveys, that include only one skill level for each occupation and use a median wage rather than weighted average.

We do not agree with the assertion by ACIP that the OES survey methodology violates the standards currently in force governing the acceptability of alternative sources of wage data. Along similar lines, we reject AILA's contention that the OES survey is flawed due to the inclusion of discretionary bonuses, commissions, cost-of-living allowances, etc. The wage component of the OES survey measures the average rate of wages that were actually paid to workers in the area of intended employment in the survey year's sample. Under the current policy, as long as payments to a worker that is the beneficiary of a labor certification application are guaranteed by the employer, they can be included in determining whether the wage offered by the employer equals or exceeds the prevailing wage then in effect.

With respect to AILA's criticism that the OES survey fails to provide a weighted average or median and that it does not include the specific salaries of each surveyed worker, we believe the methodology employed in the OES survey is statistically rigorous and defensible. The OES calculated mean wage is the estimated total wages for an occupation divided by its weighted survey employment. With the exception of the upper-ended wage interval, a mean wage value is calculated for each wage interval based on the occupational wage data collected by the BLS Office of Compensation and Working Conditions. The mean wage value for the upper open-ended interval is its lower bound (Winsorized mean). These interval mean wage values are then attributed to all workers reported in the interval. For each occupation, total weighted averages in each interval are summed across all intervals and divided by the occupation's weighted survey employment. Collecting wage data by interval allows BLS to survey a large number of employers while minimizing the burden on those employers. The distribution of workers within the wage ranges is used in both the calculation of the mean wages, and the calculation of relative errors. These reliability statistics are published with the wage estimates.

We further reject the suggestion that employers guarantee alternative sources of wage data are as accurate as current OES data. When we adopted use of the OES survey (with a dramatically smaller number of occupational categories than were available under the DOT), we felt it was vitally important to provide employers with alternative choices of data sources.

The final rule provides, at § 656.40(g), that unless the job opportunity is covered by a CBA, or by a professional sports league's rules or regulations, the SWA must consider employer-provided wage data in determining the prevailing wage. The use of such employer-provided data is an employer option. The SWA's role is merely to determine, based upon whether the survey meets the acceptability criteria set forth in the regulations and that were in section J of GAL 2–98 or other guidance issued by DOL, whether the employer-provided survey is adequate, not whether it is more (or less) accurate than the OES survey.

8. Use of Median

Several commenters commended DOL's proposal to allow the use of surveys that provide median prevailing wages in the absence of the currently required mean or weighted average under current regulation. One commenter opposed the use of a median prevailing wage, stating it would not necessarily represent the average wage of the workers surveyed.

The median is an acceptable measure of central tendency widely used by organizations, including statistical agencies such as BLS, in determining

average rates of wages. Use of the median will only be permitted in the absence of an arithmetic mean. We do not wish to rule out wage surveys that are otherwise acceptable in terms of the statistical methodology employed, but were unacceptable under current regulations solely due to the use of the median (as opposed to the mean) wage.

9. Definition of Similarly Employed

Under the proposed rule, use of a geographic area broader than the commuting distance is acceptable if a representative sample of ''similarly employed'' workers in the area of intended employment can not be obtained. AILA considered this proposal beneficial, because it allows employers to default to CMSA or statewide data when a corresponding MSA survey has an inadequate sample size. Despite this proposed change, AILA believed further adjustments would be needed because many reputable surveys start with the CMSA as the lowest geographical area. AILA also maintained although employees may not commute within the entire CMSA, these are wages that are reasonably uniform and therefore tend not to vary significantly from MSA data. AILA therefore requested that CMSA surveys be considered acceptable.

AILA's recommendation concerning the CMSA is generally consistent with existing policy regarding the area of intended employment. However, we can not agree that CMSAs should always be considered as reflecting the area of intended employment and thus, an appropriate geographic scope for employer-provided wage data. Based on operational experience, we have determined that CMSAs can be too geographically broad to be used in this manner when more specific surveys are available.

Although any location within a CMSA is not automatically deemed to be within normal commuting distance of the place of intended employment, as are locations within a PMSA, there are instances in which the use of a CMSA-based survey would be appropriate; *e.g.,* if an employer can demonstrate it was not possible to obtain a representative sample of similarly employed workers within the MSA or PMSA based upon standard survey practices. Furthermore, if an employer is unable to obtain a representative sample at the MSA or PMSA level, the geographic base of the survey should be expanded. A CMSA survey will be accepted if the employer can demonstrate that all points on a particular survey are within normal commuting distance of the employer. Last, as noted in the response to question 16 from Attachment A to General Administrative Letter No. 1–00, *Prevailing Wage Policy ''Q's & A's''* (May 16, 2000), if the OES survey uses a Level 2 (contiguous) area or, by implication, a Level 3 (statewide) or 4 (nationwide) geographic area, a CMSA would be considered to be a reasonable alternative. We acknowledge that the terminology CMSAs and PMSAs are being replaced by OMB. However, we will continue to recognize use of these area concepts as well as their replacements.

10. Transition of H–1B Workers from Inexperienced to Experienced

Section 212(n)(1) of the INA (8 U.S.C. 1182(n)(1)) requires an employer seeking to employ H–1B workers to attest it will comply with prescribed labor conditions. With respect to wages, the employer agrees it is offering and will offer during the period of authorized employment to H–1B workers wages that are at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. The corresponding provision regarding H–1B1 workers is in 8 U.S.C. 1182(t)(1). As explained in the statutory section above, DOL's H–1B regulations were recently extended to the new H–1B1 program. The statutory wage obligation is described at 20 CFR 655.731(a)(1), in part, as follows:

> The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors.
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> * * * * *
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> Where there are other employees with substantially similar experience and qualifications in the specific employment in question, *i.e.*, they have substantially the same duties and responsibilities as the H–1B nonimmigrant, the actual wage shall be the amount paid to these other employees.

The regulation continues: ''The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information as of the time of filing the application.'' 20 CFR 655.731(a)(2).

In the NPRM, the Department proposed to amend § 655.731(a)(2) to establish an additional requirement where an employer's prevailing wage determination was based on a survey that set more than one wage rate for an occupation listed on the employer's LCA. The Department proposed if an employer, in establishing its prevailing wage determination for the occupational classification, utilizes a survey that provides more than one wage rate or level for that classification, the employer is required to pay the H–1B worker at least the applicable wage rate for the level of work as described by the employer. In making this proposal, the Department stated that if, during the life of the LCA, an entry-level H–1B worker gains experience and the nature of his/her work grows in responsibility, the applicable prevailing wage would be the wage set by the survey for the experienced level.

Twenty-three commenters responded to the Department's proposal. Although there was general support for the premise underlying the proposal, *i.e.,* an H–1B worker should be paid at the wage level appropriate to his duties, the commenters generally opposed the notion that the H–1B wage attestation requirement relating to an employer's prevailing wage obligation mandated the payment of multiple levels of wages. Commenters expressed the following views on the Department's proposal:

- The statute requires only the payment of the prevailing wage appropriate to the position at the time the determination is made; it remains static, not dynamic, as the proposal would require.
- The appropriate response to a material change or increase in the duties of the H–1B worker is to obtain a new prevailing wage determination and LCA and file a new I–129 petition, not the response proposed by the Department.
- The actual wage requirement of the wage attestation, not its prevailing wage prong, addresses the employer's obligation to increase an H–1B worker's pay where the worker gains experience.
- The proposal would require constant out-of-cycle review of H–1B wage rates by employers, perpetually ratcheting up H–1B salaries, with significant economic and paperwork concerns not addressed by the proposal.
- The proposal is ambiguous as to whether a fixed time requirement for paying higher level wages would be imposed.
- Employers are hampered by the predominant use of a two-level system in surveys, which often overstates the salary differential between the levels for some occupations.

• Multi-tiered wage levels should be set for each occupation to better reflect ''real world'' experience. A two-tier wage level is unrealistic where an entry level job by its nature requires considerable independence (e.g., a teacher) or the salary for the second level is markedly higher, e.g., post-doctoral research fellow, medical resident, college instructor, marketing manager.

• The proposed regulation would serve to elevate wages for H–1B nonimmigrant workers while doing nothing to elevate the wages of U.S. workers (treating aliens differently from U.S. workers).

• The Department should preserve this and other H–1B issues for future rulemaking.

As noted, AILA and Microsoft criticized the proposal as exceeding the Department's statutory authority. As stated by AILA: ''The statute clearly contemplates that the prevailing wage determination is made based on the information available at the time of filing the application, and NOT thereafter.'' AILA continued: ''[u]nder the statute, the higher of the actual wage or the prevailing wage as determined at the time of filing is the wage that is paid to the H–1B worker during the period of authorized employment. The statute neither authorizes, nor contemplates, review of the applicability of the prevailing wage to the position after the time of filing.'' In a similar vein, Microsoft objected to the proposal as contrary to statute: ''The statute specifically calls for the prevailing wage determination to be based on information that is available when the application is filed—not information that becomes available later during the life of the petition, if the H–1B nonimmigrant worker's duties change. If the change in duties is sufficiently great, the employer should file a new H–1 petition.'' Microsoft also noted, however, that ''DOL regulations already require the employer to pay the higher of the prevailing wage and actual wage. The employer is obligated to provide H–1B nonimmigrant workers with any pay increases that its actual compensation system provides, and this obligation is ongoing throughout the life of the H–1B petition and LCA. The actual wage obligation is sufficient to ensure that employees receive pay increases in skill level.''

Based on its review of the comments, the Department has decided not to implement the proposal. The Department does not share the view that the proposal would be inconsistent with the statute or necessarily pose all of the practical problems suggested by some of the comments. The Department does, however, believe the ''actual wage'' requirement in the current regulation and the requirement to file a new H–1B petition when the workers' duties change are adequate to ensure that H–1B workers receive the wages appropriate to their duties. In this regard, the Department notes the regulation expressly provides: ''Where the employer's pay system or scale provides for adjustments during the period of the LCA—e.g., cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation—such adjustments shall be provided to similarly employed H–1B nonimmigrants (unless the prevailing wage is higher than the actual wage).'' 20 CFR § 655.731(a)(1). The Department also notes the prevailing wage, even if it remains the required wage during an H–1B worker's placement, will be adjusted upon the expiration of the LCA applicable to his or her employment. Since an LCA has a maximum length of three years, upon renewal a new prevailing wage will be established.

We believe the current regulation will protect H–1B and H–1B1 workers and U.S. workers. By ensuring H–1B and H–1B1 workers receive the full wages due them under the attestation, the Department protects against the erosion of wage or other conditions of employment available to U.S. workers. The regulations provide flexibility to employers in choosing from among the accepted survey methodologies in establishing the prevailing wage for a position to be filled under an LCA, thus eliminating or minimizing any concerns about the difficulties of establishing multiple levels of pay. The Department expects most employers are and will continue to be attentive to their obligation to adjust wages paid to the H–1B or H–1B1 worker if and when their duties and experience require an increase from their beginning required wage. If, upon investigation, questions arise about the appropriateness of the wage paid to an H–1B or H–1B1 worker, the Department will consider all the circumstances bearing on the questions, including the actual and written duties of the worker (at the time the employment began and as they may have changed over time), documentation submitted by the employer in connection with obtaining a prevailing wage determination, the data provided to the employer through the survey it utilized, and the effect upon an H–1B or H–1B1 worker's wages, if any, of adjustments in the employer's actual wage system. As appropriate, the Department will order an employer to pay back wages, and direct further relief to remedy any violation of the wage attestation.

11. Submission of Supplemental Information

One commenter stated that allowing limited opportunities to resubmit PWDR's would save time, as employers currently submit repeated requests in order to secure a different PWD. Another commenter stated the proposed regulations encourage employers to resubmit cases to get better prevailing wage rates, overburdening SWA staff, while in the past, the loss of priority dates discouraged repeat submission of cases. The commenter suggested employers be required to wait a certain amount of time before being allowed to submit a new job description on behalf of the same alien worker. Two commenters asked whether the supplemental filing allowed under the proposed rule (see § 656.40(h)) meant the employer could submit a second survey rather than a supplement to the initial survey.

We believe the concerns of SWA commenters are addressed by the proposed requirement that employers may only submit supplemental information to the SWA one time about the skill level of the job opportunity, the survey it provided for the SWA's consideration, or some other legitimate basis for further review by the SWA. Another commenter suggested the proposed rule at § 656.40(h) should include a provision for handling changes in Standard Occupational Classification (SOC) code due to the inclusion of supplemental information by employers. The commenter also suggested the section include provisions for situations in which there are disputes over issues other than skill level or acceptability of surveys.

In response to the question about the employer's ability to submit supplemental information to a SWA, we note this provision was meant to address situations where the employer disagrees with the SWA about the skill level assigned to the job opportunity, or where there is a need to address issues concerning the rejection of an employer-provided survey or the improper application by the SWA of the appropriate skill level from such a survey. It was not intended to serve as a means for an employer to submit a completely different survey. The submission of a wholly different alternative wage survey by an employer will be considered a new request for a prevailing wage determination and a new review process will be initiated.

Last, it should be noted if the employer submits its own published survey in response to a prevailing wage determination from the SWA that was derived from the OES survey, this submission would not be considered to be the single opportunity the employer has under § 656.40(h) to submit supplemental information regarding a prevailing wage determination. Rather, the submission of an alternative survey by the employer in this situation would be considered a new request for a prevailing wage determination and should be reviewed by the SWA under § 656.40(g), as if the employer had submitted the alternative survey with its initial request. If the SWA then rejects the employer-provided survey as inadequate or unacceptable for any reason, the employer may then submit supplemental information on the survey under § 656.40(h). If, after a review of the employer's supplemental information, the SWA determines the survey is still unacceptable, the employer would then have the opportunity to request a review of the SWA's prevailing wage determination by the CO under § 656.41.

