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

in increased burdens for both DOL and DHS. That likelihood is overstated. Commenters posited that DOL will likely see an increase in filings due to the re-submission of applications to replace labor certifications that expire before the Form I-140 can be filed, which will, in turn, result in filing backlogs. This claim does not take into consideration the efficiency of the PERM system. Moreover, given the importance of the labor certification for both the employer and the alien, it is unlikely that a significant number of labor certifications will be allowed to expire. Similarly, the claim that a "rush to file" the Form I-140 will result in inaccurate and incomplete Form I-140 filings is also difficult to envision, given the significance of the filing. DOL expects that employers, attorneys and agents will be thoughtful and careful as they complete each labor certification application and immigrant petition and that at least some preparation for the entire permanent residence process would have taken place in advance of certification. Furthermore, the lengthening of the validity period from 45 to 180 days will provide the employer a reasonable period of time in which to ensure that all documentation and information necessary are accurate and complete prior to filing.

E. Program Integrity and Debarment

The preamble to the PERM Final Rule indicated the Department would consider the imposition of stricter remedial measures in any future rulemaking involving the permanent program. Consistent with this intent, the NPRM to this Final Rule contained several provisions to promote the program's integrity and assist the Department in obtaining compliance with the proposed amendments and existing program requirements. The Department proposed several revisions to § 656.31, the regulatory section governing the Department's response to instances of potential fraud or misrepresentation, including extending the time for potential suspension of processing for applications filed by certain employers, attorneys, or agents. In addition, the NPRM made the section applicable to applications filed under the current regulation and the regulation in effect prior to March 28, 2005. This Final Rule adopts the provisions on suspension of applications and notice to employers largely as proposed in the NPRM.

As stated in the proposed rule, given the breadth and increased sophistication of the immigration fraud that has been identified in the recent past, the Department requires added flexibility to respond to potential improprieties in permanent labor certification filings. While the Department already has the authority, this Final Rule clarifies § 656.31(a) to state the Department may deny any application for permanent labor certification which contains false statements, is fraudulent, or otherwise was submitted in violation of the permanent labor certification program regulations.

The Department received a variety of comments on the proposed amendments to § 656.31. While we carefully considered these comments, we have elected to keep the provisions largely as proposed. However, in response to comments, the Final Rule amends the debarment provisions to clarify the intent requirements ("willful") and other review standards applicable to debarment.

1. When an Employer, Attorney, or Agent Is Involved in Possible Fraud or Willful Misrepresentation

In § 656.31(b), the Final Rule revises what was § 656.31(a) in the NPRM and current regulation to clarify that if an employer, attorney, or agent connected to a permanent labor certification application is involved in either possible fraud or willful misrepresentation, the Department may, for up to 180 days, suspend the processing of any permanent labor certification application involving that employer, attorney, or agent. Thereafter, the Certifying Officer may either continue to process some or all of the applications or extend the suspension until completion of any investigation and/or judicial proceeding.

"Possible fraud" standard ? One commenter maintained § 656.31(b) (§ 656.31(a) in the NPRM) proposed a new legal standard of "possible fraud." The discovery of "possible fraud or willful misrepresentation" is not a new legal standard. This basic provision, allowing applications to be suspended for a period of time if the Department discovers possible fraud or willful misrepresentation involving a labor certification, has been in the permanent labor certification regulations since 1977 (see 42 FR 3449 (January 18, 1977)). The Final Rule continues the use of the language "discovers . . . possible fraud or willful misrepresentation."

Use of "knowing" instead of "willful" ? One commenter suggested using "knowing" instead of "willful" in the phrase "willful misrepresentation" in § 656.31(b) (proposed as § 656.31(a)). The Department should be required to prove, the commenter continued, that the employer, attorney, or agent knew the nature of his acts, and that he or she knew his acts violated the regulation; and to promote fair notice and minimize risk of arbitrary enforcement, there should be an opportunity for persons to present an affirmative defense that they mistakenly believed their conduct was allowed.

As always, applicants must remain aware of their responsibilities under the permanent labor certification process and of the consequences of submitting false or misleading information to a Federal agency. The application form makes it clear that the person signing the form is certifying, under penalty of perjury, to the accuracy of the information contained in the application. No one who signs an application should be confused about the capacity in which he or she signs it.

After review of the comments, the Department has decided to retain the use of "willful" as the more appropriate terminology. Black's Law Dictionary provides that a "[w]illful act may be described as one done intentionally, knowingly, and purposely" [emphasis supplied]. Hence, the phrase "willful misrepresentation" as used in the permanent labor certification program regulations means a person who intentionally and knowingly meant to make a misrepresentation.

Suspension of case processing for 180 days ? The Department proposed to increase the initial suspension of case processing in § 656.31(b) (§ 656.31(a) in the proposed rule) from 90 to 180 days and to allow the suspension of any permanent labor certification application involving such employer, attorney, or agent until completion of any investigation and/or judicial proceeding. The Department also proposed to revise § 656.31(b) and (c) (§ 656.31(a) and (b) in the NPRM)) to clarify the Department may suspend processing of any permanent labor certification application if an employer, attorney or agent connected to the application is involved in either possible fraud or willful misrepresentation or is named in a criminal

indictment or information related to the permanent labor certification program. Virtually all commenters objected to these proposals.

The Department has concluded that, in view of the extensive history of fraud in the permanent labor certification program, the need to promulgate what are now paragraphs (b) and (c) of § 656.31 ? concerning initially suspending applications for 180 days and clarifying the Department's authority as to which permanent labor certification applications may be suspended ? outweighs the concerns raised by the commenters. Our responsibility as a government agency to cooperate with law enforcement agencies in the investigation and prosecution of possible criminal activity supports this position. In addition, after due consideration, the Department has concluded the proposed provisions extending the suspension period are exempt from the notice and comment provision of the Administrative Procedure Act as matters of agency practice and procedure and as part of the agency's inherent authority to effectuate the labor certification review process. See 5 U.S.C. 553(b). Accordingly, this Final Rule includes the provisions allowing the Department to suspend, initially for up to 180 days, the processing of any application relating to an employer, attorney, or agent involved in possible fraud or willful misrepresentation.

Terms recommended for deletion and/or considered inappropriate in § 656.31(a) ? In this Final Rule, the Department has taken the last sentence of proposed § 656.31(a) and finalized it as the entirety of § 656.31(a), moving the remainder of the proposed text to § 656.31(b). One commenter took issue with the portion of § 656.31(a) which reads: "A Certifying Officer may deny any application for permanent labor certification if the officer finds the application contains false statements, is fraudulent, or was otherwise submitted in violation of the DOL permanent labor certification regulations." This commenter recommended the phrases "false statements" and "or was otherwise submitted in violation of the regulations" should be deleted from § 656.31(a). According to the commenter, the term "false statements" should be removed because attorneys, aliens, employers, or agents may inadvertently make mistakes on the labor certification application about minor details, or omit inconsequential information. The commenter believed it improper to equate such "innocent errors or omissions" with fraud, and insisted the section improperly imposed penalties for innocent errors. The phrase "or was otherwise submitted in violation of the regulations," according to the commenter, is overbroad and simply too vague to be understood or fairly applied. Because other sections of the regulations already explain when denial is appropriate, the commenter recommended that § 656.31 should only focus on fraud and willful misrepresentation.

The technological enhancements to the PERM system discussed above make it difficult to have inadvertent errors or omissions, and those few that will be made despite these enhancements may still not rise to the level of a false statement. The provision is not designed to impose penalties for innocent errors not in the control of the submitter but is applicable to any material inaccuracy. Although a false statement may not rise to the level of fraud, the statement may involve information or a subject matter that is material to the application. The phrase "or was otherwise submitted in violation of the regulations" is in large measure merely a restatement of the authority already provided in § 656.24(b)(1) of the current permanent labor certification regulations. Section 656.24(b)(1) provides, in

relevant part, that one of the factors the Certifying Officer considers in making a determination to either grant or deny a certification is whether or not the employer has met the requirements of part 656.

As stated in the NPRM, we have added the above sentence to clarify the Department's authority. As a further clarification, the Department has removed the last sentence from § 656.31(a) as published in the NPRM and has placed it alone as the first paragraph and designated it § 656.31(a). The other paragraphs are redesignated accordingly.

2. When an Employer, Attorney, or Agent Is the Subject of a Criminal Indictment or Information

With minor changes from the proposed rule, the Final Rule revises § 656.31(c) (§ 656.31(b) in the NPRM) to clarify that, if the Department learns an employer, attorney, or agent is named in a criminal indictment or information in connection with the permanent labor certification program, it may suspend the processing of any applications related to that employer, attorney, or agent until the judicial process is completed. Further, the regulation provides that, unless the investigatory or prosecuting agency requests otherwise, the Department must provide written notification to the employer of the suspension in processing.

Provision of notice ? One commenter objected that, under this section as proposed, no notice of an investigation was to be provided to the employer, attorney or agent. As noted above, the Final Rule does provide for limited notice to employers whose applications are impacted by an investigation of an agent or attorney. Our program experience has shown that notifying parties under investigation can impede the effectiveness and outcome of investigations that are initiated or ongoing, and the rule accordingly provides that an investigating or prosecuting agency, which is in the best position to judge the adverse impact of notice, can request that notification not be made.

