INA dictates that after six years, H-1B status must terminate. The specific exceptions to that termination are linked by AC21 to harm resulting from permanent residence backlogs, including backlogs in the permanent labor certification program. The extension beyond six years is intended by the statute to benefit an H-1B worker when 365 days or more have elapsed since the filing of a permanent labor certification application "on the alien's behalf (if such certification is required for the alien to obtain status under such [INA] section 203(b))… ." Public Law 106-313 section 106(a)(1). Clearly, the alien intended to be helped by this provision is the alien who may have been prejudiced by the backlog in processing labor certification applications under DOL's pre-PERM regulations. An H-1B worker seeking substitution may have benefited by working in the U.S. for six or more years, but has not necessarily been affected by the backlog at all. It is not inconsistent with the statutory intent of AC21 to limit the ability of that alien to continue his or her nonimmigrant status to a labor certification filed on his or her behalf rather than on someone else's behalf. .

The Department recognizes that those aliens who fall outside the five-year mark will potentially be unable to extend beyond the sixth year of H-1B status and otherwise might have been able to do so through substitution. This small group of affected individuals, however, does not present sufficient equities to persuade the Department to carve out an exception to the prohibition on substitution, since employers in such situations have had upwards of five years in which to initiate permanent resident status on their behalf.

Further, extension of an alien's nonimmigrant visa status is the province of USCIS, not the Department of Labor. The Department's mandate is not to preserve the opportunity or further the potential opportunity in all circumstances for an employer to hire an immigrant worker, nor is it a process driven by the interests of any or all aliens who may wish to enter the U.S. through employment-based immigration. The Department's mandate, rather, is to design and implement a secure framework within which an employer with legitimate business needs may determine the availability of U.S. workers and, if such workers are not found, bring in a foreign worker. Moreover, because the Final Rule prohibits only substitutions which have not yet been made, aliens who have not otherwise begun the permanent residence process before the end of the fifth year of H-1B status presumably do not anticipate and therefore cannot claim a reasonable expectation of benefiting from substitution.

5. Effect of the Elimination of Substitution on Employers

The Department received many comments addressing the perceived hardships employers would suffer if substitution were prohibited.

Added cost and burden ? Employers were concerned about loss of their investment in the first application; the loss of an important employee retention and recruitment tool; added cost and burden from a new application, including advertising and recruiting costs, staff time, legal fees; inherent delays to getting a new worker in place, and potential processing delays with the Department or other agencies; additional costs from other parts of the petitioning and visa application process; loss of place in the queue given visa retrogression; and retardation of business growth and loss of competitiveness from potential delays in getting products to market.

Some pointed to the potential negative impact on special groups, such as high-tech employers, nonprofits, or businesses located in rural areas. One commenter stated that each set of costs should not be viewed in isolation, but rather multiplied by the number of applications for each employer, and the large number of employers that must respond to labor mobility and unforeseen business changes.

Despite a lack of consistent information from commenters on the additional costs associated with new filings, the Department is aware of and sensitive to the time and expense employers absorb to recruit and retain a qualified workforce. However, the costs associated with the employment-based immigration process, including the costs incurred by employers requesting permanent labor certification, have been an accepted part of the labor certification process for almost 30 years and are not unanticipated by the statute. The INA presumes inadmissibility of each alien, and requires the presumption be overcome for each foreign worker through, in part, the Secretary of Labor's determination. A demonstration of worker unavailability is inherent to the process of filing a labor certification application, and it is not unreasonable or inconsistent with the INA to require recruitment every time an employer seeks to bring in a new foreign worker. Recruitment activities and the costs associated with them are equally as appropriate for the would-be substituted foreign worker as they were for the originally named alien. Accordingly, while we are sensitive to employers' concerns, we must nevertheless conclude that elimination of the current substitution practice is amply justified notwithstanding.

In addition, the Department fully recognizes that substitution has become a tool to address visa retrogression. However, the Department is not convinced it should retain a policy on substitution that gives rise to significant fraud and may adversely affect U.S. workers as a means to cope with the visa cap issue, or to support any unintended cost savings for employers that may have resulted from this practice.

Loss of priority date ? Many commenters expressed concern over the loss of the visa priority date when a new application is required to hire a new alien. Our program experience indicates that the priority date plays a defining role in the commoditization of labor certifications; substitution enhances the labor certification's marketability. Commoditization stems from the ability to substitute aliens on labor certifications, which are valid indefinitely, while maintaining the priority date of the original filing. Indeed, the priority date is often a prime motivator for the marketability and added value of labor certifications. It is also not necessarily true that the availability of substitution is beneficial to aliens as a class. As stated in the NPRM, under the substitution process currently in place, the new alien beneficiary is inserted into an in-process application or certification initially filed for a different alien and with a filing date that is often years earlier than the substituted alien would have received if named in a newly filed application.

We are aware of concerns that these practices make substitution fundamentally unfair to other aliens (and their petitioning employers) seeking to immigrate to the U.S. who remain below the substituted worker in the visa priority date queue, as well as to U.S. workers. See 71 FR 7656 (Feb. 13, 2006) and 56 FR 54920 (Oct. 23, 1991). The need for a new labor market test and the Department's interest in removing aspects of the current process creating

incentives for fraud, combined with the inequity to other aliens waiting in the visa queue who have not been substituted in, outweigh the harm to an individual employer and alien from the loss of a priority date on a given application. In addition, the reasoning that the employer suffers a hardship from the inability to apply an earlier priority date to a subsequent application rests on an unsupported assumption that another test of the labor market would not yield a qualified and willing U.S. worker. We do not agree with this reasoning and find it contrary to our statutory responsibility to protect U.S. workers, as well as virtually impossible to legitimately accommodate in the administration of the permanent labor certification program.

B. Prohibition of Modifications to Applications

The proposed rule sought to clarify procedures for modifying applications filed under the new permanent labor certification regulation and, in particular, to prohibit modifications to applications once filed with the Department. We received numerous comments raising concern over this new provision. After careful consideration of these comments and for the reasons set forth below, this Final Rule codifies the new provision at § 656.11(b) with slight changes from the NPRM, clarifying that requests for modifications to an application submitted under the PERM regulation will not be accepted where the application was filed after this Final Rule's effective date. In considering how to implement the "no modification" provision, while ensuring due process to applicants for labor certification, we have determined that it is advisable to revise the language of § 656.24(g) to more precisely define what documentation may be submitted with a request for reconsideration.

Codifying the "no amendments" requirement through notice and comment ? As explained in the NPRM, the clarification made by this Final Rule is consistent with the streamlined labor certification procedures governed by the regulation that went into effect March 28, 2005. Nothing in the regulation contemplates permitting employers to make changes to applications after filing. That practice was one the Department specifically sought to change through the Final Rule implementing the re-engineered PERM program. The re-engineered program is designed to streamline the process, and an open amendment process that either freely allows changes on applications or results in continual back and forth exchange between the employer and the Department regarding amendment requests is inconsistent with that goal. Further, the re-engineered certification process has eliminated the need for changes.

The Department has instituted screening and guideposts for electronic permanent labor certification applications. The online application system, especially in light of the technological enhancements described below, allows the user to proofread, revise, and save the application prior to submission, and the Department expects users will do so. ETA has received frequent, positive feedback from stakeholders on what they have found to be the time and cost-saving nature of this review.