12. Prevailing Wages for Certain Academic, Nonprofit, and Research Entities

A number of commenters, largely university representatives, addressed prevailing wage issues pertinent to nonprofit institutions. Some commenters were concerned DOL had failed to meet its statutory obligation to calculate prevailing wages for the academic community. One commenter urged DOL to meet that obligation by accepting and using wage scales already in place, and suggested a number of sources, including the National Institutes of Health and similar Government agencies, the Journal Academe, and the Council on Teaching Hospitals.

The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Pub. L.105–277, 112 Stat. 2681–641, amended the INA (Section 212(p)(1), 8 U.S.C. 1182(p)(1)) to require the computation of the prevailing wage for employees of institutions of higher education, nonprofit entities related to or affiliated with such institutions, nonprofit research organizations, and Governmental research organizations only take into account the wages paid by such institutions and organizations in the area of intended employment. With respect to commenters' suggestions that DOL has yet to fully comply with the ACWIA mandate in determining prevailing wages for the affected institutions, we continue to believe it may not be feasible to identify the different kinds of entities that might comprise educational institutions' related or affiliated nonprofit entities, or nonprofit research organizations. If those entities can not be identified, it may not be possible for DOL to properly define the universe that should be surveyed to determine the appropriate prevailing wages. It should be noted that despite these difficulties in identifying the appropriate entities to be surveyed, employers are always free to submit alternative sources of wage data that survey individuals employed by the affected entities.

In order to comply with these requirements in the absence of a solution to this issue, the OES data we currently make available is broken out into two data sets. In the absence of a better alternative, we will continue to use the prevailing wage data OES currently collects in surveying institutions of higher education to determine a prevailing wage for one universe consisting of institutions of higher education, affiliated or nonprofit research institutions, and nonprofit research organizations.

We continue to discuss with BLS the possibility of obtaining data for ''Governmental research organizations,'' because pay scales for Governmental research laboratories and other related activities are established by the Federal Government and do not necessarily correspond with the other three types of entities set forth under ACWIA. For this reason, we do not contemplate including Governmental research organizations in the same universe unless the technical problems in determining the prevailing wages for such entities prove to be insurmountable. Although BLS has data from the Office of Personnel Management on Federal wages, it must be determined whether we can extract from that data those wages paid in organizations in which the primary function is research. Until that analysis occurs and it is determined if that information can be used, the prevailing wage data obtained from surveys of institutions of higher education will continue to be used for these types of organizations as well.

13. Role of the SWA in the Prevailing Wage Process

For various reasons, some commenters recommended the elimination of SWAs from the PWD process. AILA asserted that prevailing wage determinations vary widely from SWA to SWA, and suggested regional determinations would produce greater reliability and uniformity for employers. AILA suggested DOL amend the proposed rule to allow employers to obtain prevailing wage data from published, acceptable Government sources, such as OES. The employer's prevailing wage and wage source could then be reviewed at the CO level. The commenters stated this procedure would improve the PWD process by eliminating the expensive step of SWAs determining and assigning wage rates.

Two commenters stated that by requiring a SWA-endorsed PWDR, DOL is missing an opportunity to reduce the resource burden on SWAs. The commenters emphasized that DOL is shifting to an attestation-based labor certification system, and suggested the prevailing wage requirements also shift to such a system. The commenters noted employers are not required to secure a PWD from a SWA in connection with H'1B nonimmigrant applications, and believed they should not be required to do so in the context of permanent labor certification either.

For the reasons provided above in our discussion of employer-provided wage data, we can not agree with the suggestion that the SWA's role in the prevailing wage process be eliminated. The results of our audit experience under the streamlined labor certification system and the program experience we will obtain in administering the prevailing wage function will be considered in considering whether the role of the SWA in determining prevailing wages should be modified or eliminated.

14. Occupational Wage Library

Several commenters discussed issues relating to electronic processing of PWD. A few commenters believed DOL's Online Wage Library (OWL) could be a useful tool in streamlining the PWD process. The commenters all discussed modifying the proposed rule to take advantage of OWL. One of the commenters stated that, by using OWL, employers could bypass direct processing of PWDR's by SWAs, saving both time and resources. The commenter suggested employers could submit computer-generated PWDR forms created by OWL along with the labor certification application. The computer-generated forms could include date stamping or other embedded codes to allow DOL to verify the date the form was generated. The commenter believed such automation of PWDR forms would lead to improved efficiency at the SWA level.

We strongly encourage interested parties to make use of the OWL as a means of identifying prevailing wage rates for positions for which an

employer seeks to employ foreign workers. However, for the reasons provided above in the sections on employer provided wage surveys and the role of the SWA, we do not believe it would be appropriate to automate the prevailing wage determination process in its entirety at this time.

15. Technical Correction

One commenter indicated there was a typographical error at § 656.40(b)(3). The commenter also stated that in § 656.40(g)(2) there is potential confusion in referring to ''other wage data.'' As the term could be open to interpretation, the commenter suggested DOL delete the term ''other wage data'' throughout the section and substitute ''surveys.''

We have corrected the error in § 656.40(b)(3) in accordance with the commenter's suggestion. With respect to the concern with the phrase ''other wage data'' in § 656.40(g)(2), we do not believe it necessary to modify the regulation. This language predates the NPRM and was taken directly from section J of GAL 2–98. The provision in the regulation is intended to highlight the fact that an alternative source of wage data need not be a formally conducted and published wage survey, but could also be an ad hoc set of wage data from a survey that has been conducted or funded by the employer, as long as each of the criteria from section J were met.

16. Miscellaneous Matters

AILA asserted the proposed regulations at §§ 655.731 and 656.40 establish two different standards for determining prevailing wage rates for essentially the same occupations. AILA stated the involvement of two different agencies in the PWD process constitutes an unnecessary two-tier wage system, doubling processing times, opportunities for delay, and the likelihood of errors and inconsistencies. The Immigration Act of 1990 (IMMACT 90), Public Law 101–649, 104 Stat. 4978, first established the attestation process for H–1B ''specialty occupation'' nonimmigrants, and included a prevailing wage requirement under that process. The Conference Report on IMMACT 90 did indeed suggest that ''the prevailing wage to which an employer must attest is expected to be interpreted by the Department of Labor in a like manner as regulations currently guiding section 212(a)(14)'' [now at section 212(a)(5)(A)]. The regulations referred to are the provisions at § 656.40 that govern the prevailing wage process under the permanent labor certification program. However, while the prevailing wage processes under the two programs are as similar as is functionally possible, they have different legislative and programmatic histories. For example, under the permanent program, the employer is required to obtain a prevailing wage determination from the SWA, whether through the use of a CBA, the OES survey, or the submission of alternative sources of data for SWA review. In contrast, under the H–1B program, SWA approval of any particular source of prevailing wage data is not required. As stated in the current regulations at § 655.731(a)(2) ''the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a SESA, an independent authoritative source, or other legitimate sources of wage data.'' While it is correct that under the current regulation, the involvement of both SWAs and ETA regional offices in the prevailing wage determination process constitutes a two-tiered process, with this final rule the process will be streamlined whereby appeals of SWA PWDs will be handled by COs located in ETA processing centers as discussed below.

One commenter recommended DOL institute controls to ensure employers use the correct prevailing wages in job orders and advertisements during recruitment. The commenter also suggested on-site wage and hour audits be conducted to ensure employers are following through and paying employees prevailing wages. While this final rule does not require the employer to include the wage offer in advertisements placed as part of the required pre-filing recruitment, if the wage offer is included, it will be reviewed in the event of audit to ensure it meets or exceeds the prevailing wage for the job opportunity for which certification is sought. With respect to the recommendation that the Wage and Hour Division conduct on-site audits to ensure employer compliance, we have no statutory authority to require this activity.

V. Certifying Officer Review of Prevailing Wage Determinations

The NPRM proposed establishing a Prevailing Wage Panel (PWP) that does not exist under the current regulations. The national PWP would have adjudicated complaints arising from PWD made by SWAs.

Commenters generally supported the creation of the PWP. For example, one prevailing wage specialist considered the PWP to be an excellent idea, stating the PWP would improve consistency of wage determination review and simultaneously would support the efforts of SWAs. Likewise, AILA stated a single adjudicative body would improve resolution of prevailing wage issues. The PWP would help resolve differences in alternative sources of prevailing wage data, for instance, by determining the acceptability of particular surveys and applying the OES survey to wage determinations. While expressing support for the proposed PWP, many commenters also suggested modifications to the proposed rule.

However, because the processing of applications for permanent employment certification will occur in one of two processing centers, we have concluded the establishment of a PWP is not necessary. Each center will be managed by a center director who will report to the Chief, Division of Foreign Labor Certification. Case determinations will be made by COs assigned to the processing centers. The COs will also make determinations with respect to appeals of the prevailing wage determinations issued by the SWAs. It will be considerably easier for the national office to review and provide oversight of the determinations issued by COs located in ETA processing centers. This change in reporting is different than under the former system when the national office did not have line authority over case processing and decisions made by COs with respect to PWDs. Accordingly, uniformity in decision-making with respect to appeals will be enhanced and § 656.41 provides in this final rule, appeals of PWDs issued by SWAs will be decided by a CO rather than by a PWP.

We can not accept the recommendations of several commenters to impose specific time frames on SWAs and the PWP (now the COs in this final rule) in taking actions under the prevailing wage determination and review process. Because it is not possible to anticipate the number of challenges that will be directed to the COs for review, and because there is no set level of resources, we do not believe it would be appropriate to constrain the COs in such fashion at the infancy of the new process. We do, however, anticipate that SWAs and the COs will operate in as expeditious a manner as is possible. Further, in response to comments that the 21 day period during which a request for review must be initiated by an employer is unreasonable and unduly burdensome, we have amended the proposed § 656.41(a) to state an employer requesting a review of a SWA prevailing wage determination must make such a request within 30 days of the date of the determination.

We have also amended § 656.41(a) to correct an inconsistency as to when the period during which the employer may request review of a prevailing wage determination commences. The first sentence stated the employer must make a request for such a review ''within 21 days of receiving a determination from the SWA,'' while the next sentence stated the request for review must be sent to the SWA that issued the prevailing wage determination ''within 21 days of the date of the PWD.'' To remove this inconsistency and to provide greater clarity as to the date upon which the request for review period commences, the final rule has been modified to state in both places it appears that the employer must make a request for review within 30 days from the date the prevailing wage determination was first issued by the SWA. Similarly, we have modified this final rule to provide that a request for review of the determination by BALCA must be made within 30 days of the date of the decision of the CO.

Last, it should be noted the appeal stage of the process is not intended to serve as an avenue for the employer to submit new materials relating to a prevailing wage determination. The employer's submittal of an employer-provided alternative survey subsequent to a prevailing wage determination based upon the OES survey, and the single opportunity to submit supplemental information to the SWA, represent the employer's only opportunities beyond the initial filing to include materials in the record that will be before the CO in the event of an employer request for review under § 656.41.

Executive Order 12866

Several commenters suggested we had not adequately assessed the potentially increased costs the NPRM could impose on employers. Some maintained these costs singularly or collectively would have an economic impact of $100 million or more. These commenters asserted we had not adequately addressed a number of issues in certifying that this rule was not an economically significant regulatory action within the meaning of Executive Order 12866. These issues are discussed below:

1. Impact of Fraud and Abuse

FAIR maintained we are required to conduct a full cost/benefit analysis of the proposed regulatory changes to determine if the regulatory scheme can be tailored to remove or significantly reduce the impermissible burden on society that fraud and abuse in employment-based immigration represents. FAIR, however, did not allege that any fraud or abuse that may exist in the permanent labor certification program would be greater under the new system than it is under the current system. Moreover, the information FAIR provided about the impact of fraud and abuse was not supported by any factual data, was speculative in nature or couched in hypothetical terms. For example, FAIR stated it ''had received indications of a 40 percent fraud and misrepresentation rate of permanent labor certification applications filed in at least one jurisdiction.'' FAIR did not provide any factual information to support a 40 percent fraud rate in any jurisdiction. We do not believe FAIR's unsupported allegations provide a sufficient basis to conclude this final rule is likely to have an annual effect on the economy of $100 million or more.

2. Cost of Advertisements

Several commenters maintained the $500.00 cost per advertisement over all types of publications and geographic locations specified in the Paperwork Reduction Act statement in the NPRM was too low. For the purpose of assessing the economic impact of advertising costs, however, it is not the absolute level of such costs that is important, but the comparison of the costs under the current rule versus this final rule. Our analysis indicates that advertising costs will be lower under this final rule than under the current regulations. As indicated in the preamble on the contents of advertising, employers have the option of writing a considerably less detailed advertisement under this final rule than they do under the current system.

A review of advertising costs was conducted by contacting major newspapers in various U.S. cities and inquiring about advertising rates for Sunday and midweek advertisements. The basis for assessing the costs of the advertisements was two 10-line advertisements. Ten-line advertisements would be permissible under this final rule. Estimated costs for placing two 10-line Sunday advertisements ranged from $400 to $1,100, whereas a 3-day advertisement would cost between $330 and $1,100. It is highly unlikely the cost of Sunday advertisement will be as high as claimed by commenters. Further, we conclude on the basis of our program experience the 3-day advertisements typically placed by employers under the current regulations are considerably longer than 10 lines. Consequently, the two Sunday advertisements required under this final rule will cost less than the 3-day advertisement under the current regulations.