Another commenter recommended that, when providing notice to employers not under investigation that processing of their applications has been suspended, the notice clarify for the employer receiving the notice that it is not under investigation. The Department will provide appropriate notice in cooperation with the investigatory and prosecuting agencies.

Notification by employer within 30 days when attorney or agent has committed fraud ? In the case of a pending application involving a finding of fraud or willful misrepresentation by the employer's attorney or agent, § 656.31(e)(3) (§656.31(d)(3) in the NPRM) provides that the Department will notify the employer and allow 30 days for the employer to notify the Department, in writing, that the employer will withdraw the application, designate a new attorney or agent, or continue the application without representation. If the employer elects to continue representation by the attorney or agent, the Department shall suspend processing of affected applications.

One commenter maintained that 30 days was not a reasonable timeframe for notification. The commenter noted the decisions are complex, it takes time just to receive DOL's decisions, and time may be required to secure second opinions, decide whether to secure other

representation, and provide the Department with a response.

We disagree. The 30 days required for notification is the same as the time provided for employers to submit requests for reconsideration pursuant to § 656.24(g) or review by the BALCA under § 656.26(a). Such requests for reconsideration or review involve making decisions similar to those involved in furnishing the notice required under the section now redesignated as § 656.31(e)(3). Like the § 656.31(e)(3) notice, the BALCA requests also require complex decisions to be made; time elapses between the mailing of the denial and its receipt by the employer; second opinions may be sought; a request for review must be prepared and submitted; and the employer may prepare a detailed brief of the matter. Accordingly, the Department has concluded 30 days is sufficient time for the employer to provide the notification required by § 656.31(e).

3. Determination of Fraud or Willful Misrepresentation

As proposed, § 656.31(d) (§ 656.31(c) in the NPRM) continues to provide the Certifying Officer will decide each application on its merits where the employer, attorney, or agent is acquitted of wrongdoing or if criminal charges otherwise fail to result in a finding of fraud or willful misrepresentation. The Department did not receive comments on these provisions and, consequently, is implementing the language as noted above in this Final Rule. Where a court, DHS, DOS, or another body finds the employer, attorney, or agent did commit fraud or willful misrepresentation, redesignated § 656.31(e), as revised in the Final Rule, provides that any pending applications related to the employer, attorney, or agent will be decided on their respective merits and may be denied in accordance with § 656.24 and § 656.31(a).

4. Debarment Proceedings

Commenters generally expressed concern that, as proposed, the debarment provisions of § 656.31(f)(1) (§ 656.31(e)(1) in the NPRM) failed to set a materiality standard and, hence, left employers and attorneys open to consequences that were inconsistent with the individual's intent and disproportionate to the violation's impact or importance. With respect to the various grounds for debarment, generally, commenters stated concern that the rule would impose a severe penalty for relatively minor and likely inadvertent offenses.

After reviewing the comments, we have modified the proposed rule to add in this Final Rule an intent requirement ("willfully"). The Final Rule revises the provisions on failure to comply with the terms of the form, failure to comply with the audit process, and failure to comply with Certifying Officer-ordered supervised recruitment by adding a requirement that, for there to be a basis for debarment, there must be a pattern or practice of misconduct. As elsewhere in the Final Rule, the determination of when debarment is appropriate is made by the Administrator, Office of Foreign Labor Certification, a nomenclature change from the proposed rule, which named the Chief of the former Division.

Improper or prohibited ? One commenter maintained the term "improper" is impermissibly vague in the portion of § 656.31(f)(1) (§ 656.31(e)(1) of the NPRM) that provides for debarment from the program based upon any action that was improper or prohibited at the time the action occurred. The term improper is a broad term and does

not necessarily imply illegality or an action that was in violation of the permanent labor certification program regulations. Accordingly, the Department has removed the term from § 656.31(f)(1).

Time limits to pursue debarment ? A commenter maintained most punitive laws include a statute of limitations, beyond which violations cannot be prosecuted or pursued. Further, according to this commenter, statutes of limitations are promulgated because evidence and recollections fade with time. Conceivably, DOL could pursue debarment 20 years after an application is filed. In this connection, the commenter noted the H-1B program imposes a one-year time limit to lodge a complaint.

The Department has concluded it would be appropriate to include a provision limiting the time in which to initiate debarment actions against employers, attorneys or agents. We considered requiring initiation of an investigation any time within the five years the employer is required to retain copies of applications for permanent employment certification filed with the Department and all supporting documentation from the date of filing the labor certification application (see § 656.10(f) at 69 FR 77390 (Dec. 27, 2004)), or within a reasonable time thereafter. Since investigations can be time consuming, we have provided in § 656.31(f)(1) of this Final Rule that debarment actions must be formally initiated within six years of the original filing date of the labor certification application on which the debarment action is based. For purposes of a pattern or practice, the statute of limitations will start to run with the last or most recent application that demonstrates or constitutes the pattern.

Mandatory and permanent debarment ? One commenter proposed that debarment be mandatory rather than permissive. After carefully considering this option, the Department has concluded it should retain discretion in the administration of the debarment provision. Debarment is a serious remedial measure not to be undertaken lightly. Discretion is also necessary to administer the debarment provision in the manner stated above and in the preamble to the proposed rule at 71 FR 7660 (Feb. 13, 2006). As a result, we conclude the debarment provision in the Final Rule should remain discretionary rather than mandatory.

The same commenter proposed that repeat offenders should be permanently debarred from the program following a second offense. The Department has concluded that we should gain operational experience with the debarment provision in this Final Rule before considering a provision to make debarment permanent following a second or later offense. Further, the Department is of the opinion that notice and comment rulemaking should be undertaken before promulgating a regulation allowing for permanent debarment.

Requested changes to debarment proceedings ? More than one commenter maintained debarment proceedings should include the right to specifically articulated charges; the right to request a hearing before an Administrative Law Judge (ALJ); the ability to present and confront witnesses; a transcript; and a stay of debarment upon timely appeal.

With respect to the request for clearly articulated charges, § 656.31(f)(2), as redesignated in this Final Rule, has been amended to provide that a notice of debarment must include a detailed explanation of how the employer, attorney, and/or agent has

participated in or facilitated one or more of the bases for debarment listed in paragraphs (f)(1)(i) through (f)(1)(v) of § 656.31.

With respect to the right to request a hearing before an ALJ, this Final Rule provides, at § 656.26(a)(1), for the right to a review by the BALCA upon filing a written request with the Administrator, Office of Foreign Labor Certification, within 30 days of the date of the debarment. Section 656.27(e) authorizes the BALCA to hold hearings governed by the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, found at 29 CFR part 18, encompassing both the right to present evidence and confront witnesses. While historically the ALJs have held very few hearings in permanent labor certification cases, we assume the BALCA will order hearings in appropriate cases.

With respect to the ability to present and confront witnesses, the procedures outlined in 29 CFR part 18, which govern the Office of Administrative Law Judges and apply to the BALCA proceedings, establish the right to examine and cross-examine witnesses. 29 CFR 18.34. With respect to the right to a transcript, the BALCA procedures already provide for a hearing transcript. With respect to the right of a stay of debarment upon a timely appeal, the regulation at § 656.26(a) of this Final Rule has been amended to provide that debarment is stayed upon receipt of the request for review.

5. Debarment of Attorneys and Agents

Many commenters maintained the Department lacks the statutory authority to debar attorneys or agents. They argued, for example, that INA section 212(a)(5) relates solely to the admissibility of an alien coming to work in the United States and does not grant authority to legislate a system of penalties against an employer or its attorney or agent. Further, commenters suggested that, because the Congress did not explicitly establish debarment authority for the permanent labor certification program as it did in the H-1B and H-2A programs, the Department has no authority to create debarment mechanisms by this rule.

The Department has considered the comments and has decided to retain the proposed remedial measure of debarment for employers, attorneys and agents in the Final Rule. There is extensive case law establishing that Federal agencies have the authority to determine who can practice and participate in administrative proceedings before them. The general authority of an agency to prescribe its own rules of procedure is sufficient authority for an agency to determine who may practice and participate in administrative proceedings before it, even in the absence of an express statutory provision authorizing that agency to prescribe the qualifications of those individuals or entities. Koden v. United States Department of Justice, 546 F.2d 228, 232-233 (7th Cir. 1977) (citing Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926)). See also Schwebel v. Orrick, 153 F. Supp. 701, 704 (D.D.C. 1957) ("The Securities and Exchange Commission has implied authority under its general statutory power to make rules and regulations necessary for the execution of its functions[,] to establish qualifications for the attorneys practicing before it and to take disciplinary action against attorneys found guilty of unethical or improper professional conduct"). In addition, an agency with the power to determine who may practice before it also has the authority to debar or discipline such individuals for unprofessional conduct. See Koden, 564 F. 2d at 233. Further, as

the Department has the authority to prescribe regulations for the performance of its business (as is the case with all executive departments under 5 U.S.C. 301), it likewise has the authority to determine who may practice or participate in administrative proceedings before it and may debar or discipline those individuals engaging in unprofessional conduct. The Department has exercised such authority in the past in prescribing the qualifications, and procedures for denying the appearance, of attorneys and other representatives before the Department's Office of Administrative Law Judges under 29 CFR 18.34(g). See also Smiley v. Director, Office of Workers' Compensation Programs, 984 F.2d 278, 283 (9th Cir. 1993).