Moreover, in signing the application, the employer declares under penalty of perjury that it has read and reviewed the application and the submitted information is true and accurate to the best of its knowledge. In the event of an inadvertent error or any other need to refile, an employer can withdraw an application, make the corrections

and file again immediately. Similarly, if an employer receives a denial under the new system, it can choose to correct the application and file again immediately if it does not seek reconsideration or appeal.

Immediate feedback on deficiencies or deniability prior to submission of an application – Prohibiting the modification of applications will allow the Department to process employer applications more quickly and support greater uniformity and consistency in their adjudication. However, as part of our continuing upgrades to PERM processing capabilities, as well as in response to comments on the NPRM and the suggestion by the BALCA in its decision in In the Matter of HealthAmerica, No. 2006-PER-1 (July 18, 2006), we have dramatically increased the nature and number of system "prompts" and warnings in an effort to provide employers and others with additional opportunities for correction prior to submission of an application.

The Department has added system capabilities in the form of "pop-up" edit alerts to notify each applicant when a response to a question is technically in conflict with either the PERM regulation or certain of the formal instructions for completion of the form. The applicant is allowed to continue, but with full warning of possible deniability. The system permits submission of the application, but the applicant assumes the risk that the application will be denied based on the failure to fully comply with the technical requirements and alerts of the program. This electronic advisory system is much more detailed and more robust than anything available previously to online users, and it is continuing to reduce the type of automated denials that gave rise to HealthAmerica.

The majority of form preparation errors that have occurred to date will now generate an automated prompt, warning the filer that it may have entered erroneous information that may cause a denial of the application. As described above, similar manual mechanisms are in place to detect and correct errors on mailed applications. The Department reiterates, however, the fundamental responsibility to submit an application which does not contain typographical or similar errors remains with program users.

Under the system upgrades now in place, applications containing errors in contravention of system alerts are denied. Consistent with the "no modifications" policy codified by this rule and the evidentiary parameters of the revised § 656.24(g) described below, requests for reconsideration based on such denials will not be granted, where an application filed after this rule's effective date is at issue. Requests for reconsideration based on such denials involving applications filed prior to this rule's effective date will be reviewed on a case-by-case basis; they will be placed in the appropriate queue and reviewed on a "first in, first out" basis and as workload permits.

Evidence in support of requests for reconsideration and amendment of § 656.24(g) – We have made one change from the NPRM in this Final Rule based on the BALCA's decision in HealthAmerica. Among other issues, the Board addressed the meaning of the current § 656.24(g) governing requests for reconsideration. That section provides that reconsideration requests "may not include evidence not previously submitted." The Board concluded that evidence "previously submitted" encompassed material in the possession of the employer at the time of filing. That reasoning was the basis for the Board's decision that

allowed the employer to modify its application to correct a mistake. To the extent the BALCA favored allowing the employer in HealthAmerica to present evidence that effectively changed the response to a question on the application, the BALCA's approach is inconsistent with the Department's objective and the NPRM proposal that applications cannot be changed or modified after submission.

However, the Department recognizes that there will be situations where - although an employer will not be permitted to amend its response to a question as it did in HealthAmerica - it may nonetheless be appropriate to consider information not previously in the Certifying Officer's (CO's) physical possession in order to provide appropriate evaluation of the employer's request for reconsideration. The Department has determined an approach that allows for submission with a motion to reconsider of documentation in existence at the time of filing and held by an employer as part of its compliance responsibilities under the PERM recordkeeping requirements is appropriate. Accordingly, we have adopted a modified approach to that proposed in the NPRM, continuing to prohibit application modifications but recognizing the appropriateness of an opportunity to present and consider evidence that was generated to comply with record retention requirements of the PERM program.

Accordingly, the Department is including as part of this Final Rule a revised § 656.24(g) setting the new standard for applications filed on or after the effective date of this Final Rule. The new § 656.24(g) describes the evidence that can be submitted with a motion to reconsider and clarifies the interplay with the no-modification provision of § 656.11(b). The revised § 656.24(g) limits evidence submitted at reconsideration to documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or documentation that the employer did not have an opportunity to present to the Certifying Officer, but that existed at the time the application was filed, and was maintained by the employer to support the application for permanent labor certification to meet the documentation requirements of § 656.10(f). Revised § 656.24(g) also provides that the Department will not grant motions to reconsider where the deficiency that caused denial resulted from the applicant's disregard of a system prompt or other direct instruction. These changes together adequately ensure that employers and others have sufficient opportunity to present evidence on salient points, even if denied that opportunity during the application's consideration, while enabling the PERM program to function in its intended streamlined manner.

1. Issues Raised by Public Comments

Authority to limit modifications to an Application for Permanent Employment Certification ? Many commenters questioned the Department's authority to limit and prohibit an employer's ability to modify a Form ETA 9089, Application for Permanent Employment Certification. We disagree. Federal agencies have the authority, and sometimes the necessity, to write strict procedural rules in order to manage their respective responsibilities. HealthAmerica, slip op. at 17. Our past practice and program experience led us to make regulatory changes in the nature of the permanent labor certification program, changes that were publicized through extensive stakeholder outreach and during numerous public meetings across the country. The resulting efficiency and effectiveness measures have contributed to overall program productivity increases and have reinforced, among

other factors, the critical need to discontinue what has historically been continual, unduly time-consuming communication between ETA Certifying Officers and employers or their representatives.

The Department recognizes that the accountability-based standard it put in place in PERM was, at least for purposes of the modifications issue, not made sufficiently clear in the text or preamble to the original December 27, 2004 Final Rule. The BALCA pointed out in its HealthAmerica decision that a requirement for precise filing can be imposed with proper notice, citing Glaser v. FCC, 20 F.3d 1184, 1186 (D.C. Cir. 1994); Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir. 1985); JEM Broadcasting Co., Inc. v. FCC, 22 F.3d 320 (D.C. Cir. 1994); Florida Cellular Mobil Communications Corp. v. FCC, 28 F.3d 191 (D.C. Cir. 1994). In these cases, the D.C. Circuit found the FCC could appropriately and legitimately write regulations requiring certain license applications be "letter-perfect" (i.e., complete and sufficient) when submitted because the requirement was provided for in agency regulations that had been subject to notice and comment. The BALCA noted the issuance of the NPRM as evidence that such a "letter-perfect" requirement did not exist under the PERM regulations as initially issued. This rulemaking satisfies public notice and comment objectives.

Relationship to fraud ? One commenter suggested the Department is insinuating that any request for modification is grounded in fraud. We disagree. As we have stated, the "no amendments" clarification in this rule simply codifies a policy the Department assumed was part and parcel of the re-engineered program, and which was an (albeit unstated) assumption of the PERM Final Rule. The "no modifications" policy furthers administrative efficiency. In addition, it protects against certain program abuses, such as the submission of a form with incomplete or inaccurate information simply to save the priority date. Thus, the policy serves a number of purposes not limited to fraud prevention.

Need for modifications ? Many commenters stated modifications to applications were necessary because alleged errors made by the Department in reviewing mailed-in applications led to erroneous case denials. For example, the Department issued denials for failure to include the language that the employer would accept "any suitable combination of education, training, or experience," when, in fact, the language was included in the application. Further, commenters stated other applications have been denied because the Department allegedly stated the alien did not possess the required academic credentials when, in fact, he or she did, and those credentials were clearly noted in the application in the appropriate place.