3. Recruitment Reports

AILA maintained we did not address in the NPRM the added expense of a recruitment report that would require employers to track each and every applicant for a position, so the process by which an applicant was deemed qualified or unqualified for the position can be reported on an applicant by applicant basis. AILA indicated this would be particularly troublesome for larger employers.

Requiring employers to track each and every applicant for a position is not a new requirement. This is what the current basic process requires at § 656.21(j). The Department has required this since 1981. Admittedly, we have for the last few years permitted a simplified recruitment report, which did not require employers to track every applicant for a job opportunity, which was the subject of an RIR application. The RIR procedure, however, only applies to those occupations for which there is little or no availability. This procedure is the exception rather than the rule.

However, in response to comments raised with respect to this issue, we have revised our recruitment report requirements by removing the requirement that each individual U.S. worker who applied for the job opportunity be identified on the report. However, the employer retains the responsibility for proving that U.S. workers are not available for the job opportunity and any U.S. worker rejections were for lawful reasons.

It should be noted, however, that we did address the cost of preparing the required recruitment report in the Information Collection Request (ICR) that was submitted to the Office of Management and Budget in connection with publication of the NPRM on May 6, 2002. In the ICR we estimated on average it would take 1 hour for an employer to prepare a recruitment report for each application it files. This estimate included employers preparing recruitment reports under the regular basic process and the RIR process.

The NPRM at 67 FR 30483 indicated how to request copies of the ICR and where to submit comments on the ICR. We did not receive any comments on the average of one burden hour we allocated to the preparation of the recruitment report.

4. Additional Recruitment Steps

AILA maintained DOL failed to address the cost of required additional recruitment steps. According to AILA,

''(p)articipation in job fairs, use of placement agencies, and internet ads can be extremely costly recruitment tools, thus imposing significant additional expenses upon employers who wish to participate in the labor certification process, particularly small employers.''

Under the procedures in this final rule, employers may select from a more extensive list of additional recruitment steps than were listed in the proposed rule. Two of the additional recruitment steps—employer's website and campus placement offices—would require no more than nominal expenditures on the part of the employer-applicant. While some of the other alternative recruitment steps can be expensive, they are not always expensive. Employers can, for example, recruit using a low cost job fair instead of an expensive job fair. Further, we believe the additional recruitment steps represent real world alternatives. The overwhelming majority of employers seriously recruiting workers for U.S. jobs would routinely use one or more of the listed additional recruitment steps. Additionally, it should be noted the alternative recruitment steps only require employers to advertise for the occupation involved in the application rather than the job opportunity involved in the application as is required for the newspaper advertisement. Allowing employers to recruit for the occupation involved in the application should also work to minimize employers costs to conduct special recruitment efforts solely to satisfy the alternative recruitment steps. In sum, we do not believe the cost of additional recruitment steps to the employer will be significant.

5. RIR Recruitment Costs

Some commenters expressed concerns about differences in the cost to prepare and submit an RIR application as compared to the new system would be due to differences in advertising requirements. RIR recruitment efforts and concomitant costs vary with economic conditions. In light of the current labor market and the substantially increased availability of U.S. workers, COs scrutinize applications and the recruitment efforts supporting them more closely than they did during more favorable economic conditions characterized by lower unemployment rates. In the current economic environment, employers are supporting their RIR applications with more extensive recruitment documentation than they were when labor markets were considerably tighter. Our program experience leads us to believe the pre-filing recruitment efforts currently being conducted by employers under the RIR process compare favorably with the pre-filing recruitment required under this final rule. Regardless of whether economic conditions are characterized by tight or loose labor markets, COs require employers to show a pattern of recruitment which requires the employer, as a practical matter, to conduct one or more of the alternative steps required under this final rule. Many employers, regardless of the state of the labor market, place two print advertisements to support their RIR applications. In our judgment, the time and resources employers are expending to conduct recruitment to support their RIR applications is about the same as the time and resources they would have to spend on such activities to obtain the documentation necessary to support their application under the new streamlined program.

6. Business Necessity, Alternative Job Requirements, Combination Occupations, and Experience Gained With the Employer

AILA maintained we failed to assess the economic consequences of the proposed elimination of the use of the business necessity standard, alternative job requirements, combination occupations and experience gained with the employer. However, as discussed above, DOL has decided to retain the business necessity test and allow the appropriate use of these standards and criteria by employers applying for permanent alien employment certifications. Therefore, there is no economic impact from the continued use of business necessity, alternative job requirements, combination occupations and experience gained with the employer that needs to be discussed in this final rule.

7. Elimination of the Five (5) Percent Variance From the Prevailing Wage

AILA maintained that this final rule must explore and discuss the economic effect of the proposed elimination of the provision in the current rule under which the wage offered in a labor certification application is considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. AILA stated the 5 percent variance ''was significant, because it helped to compensate for the fact that DOL's prevailing wage data is outdated, and artificial by comparison [sic] by elements such as bonuses and commissions (elements under the DOL rule, may not be included in the employer's offered wage).''

The policy of not including bonuses in calculating the prevailing wage is a longstanding policy and was not a factor in the decision to permit employers to set forth a wage on the labor certification that was within 95 percent of the prevailing wage. It should also be noted employers were always allowed to base the offered wage on commissions, bonuses or other incentives as long as the employer guaranteed a wage paid on a weekly, biweekly, or monthly basis. (See 20 CFR 656.20(c)(3) of the current regulation and page 34 of *Technical Assistance Guide No. 656—Labor Certifications.*)

The reason for allowing employers to offer a wage that was within 95 percent of the prevailing wage was because we could not always be confident of the statistical precision of the ad hoc telephone surveys of employers that were often conducted by the SWAs to determine the prevailing wage. Since the statistical precision of these ad hoc surveys varied greatly, we believed it necessary to allow some variance in the rate offered by the employer. In reviewing this policy we have determined the basic premise was in one respect flawed as the ad hoc surveys conducted by SWAs were as likely to be inaccurate on the low side as on the high side.

As indicated in the preamble, since the introduction of the OES program in 1998, we have determined it is no longer necessary to provide the 5 percent variance. The wage component of the OES survey is conducted by BLS and with the exception of the Decennial Census is the most comprehensive survey conducted by an agency of the Federal Government. The OES program surveys approximately 400,000 establishments per year, taking 3 years to fully collect the sample of 1.2 million establishments. This sample covers over 70 percent of the employment in the U.S. See 67 FR at 30479. The comprehensive nature of the OES program and resulting degree of statistical precision make it unnecessary to provide a 5 percent variance which was, as indicated above, based on a flawed premise.

Further, we have determined that, in view of the greater accuracy of PWD under the OES program, the Secretary would not be fulfilling her statutory responsibility to certify that the employment of the beneficiary of a labor certification application will not adversely affect the wages and working conditions of U.S. workers similarly employed if she continued to certify applications whereby employers were allowed to pay 95 percent of the

prevailing wage as determined by the SWA.

8. Attorney Fees

One commenter stated the proposed rule will add up to 10 hours of additional attorney time and will cost from $800.00 to $2,500 per case. Legal fees are not appropriate to include in any estimate of financial impact. Attorney representation is not necessary to file an *Application for Permanent Employment Certification.*

9. Cost of In-House Compliance

One commenter stated the cost of $25.00 per hour for the 557,429 burden hours provided in item 12 of the supporting statement to the Information Collection Request submitted to OMB significantly understates the true costs of such employees by at least 100 percent. We believe the $25.00 an hour used in the ICR to compute the cost for burden associated with this rulemaking is fair and reasonable. According to the 2001 National Occupational Employment and Wage estimates published by BLS, the national average wage for employment recruitment and placement specialists amounted to $21.31. In the main, we believe employment recruitment and placement specialists fairly represent the skills and work experience required to comply with the paperwork requirements of this final rule.

Based on the foregoing, we certify, as in the NPRM, that this final rule is not an ''economically significant regulatory action'' within the meaning of Executive Order 12866. The direct incremental costs employers will incur because of this rule, above business practices required by the current rule of employers that are applying for permanent alien workers, will not amount to $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities. DOL believes any potential increase in recruitment and recordkeeping costs associated with the proposed rule will be more than offset by the combination of eliminating the role of the SWAs in the recruitment process and, consequently, eliminating the time employers currently spend in working with SWAs to meet regulatory requirements. Further, the expected large reduction in the time to process applications will lead to a reduction in the resources employers spend on processing applications and will eliminate DOL's need to periodically institute special, resource intensive efforts to reduce backlogs, which have been a recurring problem under the current process. Any cost savings realized, however, will not be greater than $100 million.

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

Regulatory Flexibility Act

We have notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification under the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule will not have a significant impact on a substantial number of small entities. The final rule will affect only those employers seeking immigrant workers for permanent employment in the United States. Since any employer can file a permanent application for permanent employment, the Department considers the appropriate universe to determine the impact of the final rule on a substantial number of small entities in the United States is the universe of small businesses in the United States. The Department estimates in the upcoming year 60,000 employers will file approximately 100,000 applications for permanent employment certification. Some large employers file several hundred applications in a year. Therefore, the number of small entities that file applications is significantly less than the 60,000 employers that will file applications in the coming year. According to the Small Business Administration's publication The Regulatory Flexibility Act; An Implementation Guide for Federal Agencies, there were 22,400,000 small businesses in the United States in 2001. Thus the percentage of small businesses that file applications for permanent alien employment certification is 0.27 percent (60,000 22,400,000 = 0.27%). The Department of Labor asserts a small business pool of 0.27% does not represent a substantial proportion of small entities.

When the proposed rule was published, the Department notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule would not have a significant impact on a substantial number of small entities. The Chief Counsel did not submit a comment.

Unfunded Mandates Reform Act of 1995

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

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996 (SBREFA). The standards for determining whether a rule is a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act are similar to those used to determine whether a rule is an ''economically significant regulatory action'' within the meaning of Executive Order 12866. Because we certified this final rule is not an economically significant rule under Executive Order 12866, we certify that the final rule is not a major rule under SBREFA. It will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132

We received one comment maintaining that a summary impact statement should be required prior to any passage of these rules. The commenter maintained the impact of an increased number of aliens entering the various states will be substantial. The commenter went on to state: ''If, for example, in California there are 10,000 aliens and their spouses and minor children entering the state each year as a result of fraudulent and misrepresented labor certifications, U.S. workers will have fewer job opportunities and community resources will be additionally taxed for the provision of various services at the expense of lawful state residents.'' The permanent alien labor certification regulations do not affect the numbers of immigrants entering the United States each year under various visa categories, including work-based visas. Those numbers are fixed by statute. Further, the Department sees no basis for the speculation the rule will result in an increase in fraudulently obtained labor certifications. For those reasons, we have determined the rule will not have a substantial and direct impact on the

states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government.

Assessment of Federal Regulations and Policies on Families

The proposed regulation does not affect family well-being.

Paperwork Reduction Act

Summary: This final rule contains revised paperwork requirements that are necessary to the implementation of the revised labor certification program. The revised paperwork requirements are discussed in detail in section V of the preamble that addresses the comments received on the proposed rule and in the section that discusses the comments relevant to the Department's certification under Executive Order 12866 that this final rule is not an ''economically significant regulatory action.''

Respondents and frequency of response: Employers submit an *Application for Permanent Employment Certification* when they wish to employ an immigrant alien worker. ETA estimates, based on its operating experience that in the upcoming year employers will file approximately 100,000 applications for alien employment certification (including an estimated 5,300 applications filed with the DHS on behalf of aliens who qualify for Schedule A or who are immigrating to work as sheepherders), for a total burden of 125,000 hours (100,000 applications for permanent employment certification × 1.25 hours = 125,000 hours).

The Department estimates the total annual burden for all information collections in the final rule amounts to 255,980 hours. Employers filing applications for permanent employment certifications come from a wide variety of industries. Personnel costs for employers and/or their employees who perform the reporting and recordkeeping functions required by this regulation may range from several hundred dollars to several thousand dollars where the corporate executive officer of a large company performs some or all of these functions themselves. Absent specific wage data regarding such employers and employees, respondent costs were estimated in the proposed rule at an average of $25.00 an hour. Based on the forgoing, the total annual respondent costs for all information collections are estimated at $6,399,500.

The Department estimates that 5,000 employers will be required to conduct supervised recruitment. The Department estimates the cost of an advertisement over all types of publications and geographic locations will average $500.00 for a total annual burden of approximately $2,500,000.

The paperwork requirements discussed in the preamble to this final rule will not become effective until OMB has reviewed and approved these requirements and assigned an OMB approval number. A copy of the current draft of ETA Form 9089 and instructions follow this final rule.

Catalogue of Federal Domestic Assistance Number

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

List of Subjects in 20 CFR Parts 655 and 656

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

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

Note: Appendix A will not be codified in the Code of Federal Regulations.