6. Debarment of Employers

At the time of the NPRM on the PERM program, some commenters recommended enhancing program integrity by establishing suspension and debarment procedures for employers that engage in fraudulent labor certification activities, prohibited transactions, or otherwise abuse the permanent certification process. In the NPRM to this rulemaking, the Department proposed establishing debarment procedures as an important part of efforts to avoid fraud, enhance and protect program integrity, and protect U.S. workers.

Many comments on the NPRM expressed support for the Department's effort to debar from the permanent alien labor certification program employers and others who defraud or abuse the system. However, similar to comments received on the debarment of attorneys and agents, some commenters questioned the Department's authority to debar employers.

The Department has carefully considered the comments on the proposal to debar employers and has determined that the availability of suspension of case processing and debarment mechanisms for employers, attorneys and agents is necessary to maintain program integrity. Therefore, these provisions are included in this Final Rule. The suspension and debarment of entities from participating in a Government program is an inherent part of an agency's responsibility to maintain the integrity of that program. As the Second Circuit found in Janik Paving & Construction, Inc. v. Brock, 828 F.2d 84 (2d Cir. 1987), the Department possesses an inherent authority to refuse to provide a benefit or lift a restriction for an employer that has acted contrary to the welfare of U.S. workers. In assessing DOL's authority to debar violators, the court found that "[t]he Secretary may … make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions … as [s]he may find necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Government business." Id. at 89. In that case, the implied authority to debar existed even though the statute in question "specifically provided civil and criminal sanctions for violations of overtime work requirements but failed to mention debarment." Id. The court held that debarment may be necessary to "effective enforcement of a statute."

In order to encourage compliance, the regulatory scheme for PERM relies on attestations, audits and, through this Final Rule, the remedial measures of suspension and debarment proceedings to assure compliance. Use of debarment as a mechanism to encourage compliance has been endorsed in the INA for a number of foreign labor certification and attestation programs, e.g., the H-1A, H-1B, H-1C,

H-2A and D visa programs. INA sections 212(m)(2)(E)(iv) and (v), 212(n)(2)(C), 218(b)(2), and 258(c)(4)(B).

In those programs, the Congress has chosen to delineate and establish limits on the manner in which debarment is imposed. Consequently, the H-1A, H-1B, and H-1C programs, under section 212(m)(2)(E) and (n)(2)(D) of the INA, impose specific penalties on employers who willfully make a misrepresentation of a material fact in an application. See Immigration Act of 1990, Public Law 101-649, 104 Stat. 104-4978 (1990); Immigration Nursing Relief Act of 1989, Public Law 101-238, 103 Stat. 2099 (1989); Nursing Relief for Disadvantaged Areas Act of 1999, Public Law 106-95, 113 Stat. 1312 (1999); and Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005, Public Law 109-423, 120 Stat. 2900 (2006); see also INA section 258 (regarding penalties in the program for nonimmigrant maritime crewmembers performing longshore work). In each of these programs, Congress took for granted the Department's authority to debar, but acted to limit or expand that inherent authority to enforce compliance in the employment-based immigration programs under the Department's jurisdiction. In the case of the H-2A program, the Congress elevated existing practice to express statutory status. Immigration Reform and Control Act of 1986, Public Law 99-603, 100 Stat. 3359 (1986).

Beyond DOL's inherent authority to ensure compliance with the permanent alien labor certification program, there is an implied grant of statutory authority in section 122(b) of the Immigration Act of 1990, which requires the Secretary to accept reports from the public on violations of the terms and conditions of a permanent alien labor certification.4 By specifically directing DOL to accept such reports, the Congress indicated its intent that DOL take action based on that information to address reported problems.

Ensuring the integrity of a statutory program enacted to protect U.S. workers is an important part of the Department's mission. The Department was established, "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment [Act of Feb. 14, 1903, Pub. L. 62-426, sec. 1, 37 Stat. 736]...." See also Janik Paving & Construction, Inc. v. Brock, supra.

In December 2004, DOL changed, by regulation, the operation of the permanent labor certification program. Under the current regulation at 20 CFR part 656, employers may attest to compliance with requirements to recruit U.S. workers rather than engaging in all cases in supervised, post-filing recruitment. Essential to maintaining the integrity of the new, streamlined process is a need to audit compliance, already included in the regulations, and a remedial measure for continued and serious non-compliance, which is included in this Final Rule. A system of attestation and audit, relying heavily on the veracity of employer submissions, requires a system for "effective enforcement," as described in the Janik Paving holding, supra.

For the above reasons, the remedial measure of debarment, modified as discussed above, is retained in this Final Rule as it applies to employers.

7. Provision of False or Inaccurate Information

Consistent with complaints about the other terms for debarment, many commenters expressed concern the rule would impose a severe penalty for providing false information that was, all things considered, minor, immaterial, or not meaningful. Numerous commenters submitted identical comments listing specific circumstances they believed could lead to unjustified debarment and unfair punishment of attorneys, including: (1) Typographical errors in the application regarding the alien's date of birth; (2) an inaccuracy in the foreign national's job history due to someone's faulty memory; (3) employer's relationship to the alien; or (4) an inadvertent mistake in the number of workers or the Federal Employer Identification Number (FEIN). Some commenters opined that attorneys should be allowed to rely on information provided by clients unless there is a clear indication of fraud, and that "no conduct of any attorney in any setting is punishable without the elements of materiality and fraud."

Some commenters raised due process concerns. One commenter believed that existing mechanisms, e.g., denial of an application or imposition of supervised recruitment (but in future filings), were more viable options than what the commenter interpreted as indefinite suspension.

The Department has concluded that § 656.31(f)(1)(ii) (§ 656.31(e)(1)(ii) in the NPRM) should be modified to address the commenters' concerns. Accordingly, the term "willful" has been added to this section so this Final Rule now applies to "the willful provision or willful assistance in the provision of false or inaccurate information in applying for permanent labor certification." The Department wants to make clear it views debarment as an extraordinary remedy and does not intend to invoke it except under the most serious of circumstances.

Authority to prohibit false or inaccurate information on an Application for Permanent Employment Certification ? Commenters further argued the Department lacks the authority to regulate the information provided on an Application for Permanent Employment Certification. One commenter insisted the Department lacked the authority to prohibit an employer from providing false information on an application. As stated above, the authority given to the Department under the INA to approve applications carries with it the authority to regulate the program, debar abusers, and prohibit false or inaccurate information.

8. Failure to Comply with the Terms of the Labor Certification Application

Proposed § 656.31(f)(1)(iii) (§ 656.31(e)(1)(iii) in the NPRM) provided that failure to comply with the terms of the ETA 9089 or ETA 750 will be a factor in determining whether to issue a notice of debarment. Some commenters argued that such a rule would make the attorney the guarantor of the accuracy of the Application for Permanent Employment Certification. The Department disagrees. Section 656.3(f)(1) provides that a notice of debarment from the permanent labor certification program may be provided to an employer, attorney, agent, or any combination thereof. As stated in the preamble to the proposed rule the Department acknowledges that not all debarment triggers should be treated equally and will, therefore, take steps to ensure that any debarment is reasonable and proportionate to the improper activity.

Further, the attorney does not have to sign the application unless he or she is the "preparer" in Section M of the application. Presumably, the attorney will take reasonably prudent steps to apprise him or herself of the facts before signing the application. However, to allay any fears the regulated community may have concerning the Department's possible use of the debarment provision, the Department has added the requirement that there must be a pattern or practice with respect to failure to comply with the terms of the labor certification application (either Form ETA 9089 or Form ETA 750). A similar requirement for a pattern or practice has been added to § 656.31(f)(1)(iv), failure to comply in the audit process, and to § 656.31(f)(1)(v), failure to comply with the Certifying Officer-ordered supervised recruitment process.

Commenters asserted the provision discussing the failure to comply with the terms of the Form ETA 9089 or Form ETA 750 is vague or needs further clarification. We disagree. The terms and areas the Department is interested in are best represented in the certification sections of the two application forms, specifically, Section N, Employer Certifications, on the Form ETA 9089, and item 23, Employer Certifications, on the Form ETA 750. More detailed information on the employer certifications listed on the Form ETA 9089 in Section N of the application can be found in § 656.10(c) of the current regulation and in the preamble thereto at 69 FR 77389 (Dec. 27, 2004). Detailed information on the employer certifications listed in item 23, Form ETA 750, can be found in the former labor certification regulations at § 656.20 (2004), "General filing instructions" and in Technical Assistance Guide No. 656 Labor Certifications. These resources provide ample guidance to the information sought in these sections and no further clarification is required.

9. Failure to Comply in the Audit or Supervised Recruitment Process

Some commenters sought clarification of the provisions at § 656.31(f)(1)(iv) and (v) (§ 656.31(e)(1)(iv) and (v) in the NPRM) that failure to comply with the audit and supervised recruitment processes may be a factor in issuing a debarment. Section 656.31(f)(1)(iv) and (v) will not normally apply to applications submitted under the former permanent labor certification regulations (20 CFR part 656 (2004)), because audit and supervised recruitment are not procedures currently in place under the backlog program. The Department has determined that these debarment provisions are appropriate to apply to conduct under the streamlined PERM processes because that system depends on ensuring employers furnish the required documentation within the required timeframes, as required by §§ 656.20 and 656.21 (69 FR 77396 (Dec. 27, 2004)). Further, a repeated failure to comply with core program requirements signals not only disregard for the process, but an intentional abuse of valuable, limited administrative resources, a practice the Department cannot tolerate.