Commenters suggested in the event of an inadvertent error, there are many reasons why refiling is not usually a viable alternative, thus making modifications necessary. For instance, they stated that often an application preparer is not aware an error has been made at the time the employer submits the electronic Form ETA 9089. Even if the mistake comes to light before the Department issues a denial, it may be too late to re-file because the recruitment may have become stale. Further, certain post-filing, pre-certification events, including but not limited to changes in corporate structure resulting in a change of employer name, tax identification number, or address, may require the amendment of the application. One commenter suggested the inability to modify inadvertent mistakes could have serious ramifications as such a mistake may result in an inability to refile

the application, cause a denial of the application, or be construed as a false statement.

The Department disagrees that these comments require alteration of the no-modifications policy reflected in the NPRM. As outlined above, going forward, electronic system prompts will most often alert the employer or its agent to the grounds for deniability, so a filer will be able to learn prior to submitting the application if the system would deny the application as currently completed. Further, as always, an employer has the right to seek reconsideration and beyond that, appeal to the BALCA, when it believes a denial was unjustified, without loss of the priority date which attached to the application. Hence, the "no modifications" policy does not institute a standard not previously envisioned, and does nothing to limit or undermine employer due process rights.

When filing the Application for Permanent Employment Certification, the employer certifies and declares under penalty of perjury that it has read and reviewed the application, and the information provided therein is true and accurate to the best of its knowledge. The Department understands that human error occurs in limited circumstances, which is why we have elected to increase our system "prompts" to help avoid such errors. These additions sufficiently address commenter concerns. Further, the Department believes it is capable of distinguishing between typographical or inadvertent errors and willful false statements.

Tailoring the "no modifications" policy ? One commenter suggested the current regulations governing PERM should permit a single opportunity to the employer or agent to correct minor technical deficiencies. According to this commenter, applications should be decided based on their substantive merits instead of on non-material technical errors. The Department agrees that applications should be adjudicated upon their respective merits. However, typographical or similar errors are not immaterial if they cause an application to be denied based on regulatory requirements. The Department encourages those who submit applications to carefully review all information for completeness and accuracy and has modified the online application system to assist them to do so. Attentive filers will accrue the benefits of the new streamlined system, as "clean" applications are usually processed and adjudicated within 60 days of filing.

Many commenters suggested it is highly unlikely that employers will need more than one opportunity to correct any minor technical deficiencies and the nature and number of technical errors is highly unlikely to have a significant detrimental impact on the overall efficiency of the PERM process. Commenters suggested the new system has, in fact, had a dramatic impact on the processing of applications for permanent labor certification through, among other things, centralization and implementation of new technology. According to these commenters, permitting a single opportunity to amend an application to overcome a non-substantive technical error will neither require substantial Department resources nor render the PERM system ineffective or inefficient.

We disagree with the commenters' premise that permitting modifications will not negatively impact the processing and review of applications. The processing of requests for reconsideration of denials poses a significant, costly resource drain on the PERM case management system and staff. The opportunity cost and inequity to

other employers are also high, as resources must be transferred from review of applications that do meet technical requirements to those that may not. Moreover, as we have discussed above, the alerts and prompts that we have built into the system will provide employers the opportunity to correct minor technical deficiencies before they ever submit their applications. This is a reasonable balancing of available resources. Therefore, the Department is finalizing the standard noted in the NPRM of not allowing modifications to an application. The revisions to § 656.24(g) will enable employers to present evidence in a request for reconsideration that will permit filers the opportunity, if necessary, to present evidence outside the four corners of the application.

Many commenters suggested it is reasonable to request that the modification prohibition, if adopted, should only apply to applications filed after publication of the Final Rule. We have adopted this suggestion. The changes to §§ 656.11 and 656.24 contained in this rule apply only to applications filed after the effective date of the rule; they do not impact the processing of motions for reconsideration filed with respect to applications filed prior to that date.

Concern prohibiting modifications will generate backlogs ? One commenter suggested prohibiting modifications under proposed § 656.11(b) would be an open invitation to intractable increases in backlogged applications, rather than the radical reduction in pending applications and processing times contemplated by the PERM reforms. The efficiencies created by the new system prompts, which are proving to be an effective screen for program users against system-generated denials for technical errors, as well as the "no modifications" policy put in place by this rule, will allow us to significantly reduce the pending queues of denied applications and, consequently, to process all other applications more quickly and effectively.

Distinguishing policies for backlog and PERM ? One commenter suggested the Department should clarify its position on modifications under the new PERM streamlined system, relative to applications filed with the Backlog Processing Centers, by clearly explaining the difference in treatment in the regulatory text. As proposed in the NPRM, the "no modifications" policy in this Final Rule will apply only to the PERM program since only the PERM regulation is amended in this Final Rule. In addition, this preamble describes more fully the process the Department will follow in its review of applications filed up to the effective date of the rule. This information provides sufficient notice of the expectations for employers and their representatives regarding the treatment of technical and other modifications going forward.

C. Prohibition on the Sale, Barter, or Purchase of Applications for Permanent Labor Certifications and of Approved Permanent Labor Certifications, and Prohibition on Related Payments

The proposed rule, at § 656.12, prohibited the sale, barter, and purchase of applications and approved labor certifications, as well as other related payments. The Department received numerous comments on this proposal. Commenters overwhelmingly opposed § 656.12(b), which would prohibit employers from seeking or receiving payment of any kind for any activity related to obtaining a permanent labor certification.

After carefully considering comments received, the Department has decided to move forward on all provisions, but in response to comments has clarified the types of prohibited payments, as further described below. The prohibitions in this section will apply to all such transactions on or after the effective date of this Final Rule, regardless of whether the labor certification application involved was filed under the prior or current regulation implementing the permanent labor certification program.

1. Improper Commerce

The proposed rule provided, at § 656.12(a), that permanent labor certification applications and certifications are not articles of commerce and they may not be sold, bartered, or purchased by individuals or entities. The majority of comments favored the proposal, and only a few were in opposition. Some comments were ambiguous; it was not clear whether the commenters were commenting primarily on § 656.12(a), prohibiting commerce in labor certification applications and certifications, or on § 656.12(b), which prohibits several types of payments related to labor certification applications and certifications.

The Department's extensive experience in the administration of this program leaves no doubt that some labor certifications are treated as commodities and sold at substantial gain by those who wish to engage in the existing secondary market. In one example from 2005, a joint investigation with DHS' Immigration and Customs Enforcement (ICE), the Federal Bureau of Investigation, the Department of State OIG and the Internal Revenue Service resulted in several employers, agents and attorneys being convicted of numerous visa fraud schemes. See U.S. v. Ivanchukov et. al. (No. 04-421, E.D. Va. 2005); see also DOL OIG Semiannual Report (October 1, 2005-March 31, 2006) (available at http://www.oig.dol.gov/public/semiannuals/55.pdf). In the Ivanchukov case, labor certifications were being sold for as much as $120,000.00. As a reminder of how common this activity has become, one commenter to the NPRM for this rulemaking provided the Department with a website that advertises the sale of pre-approved labor certifications. The Department has reasonably concluded that there is a need to prohibit improper commerce in permanent labor certifications.