BILLING CODE 4510–30–P

Appendix A to the Preamble-Professional Recruitment
Occupations - Education and Training Categories
by O*NET – SOC Occupation

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

O*NET-SOC code	O*NET-SOC title	Education & training category code
21-2011.00	Clergy	1
23-1011.00	Lawyers	1
29-1011.00	Chiropractors	1
29-1021.00	Dentists, General	1
29-1022.00	Oral and Maxillofacial Surgeons	1
29-1023.00	Orthodontists	1
29-1024.00	Prosthodontists	1
29-1041.00	Optometrists	1
29-1051.00	Pharmacists	1
29-1061.00	Anesthesiologists	1
29-1062.00	Family and General Practitioners	1
29-1063.00	Internists, General	1
29-1064.00	Obstetricians and Gynecologists	1
29-1065.00	Pediatricians, General	1
29-1066.00	Psychiatrists	1
29-1067.00	Surgeons	1
29-1081.00	Podiatrists	1
29-1131.00	Veterinarians	1
15-1011.00	Computer and Information Scientists, Research	2
19-1021.01	Biochemists	2
19-1021.02	Biophysicists	2
19-1022.00	Microbiologists	2
19-1042.00	Medical Scientists, Except Epidemiologists	2

Appendix A to the Preamble-Professional Recruitment
Occupations - Education and Training Categories
by O*NET – SOC Occupation

19-2011.00	Astronomers	2
19-2012.00	Physicists	2
19-3031.00	Clinical, counseling, and school psychologists	2
19-3031.01	Educational Psychologists	2
19-3031.02	Clinical Psychologists	2
19-3031.03	Counseling Psychologists	2
25-1021.00	Computer Science Teachers, Postsecondary	2
25-1022.00	Mathematical Science Teachers, Postsecondary	2
25-1032.00	Engineering Teachers, Postsecondary	2
25-1041.00	Agricultural Sciences Teachers, Postsecondary	2
25-1042.00	Biological Science Teachers, Postsecondary	2
25-1043.00	Forestry and Conservation Science Teachers, Postsecondary	2
25-1052.00	Chemistry Teachers, Postsecondary	2
25-1054.00	Physics Teachers, Postsecondary	2
25-1071.00	Health Specialties Teachers, Postsecondary	2
25-1072.00	Nursing Instructors and Teachers, Postsecondary	2
25-1121.00	Art, Drama, and Music Teachers, Postsecondary	2
25-1191.00	Graduate Teaching Assistants	2
15-2021.00	Mathematicians	3
15-2031.00	Operations Research Analysts	3
15-2041.00	Statisticians	3
19-1041.00	Epidemiologists	3
19-2041.00	Environmental Scientists and Specialists, Including Health	3
19-2042.00	Geoscientists, Except Hydrologists and Geographers	3
19-2042.01	Geologists	3
19-2043.00	Hydrologists	3
19-3011.00	Economists	3
19-3021.00	Market Research Analysts	3
19-3022.00	Survey Researchers	3
19-3032.00	Industrial-Organizational Psychologists	3
19-3041.00	Sociologists	3
19-3051.00	Urban and Regional Planners	3
19-3091.01	Anthropologists	3
19-3091.02	Archeologists	3
19-3092.00	Geographers	3
19-3093.00	Historians	3
19-3094.00	Political Scientists	3

Appendix A to the Preamble-Professional Recruitment
Occupations - Education and Training Categories
by O*NET – SOC Occupation

21-1011.00	Substance Abuse and Behavioral Disorder Counselors	3
21-1012.00	Educational, Vocational, and School Counselors	3
21-1013.00	Marriage and Family Therapists	3
21-1014.00	Mental Health Counselors	3
21-1015.00	Rehabilitation Counselors	3
21-1023.00	Mental Health and Substance Abuse Social Workers	3
21-1091.00	Health Educators	3
25-4011.00	Archivists	3
25-4012.00	Curators	3
25-4021.00	Librarians	3
25-9031.00	Instructional Coordinators	3
29-1121.00	Audiologists	3
29-1123.00	Physical Therapists	3
29-1127.00	Speech-Language Pathologists	3
11-1011.00	Chief Executives	4
11-1011.01	Government Service Executives	4
11-1011.02	Private Sector Executives	4
11-1021.00	General and Operations Managers	4
11-2011.00	Advertising and Promotions Managers	4
11-2021.00	Marketing Managers	4
11-2022.00	Sales Managers	4
11-2031.00	Public Relations Managers	4
11-3011.00	Administrative Services Managers	4
11-3021.00	Computer and Information Systems Managers	4
11-3031.00	Financial Managers	4
11-3031.01	Treasurers, Controllers, and Chief Financial Officers	4
11-3031.02	Financial Managers, Branch or Department	4
11-3040.00	Human Resources Managers	4
11-3041.00	Compensation and Benefits Managers	4
11-3042.00	Training and Development Managers	4
11-3061.00	Purchasing Managers	4
11-9011.00	Farm, Ranch, and Other Agricultural Managers	4
11-9011.01	Nursery and Greenhouse Managers	4
11-9011.02	Agricultural Crop Farm Managers	4
11-9011.03	Fish Hatchery Managers	4
11-9031.00	Education Administrators, Preschool and Child Care Center/Program	4
11-9032.00	Education Administrators, Elementary and Secondary School	4

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11-9033.00	Education Administrators, Postsecondary	4
11-9041.00	Engineering Managers	4
11-9111.00	Medical and Health Services Managers	4
11-9121.00	Natural Sciences Managers	4
13-1011.00	Agents and Business Managers of Artists, Performers, and Athletes	4
13-1111.00	Management Analysts	4
15-2011.00	Actuaries	4
23-1021.00	Administrative Law Judges, Adjudicators, and Hearing Officers	4
23-1022.00	Arbitrators, Mediators, and Conciliators	4
23-1023.00	Judges, Magistrate Judges, and Magistrates	4
25-2023.00	Vocational Education Teachers, Middle School	4
25-2032.00	Vocational Education Teachers, Secondary School	4
27-1011.00	Art Directors	4
27-2012.00	Producers and Directors	4
27-2012.01	Producers	4
27-2012.02	Directors - Stage, Motion Pictures, Television, and Radio	4
27-2012.03	Program Directors	4
27-2012.04	Talent Directors	4
27-2012.05	Technical Directors/Managers	4
27-2041.00	Music Directors and Composers	4
27-2041.01	Music Directors	4
27-2041.02	Music Arrangers and Orchestrators	4
27-2041.03	Composers	4
27-3020.00	News analysts, reporters and correspondents	4
27-3021.00	Broadcast News Analysts	4
27-3022.00	Reporters and Correspondents	4
11-3051.00	Industrial Production Managers	5
11-9021.00	Construction Managers	5
11-9141.00	Property, Real Estate, and Community Association Managers	5
11-9151.00	Social and Community Service Managers	5
13-1071.00	Employment, Recruitment, and Placement Specialists	5
13-1071.01	Employment Interviewers, Private or Public Employment Service	5
13-1071.02	Personnel Recruiters	5
13-1072.00	Compensation, Benefits, and Job Analysis Specialists	5
13-1073.00	Training and Development Specialists	5
13-1121.00	Meeting and Convention Planners	5
13-2011.01	Accountants	5

Appendix A to the Preamble-Professional Recruitment
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13-2011.02	Auditors	5
13-2031.00	Budget Analysts	5
13-2041.00	Credit Analysts	5
13-2051.00	Financial Analysts	5
13-2052.00	Personal Financial Advisors	5
13-2053.00	Insurance Underwriters	5
13-2061.00	Financial Examiners	5
13-2071.00	Loan Counselors	5
13-2072.00	Loan Officers	5
13-2081.00	Tax Examiners, Collectors, and Revenue Agents	5
15-1021.00	Computer Programmers	5
15-1031.00	Computer Software Engineers, Applications	5
15-1032.00	Computer Software Engineers, Systems Software	5
15-1051.00	Computer Systems Analysts	5
15-1061.00	Database Administrators	5
15-1071.00	Network and Computer Systems Administrators	5
15-1071.01	Computer Security Specialists	5
15-1081.00	Network Systems and Data Communications Analysts	5
17-1011.00	Architects, Except Landscape and Naval	5
17-1012.00	Landscape Architects	5
17-1021.00	Cartographers and Photogrammetrists	5
17-1022.00	Surveyors	5
17-2011.00	Aerospace Engineers	5
17-2021.00	Agricultural Engineers	5
17-2031.00	Biomedical Engineers	5
17-2041.00	Chemical Engineers	5
17-2051.00	Civil Engineers	5
17-2061.00	Computer Hardware Engineers	5
17-2071.00	Electrical Engineers	5
17-2072.00	Electronics Engineers, Except Computer	5
17-2081.00	Environmental Engineers	5
17-2111.00	Health and Safety Engineers, Except Mining Safety Engineers and Inspectors	5
17-2111.01	Industrial Safety and Health Engineers	5
17-2111.02	Fire-Prevention and Protection Engineers	5
17-2111.03	Product Safety Engineers	5
17-2112.00	Industrial Engineers	5
17-2121.00	Marine Engineers and Naval Architects	5

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17-2121.01	Marine Engineers	5
17-2121.02	Marine Architects	5
17-2131.00	Materials Engineers	5
17-2141.00	Mechanical Engineers	5
17-2151.00	Mining and Geological Engineers, Including Mining Safety Engineers	5
17-2161.00	Nuclear Engineers	5
17-2171.00	Petroleum Engineers	5
19-1010.00	Agricultural and food scientists	5
19-1011.00	Animal Scientists	5
19-1012.00	Food Scientists and Technologists	5
19-1013.01	Plant Scientists	5
19-1013.02	Soil Scientists	5
19-1020.00	Biological Scientists	5
19-1020.01	Biologists	5
19-1023.00	Zoologists and Wildlife Biologists	5
19-1031.00	Conservation Scientists	5
19-1031.01	Soil Conservationists	5
19-1031.02	Range Managers	5
19-1031.03	Park Naturalists	5
19-1032.00	Foresters	5
19-2021.00	Atmospheric and Space Scientists	5
19-2031.00	Chemists	5
19-2032.00	Materials Scientists	5
21-1021.00	Child, Family, and School Social Workers	5
21-1022.00	Medical and Public Health Social Workers	5
21-1092.00	Probation Officers and Correctional Treatment Sp	5
21-2021.00	Directors, Religious Activities and Education	5
23-2092.00	Law Clerks	5
25-2012.00	Kindergarten Teachers, Except Special Education	5
25-2021.00	Elementary School Teachers, Except Special Education	5
25-2022.00	Middle School Teachers, Except Special and Vocational Education	5
25-2031.00	Secondary School Teachers, Except Special and Vocational Education	5
25-2041.00	Special Education Teachers, Preschool, Kindergarten and Elementary	5
25-2042.00	Special Education Teachers, Middle School	5
25-2043.00	Special Education Teachers, Secondary School	5
25-3011.00	Adult Literacy, Remedial Education, and GED Teachers and Instructors	5
25-4013.00	Museum Technicians and Conservators	5

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25-9021.00	Farm and Home Management Advisors	5
27-1014.00	Multi-Media Artists and Animators	5
27-1021.00	Commercial and Industrial Designers	5
27-1022.00	Fashion Designers	5
27-1024.00	Graphic Designers	5
27-1025.00	Interior Designers	5
27-1027.00	Set and Exhibit Designers	5
27-1027.01	Set Designers	5
27-1027.02	Exhibit Designers	5
27-3031.00	Public Relations Specialists	5
27-3041.00	Editors	5
27-3042.00	Technical Writers	5
27-3043.00	Writers and Authors	5
27-4032.00	Film and Video Editors	5
29-1031.00	Dietitians and Nutritionists	5
29-1071.00	Physician Assistants	5
29-1122.00	Occupational Therapists	5
29-1125.00	Recreational Therapists	5
29-2011.00	Medical and Clinical Laboratory Technologists	5
29-2091.00	Orthotists and Prosthetists	5
29-9010.00	Occupational health and safety specialists and technicians	5
29-9091.00	Athletic Trainers	5
33-3021.03	Criminal Investigators and Special Agents	5
39-9032.00	Recreation Workers	5
41-3021.00	Insurance Sales Agents	5
41-3031.01	Sales Agents, Securities and Commodities	5
41-3031.02	Sales Agents, Financial Services	5
41-9031.00	Sales Engineers	5
53-2011.00	Airline Pilots, Copilots, and Flight Engineers	5

Appendix A to the Preamble-Professional Recruitment Occupations - Education and Training Categories by O*NET – SOC Occupation

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

Final Rule

Accordingly, for the reasons stated in the Preamble, Parts 655 and 656 of Chapter V of Title 20 of the Code of Federal Regulations are amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

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

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

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

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

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

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

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

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b1), 1182(n), 1182(t), and 1184; 29 U.S.C. 49 *et seq.*; sec 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and Title IV, Pub. L. 105–277, 112 Stat. 2681.

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

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(1)(c), 1182(m), and 1184, 29 U.S.C. 49 *et seq.*

Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models, and Labor Attestation Requirements for Employers Using Nonimmigrants on H–1B1 Visas in Specialty Occupations

■ 2. Section 655.731 is amended by:
■ (a) Revising paragraph (a)(2);
■ (b) Redesignating paragraphs (b)(3)(iii)(B)(*2*) and (*3*) as (b)(3)(iii)(B)(*3*) and (*4*), respectively;
■ (c) Adding new paragraph (b)(3)(iii)(B)(*2*);
■ (d) Redesignating paragraphs (b)(3)(iii)(C)(*2*) and (*3*) as paragraphs (b)(3)(iii)(C)(*3*) and (*4*), respectively;
■ (e) Adding new paragraph (b)(3)(iii)(C)(*2*);
■ (f) Revising paragraph (d)(1);
■ (g) Revising paragraph (d)(2) introductory text;
■ (h) Revising paragraph (d)(2)(i); and
■ (i) Removing paragraph (d)(4).