Some commenters provided scenarios in which an employer might fail to comply with audit or supervised recruitment requirements because the employer no longer wishes to go forward with the application, for example: (1) The employer has terminated the alien and, therefore, does not wish to respond to the audit request; (2) after an employer is requested to engage in supervised recruitment, its human resources office decides to terminate the application process; or (3) the employer decides to terminate the process after an audit when the employee resigns.

These comments do not warrant removal from this Final Rule of the (f)(1)(iv) and (f)(1)(v) bases for debarment. We recognize that there are legitimate reasons for terminating an application during the audit or supervised recruitment processes and do not intend that these reasons should provide a basis for debarment.5 There are, however, cases in which the persistent failure to cooperate in the audit or supervised recruitment processes is evidence of an intent to avoid the discovery of serious violations of the regulations. Thus, the fact patterns these commenters cite must be considered individually as they arise. The existence of legitimate reasons to discontinue an application does not moot the need for these debarment provisions.

F. Other Objections and Comments

Investigation of past substitution cases ? Another commenter suggested that DOL investigate all past substitution cases with the help of USCIS. DOL does not have primary responsibility for investigation of past substitutions that were made after certification. The Department has participated in investigations and criminal prosecutions in appropriate cases involving substitution, and we will continue to work with DHS, DOL OIG, and DOJ when there are indications of possible fraud.

Adequacy of current fraud safeguards ? According to one commenter, the PERM system's vulnerability to fraud provides insufficient justification for DOL's proposals as articulated in the proposed rule. A certain amount of fraud should be tolerated, the commenter insisted, citing Medicare, credit card systems, and the entire tax system as processes in which some level of fraud is simply accepted by society. This commenter invited DOL to ignore the PERM system's vulnerability to fraud as the price to be paid for offering what the commenter characterized as a "benefit" to all. Having acknowledged fraud exists, the commenter next pointed to the design of the PERM system itself as containing built-in fraud protection mechanisms. As examples, the commenter cited built-in safeguards to detect fraud prior to filing such as: Initial establishment of the PERM account; verification of employer's existence; establishment of PINs; and limiting changes to accounts and sub-accounts. Finally, the commenter viewed Federal prosecutions as significant in preventing fraud or abuse.

The Department declines the commenter's suggestion to simply acquiesce in a certain amount of fraud by those seeking certification. No regulatory scheme can eliminate all possibilities of fraud, but, as a matter of good government, the Department must make every reasonable effort to eliminate fraud. DOL takes its role and its statutory authority under the INA quite seriously and will continue to look for ways to eliminate fraud and the enticements to fraud in the permanent labor certification system. This Final Rule's elimination of substitution and of indefinite certification validity bolster fraud protection and reduce incentives and opportunities to commit fraud. The need to protect the system from fraud and eliminate vulnerabilities is clearly within DOL's authority and furthers the INA's statutory purpose.

While fraud cases arising under the new PERM system were not described in the NPRM, this should not be taken as proof that fraud is not occurring under the system. The system is new and has not had

the full opportunity for investigation and prosecution as has occurred under the previous regulation. In fact, the Department is aware of and has referred cases of possible fraud for investigation under the new PERM system. Further, we disagree that the issue of fraud in the permanent labor certification program lies solely in the Backlog Processing Centers or that the fraud detection examples provided by the Department indicate we are asserting that fraud cannot or will not occur under the new re-engineered PERM program. We disagree that not providing anecdotal evidence of fraud under the new PERM program is proof that no fraud is being conducted by some employers, agents or attorneys.

PERM introduced many important safeguards that will help deter and detect fraud. However, these protections are insufficient to eliminate the incidence and incentives for fraud in the permanent labor certification program. The existence of some anti-fraud measures does not preclude the agency from initiating and establishing additional fraud detection and avoidance mechanisms, particularly when considering the value of such mechanisms against their relatively small costs. Our Federal partner agencies have demonstrated through investigations and prosecutions that the level of fraud today is far more advanced and sophisticated than it was 10 years ago and that it continues to evolve and become even more sophisticated. It is incumbent upon the Department to remain aware of these trends and to strengthen the program to withstand the changing nature of fraud being committed against it. Because the Department has direct experience with how fraudulent behavior within the permanent labor certification process is pervasive throughout the process and detrimental to the purpose and intent of the process, we can assess what systems and/or procedures are adequately detecting fraud and where improvements are needed.

Many commenters stated that because we currently possess the authority to invalidate an application for labor certification up to five years after it has been certified, we already have sufficient safeguards in the permanent labor certification program. We respectfully disagree. The invalidation of an application is what happens to an application once the Department has detected fraud and found the employer, agent or attorney willfully engaged in such fraudulent behavior. It remedies a particular instance of fraud, but it does not, in and of itself, deter or prevent the increasing fraud occurring in the program.

For the reasons stated throughout this preamble, the measures instituted by this Final Rule - eliminating substitution, limiting the validity period of a permanent labor certification, prohibiting sale of labor certifications, prohibiting employers from recouping recruitment costs and attorney fees from aliens, and prohibiting violators from using the permanent labor certification program - will deter and redress fraud and abuse in the permanent labor certification program. For the same reasons, the rule also clarifies the Department's authority to deny an Application for Permanent Employment Certification when we find an employer, agent or attorney has provided false information to us.

G. Comments Outside the Scope of the Rule

The Department received a number of comments not directly related to the issues raised by the NPRM. These comments generally addressed the following topic areas:

* Lack of consistency between agencies, especially related to the need for labor certifications in light of USCIS policies limiting the availability of National Interest Waivers when the need for the individual stems from a labor shortage.

* Suggestions of other measures the Department should consider related to the permanent labor certification program, including conducting more investigations of suspected fraud, eliminating the authority of agents to represent employers or aliens in labor certification cases, fixing problems in the PERM software, and revising current requirements for advertising.

* Descriptions of personal experiences with the immigration process generally provided as examples of fraud and abuse.

* Comments concerning delays in the processing centers and, specifically, delays resulting from the audit process.

We do not respond here to these issues individually, as they fall outside the scope of this rulemaking.

H. Other Amendments.

In addition to the specific revisions described above, the Department has made other minor, technical, and editorial changes to the regulatory text, as appropriate.

IV. Required Administrative Information

A. Regulatory Flexibility Act

In crafting this Final Rule and reviewing public comments, the Department conferred with the Office of the Chief Counsel for Advocacy, Small Business Administration (SBA), as required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 609(b). This impact analysis reflects those consultations and generally incorporates the Chief Counsel's comments. Based on the analysis detailed below, the Department submits that this Final Rule will not have a significant economic impact on a substantial number of small entities.

In this rule, the Department takes measures to enhance program integrity and reduce the incentives and opportunities for fraud and abuse in the permanent employment of aliens in the United States. The rule's limitations on the acquisition and use of permanent labor certification applications and permanent labor certifications will have an economic effect on only those employers seeking DOL certification to hire foreign workers for permanent positions. The prohibition against substitution on the employer's permanent labor certification application and the validity period of 180 days on approved certifications each trigger a retest of the labor market (when original alien becomes unavailable a certification expires) to ensure that no U.S. workers are qualified and available to fill the job opportunity, carrying with it an economic cost. Employers' compliance with the procedures set forth in the Final Rule will not require completion of additional preprinted forms or the collection of information beyond that already required by Form ETA 9089, Application for Permanent Employment Certification.

In Program Year (PY) 2005 (July 1, 2005 - June 30, 2006), the

Department received approximately 115,952 applications from employers seeking labor certification under the PERM program. Because the Final Rule would also impact permanent labor certification applications being processed and certifications issued through ETA's Backlog Processing Centers, the Department also included in its analysis 176,496 backlogged applications in process as of September 7, 2006.6

To conduct its analysis, the Department looked to the major industries that PERM program data showed had applied for permanent labor certification in PY 2005, then applied a similar distribution (same industries and general percentages) to applications currently being processed through the Backlog Processing Centers.

Although some, but not all, employers will file multiple applications with the Department in a given year, the Department's analysis treated each application as a separate economic impact on the employer and, consequently, the estimated impacts of the Final Rule may be overstated. Based on anecdotal evidence, and in the absence of precise historical data to accurately track substitution requests, the analysis also assumed that 10 percent of all employer applications will request substitution of the alien on the permanent labor certification application prior to implementation of this Final Rule, even though the historical practice of alien substitution by employers participating in the Department's permanent labor certification process is far less. The analysis does not attempt to quantify lost productivity costs employers could potentially incur after the loss of an alien worker for whom a permanent labor certification application has been filed and for whom substitution is no longer permitted. In the Department's experience, such costs are believed to be negligible, since the overwhelming majority of applications filed are for nonimmigrants already working in the United States and in the position that is the subject of the application.