Sale, barter or purchase ? Two commenters indicated that prohibiting sale, barter, and purchase was one of the most effective amendments the Department could promulgate to reduce fraud in the permanent labor certification program, as it removes the economic incentive for unscrupulous behavior. Some commenters indicated the terms "sold," "bartered," and "purchased" were impermissibly vague. Other commenters stated the proposed ban on sale, barter, purchase, and related payments was overbroad and did not take into account that both employer and employee benefit when an employee obtains permanent residence. The Department acknowledges these concerns by adding definitions of the terms sale, barter, and purchase to the definitions at § 656.3, and by specifying and clarifying what constitutes the ban on sale, barter, purchase, and related payments. A labor certification is a certification from the Department that there are no able, willing, and qualified U.S. workers available for the specific job opportunity stated on the employer's application. Converting this labor certification into a commodity is an example of selling, bartering, or purchasing.

Many commenters suggested that if DOL wants to make selling labor certifications illegal, it should make such sales illegal and prosecute those who break the law rather than punishing everyone. We disagree that the rule punishes everyone; this aspect of the rule only impacts an individual or employer when there is an actual sale. Further, our program experience clearly indicates that not "everyone" uses the substitution accommodation or wishes to sell labor certifications.

One commenter suggested we should remove institutions of higher education from the prohibition on barter, sale and purchase, suggesting that the prohibition be tailored to industries where the prohibited activity has been shown to occur. The Department's rationale for prohibiting the sale of labor certifications is based upon a broader policy concern than the commenter implies. Any such activity is contrary to the statutory purpose of the program. There is no basis upon which to exempt one industry sector or type of employer. Further, as other commenters have stated, there is no legitimate reason for an employer to sell or barter permanent labor certifications. Further, if such activity is not occurring in a particular industry, then employers in that industry will not be affected by the prohibition.

Attorneys' fees for preparing and filing labor certification applications ? Two commenters supported the improper commerce provisions, contingent upon clarification that attorneys' fees for preparing and filing an application would not be prohibited or deemed a sale or purchase. It is not the Department's intent to prohibit attorneys from charging fees for preparing and filing labor certification applications for employers or to deem such fees by themselves to be a sale or purchase of the application or resulting certification.

Corporate restructuring ? One commenter was troubled that the proposed rule could be construed broadly to prohibit transfer of a labor certification that arises as the consequence of a merger, acquisition, spin-off or other type of corporate restructuring. The commenter went on to say the proposed rule could be construed to contradict the intent of the Congress in stating in AC21 that corporate restructuring should not have any adverse impact on the immigration process. According to the commenter, in cases where one company is acquired by another, the acquiring company often compensates the acquired entity for the cost of pending labor certifications and other types of applications. In other cases, the employer filing the labor certification application may spin off part of the company and wish to sell the pending labor certification to the spun-off entity so that it can be used to obtain a green card for the original beneficiary, who now works for that spun-off entity. According to the commenter, the proposed rule is ambiguous with respect to both of the above factual situations. The commenter requested the rule be clarified to state that the prohibition against sale, barter or purchase of labor certification applications and certifications does not apply to transfers stemming from legitimate corporate restructuring activities such as mergers acquisitions, or spin-offs.

The Department did not intend this provision to govern corporate restructuring or internal corporate accounting and finance practices which exist independently of the permanent labor certification program. The Department has determined that further clarification on

this question is not necessary.

2. Prohibition on Employers Seeking or Receiving Certain Payments, Including Payment of Attorneys' Fees

As proposed, the rule would have added a new § 656.12(b) to prohibit employers from seeking or receiving payment of any kind, from any source, for filing a Form ETA 750 or a Form ETA 9089 or for other actions in connection with the permanent labor certification process. The Department proposed to include in this prohibition a ban on payment or reimbursement, directly or indirectly, of any employer-incurred attorneys' fees and other costs related to the preparing, filing, and obtaining of a labor certification, whether payment was by the alien or another individual or entity. The Department received numerous comments in response to this proposal, most in strong opposition to the proposal.

Following careful review of comments and weighing our growing program experience with this issue, and for the reasons explained in detail below, the Department finds the need for program integrity outweighs any interest in the ability of the employer to receive payment or reimbursement from the alien or others in exchange for the filing of a labor certification application, especially when such payment or reimbursement has led to abuse of the process or exploitation of individual aliens. The Department's unique responsibility to reduce the incentive for fraud in the permanent labor certification program while simultaneously protecting the rights and working conditions of U.S. workers requires us to focus on the nature of the payment that an employer would receive from an alien or others for costs or fees relating to the preparation and filing of the labor certification application or obtaining permanent labor certification. The Department's concern, which is shared by other Federal agencies, is that such a payment undermines the labor certification process by potentially corrupting the search for qualified U.S. workers and creating serious doubt as to whether the employer is offering a bona fide job opportunity and making it available for U.S. workers.

Accordingly, consistent with the proposed rule, the intent of this Final Rule is to make it clear that employers who submit applications for permanent labor certification do so with the full understanding that the costs they incur for the preparation and filing of the application and obtaining permanent labor certification are to be exclusively borne by the employer. Thus, the Final Rule prohibits an employer from receiving payment of any kind as an incentive or inducement to file, or in reimbursement of the costs of preparation or filing of, an application for labor certification, including covering the costs of the employer's attorneys' fees, except as specifically provided for certain third-party payments. The Final Rule also prohibits an employer filing an application for labor certification from reducing the wages, salary or benefits of an alien named on the application for any expense related to the preparation and filing of the application. This prohibition includes the payment by the alien of costs (for recruitment or other activities in furtherance of the labor certification) as well as the employer's attorneys' fees.

In addition, this Final Rule prohibits employers engaged in the labor certification process from withholding from an alien's wages, either in increments or in lump sum, any payment in reimbursement to the employer for costs associated with that process.

As first described in the NPRM, prohibited payments include, but are not limited to: Employer fees for hiring the alien beneficiary; receipt of "kickbacks" of part of the alien beneficiary's pay, whether through a payroll deduction or otherwise; reducing the alien beneficiary's pay for purposes of reimbursement or pre-payment; goods and services or other wage or employment concessions; kickbacks, bribes or tributes; or receipt of payment from aliens, attorneys, or agents for allowing a permanent labor certification application to be filed on behalf of the employer.

There are strong and ample grounds upon which to prohibit these payments or arrangements, including the payment by the alien of the employer's attorneys' fees. Permanent labor certification is an employer-driven process; employers, not aliens must file permanent labor certification applications. To the extent the alien beneficiary who is the subject of the labor certification application and, later, the immigrant petition, is financially involved in the application process directly or indirectly, this involvement casts suspicion on the integrity of the process and the existence of a bona fide job opportunity. Payment by the alien of employer costs allows him or her some level of control over what must remain an employer-driven process. The degree of that control, at least at the labor certification stage, directly and unduly influences the legitimacy of the job opportunity and whether that opportunity has been and remains truly open to U.S. workers. In other words, as stated in the NPRM, alien subsidization of employer-incurred costs adversely affects the likelihood that a U.S. worker will be offered the job when, for example, the alien is paying for the recruitment effort.