§ 655.731 What is the first LCA requirement regarding wages?

* * * * *

(a) * * *

(1) * * *

(2) The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a State Employment Security Agency (SESA) (now known as State Workforce Agency or SWA), an independent authoritative source, or other legitimate sources of wage data. One of the following sources shall be used to establish the prevailing wage:

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

(ii) If the job opportunity is in an occupation which is not covered by

paragraph (a)(2)(i) of this section, the prevailing wage shall be the arithmetic mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(*2*), and (b)(3)(iii)(C)(*2*) of this section. The prevailing wage rate shall be based on the best information available. The Department believes the following prevailing wage sources are, in order of priority, the most accurate and reliable:

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

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

(*2*) If the employer is unable to wait for the SESA to produce the requested prevailing wage for the occupation in question, or for the CO and/or the Board of Alien Labor Certification Appeals to issue a decision, the employer may rely on other legitimate sources of available wage information as set forth in paragraphs (a)(2)(ii)(B) and (C) of this section. If the employer later discovers, upon receipt of the prevailing wage determination from the SESA, that the information relied upon produced a wage below the prevailing wage for the occupation in the area of intended employment and the employer was paying below the SESA-determined wage, no wage violation will be found if the employer retroactively compensates the H–1B nonimmigrant(s) for the difference between wage paid and the prevailing wage, within 30 days of the employer's receipt of the prevailing wage determination.

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

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

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

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

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

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

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

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

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

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

(viii) An employer may file more than one LCA for the same occupational classification in the same area of employment and, in such circumstances, the employer could have H–1B employees in the same occupational classification in the same area of employment, brought into the

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

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(B) * * *

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

* * * * *

(C) * * *

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

* * * * *

(d) (1) In the event that a complaint is filed pursuant to subpart I of this part, alleging a failure to meet the ''prevailing wage'' condition or a material misrepresentation by the employer regarding the payment of the required wage, or pursuant to such other basis for investigation as the Administrator may find, the Administrator shall determine whether the employer has the documentation required in paragraph (b)(3)of this section, and whether the documentation supports the employer's wage attestation. Where the documentation is either nonexistent or is insufficient to determine the prevailing wage (*e.g.*, does not meet the criteria specified in this section, in which case the Administrator may find a violation of paragraph (b)(1), (2), or (3), of this section); or where, based on significant evidence regarding wages paid for the occupation in the area of intended employment, the Administrator has reason to believe that the prevailing wage finding obtained from an independent authoritative source or another legitimate source varies substantially from the wage prevailing for the occupation in the area of intended employment; or where the employer has been unable to demonstrate that the prevailing wage determined by another legitimate source is in accordance with the regulatory criteria, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed. The 30-day investigatory period shall be suspended while ETA makes the prevailing wage determination and, in the event that the employer timely challenges the determination (see § 655.731(d)(2)), shall be suspended until the challenge process is completed and the Administrator's investigation can be resumed.

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, and the employer desires review, including judicial review, the employer shall challenge the ETA prevailing wage only by filing a request for review under § 656.41 of this chapter within 30 days of the employer's receipt of the prevailing wage determination from the Administrator. If the request is timely filed, the decision of ETA is suspended until the CO issues a determination on the employer's appeal. If the employer desires review, including judicial review, of the decision of the CO, the employer shall make a request for review of the determination by the Board of Alien Labor Certification Appeals (BALCA) under § 656.41(e) of this chapter within 30 days of the receipt of the decision of the CO. If a request for review is timely filed with the BALCA, the determination by the CO is suspended until the BALCA issues a determination on the employer's appeal. In any challenge to the wage determination, neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where an employer timely challenge an ETA prevailing wage determination obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling. Upon such a final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's prevailing wage determination serving as the conclusive determination for all purposes.

* * * * *

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

■ 3. Part 656 is revised to read as follows:

Subpart A—Purpose and Scope of Part 656

Sec.
656.1 Purpose and scope of part 656.
656.2 Description of the Immigration and Nationality Act and of the Department of Labor's role thereunder.
656.3 Definitions, for purposes of this part, of terms used in this part.

Subpart B—Occupational Labor Certification Determinations

656.5 Schedule A.

Subpart C—Labor Certification Process

656.10 General instructions.
656.15 Applications for labor certification for *Schedule A* occupations.
656.16 Labor certification applications for sheepherders.
656.17 Basic labor certification process.
656.18 Optional special recruitment and documentation procedures for college and university teachers.
656.19 Live-in household domestic service workers.
656.20 Audit procedures.
656.21 Supervised recruitment.
656.24 Labor certification determinations.
656.26 Board of Alien Labor Certification Appeals review of denials of labor certification.
656.27 Consideration by and decisions of the Board of Alien Labor Certification Appeals.
656.30 Validity and invalidation of labor certifications.
656.31 Labor certification applications involving fraud or willful misrepresentation.
656.32 Revocation of approved labor certifications.

Subpart D—Determination of Prevailing Wage

656.40 Determination of prevailing wage for labor certification purposes.
656.41 Certifying Officer review of prevailing wage determinations.

Authority: The Authority citation for part 656 is revised to read as follows: 8 U.S.C. 1182(a)(5)(A), 1189(p)(1); 29 U.S.C. 49 *et seq.*; section 122, Pub. L. 101–649, 109 Stat. 4978; and Title IV, Pub. L. 105–277, 112 Stat. 2681.

Subpart A—Purpose and Scope of Part 656

§ 656.1 Purpose and scope of part 656.

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

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

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

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

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

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

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

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

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

(c)(1) *Role of the Department of Labor.* The permanent labor certification role of the Department of Labor under the Act derives from section 212(a)(5)(A) (8 U.S.C. 1182(a)(5)(A)), which provides that any alien who seeks admission or status as an immigrant for the purpose of employment under paragraph (2) or (3) of section 203(b) of the Act may not be admitted unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

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

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

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

(3) We certify the employment of aliens in several instances: For the permanent employment of aliens under this part; and for temporary employment of aliens for agricultural and nonagricultural employment in the United States classified under 8 U.S.C. 1101(a)(15)(H)(ii), under the DHS regulation at 8 CFR 214.2(h)(5) and (6) and sections 101(a)(15)(H)(ii), 214, and 218 of the Act. See 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188. We also administer labor attestation and labor condition application programs for the admission and/or work authorization of the following nonimmigrants: Specialty occupations and fashion models (H–1B visas), specialty occupations from countries with which the U.S. has entered agreements listed in the INA (H–1B1 visas), registered nurses (H–1C visas), and crewmembers performing longshore work (D visas), classified under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1101(a)(15)(H)(i)(b1), 1101(a)(15)(H)(i)(c), and 1101(a)(15)(D), respectively. See also 8 U.S.C. 1184(c), (m), and (n), and 1288.

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

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

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

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

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

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

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

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

Appeals is located in Washington, DC, and reviews and decides appeals in Washington, DC.

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

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

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

Employer means:

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

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

Employment means:

(1) Permanent, full-time work by an employee for an employer other than oneself. For purposes of this definition, an investor is not an employee. In the event of an audit, the employer must be prepared to document the permanent and full-time nature of the position by furnishing position descriptions and payroll records for the job opportunity involved in the *Application for Permanent Employment Certification*.

(2) Job opportunities consisting solely of job duties that will be performed totally outside the United States, its territories, possessions, or commonwealths can not be the subject of an *Application for Permanent Employment Certification*.

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

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

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

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

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

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

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

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

Prevailing wage determination (PWD) means the prevailing wage provided by the State Workforce Agency.

Professional occupation means an occupation for which the attainment of a bachelor's or higher degree is a usual education requirement. A beneficiary of an application for permanent alien employment certification involving a professional occupation need not have a bachelor's or higher degree to qualify for the professional occupation. However, if the employer is willing to accept work experience in lieu of a baccalaureate or higher degree, such work experience must be attainable in the U.S. labor market and must be stated on the application form. If the employer is willing to accept an equivalent foreign degree, it must be clearly stated on the *Application for Permanent Employment Certification form*.

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

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

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

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

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

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

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

United States worker means any worker who is:

(1) A U.S. citizen;

(2) A U.S. national;

(3) Lawfully admitted for permanent residence;

(4) Granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1);

(5) Admitted as a refugee under 8 U.S.C. 1157; or

(6) Granted asylum under 8 U.S.C. 1158.

Subpart B—Occupational Labor Certification Determinations

§ 656.5 Schedule A.

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

Schedule A

(a) Group I:

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

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

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

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

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

(3) Definitions of Group I occupations:

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

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

(b) Group II:

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

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

Subpart C—Labor Certification Process

§ 656.10 General instructions.

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

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

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

(3) An employer seeking labor certification for an occupation listed on *Schedule A* must apply for a labor certification under this section and § 656.15.

(4) An employer seeking labor certification for a sheepherder must apply for a labor certification under this section and must also choose to file under either § 656.16 or § 656.17.

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

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

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

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

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

(1) The offered wage equals or exceeds the prevailing wage determined

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;

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

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

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

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

(5) If an application is filed on behalf of a college and university teacher selected in a competitive selection and recruitment process, as provided by § 656.18, the notice must include the information required for advertisements by § 656.18(b)(2), and must include the information required by paragraph (d)(3) of this section.

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

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

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

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

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

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

§ 656.15 Applications for labor certification for Schedule A occupations.

(a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.

(b) *General documentation requirements.* A *Schedule A* application must include:

(1) An *Application for Permanent Employment Certification* form, which includes a prevailing wage

determination in accordance with § 656.40 and § 656.41.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) Playbills and star billings;

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

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

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

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

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

§ 656.16 Labor certification applications for sheepherders.

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

(2) A signed letter or letters from each U.S. employer who has employed the alien as a sheepherder during the immediately preceding 36 months,

attesting the alien has been employed in the United States lawfully and continuously as a sheepherder for at least 33 of the immediately preceding 36 months, must be filed with the application.

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

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

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

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

§ 656.17 Basic labor certification process.

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

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

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

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

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

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

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

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

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

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

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

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

(4) For purposes of paragraph (d)(1)(i) of this section, a job opportunity shall be considered identical if the employer, alien, job title, job location, job requirements, and job description are the same as those stated in the original application filed under the regulations in effect prior to March 28, 2005. For purposes of determining identical job opportunity, the original application includes all accepted amendments up to the time the application was withdrawn, including amendments in response to an assessment notice from a SWA pursuant to § 656.21(h) of the regulations in effect prior to March 28, 2005.

(e) *Required pre-filing recruitment.* Except for labor certification applications involving college or university teachers selected pursuant to a competitive recruitment and selection process (§ 656.18), *Schedule A* occupations (§§ 656.5 and 656.15), and sheepherders (§ 656.16), an employer must attest to having conducted the following recruitment prior to filing the application:

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

(i) *Mandatory steps.* Two of the steps, a job order and two print advertisements, are mandatory for all applications involving professional occupations, except applications for

college or university teachers selected in a competitive selection and recruitment process as provided in § 656.18. The mandatory recruitment steps must be conducted at least 30 days, but no more than 180 days, before the filing of the application.

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

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

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

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

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

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

(A) *Job fairs.* Recruitment at job fairs for the occupation involved in the application, which can be documented by brochures advertising the fair and newspaper advertisements in which the employer is named as a participant in the job fair.

(B) *Employer's Web site.* The use of the employer's Web site as a recruitment medium can be documented by providing dated copies of pages from the site that advertise the occupation involved in the application.

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

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

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

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

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

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

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

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

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

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

(ii) *Newspaper advertisements.* (A) Placing an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity.

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

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

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

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

(1) Name the employer;

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

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

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

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

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

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

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

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

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones. To establish a business necessity, an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner.

(2) A foreign language requirement can not be included, unless it is justified by business necessity. Demonstrating business necessity for a foreign language requirement may be based upon the following:

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

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

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

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

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

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

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

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

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

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

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

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

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

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

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

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

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

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

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

notification and consideration. A layoff shall be considered any involuntary separation of one or more employees without cause or prejudice.

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

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

(1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 656.19 Live-in household domestic service workers.

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

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

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

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

(ii) The number of rooms in the residence;

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

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

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

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

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

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

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

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

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

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

(viii) That a duplicate contract has been furnished to the alien;

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

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

(3) Documentation of the alien's paid experience in the form of statements from past or present employers setting forth the dates (month and year) employment started and ended, hours of work per day, number of days worked per week, place where the alien worked, detailed statement of duties performed on the job, equipment and appliances

used, and the amount of wages paid per week or month. The total paid experience must be equal to one full year's employment on a full-time basis. For example, two year's experience working half-days is the equivalent of one year's full time experience. Time spent in a household domestic service training course can not be included in the required one year of paid experience. Each statement must contain the name and address of the person who signed it and show the date on which the statement was signed. A statement not in English shall be accompanied by a written translation into English certified by the translator as to the accuracy of the translation, and as to the translator's competency to translate.

§ 656.20 Audit procedures.

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

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

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

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

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

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

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

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

(d) Before making a final determination in accordance with the standards in § 656.24, whether in course of an audit or otherwise, the Certifying Officer may:

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

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

§ 656.21 Supervised recruitment.

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

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

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

(2) The advertisement must:

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

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

(iii) Describe the job opportunity;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 656.24 Labor certification determinations.

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

(2) If the labor certification presents a special or unique problem, the Director of an ETA application processing center may refer the matter to the Chief, Division of Foreign Labor Certification. If the Chief, Division of Foreign Labor Certification, has directed that certain types of applications or specific applications be handled in the ETA national office, the Directors of the ETA application processing centers shall refer such applications to the Chief, Division of Foreign Labor Certification.