Under the Small Business Administration Act, a small business is one that is "independently owned and operated and which is not dominant in its field of operation." The definition of small business varies from industry to industry to the extent necessary to properly reflect industry size differences.

The Department conducted its size standard analysis based on 13 CFR part 121, which describes the SBA's size standards for businesses in various industries. To group employers by size, the Department relied on information submitted by each employer on the permanent labor certification application, which provides data on the total number of employees in the area of intended employment for each application. Because the Department does not collect information with respect to the annual receipts of employers, it used the average employment level of firms in each industry that predominates in the permanent labor certification program as the size standard for small businesses in each of those industries.

To estimate the cost of the Final Rule on small businesses, the Department calculated each employer would likely pay in the range of $300 to $1,500 to meet the advertising and recruitment requirements for a job opportunity, and take one hour to prepare the recruitment report required for each application. The cost range for advertising and recruitment is taken from a recent (September 2006) sample of newspapers in various urban and rural U.S. cities, and reflects approximate costs for placing two 10-line advertisements in those

newspapers. The cost to prepare the recruitment report is based on the median hourly wage rate for a Human Resources Manager ($36.52), as published by the U.S. Department of Labor's Occupational Information Network, O*Net OnLine, and increased by a factor of 1.42 to account for employee benefits and other compensation.7

The Department determined the following industries predominate in the permanent labor certification program: (1) Professional, Scientific, and Technical Services; (2) Manufacturing; (3) Accommodation and Food Services; (4) Healthcare and Social Assistance; (5) Educational Services; and (6) Construction. The Department has reviewed the data from each of these industries as described below to determine there is no significant impact on small businesses.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 602,578 employer establishments were operating year-round in the Professional, Scientific, and Technical Services Industry, and 96.7 percent of those employed less than 50 employees. In PY 2005, 13,286 PERM applications were filed with the Department by employers who indicated they employed less than 50 workers in the area of intended employment for positions in this industry. We estimate approximately 20,223 of the backlogged applications currently in process were submitted by similarly sized employers in this industry sector. Assuming employers will attempt to substitute the alien on 10 percent of applications filed with the Department, we estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 3,351 at a cost range of $1,346,597 to $5,200,161.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 350,828 employer establishments were operating in the Manufacturing Industry, and 98.9 percent of those employed less than 500 employees. In PY 2005, 9,342 PERM applications were filed with the Department by employers who indicated they employed less than 500 workers in the area of intended employment for positions in this industry. We estimate approximately 14,220 of the backlogged applications currently in process were submitted by similarly sized employers in this industry sector. Assuming employers will attempt to substitute the alien on 10 percent of applications filed with the Department, we estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 2,356 at a cost range of $946,855 to $3,656,473.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 456,856 employer establishments were operating year-round in the Accommodation and Food Services Industry, and 90.8 percent of those employed less than 50 employees. In PY 2005, 7,478 PERM applications were filed with the Department by employers who indicated they employed less than 50 workers in the area of intended employment for positions in this industry. We estimate approximately 11,383 of the backlogged applications currently in process were submitted by similarly sized employers in this industry sector. Assuming employers will attempt to substitute the alien on 10 percent of applications filed with the Department, we estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 1,886 at a cost range of $757,930 to $2,926,901.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 619,517 employer establishments were operating year-round in the Healthcare and Social Assistance Industry, and 93

percent of those employed less than 50 employees. In PY 2005, 4,216 PERM applications were filed with the Department by employers who indicated they employed less than 50 workers in the area of intended employment for positions in this industry. We estimate approximately 6,417 of the backlogged applications currently in process were submitted by similarly sized employers in this industry sector. Assuming employers will attempt to substitute the alien on 10 percent of applications filed with the Department, we estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 1,063 at a cost range of $427,311 to $1,650,149.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 38,293 employer establishments were operating year-round in the Educational Services Industry, and 98.9 percent of those employed less than 100 employees. In PY 2005, 1,336 PERM applications were filed with the Department by employers who indicated they employed less than 100 workers in the area of intended employment for positions in this industry. We estimate approximately 2,034 of the backlogged applications currently in process were submitted by similarly sized employers in this industry sector. Assuming employers will attempt to substitute the alien on 10 percent of applications filed with the Department, we estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 337 at a cost range of $135,410 to $522,912.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 710,307 employer establishments were operating in the Construction Industry, and 99.9 percent of those employed less than 500 employees. In PY 2005 PERM, 5,579 PERM applications were filed with the Department by employers who indicated they employed less than 500 workers in the area of intended employment for positions in this industry. We estimate approximately 8,492 of the backlogged applications currently in process were submitted by similarly sized employers in this industry sector. Assuming employers will attempt to substitute the alien on 10 percent of applications filed with the Department, we estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 1,407 at a cost range of $565,457 to $2,183,629.

Several commenters maintained the rule would have a significant impact on a substantial number of small entities. One commenter challenged the analysis used by the Department to support its statement that the rule's impact on small business will be immaterial. The commenter maintained that although less than one percent of all small businesses would be affected, the appropriate universe to consider would consist only of those small businesses that wish to hire a foreign worker using the labor certification process. According to the commenter, the rule would not affect those businesses that do not submit applications. The commenter also suggested other measures of materiality, including: (1) Comparing the number of small businesses that have applied under the PERM and prior programs to the total number of businesses that have applied under those programs; and (2) comparing the number of labor certification applications filed by small businesses to the number filed by all businesses.

Several commenters focused on the impact on small businesses of the prohibitions on substitution and reimbursement as a subset of the costs incurred by small businesses in successfully obtaining labor certifications. One commenter described the steps employers take when

submitting labor certification applications, including verifying the job skills and cultural fit of the worker, conducting labor market tests, and determining future needs based on demand. Another commenter described the requirement to advertise positions in print, along with other recruiting activities. One commenter estimated the cost for each application was approximately $10,000, based on informal conversations with others. The same commenter said the costs for applications were at least $1,000 each. Commenters claimed the costs to small businesses were substantial.

As described above, the Department's analysis focused only on those small businesses that filed or are likely to file applications for permanent labor certification, and accounts for costs of advertising and related recruitment activities. As stated in the section of the preamble addressing substitution, these are not costs unanticipated by the statute. Also, the Form ETA 9089 may be filed electronically and does not require a filing fee. The Department's analysis does not estimate reimbursement amounts, as the Department has always assumed an employer is not entitled to reimbursement; as explained in the section governing payments, above, the costs of labor certification are generally the employer's, and this rule simply codifies that responsibility. Our analysis leads us to conclude this rule's economic impact will not be significant.

B. Unfunded Mandates Reform Act of 1995

This Final 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 one year, and it will not significantly or uniquely affect small governments. Therefore, no action is necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

One commenter stated this rule would amount to an unfunded mandate because it would be difficult to enforce and would require ETA to employ a large police force to monitor compliance. The Department disagrees with this comment. We do not anticipate significant additional costs to State, local, or tribal governments as a result of this rule. Although we do not speak here to any budgetary implications of the rule, additional costs, if any, to ETA as a result of this regulation are strictly Federal and attendant to the Department's responsibility in administering the permanent labor certification program. The Unfunded Mandates Reform Act does not cover costs to Federal agencies.

C. Executive Order 12866

This Final Rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined, based on its benefit-cost analysis8 of the key provisions of the regulation, that the rule is not an "economically significant" regulatory action within the meaning of section 3(f)(1) of the Executive Order. This rule will not have an annual effect on the economy of $100 million or more, nor will it 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. We estimate the Final Rule's quantified benefits to be $64.3 million per year and the quantified costs to be $39.8 million per year. The Department made every effort, where feasible, to

quantify and monetize the benefits and costs of this Final Rule. Where we could not quantify them - for example, due to data limitations - we described benefits and costs qualitatively. In such cases, the Department has provided a comprehensive qualitative discussion of the impacts of the rule. Finally, the Department has concluded, after consideration of both the quantitative and qualitative impacts of the rulemaking, that the benefits of the rule justify the costs.

Overall, the analysis estimated the benefits and costs associated with the Final Rule compared to the baseline, that is, the permanent labor certification application process before implementation of the rule. For a proper evaluation of the benefits and costs of the rule and its alternatives, we explain how the actions the rule requires of workers, employers, government agencies, and others are linked to the expected benefits. We also identify expected undesirable side effects of the Final Rule and the alternatives considered.

Following OMB Circular A-4, this analysis focuses primarily on benefits and costs that accrue to citizens and permanent residents of the United States; it does not factor in benefits and costs to aliens who, for example, may be named on labor certification applications but are not yet U.S. citizens or lawful permanent residents. As explained in greater detail below, to the extent this Final Rule's economic costs or benefits are affected by the existence of foreign workers who are already here in the United States and part of the economy, the analysis considers those costs or benefits to be transfers between U.S. and foreign workers and not measurably impacting the rule's net economic impact.

In most cases, this benefit-cost analysis covers 10 years to ensure it captures all major benefits and costs with respect to key entities and programmatic activities. For purposes of this analysis, the 10-year period starts in the next fiscal year on October 1, 2007. The analysis does not include permanent labor certification applications filed under the regulation in effect prior to March 28, 2005 and pending at the Department's Backlog Processing Centers. As stated above, we expect to eliminate the backlog by September 30, 2007. In the unlikely even that the Department does not completely eliminate the backlog by September 30, 2007, the costs of the rulemaking may be slightly underestimated.