The essence of this aspect of this Final Rule is that expenses that rightfully belong with an employer should not be transferred to an alien beneficiary or others. An alien is free to retain counsel to represent his or her interests in the labor certification process and also to assume responsibility for those costs. This Final Rule does not seek to regulate or control payments to, or the identity of, the alien's attorney. However, to the extent that any attorney is preparing or filing a labor certification application and thus engaged by the employer as well as with the alien, the costs attributable to work for the employer must be paid by the employer. Costs for attorneys' fees outside the labor certification process are not part of this rulemaking.

The Department is aware of the import of its position – the implications are at the center of the reasons we find the prohibition a necessity. We recognize the vast majority of aliens for whom permanent labor certifications are filed are already employed by the employer. In initiating the permanent residence process, the employer demonstrates a desire to retain the alien on a more permanent basis than permitted by his or her nonimmigrant status. The pre-existing relationship provides the employer with significant incentive to conduct the recruitment process in a manner that favors the alien. The cost incurred in the labor certification recruitment process by the employer serves as an identifiable disincentive to that outcome. It serves at least to make the employer examine the value it places on retaining the alien. By requiring employers to bear their own costs and expenses, including the representation of the employer, the Department is ensuring that the disincentive to pre-qualify the alien in the job opportunity - keeping the job open and the recruitment real ? remains in the process. This enables the Department to remain

in its statutory role as the arbiter of the presence of otherwise-eligible U.S. workers in relation to the admissibility of the alien.

The complexities associated with multiple-party financial involvement in the labor certification process are not new. The provisions in this section work in concert with other parts of the regulation and reflect the Department's determination to keep the recruitment process open, fair and available to U.S. workers. For example, as stated in the preamble to the final PERM regulation, evidence that the employer, agent, or attorney required the alien to pay employer costs may 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. The rule prohibiting the payment of an employer's fees or costs by the alien and the rule requiring the presence of a bona fide job offer, in turn, are consistent with the prohibition on sale and barter in the Final Rule, as they support the Department's desire to actively prevent and prohibit activities that directly commoditize permanent labor certifications.

Under the authority of § 656.10(c)(8) of the current regulation, Form ETA 90892 already requires employers to disclose and specify "payment[s] of any kind [emphasis added] for the submission of [the] application." The decision to seek this disclosure as part of the information related specifically to recruitment reflects the Department's concern that such payments may adversely impact the availability of the job opportunity to the U.S. workforce. The provisions added by this Final Rule are simply a logical extension and clarification of the type of information the Department considers relevant to this concern.3

This Final Rule clarifies the application of § 656.10(c)(8) to the issue of alien payment. It prohibits employer practices that require an alien to pay employer labor certification costs, including prohibiting practices that require the alien beneficiary to cover all labor certification costs, requirements that an alien cover specific activity-related costs (all recruitment costs, all in-house legal expenses), and wage deductions to the alien's paycheck as reimbursement for or in anticipation of such costs, regardless of the labor certification activity they cover. As with the modifications policy, this Final Rule reinforces the PERM rule's policy; it also specifies in greater detail the specific activities the prohibition is meant to cover.

As stated in the NPRM, the Department recognizes the possibility that legitimate employers may have a practice of seeking reimbursement from the aliens they hire for the expenses they incur in filing and obtaining the permanent labor certification. The Department has determined that any such reimbursement including, but not limited to, attorneys' fees to prepare an employer's application, recruitment expenses to determine whether domestic labor is available, or other such employer expenses, is contrary to the purpose of the labor certification program and such costs should be borne exclusively by the employer. An alien employee who reimburses his employer is effectively being paid a lower wage than agreed to by the employer on the labor certification, which undermines the Secretary's finding that the wages and working conditions of the job will not adversely affect U.S. workers and the Secretary's duty to protect U.S. workers.

3. Issues Raised by Comments on Attorneys' Fees

The Department received a significant number of comments on the proposed prohibition on payment or reimbursement of the employer's attorneys' fees or other employer costs related to preparing and filing a permanent labor certification application and obtaining permanent labor certification. The overwhelming majority of the commenters were opposed to this proposal.

Relationship of this prohibition to purpose of the rule ? Commenters questioned the relationship between the prohibition against aliens paying or reimbursing the employer for expenses related to the labor certification application, including attorneys' fees, and the Department's efforts to limit the opportunities and incentives for fraud in the labor certification program. They believed the Department's statements in the preamble to the NPRM were vague and did not establish a logical relationship between illegal merchandising of labor certifications and such payments or reimbursements. Commenters also questioned the reasoning behind the Department's statement in the NPRM at 71 FR at 7660, that an alien's payment of the employer's costs might indicate there is not a bona fide position and wage available to U.S. workers.

The Department stands by its reasoning. An alien's reimbursement or payment to an employer for filing a labor certification on his behalf turns labor certifications into commodities, increases the likelihood that a prejudicial arrangement exists which precludes any consideration of U.S. workers, and undermines the integrity of the labor market test required for certification under Section 212(a)(5)(A) of the INA. An alien employee who reimburses his employer via deductions from his paycheck or a lump payment is effectively being paid a lower wage than agreed to by the employer on the labor certification. A U.S. worker is non-competitive with the alien worker unless he too accepts the actual lower wage. Therefore, the practice of aliens reimbursing employers for expenses the employer incurred in the labor certification process adversely affects the compensation of U.S. workers. Because the INA mandates that the Department may only approve a labor certification if there are not qualified U.S. workers for the position, and if the wages and working conditions of similarly employed U.S. workers are not adversely affected, the Department will not permit the practice of reimbursement of attorneys or other fees or costs associated with obtaining a labor certification. There is a direct correlation between an alien's financial participation in the labor certification process and the likelihood that an arrangement exists which precludes legitimate consideration of U.S. workers, affecting the integrity of the labor market test required by INA section 212(a)(5)(A). The statute charges the Department to ensure an adequate, good faith test of the labor market ? that an alien will not be admitted for a job for which a qualified U.S. worker is available. It is, therefore, the Department's role and statutory responsibility to remove the potential for this undue influence.

Authority ? Many of the commenters questioned the Department's authority to dictate who should not pay attorneys' fees and other costs. They asserted that there is no statutory authority for such a rule and stated that had the Congress intended to give DOL the authority to regulate the attorney-client relationship and/or to set limits on the payment of attorneys' fees, it would have done so explicitly and unambiguously as it has in other contexts. They cited the authority in INA section 212(n) for the H-1B program as an

example. Many commenters opined the proposed rule would be restrictive of freedom to contract.

In addition, many commenters expressed the belief the Department was intruding into the licensing and regulation of attorneys. They stated this issue has been left exclusively to the states, which prescribe the qualifications for admission to practice and the standards of professional conduct and are responsible for attorney discipline. These commenters believed the Department has neither statutory nor other authority to regulate payments to the attorneys that parties to proceedings before the Department are entitled to retain. They further stated any changes to this complex relationship should be left to the regulatory bodies that traditionally make them - states and their bar associations.