(b) The Certifying Officer makes a determination either to grant or deny the labor certification on the basis of whether or not:

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

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

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

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

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

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

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

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

(1) State the reasons for the determination;

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

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

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

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

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

(f) If the Certifying Officer determines the employer substantially failed to produce required documentation, or the documentation was inadequate, or determines a material misrepresentation was made with respect to the application, or if the Certifying Officer determines it is appropriate for other reasons, the employer may be required to conduct supervised recruitment pursuant to § 656.21 in future filings of labor certification applications for up to two years from the date of the Final Determination.

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

(2) The request for reconsideration may not include evidence not previously submitted.

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

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

(a) *Request for review.* (1) If a labor certification is denied, or revoked pursuant to § 656.32, a request for review of the denial or revocation may be made to the Board of Alien Labor Certification Appeals by the employer by making a request for such an administrative review in accordance with the procedures provided in this paragraph (a). The request for review:

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

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

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

(iv) Must include the Final Determination.

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

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

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

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

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

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

(a) *Panel designations.* In considering requests for review before it, the Board

of Alien Labor Certification Appeals may sit in panels of three members. The Chief Administrative Law Judge may designate any Board of Alien Labor Certification Appeals member to submit proposed findings and recommendations to the Board of Alien Labor Certification Appeals or to any duly designated panel thereof to consider a particular case.

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

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

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

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

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

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

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

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

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

§ 656.30 Validity of and invalidation of labor certifications.

(a) *Validity of labor certifications.* Except as provided in paragraph (d) of this section, a labor certification is valid indefinitely.

(b) *Validation date.* (1) A labor certification involving a job offer is validated as of the date the ETA application processing center date-stamped the application or the date an electronically filed application was submitted; and

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

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

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

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

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

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

§ 656.31 Labor certification applications involving fraud or willful misrepresentation.

(a) *Possible fraud or willful misrepresentation.* If possible fraud or willful misrepresentation involving a labor certification is discovered before a final labor certification determination; the Certifying Officer will refer the matter to the DHS for investigation, and must send a copy of the referral to the Department of Labor's Office of Inspector General. If 90 days pass without the filing of a criminal indictment or information, or receipt of a notification from DHS, DOL OIG, or other appropriate authority that an investigation is being conducted, the Certifying Officer may continue to process the application.

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

(c) *Finding of no fraud or willful misrepresentation.* If a court finds there was no fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute, the Certifying Officer shall decide the case on the merits of the application.

(d) *Finding of fraud or willful misrepresentation.* If as referenced in § 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification

application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent, as appropriate, and a copy of the notification is sent by the Certifying Officer to the alien and to the Department of Labor's Office of Inspector General.

§ 656.32 Revocation of approved labor certifications.

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

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

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

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

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

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

Subpart D—Determination of Prevailing Wage

§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) *Application process.* The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA's prevailing wage determination under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

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

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

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

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

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

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

(d) *Similarly employed.* For purposes of this section, similarly employed means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the occupational category can not be obtained in the area of intended employment, similarly employed means:

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

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

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

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

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

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

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

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

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

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

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

(iii) *Nonprofit research organization or Governmental research organization* means a research organization that is either a nonprofit organization or entity primarily engaged in basic research and/or applied research, or a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

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

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

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

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

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

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

(3) The survey submitted to the SWA must be based upon recently collected data:

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

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

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

(5) The employer, after receiving notification that the survey it provided for the SWA's consideration is not acceptable, may file supplemental information as provided in paragraph (h) of this section, file a new request for a prevailing wage determination, or appeal under § 656.41.

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

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

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

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

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

§ 656.41 Certifying Officer review of prevailing wage determinations.

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

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

(2) The SWA must send a copy of the employer's appeal, including any material added under paragraph (b)(1) of

this section, to the appropriate ETA application processing center.

(3) The SWA must send a copy of any material added by the SWA under paragraph (b)(1) of this section to the employer.

(c) *Designations.* The director(s) of the ETA application processing center(s) will determine which CO will review the employer's appeal.

(d) *Review on the record.* The CO reviews the SWA PWD solely on the basis upon which the PWD was made and, upon the request for review, may:

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

(2) Modify the prevailing wage determination; or

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

(e) *Request for review by BALCA.* Any employer desiring review of a CO prevailing wage determination must make a request for review of the determination by the Board of Alien Labor Certification Appeals within 30 days of the date of the decision of the CO.

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

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

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

(4) The BALCA handles the appeals in accordance with § 656.26 and § 656.27 of this part.

Signed in Washington, DC, this 13th day of December, 2004.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration.

Editorial Note: The ETA Form 9089 and instructions will not appear in the Code of Federal Regulations.

BILLING CODE 4510–30–P

OMB Approval:
Expiration Date:

Application for Permanent Employment Certification

Form ETA 9089 - Instructions

U.S. Department of Labor

Appendix B
Draft

IMPORTANT: Please read these instructions carefully before completing Form ETA 9089 – Application for Permanent Employment Certification. These instructions contain full explanations of the questions and attestations that make up Form ETA 9089.

Any employer or alien, or their agent or attorney, who knowingly and willingly furnishes any false information in the preparation of Form ETA 9089 and any supporting documentation, or aids, abets, or counsels another to do so is committing a federal offense, punishable by fine or imprisonment up to five years or both (18 U.S.C. 2,1001). Other penalties apply as well to fraud or misuse of this immigration document and to perjury with respect to this form (18 U.S.C. 1621 (2)).

Employing or continuing to employ an alien unauthorized to work in the United States is illegal and may subject the employer to criminal prosecution, civil money penalties, or both.

Privacy Statement Information

In accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a), you are hereby notified that the information provided herein is protected under the Privacy Act. The Department of Labor (Department) maintains a System of Records titled Employer Application and Attestation File for Permanent and Temporary Alien Workers (DOL/ETA-7) that includes this record.

Under routine uses for this system of records, case files developed in processing labor certification applications, labor condition applications, or labor attestations, may be released as follows: in connection with appeals of denials before the DOL Office of Administrative Law Judges and Federal courts, records may be released to the employers that filed such applications, their representatives, to named alien beneficiaries or their representatives, and to the DOL Office of Administrative Law Judges and Federal courts; and in connection with administering and enforcing immigration laws and regulations, records may be released to such agencies as the DOL Office of Inspector General, Employment Standards Administration, the Department of Homeland Security's U.S. Citizenship and Immigration Services and Bureau of Immigration and Customs Enforcement, and Department of State.

Further relevant disclosures may be made in accordance with the Privacy Act and under the following circumstances: in connection with federal litigation; for law enforcement purposes; to authorized parent locator persons under Pub. L. 93-647; to an information source or public authority in connection with personnel, security clearance, procurement, or benefit-related matters; to a contractor or their employees, grantees or their employees, consultants, or volunteers who have been engaged to assist the agency in the performance of Federal activities; for Federal debt collection purposes; to the Office of Management and Budget in connection with its legislative review, coordination, and clearance activities; to a Member of Congress or their staff in response to an inquiry of the Congressional office made at the written request of the subject of the record; in connection with records management; and to the news media and the public when a matter under investigation becomes public knowledge, the Solicitor of Labor determines the disclosure is necessary to preserve confidence in the integrity of the Department, or the Solicitor of Labor determines that a legitimate public interest exists in the disclosure of information, unless the Solicitor of Labor determines that disclosure would constitute an unwarranted invasion of personal privacy.

OMB Notice ***Paperwork Reduction Act/Information Control Number 1205-0015***

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Respondent's obligation to reply to these reporting requirements are required to obtain the benefits of permanent employment certification. (INA Act, Section 212(a)(5)). Public reporting burden for this collection of information is estimated to average 1¼ hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Division of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW * Washington, DC * 20210. **Do NOT send the completed application to this address.**

Regulatory Information

The Permanent labor certification program is governed by the Immigration and Nationality Act, 8 U.S.C. 1101 et seq. and 20 CFR part 656. This regulation can be found at http://workforcesecurity.doleta.gov/foreign/perm.asp. Employers applying for labor certification must comply with all regulatory and statutory requirements.

How to File

A. Who May File:
An employer who desires to apply for a labor certification on behalf of an alien must file Form ETA 9089.

B. How/Where to File

1. For all occupations other than Schedule A and Sheepherders, Form ETA 9089 must be submitted to the Department of Labor for processing in one of two ways:

   - Online. Employers can complete and submit their Permanent applications online at the following web address: http://www.plc.doleta.gov
   - Mail. Applications can be mailed to the DOL Application Processing Center serving the state where the job will be located. Addresses can be found at the following web address: http://workforcesecurity.doleta.gov/foreign/

2. Applications for Sheepherders and Schedule A occupations are granted or denied by the United States Citizenship and Immigration Service (USCIS). All applications for Sheepherders and Schedule A labor certifications must be mailed to the USCIS service center serving the state where the job will be located. Addresses can be found at: http://www.uscis.gov

3. All application information (certified Form ETA 9089, recruitment information, refiling information (if applicable), etc...) must be retained by the employer or their attorney/agent until the visa petition has been approved.

Section A
Refiling Instructions

Employers that filed applications under the previous regulations (Form ETA 750) may, if the employer has not yet commenced the recruitment process by filing a job order, refile applications under the current regulations (Form ETA 9089) without loss of the previous filing date by the following process:

A. The application must be for the identical job opportunity filed under the previous regulations, and the employer must comply with all of the filing and recruiting requirements of the current regulation.
B. The employer must withdraw the case involving the identical job opportunity under the previous regulations and refile under the current regulations. Withdrawal instructions can be found at http://workforcesecurity.doleta.gov/foreign/

1. If this application was previously submitted under the former Permanent application process (Form ETA-750), select *Yes* to keep your original filing date. Otherwise, select *No*.

1-A. Enter the date you filed the application under the former Permanent application process (Form ETA 750). Enter the date in *mm/dd/yyyy* format.
1-B. Enter the case number assigned to the application you submitted under the former Permanent application process (Form ETA 750).

Section B
Schedule A or Sheepherder Information

1. Select *Yes* or *No*. If *Yes*, do not send the application to the Department of Labor. All applications in support of Schedule A or Sheepherder Occupations must be sent directly to the United States Citizenship and Immigration Service (CIS). Consult the USCIS website (http://uscis.gov) or the blue pages in your local phone directory for the address of the USCIS Service Center that serves the area where the alien will work.

Section C
Employer Information (Headquarters or Main Office)

1. Enter the full legal name of the business, firm, or organization, or, if an individual, enter the name used on legal documents.
2. Enter the address of the employer's principal place of business. This should be the address of the headquarters or main office.
3. Enter the city, state or province, country and postal code of the principal place of business.
4. Enter the phone number, country or area code first, and extension (if applicable) of the employer.
5. Enter the number of employees currently employed by the employer in the area of intended employment.
6. Enter the year the employer commenced business or incorporated. If the employer is a private household employing a household domestic worker, this question may be skipped.
7. Enter the employer's nine-digit Federal Employer Identification Number (EIN), which is assigned by the Internal Revenue Service.
8. Enter the North American Industry Classification System (NAICS) code. This is a six-digit number. If you do not know the NAICS code, you can search for the correct code at http://www.naics.com/search.htm.
9. Select *Yes* or *No*. Closely Held Corporations are corporations that have relatively few shareholders and whose shares are not generally traded in the securities market.

Section D
Employer Contact Information

This information must be different than the agent or attorney information entered in Section E. The person listed in this section may be contacted for authentication of the application.

1. Enter the full legal name of the employer's point of contact.
2. Enter the business address of the employer's point of contact. P.O. Boxes are not acceptable.
3. Enter the city, state or province, country, and postal code of the employer's point of contact.
4. Enter the phone number, country or area code first, and extension (if applicable) of the employer's point of contact.
5. Enter the full business e-mail address of the employer's point of contact.

Section E
Agent or Attorney Information

This information must be different than the employer contact information entered in Section D.

1. Enter the full legal name of the agent or attorney designated to act on behalf of the employer for this application.

2. Enter the name of the company or law firm that employs the agent or attorney.

3. Enter the nine-digit Federal Employer Identification Number (EIN) assigned to the agent or attorney's company or law firm by the IRS.

4. Enter the phone number, country or area code first, and the extension (if applicable) of the agent or attorney.

5. Enter the complete mailing address of the agent or attorney.

6. Enter the city, state or province, country and postal code of the agent or attorney.

7. Enter the full business e-mail address of the agent or attorney.

Section F
Prevailing Wage Information

Before you can complete this section of the form, you must secure a Prevailing Wage Determination (PWD) from the State Workforce Agency (SWA) responsible for the state in which the work will be performed. A listing of SWAs and their contact information can be found at: http://workforcesecurity.doleta.gov/map.asp

1. Enter the prevailing wage tracking number assigned by the SWA. This field is optional as not all states assign a code.

2. Enter the Standard Occupational Classification (SOC) code (or O*NET/OES extension) specific to the occupation listed in the prevailing wage determination request. Further information concerning SOC codes can be found at: http://ows.doleta.gov/foreign/

3. Enter the occupational title associated with the SOC/O*NET(OES) code as determined by the SWA.

4. Enter the skill level of the job subject to this application as determined by the SWA.

5. Enter the prevailing wage rate for the job as assigned by the SWA in the PWD. Select whether the offered wage is in terms of hour, week, bi-weekly, month, or year.