With respect to immigrant worker petitions currently pending and open to substitution at the Department of Homeland Security, the analysis assumes a one-time impact (rather than recurring impact over 10 years) until those applications are adjudicated. As this preamble states earlier in response to commenter concerns about application of the rule to pending applications, program users have had sufficient notice of the Department's intent to eliminate the practice of substitution; therefore, we believe that employers have had the opportunity to act on any substitution requests they know to be required but remain outstanding and not yet submitted to DOL or DHS,9 thus minimizing or eliminating impact of the prohibition on those employers for purposes of those applications.10 Nonetheless, in acknowledgment of the multi-agency process required for employment-based immigration, the analysis makes a good faith attempt to quantify the most salient (potential) costs and benefits to employers with substitutable petitions currently pending at DHS, regardless of when filed. For purposes of a cost estimate, this analysis assumes that any employer who may find itself in need of

substitution after the prohibition is in place could, in order to fill the vacancy, incur certain additional costs not required if substitution were still an option.

Because up-front, one-time costs associated with reading and understanding the Final Rule would not result in significant costs to employers or government agencies, we did not include them in our analysis. In addition, we assumed that annual costs would be the same each year. Following OMB guidance, we used discount rates of seven percent and three percent.

The Department separately analyzed the benefits and costs of the major provisions of the Final Rule. The Department's analysis (elimination of substitution, establishment of a validity period, etc.) and response to public comments are set forth below. The size of the net benefits, the absolute difference between the projected benefits and costs, indicates whether one policy is more efficient than another. We estimated that total 10-year discounted quantified and monetized benefits range from $445.0 to $540.4 million and the total 10-year discounted quantified and monetized cost ranges from $279.5 to $339.4 million for a net present value of the benefits of $165.5 to $201.0 million.

1. Employer Costs and Burden Generally

Some commenters maintained the proposed rule is a "significant" regulatory action within the meaning of Executive Order 12866 for several reasons, including its overall cost to employers and its potential impact on the U.S. economy. These commenters based their concerns on the process they say employers generally undertake in successfully applying for a certification and their estimate of costs incurred by employers in pursuing those applications. One commenter pointed out the certification application is only one of several steps in hiring a foreign worker. In addition, according to the commenter, the employer must verify the job skills and cultural fit of the worker, conduct a labor market test, and determine its hiring and training needs based on demand. Another commenter made similar points, noting that it engages in required print advertising and other recruiting activities at a cost of more than $200,000 annually. It also reviews resumes, interviews candidates, and engages legal counsel to assist in preparing and reviewing materials required for the application. Although none of the commenters provided detailed figures for each of their activities, at least one commenter estimated, based largely on feedback it states it received from other companies, that the cost for each application was approximately $10,000.

Several commenters made broad observations related to the general burdens that the proposed rule would impose. One commenter stated the proposed rule is burdensome because the labor certification process itself has numerous requirements and is difficult to understand. Two other commenters argued the proposed rule is likely to curb business growth, inhibit job creation, and encourage employers to move jobs and operations offshore. Another commenter stated its concern that the rule would punish nonprofit research institutions due to the costs of compliance. One commenter suggested the rule could result in a reduction of foreign workers, which in itself would have an impact on the economy because foreign workers themselves create demand in the economy for housing, food and other essentials. Finally, one commenter protested that the rule will impose significant additional

costs on the many employers who are honest in their acquisition and use of certifications, based on the misdeeds of a small number of employers who have abused the process.

The Department agrees with the commenters that this rule is a significant regulatory action under EO 12866, and has been submitted to OMB for review. While the commenters express general concern over possible harm to employers, however, they failed to articulate how the rule itself will adversely affect the economy in a material way within the meaning of Executive Order 12866. Moreover, the commenters made little effort to explain how costs associated with the rule could result in an annual effect on the economy of $100 million or more. Instead, the commenters took issue with the individual, activity-based costs and economic impact of the labor certification process itself.

The Department readily acknowledges that employers incur various costs associated with the decision to hire alien workers. The labor certification process, by its very nature, imposes costs to employers to establish, to the Secretary of Labor's satisfaction, the unavailability of and no adverse impact on U.S. workers. Since the costs are standard to the labor certification process, we do not consider these costs as incremental to the rulemaking.

Further, as detailed in each of the sections below, the Department's analysis reveals the Final Rule's quantified and monetized benefits outweigh costs, and will impose no significant economic impact or material adverse effect within the meaning of Section 3(f)(1) of Executive Order 12866.

2. Ban on Alien Substitution

Before this Final Rule takes effect, employers may substitute a different alien on a permanent labor certification application if the original alien named on the certification application is no longer available. Under the Final Rule, employers may not substitute the alien named on the application. Separately, the rule prohibits employers from amending any information on the application once it is submitted to the Department. If an alien is no longer available for the job described on the application, an employer must conduct a new labor market test, and if this test indicates no qualified U.S. workers are available and the only qualified worker is an alien, then the employer must submit a new permanent labor certification application.

We estimate the 10-year discounted quantified and monetized benefits associated with this provision of the Final Rule will be between $177.4 and $215.5 million, and total quantified and monetized costs will be between $147.0 and $178.6 million. Thus, the quantified benefits exceed the quantified costs, and the net present value over a 10-year time horizon will range from $30.4 to $36.9 million.

Benefits

The ban on alien substitution has several important benefits to society: improved program integrity, increased employment opportunities for U.S. workers, cost-savings to employers in the form of reduced staff time and incidental costs, cost savings to State governments in the form of reduced unemployment insurance benefits, and cost savings to the Federal Government in the form of reduced

staff time resulting from a reduction in processing substitution requests.

The current practice of allowing substitution of alien beneficiaries provides a strong incentive for the filing of fraudulent labor certification applications. If substitution is permitted, permanent labor certification applications or resulting certifications can be marketed to aliens who are willing to pay a considerable sum of money to be substituted for the named aliens on the applications or certifications. The substitution ban increases program integrity by reducing the incentives or opportunities for fraud through the lawful permanent resident process. Due to a lack of adequate data, however, we were not able to quantify or monetize this important benefit.

Banning substitution will deter unscrupulous employers, attorneys, or agents from filing permanent labor certification applications simply to sell them later for profit, and reduce the number of fraudulent applications received by the Department. We estimate the cost savings achieved from recovery of processing resources by multiplying the number of fraudulent substitutions (assume a subset of the total number of substitution requests received) by the average number of hours spent by our staff on each fraudulent substitution, by the average compensation of our staff reviewing fraudulent substitutions. We estimate the annual cost saving to the Department at $2.8 million per year.11 This analysis captures savings specifically linked to applications we estimate involve fraudulent substitutions, rather than all fraudulent applications (that is, applications employing fraud, regardless of type).

An important purpose of the substitution ban is to ensure that if an alien is no longer available, the employer will conduct a new labor market test to determine whether a suitable U.S. worker is available. Since labor market dynamics can change in a matter of months, it is possible that when the alien on a permanent labor certification is nc longer available, and the employer conducts new recruiting efforts, qualified U.S. workers will be identified. Some U.S. workers hired would have otherwise remained unemployed.

Without the ban on substitution and required labor market test, the employer may not be aware that U.S. workers became available since their original test of the labor market, and may have otherwise hired an alien.12 Therefore, the second labor market test required by the Final Rule should result in increased employment opportunities for U.S. workers. We estimate the monetary value of this benefit by examining the compensation earned by U.S. workers that would not have otherwise been hired. To estimate this benefit, we accounted for the number of U.S. workers that would be favored by requiring employers to conduct new labor market tests and the compensation of these workers, which includes both their salaries and benefits, and reflects the decrease in time that those workers would have stayed unemployed. We estimate this benefit to be $21.3 million per year.13

The analysis assumes the U.S. workers hired who were previously unemployed will no longer be required to seek unemployment insurance benefits. Therefore, other things being constant, as an added benefit we estimate the states will experience a reduction in unemployment insurance expenditures as a consequence of U.S. workers being hired after labor market tests are conducted. The Department, however, was not able to quantify this important benefit for lack of adequate data.

Further, because the employer would have otherwise hired an alien if it had not conducted the labor market test, the employer will experience cost savings by not continuing with the permanent labor certification application process. We estimate this cost savings by calculating the monetary value of the decrease in employer staff time for preparing, filing, and tracking labor certification applications; preparing and maintaining the recruitment report and submitting the recruitment report (to comply with an audit, where requested). We estimate this cost savings by multiplying the staff time required to conduct such activities by the staff compensation, by the number of U.S. workers hired as a result of labor market tests. It is important to note that this cost savings to employers partially offsets the costs of compliance to employers discussed below. The cost of compliance to employers outweighs this partial cost-savings. We also account for the incidental costs (such as delivery, copying, and telephone charges) incurred by employers. We estimate the annual cost savings to employers to be $1.2 million.14

In addition, we anticipate other cost savings or benefits associated with the ban on substitution will have a ripple effect through the publicly administered immigration system. We believe cost savings could be realized in the following areas: reduction in the Department of Labor's Office of Inspector General (OIG) staff time required to review or investigate potentially fraudulent substitutions; reduced DHS staff time to review I-140 immigrant petitions; reduced DHS staff time to review I-485 applications; a reduction in DOS staff time resulting from a need to conduct fewer interviews with aliens seeking permanent residence; and less DOJ staff time spent on investigation and prosecution of fraudulent substitutions. We believe that deterring and preventing substitution-related fraud will have an important and visible impact on other Federal agencies involved in the immigration system. However, due to a lack of adequate data, we were not able to quantify or monetize these benefits to society.