The Department disagrees with those comments. This Final Rule's prohibition on improper payments governs employers and aliens engaged in the labor certification process, not the attorneys retained by the employer. The rule prohibits employers from receiving financial incentives or reimbursement for filing labor certification applications and from withholding payments from workers for that purpose (among other things). These are activities that undermine the legitimacy of the labor market test that is required to be conducted by the law before the Department may approve a labor certification. The Department's focus is not on attorneys' fees, but rather on the actual wage paid to the alien employee and the effect that a lower wage or reimbursement of costs has on the wages and opportunities available to U.S. workers. The transfer of the responsibility for payment of attorneys' fees or other costs associated with preparing, filing and obtaining labor certification from employer to alien (or others) signals preselection in the hiring decision, contrary to the requirement of an open recruitment process with full consideration of U.S. workers. The INA broadly empowers the Secretary to ensure that there is a bona fide job opportunity open to U.S. workers and that there is no adverse effect on the wages and working conditions of U.S. workers before approving a labor certification. As part of its statutory charge, the Department is responsible for eliminating factors which undermine the legitimacy of the job opening and of the recruitment process, including the improper allocation of costs and fees associated with labor certification. Prohibiting the alien, directly or indirectly, from paying the employer's attorneys' fees and other costs is a critical step toward ensuring employers or others do not degrade the validity of the labor market test. The fact that section 212(n)(2)(C)(vi)(II) of the INA prohibits an employer from accepting reimbursement from an alien employee for the fees for an H-1B nonimmigrant petition does not support the argument that the Department lacks authority to prohibit the reimbursement of attorneys' fees and other costs associated with permanent labor certifications. To the contrary, that specific prohibition in the nonimmigrant context highlights Congress' interest that the employer should bear the costs associated with hiring alien employees and not pass them onto the alien.

It is well settled that an agency is empowered to take all reasonable actions, even if not particularly specified in the statute, to effect the objective and policy of the statute. The Department is charged with ensuring that an employer's hiring of an alien employee does not displace U.S. workers or distort wages and working conditions in the U.S. labor market before approving permanent labor certifications, and this prohibition against the reimbursement of attorneys fees and

other costs directly furthers that mandate. The Final Rule in no way precludes an employer from hiring and paying an attorney for the services provided to the employer or an alien from hiring and paying an attorney for the services provided to the alien, or for that matter an employer paying for an attorney who exclusively represents the alien employee. The rule does not speak to the qualifications of an attorney or the professional standards with which the attorney practices. The rule simply seeks to ensure the integrity of the labor certification process by removing an incentive to manipulate that process in favor of an alien worker and against the interests of U.S. workers.

Right to counsel; attorney-client relationship ? Commenters also asserted that because the labor certification application is signed by both the employer and the alien, both are parties to the proceeding and both are exposing themselves to sanctions under the law for any misrepresentations made on the application. They maintained that each is entitled to counsel of his or her choosing and the Department may not limit the choice and interfere in the attorney-client relationship by regulating who may pay attorneys' fees. Some commenters included reasons as to why the alien might want independent counsel and other commenters read the proposed rule to mean the alien could not have independent counsel. Some commenters also interpreted the proposed rule as prohibiting dual representation of both employer and alien by a single attorney.

These commenters misconstrued the NPRM. The Department is not seeking to limit either party from choosing counsel. The act of seeking legal representation, the identity of legal counsel, and similar activities are all outside the scope of this regulation. As previously noted, the alien is free to retain counsel to represent his or her interests in the labor certification area or any other area in which the alien desires counsel. Nothing in this regulation prohibits the alien from hiring the same attorney as the employer. This regulation simply prohibits an employer from transferring his legal and other costs associated with procuring a permanent labor certification to the alien employee.

Vagueness ? Several commenters asserted the Department has not provided sufficient description of the conduct that it would deem to be a violation of this proposed rule. Commenters specifically identified the language in § 656.12(b) stating, "An employer shall not seek or receive payment of any kind for any activity related to obtaining a permanent labor certification" as vague.

In response to this concern, the Department has clarified the prohibited behavior in this Final Rule. The rule provides specific examples of prohibited transactions, including kickbacks, improper wage withholdings, bribes, and lump sum reimbursements. It also prohibits non-monetary transactions, such as free labor. Further, it exempts certain third-party payments from the prohibition, as discussed below, allowing these payments to be made in connection with labor certifications.

To whom labor certification benefits accrue ? Many commenters disagreed with the Department's premise that because the employer files the labor certification application, the employer should bear all of the costs. These commenters believed there is a benefit to both the employer and the alien from the labor certification and since both are interested parties, these parties should be free to

negotiate payment arrangements. Some commenters also claimed that the permanent resident status is a benefit to the alien and only benefits the employer if the employee remains on the job beyond attaining permanent status. A significant number of commenters described agreements frequently used which require reimbursement if a foreign employee resigns upon being granted permanent residence or prior to a specified length of time after obtaining permanent residence status. They compared these reimbursement arrangements to widely used employer-employee agreements linking relocation costs or training and education costs incurred by an employer to an employee commitment to remain in a job for a specified period of time or otherwise reimburse a portion or all of the costs. Other commenters stated that, under section 204(j) of the INA, since the alien beneficiary now has the ability to move to another employer even before attaining permanent residence (as soon as 180 days after filing an adjustment application), the extent of the benefit realized has shifted even more substantially to the employee and increases the employer's need for the agreement described above.

Several commenters claimed the interest in the labor certification application is weighted to the alien even more strongly. To support this argument, one commenter referenced DerKevorkian v. Lionbridge Technologies, No. 04-cv-01160-LTB-CBS, U.S. Dist. LEXIS 4191 (D. Colo. Jan. 26, 2006). In this unreported decision, the court held that an employer's promise to sponsor an alien employee for permanent residence created claims for promissory estoppel and breach of fiduciary duty by the employee against the employer. Some commenters asserted that this decision supports the proposition that an employee has legal rights in the labor certification process, even when an application has yet to be filed with the Department. The commenters further asserted this case could stand for the proposition that an employer may limit its legal liability by requiring an alien to retain his own attorney. Additionally, commenters referenced various provisions for continued employment rights for H-1B nonimmigrants which purport to recognize the alien's rights and interests in the labor certification process.

Others believed the alien should rightfully participate in paying some or all of the costs related to the labor certification application because the recruitment process and completion of the application is, in reality, an "artificial" recruitment being conducted solely to satisfy the Department's requirements. They maintained the actual recruitment that was paid for by the employer is the recruitment which produced the non-U.S. worker, and therefore, the need for the recruitment used in the labor certification process is directly tied to the alien employee and the alien should be able to contribute to the payment of the employer's costs. Further, many permanent alien workers are first hired by employers under H-1B or other nonimmigrant visas for which there is no requirement of a pre-employment labor market test to determine whether U.S. workers are available.