6. Identify the source of the prevailing wage from among the following: Occupational Employment Statistics (OES), Collective Bargaining Agreement (CBA), Employer Conducted Survey, Davis-Bacon Act (DBA), McNamara-O'Hara Service Contract Act (SCA), or Other.

6-A. If *Other* is identified for question 6, enter the name of the prevailing wage source as determined by the SWA.

7. Enter the date the prevailing wage was issued by the appropriate state agency. Enter the date in *mm/dd/yyyy* format.

8. Enter the expiration date of the validity period of the PWD received from the appropriate state agency. Enter the date in *mm/dd/yyyy* format.

Section G
Wage Offer Information

1. Enter the wage rate to be paid to the employee. If the wage offer is expressed as a range, enter the bottom of the wage range to be paid in the From section and enter the top of the wage range to be paid into the optional To section.

   Identify whether the wage rate to be paid is in terms of per hour, week, bi-weekly, month, or year (you may only select one).

Section H
Job Opportunity Information

1. Enter the full address of the primary site or location where the work will actually be performed.

2. Enter the city, state, and postal code of the primary site or location where the work will actually be performed.

3. Enter the common name or payroll title of the job being offered.

4. Select the minimum level of education required to adequately perform the duties of the job being offered.

4-A. If *Other* was selected for question 4, identify the education required. Examples are MD and JD.
4-B. Enter the major field of study required in reference to Question 4. Skip this question if the answer to question 4 is *None or High School*.

5. Select Yes or No to identify whether or not training is required for the job. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Do not include restrictive requirements that are not actual business necessities for performance of the job and that would limit consideration of other qualified U.S. workers.

5-A. If the answer to question 5 is *Yes*, enter the number of months of training that is required.
5-B. If the answer to question 5 is *Yes*, enter the field of training that is required for the job offered.

6. Select *Yes* or *No* to identify whether experience in the job offered is a requirement.

6-A. If the answer to question 6 is *Yes*, enter the number of months experience that are required for the job.

7. Select *Yes* or *No* to indicate if an alternate field of study is acceptable. This field of study is alternate to the major field of study indicated in question 4-B.

7-A. If the answer to question 7 is *Yes*, enter the alternate field of study that is acceptable for the job offered.

8. Select *Yes* or *No* to indicate if there is an alternate combination of education and experience in the job offered that will be accepted in lieu of the minimum education requirement identified in question 4 of this section. For example, if the requirement is bachelors + 2 years experience but the employer will accept a masters + 1 year experience, an alternate combination of education and experience exists.

8-A. If the answer to question 8 is *Yes*, select the alternate level of education that in combination with the number of months of experience specified in question 8-C is acceptable.
8-B. If the answer to question 8-A is *Other*, enter the alternate level of education that is acceptable.
8-C. If the answer to question 8 is *Yes*, enter the number of months of experience in the job offered that in combination with the level of education specified in question 8-A is acceptable.

9. Select *Yes* or *No*.

10. Select *Yes* or *No*.

Section H Continued

10-A. If the answer to question 10 is *Yes*, enter the number of months of experience in the alternate occupation that is required for the job offered.

10-B. If the answer to question 10 is Yes, enter the alternate occupation that is acceptable for the job offered.

11. Describe the job duties. Detail what would be performed by any worker filling the job. Specify equipment used and pertinent working conditions.

12. Select *Yes* or *No* to indicate if the job opportunity's requirements as specified in questions H-4 to H-11 are normal for the occupation being offered. If the answer to this question is No, the employer must be prepared to provide documentation demonstrating that the job requirements are supported by business necessity.

13. Select *Yes* or *No*. If the answer to this question is Yes, the employer must be prepared to provide documentation demonstrating that the language requirements are supported by business necessity.

14. Enter the job related requirements. Examples are shorthand and typing speeds, specific foreign language proficiency, and test results. Document business necessity for a foreign language requirement.

15. Select *Yes* or *No* to identify whether or not the job includes a combination of occupations. For example, engineer-pilot.

16. Select *Yes* or *No*.

17. Select *Yes* or *No*.

18. Select *Yes* or *No* to identify whether the application is for a live-in domestic service worker. Domestic service workers refer to "private household workers." The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium, or hotel may constitute a private home.

18-A. If the answer to question 18 is *Yes*, select whether the employer and the alien have executed an employment contract and the employer has provided a copy of the contract to the alien. Select *NA (not applicable)* if the answer to question 18 is *No.*

Section I
Recruitment Information

1. Select *Yes* or *No*. Professional Occupations are defined as occupations for which the attainment of a bachelor's or higher degree is a usual education requirement for the occupation. ***For the purpose of this question, Professional Occupations do not include college or university teachers.*** If the answer to this question is *Yes*, you must complete questions 6 – 22 of this section.

2. Select *Yes* or *No to* identify whether or not the application is for a college or university teacher. If the answer to this question is *Yes*, you must answer questions 2-A and 2-B.

2-A. Select *Yes* or *No*. If the answer to this question is *Yes*, you must complete questions 3 – 5 of this section. In the event of an audit the employer will be required to provide documentation as defined by 20 CFR 656.18.

2-B. Select *Yes* or *No*. If the answer to this question is *Yes*, you must complete questions 6 – 22 of this section.

Section I Continued

Complete Questions 3 – 5 only if the answer to Section I/Question 2-A is Yes

3. Enter the date the alien was selected using the competitive recruitment and selection process. Enter the date in *mm/dd/*yyyy format.

4. Enter the name of the national professional journal in which the advertisement was placed.

5. Enter additional recruitment information. You may add an attachment if more space is necessary.

Complete Questions 6 – 12 only if the answer to Section I/Questions 1 or 2-B is Yes.

6. Enter the start date for the State Workforce Agency job order. Enter the date in *mm/dd/*yyyy format.

7. Enter the end date for the State Workforce Agency job order. Enter the date in *mm/dd/*yyyy format.

8. Select *Yes* or *No*.

9. Enter the name of the newspaper (of general circulation) in which the first advertisement was placed.

10. Enter the date of the first advertisement identified in question 9. Enter the date in *mm/dd/*yyyy format.

11. Enter the name of the newspaper or professional journal in which the second advertisement was placed (if applicable). Also, select a checkbox to indicate whether the ad ran in a Newspaper or Journal.

12. Enter the date of the second Sunday advertisement (if newspaper) or date of advertisement (if other than newspaper) identified in question 11. Enter the date in *mm/dd/*yyyy format.

If the answer to Section I/Questions I.1 or I.2-B is Yes, at least 3 of the items in this section must be completed. For questions 13-22, enter the dates in *mm/dd/*yyyy format.

13. Enter the dates advertised at a job fair (if applicable).

14. Enter the dates of on-campus recruiting (if applicable).

15. Enter the dates advertised on the employer's website (if applicable).

16. Enter the dates advertised with a trade or professional organization (if applicable).

17. Enter the dates listed with a job search website (if applicable).

18. Enter the dates listed with a private employment firm (if applicable).

19. Enter the dates advertised with an employee referral program (if applicable).

20. Enter the dates advertised with a campus placement office (if applicable).

21. Enter the dates advertised with a local or ethnic newspaper (if applicable).

22. Enter the dates advertised with radio and TV stations (if applicable).

All must complete this section

23. Select *Yes* or *No*.

23-A. If you answer *Yes* to question 23, please enter details of the payment for the submission of the application.

Section I Continued

24. Select *Yes*, *No*, or *NA*.

25. Select *Yes*, *No*, or *NA*.

26. Select *Yes* or *No*.

26-A. Select *Yes*, *No*, or *NA* if the answer to question 26 is *No*. A related occupation is defined as any occupation that requires workers to perform a majority of the essential duties involved in the occupation for which certification is sought.

Section J
Alien Information

This section must be different than the agent or attorney information in Section E.

1. Enter the alien's last name, first name, and full middle name.

2. Enter the alien's current address. This should be the address of the alien's current residence.

3. Enter the city, state or province, country, and postal code of the alien's current residence.

4. Enter the phone number for the alien's current residence.

5. Enter the country of current citizenship for the alien.

6. Enter the alien's country of birth.

7. Enter the alien's date of birth in *mm/dd/yyyy* format.

8. Enter the alien's class of admission if the alien has one. This is the current visa status of the alien (e.g., H-1B, H-2A, etc.).

9. Enter the alien registration number if the alien has one. This is a number assigned to the alien by USCIS.

10. Enter the alien admission number if the alien has one. This is a number assigned to the alien by USCIS.

11. Select the highest level of education received relevant to the requested occupation that has been achieved by the alien. If the highest level of education achieved by the alien is not shown on the form, select *Other.*

11-A. If *Other* was selected for question 11, identify the highest level of education relevant to the requested occupation achieved by the alien. (e.g. MD, JD)

12. Enter the major field(s) of study for the alien in reference to the highest level of relevant education achieved.

13. Enter the year the relevant education was completed by the alien. Enter the year in *yyyy* format.

14. Enter the name of the institution where the relevant education achieved by the alien, specified in question 11, was obtained.

15. Enter the address of the institution indicated in question 14.

16. Enter the city, state or province, country, and postal code of the institution indicated in question 14.

17. Select *Yes*, *No*, or *NA*.

Section J Continued

18. Select *Yes*, *No*, or *NA*.

19. Select *Yes*, *No*, or *NA*.

20. Select *Yes*, *No*, or *NA*.

21. Select *Yes*, *No*, or *NA*.

22. Select *Yes* or *No*.

23. Select *Yes* or *No*.

Section K
Alien Work Experience

List all jobs held by the alien in the past three years whether or not it's related to the job opportunity for which the employer is seeking certification. Also list all other experiences that qualify the alien for the job opportunity. If you need more space to complete this section, you may use additional pages as attachments, but you must list the primary jobs and experiences in these spaces.

Instructions for Section a – Job 1

1. Enter the full legal name of the business, firm, or organization that employed the alien.

2. Enter the address of the employer.

3. Enter the city, state or province, country and postal code for the business address.

4. Enter the type of business of the employer. For example, food service, landscaping, computer hardware manufacturing, etc.

5. Enter the title of the job held by the alien.

6. Enter the date the alien started to work for the employer.

7. Enter the date the alien stopped working for the employer.

8. Enter the number of hours per week the alien worked while employed.

9. Enter the details of the job performed by the alien while employed. Include the phone number of the employer and the name of the alien's supervisor. Job descriptions should also include specific details of the work performed, with emphasis on skills and knowledge required, managerial or supervisory functions performed, materials or products handled, and machines, tools, and equipment used or operated.

Instructions for Section b – Job 2

Same as instructions for Section a – Job 1.

Instructions for Section c – Job 3

Same as instructions for Section a – Job 1.

Section L
Alien Declaration

1. Enter the last name, first name, and middle initial of the alien signing the application.

2. The signature of the alien identified by question 1 and the date of signature are required. The date of signature must be in *mm/dd/yyyy* format.

   Note – The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be completed when submitting by mail. If submitted electronically, the application MUST be signed immediately upon receipt before it can be submitted to USCIS for final processing.

Section M
Declaration of Preparer

1. Select *Yes* or *No*. If you select *No*, questions 2 – 5 must be completed.

2. Enter the full legal name of the person who prepared the application.

3. Enter the job title held by the person who prepared the application.

4. Enter the e-mail address of the person who prepared the application.

5. The signature of the preparer identified by question 2 and the date of signature are required. The date of signature must be in *mm/dd/yyyy* format.

   Note – The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be completed when submitting by mail. If submitted electronically, the application MUST be signed immediately upon receipt before it can be submitted to USCIS for final processing.

Section N
Employer Declaration

1. Enter the full legal name of the employer signing the application.

2. Enter the job title held by the employer.

3. The signature of the employer identified by question 1 and the date of signature are required. The date of signature must be in *mm/dd/yyyy* format.

   Note – The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be completed when submitting by mail. If submitted electronically, the application MUST be signed immediately upon receipt before it can be submitted to USCIS for final processing.

Section O
U.S. Government Agency Use Only

Do not complete this section.

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Please read and review the filing instructions before completing this form. A copy of the instructions can be found at www.workforcesecurity.doleta.gov/foreign/

Employing or continuing to employ an alien unauthorized to work in the United States is illegal and may subject the employer to criminal prosecution, civil money penalties, or both.

A. Refiling Instructions

1. Are you seeking to utilize the filing date from a previously submitted Application for Alien Employment Certification (ETA 750)?	❑ Yes	❑ No
1-A. If Yes, enter the previous filing date		
1-B. Indicate the previous case number		

B. Schedule A or Sheepherder Information

1. Is this application in support of a Schedule A or Sheepherder Occupation?	❑ Yes	❑ No
If Yes, do NOT send this application to the Department of Labor. All applications in support of Schedule A or Sheepherder Occupations must be sent directly to the United States Citizenship and Immigration Services (CIS).		

C. Employer Information (Headquarters or Main Office)

1. Employer's name			
2. Address 1			
Address 2			
3. City	State/Province	Country	Postal code
4. Phone number		Extension	
5. Number of employees in area of intended employment		6. Year commenced business	
7. EIN number		8. NAICS code	
9. Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?		❑ Yes	❑ No

D. Employer Contact Information (This section must be filled out. This information must be different from the agent or attorney information listed in Section E).