Costs

The ban on substitution does impose several costs to society: additional job advertising and recruitment by employers, increased employer staff time for filing labor certification applications, and increased staff time in State Workforce Agencies (SWAs) and the Department, all described in greater detail below. We estimate the 10-year discounted cost to society to be between $147.0 and $178.6 million.

If the employer's second labor market test indicates that no qualified U.S. workers are available, then the employer must submit a new permanent labor certification application with the name of the new alien. However, to fill the position, employers who otherwise might have substituted must test the market for U.S. workers and incur recruitment costs, independent of whether they eventually file a permanent labor certification application. To the extent an employer finds a qualified U.S. worker to fill the position, it is inappropriate to attribute those costs to the labor certification process, as in those cases the need for labor certification has been removed.

The main cost to employers associated with the substitution ban is the increase in employer staff time to prepare, file, and track labor certification applications. We estimate this cost by multiplying the

number of substitutions leading to labor market tests not favoring U.S. workers by the number of employer staff hours to prepare, file, and track the labor certifications, by the compensation of the employer staff undertaking these activities.

Another cost to employers of the substitution ban results from the additional recruiting efforts, in particular job advertising, as well as the increased employer staff time to arrange for and track recruiting efforts and for receiving, compiling, interviewing, analyzing, and reporting the results of the recruitment.15 The Department included in its cost estimate the time spent to comply in excess of the time the employer would normally spend in recruiting efforts. We estimate the recruiting costs by examining what recruiting efforts were reported by employers filing PERM applications and by surveying local newspapers, websites, and SWAs to determine the costs associated with these activities.16 We estimate the costs for filing applications and preparing recruitment reports by multiplying the staff time required to conduct such activities by the staff's compensation by the annual number of additional labor certification applications.17 We estimated the total annual cost to employers to process and track labor certification applications and conduct additional recruitment efforts to be $19.8 million per year. 18

SWAs also experience an additional cost. The substitution ban may increase the number of applications filed by employers, which requires employers to place a job order with the SWA serving the area of intended employment for a period of 30 days. Employers must also obtain a prevailing wage determination from the SWA. SWAs will incur some additional costs associated with increased SWA staff time to process job orders and provide employers with prevailing wage determinations. We estimate this cost by multiplying the SWA staff time to process job orders and determine the prevailing wage by the compensation of the staff, by the annual number of substitution requests. We estimate the annual costs to SWAs to be $0.5 million per year 19

The primary cost government-wide is the increased staff time to review additional labor certification applications, immigrant petitions, etc., that may be submitted when a legitimate change in the alien beneficiary is necessary. If employers must resubmit labor certification applications when the original alien becomes unavailable, then Department of Labor staff will spend that much more time reviewing applications. We estimate this cost to the Department by multiplying the time spent reviewing each application by the compensation of our analysts, by the increased number of applications. 20

Another related cost to the Federal Government is the increased Departmental staff time to audit an increased number of recruitment reports. We estimate this cost by multiplying the time spent auditing each recruitment report by the average compensation of one of our analysts, by the increased number of recruitment reports that will be audited. 21 We estimated the total annual Departmental costs to be $0.7 million per year.

In addition, the Department considered potential costs to employers associated with a later priority date and a longer wait for an alien who would otherwise be the beneficiary of a substitution. However, this analysis does not quantify such costs. As stated previously, to

the extent such costs are quantifiable, they are potentially negligible since most substituted jobs are already held by the alien to be substituted. To the extent they stem from a longer wait, or backlogs at other Federal agencies, the number of factors bearing on such costs (variables determining time in respective queues, mitigating factors such as options for interim sources of labor, etc.), and the relative impact of each factor, are simply too speculative for the Department to be able to accurately measure.

Impact of prohibition based on availability of alien

As stated above, the analysis assumes 10% of employers may require substitution at the labor certification stage (11,595 applications). The analysis assumes all of those applications will require a second market test, 15% (1,739 applications) of which will favor U.S. workers. As stated, in that 15% of cases in which an employer finds a qualified U.S. worker, recruitment costs related to the labor certification process should not be attributed to this rulemaking. In the remaining 9,856 cases, the analysis already includes the costs of the second labor market test and other costs of the labor certification process, including average filing and application management expenditures (recruitment, staff time, etc.) for each employer.

As a refinement on this estimate, it is possible to make some broad assumptions about impact on different categories of employers holding those remaining 9,856 applications. We may assume, broadly and based on our programmatic experience, that approximately 80% of employers (7,885 applications) have replacements at the ready (at their own place of business or another U.S. establishment), and the remaining 20% (1,971 applications, or 1.7% of total applications processed in the system) must reach outside the country when the original alien becomes unavailable.22

As a general proposition, an employer who now has the option to substitute but would normally have another alien at the ready (thereby incurring no need to advertise) would incur additional recruitment costs after the substitution prohibition to meet the requirement for a second labor market test. An employer who can now substitute but must generally look outside the country to fill vacancies may not necessarily incur additional costs specifically for recruitment as a result of the prohibition (assuming even with substitution, there would be similar costs associated with foreign recruiters and locating another worker abroad). For both groups of employers - those with ready candidates and without - the analysis assumes expenses associated with beginning the process anew, and builds in costs in addition to recruitment. Accordingly, as described in the main costs discussion above, the analysis already accounts for an average cost across employers for labor certification expenses in the absence of substitution (e.g., preparation, filing and tracking of a second labor certification). To the extent that potentially there is greater incremental impact at the labor certification stage to employers who, in the event they must substitute, must seek workers outside the country - over and above the diverse costs already included and explained above - there is insufficient data to quantify it. Additional impact to these employers may be captured in the discussion below, covering substitutable petitions pending at DHS.

Application of the prohibition to pending applications

As explained above, this analysis considers the additional, one-time impact of this rulemaking on employers with substitutable immigrant worker petitions currently pending at DHS. As DHS is a separate Federal agency, and as employer decisionmaking, unique case circumstances, and agency processing dynamics at the I-140 stage are not within either the Department of Labor's expertise or, even more importantly, its influence, this analysis can make only the broadest of assumptions. The Department cannot estimate with precision this rule's benefits or costs to those employers or to DHS program activities. However, these data limitations notwithstanding, we have included in this analysis an estimate of the potential impact on employers. Noting that the rule does not impact labor certifications already filed with DHS, the prohibition on substitution will impact DHS processing at least to some extent going forward.

The extensive benefits of the substitution prohibition described above apply equally to those labor certification applications currently in the immigrant petition backlog at DHS, and are also deemed part of this one-time impact. In addition to other benefits described above, DHS's workload would benefit from a reduction, as some of those abandoned immigrant petitions would not be replaced with foreign workers but with U.S. workers. Potential costs specifically to employers with petitions pending with DHS are described in greater detail below. These benefits and costs are in addition to the overall regulatory impact estimates provided above.

As of April 2007, a total of approximately 70,000 immigrant petitions were pending at USCIS in immigrant preferences categories that were identified by DHS as dependent upon a labor certification. The Department assumed the same 10 percent substitution rate for labor certification applications now attached to a pending immigrant petition at DHS that would be prohibited from a future substitution. The analysis accordingly assumes all of the 7,000 applications identified will require a second test of the labor market. As above, the Department has assumed that 15% of these applications (1,050 applications) will favor U.S. workers, and thus recruitment costs are not attributable. The costs of the labor certification process leading to labor market tests not favoring U.S. workers, including average filing and application management expenditures (staff time as indicated by staff compensation, costs of additional recruitment, etc.) for each employer, are then attributed to the remaining 5,950 applications for a total of $10.62 million. The Department is mindful that amount represents a one-time expense for a discrete group of applications and is, moreover, not discounted by the likelihood that some percentage of these applications that would otherwise be substituted would be too far into the adjudicatory process at DHS to be the subject of a future substitution.23

Transfer

To the extent the ban on substitution will have an economic impact on foreign labor - that impact could be a carve-out from the overall economic impact of the rule as measured in this analysis, and not an additive. The foreign worker who is substituted has by definition become unavailable for the position for reasons unrelated to this rulemaking, and therefore does not incur either a cost or benefit in this analysis. The vacancy created results in both costs and benefits for the employer, U.S. workers, and foreign workers. Costs are associated with recruitment; we assume the employer will take steps

necessary to fill the vacancy, whether with a foreign or U.S. worker. Benefits result from long-term stability and productivity gains to the employer from filling the vacancy, and pay and satisfaction to a new worker from a permanent position. The potential benefit to the employer - and the economy - from filling the vacancy would not change significantly whether the new worker is a U.S. or foreign worker; assuming a qualified individual fills the slot, the worker is meeting the same legitimate business need, and the employer incurs similar costs for comparable fringe benefits and compensation. The analysis already discusses the potential impact and assumptions associated with filling the vacancy with a U.S. worker. If, alternatively, the vacancy is filled with a second foreign worker - and to the extent foreign workers physically in the country and working are deemed part of the U.S. economy - the potential benefit to U.S. workers would be decreased by that number of slots and transferred to foreign workers who now enter the stream for permanent residency. So although total economic benefits do not change, their relative allocation does transfer between foreign and domestic workers, depending on who is awarded the permanent position. And in fact, non-material benefits to foreign workers may even be higher than to U.S. workers, were the analysis to factor in the positive impact that comes with a permanent residency-bound immigration track.