We disagree with the commenters' assumption that an alien's interest in labor certification warrants payment by the alien of the employer's expenses. For purposes of employment-based visas requiring labor certification, the application to the Department of Labor and the Secretary of Labor's determination initiate a much broader, multi-agency process whose function is to consider and complete a specified alien's entry into the United States for the sole purpose of filling an employer's job vacancy. First, the unreported

DerKevorkian decision merely suggests that an alien may have a private right of action against an employer for failure to properly proceed after agreeing to sponsor an alien for permanent residence. The court did not hold that an alien has a legal interest against the Department in the approval of a labor certification. Second, an alien does not apply to the Department for approval of a labor certification, the employer does. Finally, the purpose of the labor certification is not to provide an alien with permanent residence, rather it is to certify that the alien's admission into the United States to work in a particular position will neither displace a U.S. worker nor distort the U.S. labor market. The fact that aliens may leave employment early or change employers is a risk which is no different from the risk of hiring any U.S. worker and which should be duly considered by employers as they carefully consider whether to invest the resources they believe are required to pursue an employment-based immigration solution to their workforce shortage. This rule does not seek to govern the large majority of employment agreements between employers and alien workers - those that may require reimbursement to the employer for travel, moving expenses, loans and other expenditures that apply equally to both U.S. and foreign workers and can be shown were made directly for the benefit of that worker. The Department must weigh the undeniable benefit to the employer and the alien of sharing certification costs against the interests of U.S. workers who must, under the statute, be considered for that job opportunity before it can be offered to the alien.

Payment by the employer of the costs associated with the preparation, filing and obtaining a labor certification keeps the alien outside the process and insulates the process from financial relationships that would subvert the permanent labor certification process' goal of protecting U.S. workers. The Department has decided its statutory mandate is best served by removing this incentive for a less-than-valid test of the labor market. Under the terms of the labor certification program, the protection of U.S. workers outweighs any employer interest in obtaining financial remuneration from alien employees for the costs associated with labor certifications.

As stated, the Department is not seeking to prohibit, limit, or regulate dual legal representation of alien and employer in the permanent residence process. However, it is the Department's expectation that in such situations attorneys' fees and costs associated with the preparation, filing and obtaining of the labor certification are to be borne by the employer. Various Federal, state and local laws regulate payment of wages, prohibit or restrict deductions from wages, outlaw "kickbacks," restrain assignments, and otherwise govern the frequency and manner of paying wages. In accord with the restrictions promulgated in this rule, any attempt by an employer to recover labor certification costs from an employee through deductions from wages, uncompensated additional work by the employee, or otherwise, would be considered an attempt to circumvent the rule and could result in the debarment of the employer from the program as provided in the rule, as well as subject the employer to appropriate enforcement actions for violations under other applicable authorities.

Disparate treatment ? Several commenters were concerned the proposed rule would result in disparate treatment of nonprofit organizations, hospitals, public universities, and small businesses. According to these commenters, these organizations may not have in-house counsel or the resources to hire counsel and have traditionally negotiated a

cost-sharing agreement with the alien employee. Commenters also claimed the proposed rule would penalize those same institutions ? nonprofit research organizations and institutions of higher education ? that the Congress has expressly recognized as worthy of support. The different standard for prevailing wages and the exemption from training fees under the H-1B program were cited as examples of Congressional intent. These commenters believed the effect of the rule would be to move the program to the exclusive domain of highly profitable employers in the United States.

Commenters also stated disparate treatment of workers could result. They asserted if employers were to be required to pay the fees for labor certification, the end result would be that the alien employees would receive a specific benefit and better treatment (i.e., payment of legal fees) than similarly situated U.S. workers. Other commenters were concerned the rule as proposed would have a disparate impact on alien workers, some of whom would be given access to employer funds for legal costs and some of whom would not, based on budgetary allocations, the type of benefit sought, or other factors. One commenter suggested that this would have a disparate effect on professors and researchers in universities that, for various reasons, require their in-house or outside counsel to file labor certifications, resulting in a different outcome than their colleagues who were considered "outstanding" and thus able to bypass the labor certification process.

The Department disagrees. The recruitment, legal, and other costs associated with labor certification are transaction costs necessary for or, in the case of legal fees, desired by the employer to complete the labor market test, allow the Department of Labor to make its determination, and enable the employer to move to the next step of the hiring process, a step it will complete with DHS. The employer's responsibility to pay these costs exists separate and apart from any benefit to the alien from his or her eventual entry as an immigrant. Moreover, employers may legitimately offer benefits to employees on a selective basis in almost all areas - educational benefits offered to certain sectors of a workforce but not to others, relocation expenses offered to those at certain geographic distances but not others, training offered to managers but not to nonexempt employees, to name just a few examples. The costs involved in a labor certification are just one instance where benefits may be, at the employer's option, extended to some employees or classes of employees but not to others. The same is true of those who bypass the labor certification process entirely and who are able to file an immigrant petition directly with DHS, such as the outstanding professors and researchers noted by the commenters. The Department reminds employers, especially those small employers and non-profits who commented on this issue, that there is no statutory or regulatory requirement that an application for permanent labor certification be prepared by and/or submitted by an attorney, nor is the Department setting any standards for what such costs should be.

Third party situations ? Commenters have raised questions about payments by third parties and asserted that, by deeming attorneys' fees to be only the employer's expense, the Department was forbidding the employer from passing the expense to another party. These commenters suggested the Department is also prohibiting third party payments directly to the attorney, even though such payment is not a reimbursement of the employer's expenses.

Commenters also described purportedly common situations that involve the payment of attorneys' fees by entities other than "the employer." As an example, one commenter stated physicians frequently have split appointments between a Veterans Affairs Medical Center (VAMC) and an affiliated institution of higher education. In these cases, although there is one "employer of record" who files the labor certification application, the university reimburses the VAMC for the proportion of the fees commensurate with the proportion of the work week spent at the university.

The Department finds these comments largely meritorious and has revised the regulation at § 656.12(b) to recognize such situations. It is not our intent to look behind the employment that is the subject of the labor certification to ascertain the legitimacy of the employer vis-à-vis other entities with a legitimate interest in the alien. Where there is a legitimate third-party relationship in which the payment by the third party of the fees and costs that should be borne by the employer would not contravene the intent of the program, the payment does not adversely affect the fairness of the labor market test. In cases where there is a legitimate, pre-existing business relationship between the employer and the third party, and the work to be performed will benefit that third party, the employer is not influenced to the point of preselection of the alien worker in the labor market test. By requiring that the relationship be a business interest that predates the labor certification process, the Department is protecting against fraudulent relationships.

The Department also received comments regarding money paid to a trust fund established by a union for defraying the costs of legal services for employees, their families, and dependents. The proposed rule, the commenters maintained, would prohibit payment of attorneys' fees and costs for an alien employee by such a union fund because payment would not be coming from the employer. These commenters believed the proposed rule may contravene Supreme Court cases confirming a union's First and Fourteenth Amendment right to assert legal rights. This comment is misplaced. To the extent such a trust fund is reimbursing a worker for the worker's legitimate costs and not for the employer's costs, reimbursement is not prohibited by the Final Rule.

The Department reiterates that this Final Rule seeks to require the employer to pay its own costs, including attorneys' fees, for its own activities related to obtaining permanent labor certification, which is an employer-driven process. However, this rule does not regulate payment by an alien or others of their own costs, attorneys' fees or other expenses. Nor does this rule regulate contract arrangements, cost allocation and financial transactions within a corporation or its affiliates, between an entity and its insurers or legal service providers, or between and among entities engaged in a joint enterprise.

Employer paying alien's attorney ? Another commenter described a scenario in which an alien retains his or her own attorney separately from counsel retained by his or her employer and the employer is willing to pay the attorneys' fee, but the attorney may be prohibited from accepting such a payment under state bar rules. As previously noted, this rule does not regulate the attorney-client relationship or the alien's retention of counsel. Neither does this rule prohibit payment by the employer of costs beyond those that are exclusively the employer's ? payment, for example, of the alien's attorneys' fees or other costs attributed solely to the alien. Finally, nothing in

this regulation regulates payment by an alien, or others, of their own attorneys' fees or other expenses.