1. Contact's last name		First name	Middle initial
2. Address 1			
Address 2			
3. City	State/Province	Country	Postal code
4. Phone number		Extension	
5. E-mail address			

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E. Agent or Attorney Information (If applicable)

1. Agent or attorney's last name	First name		Middle initial
2. Firm name			
3. Firm EIN	4. Phone number	Extension	
5. Address 1			
Address 2			
6. City	State/Province	Country	Postal code
7. E-mail address			

F. Prevailing Wage Information

1. Prevailing wage tracking number (if applicable)		2. SOC/O*NET(OES) code			
3. Occupation Title		4. Skill Level			
5. Prevailing wage $	Per: (Choose only one) ❑ Hour	❑ Week	❑ Bi-Weekly	❑ Month	❑ Year
6. Prevailing wage source (Choose only one) ❑ OES	❑ CBA	❑ Employer Conducted Survey	❑ DBA	❑ SCA	❑ Other
6-A. If Other is indicated in question 6, specify:					
7. Determination date		8. Expiration date			

G. Wage Offer Information

1. Offered wage From: $	To: (Optional) $	Per: (Choose only one) ❑ Hour	❑ Week	❑ Bi-Weekly	❑ Month	❑ Year

H. Job Opportunity Information (Where work will be performed)

1. Primary worksite (where work is to be performed) address 1						
Address 2						
2. City	State	Postal code				
3. Job title						
4. Education: minimum level required: ❑ None	❑ High School	❑ Associate's	❑ Bachelor's	❑ Master's	❑ Doctorate	❑ Other
4-A. If Other is indicated in question 4, specify the education required:						
4-B. Major field of study						
5. Is training required in the job opportunity? ❑ Yes ❑ No	5-A. If Yes, number of months training required:					

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H. Job Opportunity Information Continued

5-B. Indicate the field of training:	
6. Is experience in the job offered required for the job? ❑ Yes ❑ No	6-A. If Yes, number of months experience required:
7. Is there an alternate field of study that is acceptable?	❑ Yes ❑ No
7-A. If Yes, specify the major field of study:	
8. Is there an alternate combination of education and experience that is acceptable?	❑ Yes ❑ No
8-A. If Yes, specify the alternate level of education required: ❑ None ❑ High School ❑ Associate's ❑ Bachelor's ❑ Master's ❑ Doctorate ❑ Other	
8-B. If Other is indicated in question 8-A, indicate the alternate level of education required:	
8-C. If applicable, indicate the number of years experience acceptable in question 8:	
9. Is a foreign educational equivalent acceptable?	❑ Yes ❑ No
10. Is experience in an alternate occupation acceptable? ❑ Yes ❑ No	10-A. If Yes, number of months experience in alternate occupation required:
10-B. Indentify the job title of the acceptable alternate occupation:	
11. Job duties – If submitting by mail, add attachment if necessary. Job duties description must begin in this space.	
12. Are the job opportunity's requirements normal for the occupation? ***If the answer to this question is No, the employer must be prepared to provide documentation demonstrating that the job requirements are supported by business necessity.***	❑ Yes ❑ No
13. Is knowledge of a foreign language required to perform the job duties? ***If the answer to this question is Yes, the employer must be prepared to provide documentation demonstrating that the language requirements are supported by business necessity.***	❑ Yes ❑ No

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H. Job Opportunity Information Continued

14. Specific skills or other requirements – If submitting by mail, add attachment if necessary. Skills description must begin in this space.	
15. Does this application involve a job opportunity that includes a combination of occupations?	❑ Yes ❑ No
16. Is the position identified in this application being offered to the alien identified in Section J?	❑ Yes ❑ No
17. Does the job require the alien to live on the employer's premises?	❑ Yes ❑ No
18. Is the application for a live-in household domestic service worker?	❑ Yes ❑ No
18-A. If Yes, have the employer and the alien executed the required employment contract and has the employer provided a copy of the contract to the alien?	❑ Yes ❑ No ❑ NA

I. Recruitment Information

a. Occupation Type – All must complete this section.

1. Is this application for a **professional occupation**, other than a college or university teacher? Professional occupations are those for which a bachelor's degree (or equivalent) is normally required.	❑ Yes ❑ No
2. Is this application for a college or university teacher? **If Yes, complete questions 2-A and 2-B below.**	❑ Yes ❑ No
2-A. Did you select the candidate using a competitive recruitment and selection process?	❑ Yes ❑ No
2-B. Did you use the basic recruitment process for professional occupations?	❑ Yes ❑ No

b. Special Recruitment and Documentation Procedures for College and University Teachers – Complete only if the answer to question I.2-A is Yes.

3. Date alien selected
4. Name of national professional journal in which advertisement was placed:
5. Specify additional recruitment information in this space. Add an attachment if necessary.

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I. Recruitment Information Continued

c. Professional/Non-Professional Information –
Complete this section unless your answers to questions* I.a.1 *is NO* *and* I.a.2.B *is YES

6. Start date for the SWA job order	7. End date for the SWA job order
8. Is there a Sunday edition of the newspaper in the area of intended employment?	❑ Yes ❑ No
9. Name of newspaper (of general circulation) in which the first advertisement was placed:	
10. Date of first advertisement identified in question 9:	
11. Name of newspaper or professional journal in which second advertisement was placed (if applicable).	❑ Newspaper ❑ Journal
12. Date of second Sunday advertisement (if newspaper) or date of advertisement (if other than newspaper) identified in question 11:	

d. Professional Information – Complete if the answer to question I.1 is Yes or if the answer to I.2-B is Yes. Complete at least 3 of the items.

13. Dates advertised at job fair From: To:	14. Dates of on-campus recruiting From: To:
15. Dates posted on employer web site From: To:	16. Dates advertised with trade or professional organization From: To:
17. Dates listed with job search web site From: To:	18. Dates listed with private employment firm From: To:
19. Dates advertised with employee referral program From: To:	20. Dates advertised with campus placement office From: To:
21. Dates advertised with local or ethnic newspaper From: To:	22. Dates advertised with radio and TV ads From: To:

e. General Information – All must complete this section.

23. Has the employer received payment of any kind for the submission of this application?	❑ Yes ❑ No
23-A. If Yes, specify:	
24. Has the bargaining representative for workers in the occupation in which the alien will be employed been provided with notice of this filing at least 30 days but not more than 180 days before the date the application is filed?	❑ Yes ❑ No ❑ NA
25. If there is no bargaining representative, has a notice of this filing been posted for 10 business days in a conspicuous location at the place of employment, at least 30 days before but not more than 180 days before the date the application is filed?	❑ Yes ❑ No ❑ NA
26. Has the employer had a layoff in the area of intended employment in the occupation involved in this application or in a related occupation within the six months immediately preceding the filing of this application?	❑ Yes ❑ No
26-A. If Yes, were the laid off U.S. workers notified and considered for the job opportunity for which certification is sought?	❑ Yes ❑ No ❑ NA

J. Alien Information (This section must be filled out. This information must be different from the agent or attorney information listed in Section E).

1. Alien's last name	First name	Full middle name
2. Current address 1		
Address 2		

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J. Alien Information Continued

3. City	State/Province	Country	Postal code
4. Phone number of current residence			
5. Country of citizenship	6. Country of birth		
7. Alien's date of birth	8. Class of admission		
9. Alien registration number (A#)	10. Alien admission number (I-94)		
11. Education: highest level achieved relevant to the requested occupation: ❑ None ❑ High School ❑ Associate's ❑ Bachelor's ❑ Master's ❑ Doctorate ❑ Other			
11-A. If Other indicated in question 11, specify			
12. Specify major field(s) of study			
13. Year relevant education completed			
14. Institution where relevant education specified in question 11 was received			
15. Address 1 of conferring institution			
Address 2			
16. City	State/Province	Country	Postal code

17. Did the alien complete the training required for the requested job opportunity, as indicated in question H.5?	❑ Yes ❑ No ❑ NA
18. Does the alien have the experience as required for the requested job opportunity indicated in question H.6?	❑ Yes ❑ No ❑ NA
19. Does the alien possess the alternate combination of education and experience as indicated in question H.8?	❑ Yes ❑ No ❑ NA
20. Does the alien have the experience in an alternate occupation specified in question H.10?	❑ Yes ❑ No ❑ NA
21. Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?	❑ Yes ❑ No ❑ NA
22. Did the employer pay for any of the alien's education or training necessary to satisfy any of the employer's job requirements for this position?	❑ Yes ❑ No
23. Is the alien currently employed by the petitioning employer?	❑ Yes ❑ No

K. Alien Work Experience

List all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification.

a. Job 1

1. Employer name
2. Address 1

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K. Alien Work Experience Continued

Address 2			
3. City	State/Province	Country	Postal code
4. Type of business		5. Job title	
6. Start date	7. End date	8. Number of hours worked per week	
9. Job details (duties performed, use of tools, machines, equipment, etc.)			

b. Job 2

1. Employer name			
2. Address 1			
Address 2			
3. City	State/Province	Country	Postal code
4. Type of business		5. Job title	
6. Start date	7. End date	8. Number of hours worked per week	
9. Job details (duties performed, use of tools, machines, equipment, etc.)			

c. Job 3

1. Employer name
2. Address 1
Address 2

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K. Alien Work Experience Continued

3. City	State/Province	Country	Postal code
4. Type of business		5. Job title	
6. Start date	7. End date	8. Number of hours worked per week	
9. Job details (duties performed, use of tools, machines, equipment, etc.)			

L. Alien Declaration

I declare under penalty of perjury that Sections J and K are true and correct. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both (18 U.S.C. 2, 1001).*

In addition, I **further declare** under penalty of perjury that I intend to accept the position offered in Section H of this application if I am granted a labor certification or visa or an adjustment of status based on this application.

1. Alien's last name	First name	Full middle name
2. Signature	Date signed	

M. Declaration of Preparer

1. **Was the application completed by the employer?** If No, you must complete this section.	❑ Yes ❑ No

I hereby certify that I have prepared this application at the direct request of the employer listed in Section C and that to the best of my knowledge the information contained herein is true and correct. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine, imprisonment up to five years or both (18 U.S.C. 2, 1001).*

2. Preparer's last name	First name	Middle initial
3. Title		
4. E-mail address		
5. Signature	Date signed	

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N. Employer Declaration

By virtue of my signature below, ***I HEREBY CERTIFY*** *the following conditions of employment:*

1. The offered wage equals or exceeds the prevailing wage and the employer will pay the prevailing wage from the time Permanent residency is granted or from the time the alien is admitted to take up the certified employment.
2. The wage is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage.
3. I have enough funds available to pay the wage or salary offered the alien.
4. I 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 employer's 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:
   a. 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
   b. At issue in a labor dispute involving a work stoppage.
7. The job opportunity's terms, conditions, and occupational environment are not contrary to Federal, State or local law.
8. The job opportunity has been and is clearly open to any U.S. worker.
9. The U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons.
10. The job opportunity is for full-time, permanent employment.

I hereby designate the agent or attorney identified in section E (if any) to represent me for the purpose of labor certification and, by virtue of my signature in Block 3 below, **I take full responsibility** for the accuracy of any representations made by my agent or attorney.

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both (18 U.S.C. 2, 1001).*

1. Last name	First name	Middle initial
2. Title		
3. Signature	Date signed	

Note – The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be complete when submitting. If submitted electronically, the application MUST be signed *immediately upon receipt* before it can be submitted to USCIS for final processing.

O. U.S. Government Agency Use Only

Pursuant to the provisions of Section 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, I hereby certify that there are not sufficient U.S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Signature of Certifying Officer

Date Signed

Case Number

Filing Date

P. OMB Information *Paperwork Reduction Act Information Control Number 1205-0015*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Respondent's obligation to reply to these reporting requirements are required to obtain the benefits of permanent employment certification. (INA Act, Section 212(a)(5)). Public reporting burden for this collection of information is estimated to average 1¼ hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Division of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW * Washington, DC * 20210.
Do NOT send the completed application to this address.

Q. Privacy Statement Information

In accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a), you are hereby notified that the information provided herein is protected under the Privacy Act. The Department of Labor (Department) maintains a System of Records titled Employer Application and Attestation File for Permanent and Temporary Alien Workers (DOL/ETA-7) that includes this record.

Under routine uses for this system of records, case files developed in processing labor certification applications, labor condition applications, or labor attestations, may be released as follows: in connection with appeals of denials before the DOL Office of Administrative Law Judges and Federal courts, records may be released to the employers that filed such applications, their representatives, to named alien beneficiaries or their representatives, and to the DOL Office of Administrative Law Judges and Federal courts; and in connection with administering and enforcing immigration laws and regulations, records may be released to such agencies as the DOL Office of Inspector General, Employment Standards Administration, the Department of Homeland Security's U.S. Citizenship and Immigration Services and Bureau of Immigration and Customs Enforcement, and Department of State.

Further relevant disclosures may be made in accordance with the Privacy Act and under the following circumstances: in connection with federal litigation; for law enforcement purposes; to authorized parent locator persons under Pub. L. 93-647; to an information source or public authority in connection with personnel, security clearance, procurement, or benefit-related matters; to a contractor or their employees, grantees or their employees, consultants, or volunteers who have been engaged to assist the agency in the performance of Federal activities; for Federal debt collection purposes; to the Office of Management and Budget in connection with its legislative review, coordination, and clearance activities; to a Member of Congress or their staff in response to an inquiry of the Congressional office made at the written request of the subject of the record; in connection with records management; and to the news media and the public when a matter under investigation becomes public knowledge, the Solicitor of Labor determines the disclosure is necessary to preserve confidence in the integrity of the Department, or the Solicitor of Labor determines that a legitimate public interest exists in the disclosure of information, unless the Solicitor of Labor determines that disclosure would constitute an unwarranted invasion of personal privacy.

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