D. Labor Certification Validity and Filing Period

The Department received numerous comments about the proposed language at

§ 656.30(b) establishing a validity period of 45 calendar days for permanent labor certifications. Although some commenters asserted the Department lacks the authority to define a validity period, the majority of commenters focused instead on proposing alternative time periods ranging from ninety days to five years. Some cited possible delays in both DOL and DHS processes, which they claimed would make the filing of an immigrant visa petition with DHS within the 45-day time period impractical, if not impossible.

Commenters provided very similar if not identical lists of reasons why a validity period of only 45 days would be inadequate. The reasons included: Untimely receipt of labor certifications from DOL; a prolonged absence of the individual, or individuals, necessary to the I-140 and I-485 filing processes; unavailability of documentation; and general, unforeseeable delays. Opportunities for delays notwithstanding, many commenters did not oppose a validity period and some expressly supported the concept of a labor certification being valid for only a finite length of time. Most, however, believed a longer time period was warranted. Others opposed a finite validity period but were willing to accept such a period only if it was for a time longer than 45 days.

After reviewing the arguments, considering the reasons presented for needing a longer validity period, and weighing the merits of alternative time periods, the Department, in this Final Rule, increases the validity period for a permanent labor certification from 45 to 180 days. The Department has determined that increasing the validity period to 180 calendar days is a reasonable alternative, in that it provides additional time to accommodate possible delays, while maintaining the integrity of the labor market test and the security of the labor certification. Labor market conditions are subject to rapid change, and it is consistent with DOL's mandate under INA section 212(a)(5)(A) to require a retest of the market after the passage of that time.

The question of the appropriate validity period directly addresses the reliability of the information that underlies and supports the Secretary's determinations of the availability of U.S. workers and whether the job opportunity's wages and working conditions will adversely affect the wages and working conditions of U.S. workers. The Department's certification speaks to the unavailability of U.S. workers and, hence, extends only to the point (either because of the passage of time or because, as in the case of substitution, the circumstances surrounding the job opportunity have changed) at which point availability again comes into question. The PERM regulation reflects the determination, made by the Department when the new program was instituted, that 180 days is the maximum window for the viability of labor market information. Consistent with this determination, the current regulation, at § 656.17(1)(i) and (ii), requires that mandatory recruitment be conducted no more than 180 calendar days prior to filing. A 180-day validity period after certification aligns programmatically with this recruitment

requirement and follows a similar rationale.

The Department has determined that 180 days provides sufficient time for an employer to move to the next step in the permanent residence process while minimizing the risk of potential changes in local economies. Taken together, the timeframe as currently conceived (i.e., recruitment within six months of submission of the application, PERM's average processing time which is greatly improved and generally within 60 days, and a 180-day validity period) will all provide as valid and timely a picture of the labor market as current program parameters will allow while providing sufficient flexibility for contingencies in the employment-based immigration process.

1. Statutory Authority

Some commenters opposing imposition of a validity period claimed the Department is exceeding its statutory authority under INA section 212(a)(5)(A) which requires the Secretary of Labor's determination on U.S. worker availability and adverse impact on wages and working conditions. Most asserted that although the statute does not expressly provide for a validity period, it does refer to DOL's determination being used "at the time of application for a visa." The Department does not agree it lacks the authority. To the contrary, by limiting the period of validity of the labor market test that underlies the Secretary's determination, the Department more closely adheres to the letter of the law. The statute requires the Secretary to make the certification as a function of evaluating the introduction of the alien immigrant into the workforce; the Secretary's determination is to be made at the time of the application for admission. A validity period serves to forge a closer temporal link between the determination and the admission.

One commenter argued that the INA limits the Department's authority to an assessment of the employment opportunity, i.e., the test of the labor market, in order to make a determination of whether or not to certify. No such limiting language exists in the INA. The test of the labor market was instituted by the Department as a means by which to implement the requirements of the statute. Procedures for the examination of the labor market and the larger labor certification process of which it is a part have varied, but the labor market test has always functioned as a prerequisite to the employment-based admission of an alien. The imposition of a validity period is a logical mechanism by which the Department can ensure that the information upon which a determination was based remains legitimate.

2. Delays in Processing of Applications and Receipt of Labor Certifications

Some commenters attempted to establish a nexus between the long processing times at both DOL and DHS and a validity period. They contended the Department's argument that a certification grows stale with the passage of time is disingenuous, given the extremely long processing times and resultant staleness of at least some information in applications submitted years earlier, and implied the Department's argument is not justifiable. The Department disagrees. The Final Rule addresses the question of validity post-certification. While questions of wages and recruitment are adjudicated on an individual basis as applications come up for review in our Backlog Processing Centers - independent of how long each of those applications has been pending - the Department must determine how long it will stand behind

those certifications once issued, and when it is appropriate to once again test the market. The question of a validity period addresses these broader concerns.

We also note the PERM system was implemented in direct response to the long processing times experienced under the previous program model, and we have already significantly reduced processing times from years to months. The reduction in time provides the Department assurance that the information upon which a determination is based is current and valid.

Commenters also complained of frequent and long delays in the receipt of granted labor certifications and suggested that another basis, other than the date of issuance, should be the starting point from which the time period begins to run. While it is true that delays in delivery, when they occur, negatively impact timely filing with DHS, these comments were based on the experiences at the outset of the new PERM program. Labor certifications are now being adjudicated in a more timely manner. Moreover, the longer validity period of 180 days serves to provide the time necessary to accommodate any delay that may occur in certification receipt.

3. Relationship to Fraud

Some comments in support of a validity period argued that indefinite validity allows some unscrupulous companies to stall the filing with DHS as a means of preventing the worker from leaving their employ, and that it also allows employers so disposed to prolong non-payment of the wage indicated on the application. One commenter opposed to a validity period hypothesized that an employer might not want to file the I-140 within an imposed validity period if it would be unable to demonstrate to DHS the ability to pay the wages attested to on the Form ETA 9089. We agree that indefinite validity may contribute to a variety of undesirable or unlawful behaviors and, further, that the longer the period of time the labor certification is in circulation, the greater the probability that the information on the application, not only that pertaining to recruiting, is stale or increasingly less relevant.

Some commenters pointed to other provisions currently in place or proposed in the NPRM, including the elimination of substitution, which serve to protect against fraud and argued that more fraud protection is unnecessary and merely prejudices the honest employer. As stated above with respect to the elimination of substitution, while we do not doubt that other fraud prevention and detection methods are available, the appropriateness or effectiveness of those other methods does not obviate the need for additional, targeted techniques to address the problems generated by a specific issue, such as, in this case, the indefinite validity periods for labor certifications. It is difficult to see how a reasonable validity period prejudices honest employers who presumably wish to obtain the admission of the alien worker they have sponsored as quickly as possible. The revised validity period accommodates the need for a reasonable period of time in which to submit the I-140.

4. Increased Burden at DOL Due to Untimely Filings and at DHS Due to Incomplete or Inaccurate I-140 Filings

Several commenters argued that imposing the requirement that a Form I-140 petition be filed within a limited period of time will result