Issues raised by public comment

Several commenters argued the rule's prohibition of substitution of alien beneficiaries will create significant economic impact. One commenter, presuming direct employer costs per application of $10,000, stated the impact would be at least $1 billion if employers could no longer substitute beneficiaries. Another commenter focused on the effect it believed the substitution prohibition could have on the recruitment of workers. Noting that backlogs have reached 4.5 to five years at times, the commenter claimed the application process, which he characterized as lengthy, makes it imperative that employers be permitted to use certifications that are "abandoned." One commenter stated the substitution prohibition would increase the likelihood that employers would take jobs offshore because they would be unable to recruit and obtain certification for foreign workers in a timely manner. The same commenter also suggested that a few plant closings or other business disruption could easily result in an economic impact in excess of $100 million.

One commenter focused on the costs and expenses of abandoning and reapplying for a labor certification due solely to the unavailability of a foreign worker. Noting the costs of advertising, market surveys, attorneys and recruitment, the commenter also pointed out the loss in productivity from delayed approval of applications, all of which it said results in thousands of dollars in employer expenses. The commenter argued that substitution is and should remain "perfectly legitimate" because it "mitigates the employer's investment risk in an employment-based immigration visa process that still takes (and will likely continue to take) many years to complete." In addition to claiming the economic impact was significant, the commenter asserted the rule's substitution prohibition was an attempt to eliminate an unknown, but likely insignificant, quantum of fraud. Finally, the commenter stated that the impact on high technology industry employers would be substantial because such employers must recruit foreign nationals, often from U.S. universities, given the limited supply of U.S. citizens available for technical positions.

The commenters have failed to explain how the elimination of the practice of substitution itself will result in material adverse impact, let alone economic impact exceeding $100 million. While some commenters estimated the costs of obtaining a new certification at nearly $10,000, the Department finds no support for that claim, and has estimated the costs as much lower as noted above.

As stated elsewhere, the INA's treatment of employment-based immigration is designed to protect the wages and working conditions of U.S. workers. The Department meets the requirements of the statute through the labor certification process. As the administrator of that process, the Department has an obvious interest in and responsibility to identify, address and eliminate fraud, which is what the Final Rule will accomplish. The Department's experience, as articulated and discussed herein, resulted in the PERM process, which increased fraud protection. The Department's experience also shows the practice of substitution leaves the process susceptible to fraud.

As discussed extensively throughout this Final Rule, the Department is concerned that various immigration practices, including the substitution of alien beneficiaries and the indefinite validity of permanent labor certifications, were subject to a significant degree of fraud and abuse. The purpose of this Final Rule is to impose clear limitations on the acquisition and use of permanent labor certifications in order to reduce incentives and opportunities for fraud and abuse, and enhance the integrity of the permanent labor certification program to the benefit of the U.S. workforce.

The ban on substituting alien beneficiaries reduces the incentives and opportunities for fraud in important ways. First, absent this regulatory action, employers possess incomplete information about the current availability of qualified U.S. workers in the labor market. Because labor markets are inherently dynamic, even well informed employers may not keep abreast of changes in worker availability after their initial recruitment for a job opportunity. In addition, information may not always be accurate or widely available if it is costly to produce, analyze, or disseminate. Banning substitution "remedies" the problem of imperfect information, consistent with the statutory intent to protect U.S. workers, by requiring employers to go back to the labor market a second time when the original alien becomes unavailable. This measure improves employer decision-making with respect to filling critical job openings, and improves the probability that a qualified U.S. worker will be selected for the job.

Second, the ban on alien substitution significantly reduces the incidence of "overconsumption," where unscrupulous employers, attorneys, or agents submit large numbers of applications for processing and, once certified, sell the certification to a different alien at prices that grossly exceed marginal costs. This overconsumption is driven by the exchangeability of the alien name on the certification, which in turn increases the document's transferability. In the absence of this Final Rule, a certification that was granted to be used to benefit or name one alien and no one other than the parties originally named for purposes of filing with DHS (in economic terms, a "rivalrous and excludable good"), can be used by another alien simply by exchanging the name (in economic terms, a "rivalrous and non-excludable good").

These individuals or entities are not equating marginal social costs

with marginal benefits, but rather marginal private costs with marginal benefits; hence, they overconsume from the permanent labor certification program. In other words, unscrupulous employers or attorneys have no incentive to consider the marginal social costs of filing the next fraudulent labor certification applications as long as the marginal private benefits (i.e., revenue from selling the labor certifications to a different alien) continue to exceed the marginal private costs (i.e., costs to process and track the labor certification) of the transaction.

By eliminating alien substitution, this rule seeks to restore to certifications their rivalrous and excludable qualities, in that they may no longer be transferred, sold, bartered, or purchased; the employer, job opportunity, and alien beneficiary on the application are exclusive and cannot be transferred to a different alien beneficiary. By requiring appropriate, timely market tests; promoting better information on market conditions and worker availability; and restoring the exclusivity and integrity of labor certifications, we believe this regulatory action will more effectively align the marginal social costs of processing permanent labor certifications with the marginal benefits.

3. Validity Period

Permanent labor certifications have thus far been valid indefinitely, and employers have been free to submit a permanent labor certification to DHS at any time. At least one commenter argued that a 45-day proposed validity period such as that proposed in the NPRM would result in a significant impact. The Department disagrees with this conclusion. However, in response to other comments and our own analysis, we have lengthened the validity period to 180 days. Under this Final Rule, all permanent labor certifications will expire after 180 calendar days of certification unless filed in support of an I-140 immigrant petition with DHS.

The 180-day period in which a permanent labor certification can be filed in connection with the I-140 petition to the DHS effectively limits the time in which certifications may be marketed. The ban on substitution and the establishment of a finite validity period, when taken together, effectively reduce the likelihood of validating stale recruitment while simultaneously eliminating "rent-seeking" behavior on the part of unscrupulous employers, attorneys, and agents in selling these certifications to uninformed alien beneficiaries. We estimate the cost impact of a 180-day validity period will be insignificant because sufficient time is provided to put the certification to use, since it is granted to the employer under the presumption that there is a critical need for the foreign worker and no qualified U.S. workers are available.

This analysis does not quantify the marginal value of eliminating indefinite validity of labor certifications - that is, the value of establishing a limited validity period over and above the value gained from prohibiting substitution. The commoditization of labor certifications is a function of the availability of substitution and the absence of a finite expiration date. As this Final Rule eliminates both root causes, the analysis assumes most if not all quantifiable benefits are captured by the analysis above with respect to substitution.

The analysis does measure two major benefits associated with a

defined validity period. First, a validity period ensures labor market information is current, the prevailing wage recorded on the permanent labor certification is current and accurate, and the bona fide job opportunity exists as it appeared on the original application. When a certification becomes invalid, an employer must conduct new recruiting efforts that may indicate qualified U.S. workers are available and open that job opportunity for their consideration. Second, a validity period will slow the "black market" in approved labor certifications.

As discussed in the benefit-cost analysis below, enforcing a validity period will increase costs for employers that do not file with DHS prior to the end of the validity period. In these cases, the employer must conduct a new labor market test and submit a new permanent labor certification application to the Department. The Department's costs will also increase, since it will review additional applications that are submitted because the original certification expired.

The Department considered two periods of validity, 45 days and 180 days. Both alternatives are discussed further below.

3(A). Validity period of 180 days

We estimate that the 10-year discounted quantified benefits associated with this provision of the Final Rule will be between $74.8 and $90.9 million, and total quantified costs will be between $132.4 and $160.8 million. Thus, the net present value over a 10-year time horizon will range from -$57.6 to -$70 million. Due to a lack of adequate data, we were not able to quantify or monetize some important benefits of this provision of the Final Rule.

Benefits

The 180-day validity period has several important benefits to society: Increased employment opportunities for U.S. workers, improved program integrity, and cost savings to the Federal Government resulting from positions filled with U.S. workers.

An important purpose of the 180-day validity is to ensure that the certified job opportunity still exists as described on the initial application. If an employer files with DHS 180 days or more after the certification was approved by the Department, the passage of time may have impacted worker availability for purposes of the job opportunity that is the subject of the certification. This provision requires employers to conduct new labor market tests and submit a new application to the Department once validity expires.

As with the benefits discussed under the substitution section, above, the Department estimates that without the 180-day validity period and required labor market test, the employer may not be aware that U.S. workers are available, and may have otherwise hired an alien.24 Therefore, the second labor market test required by the Final Rule may favor and result in increased employment opportunities for U.S. workers. As under the substitution section above, we estimated the monetary value of this benefit by examining the compensation earned by U.S. workers that would not have otherwise been hired. To estimate this benefit, we accounted for the number of U.S. workers that would be favored by requiring employers to conduct new labor market tests and the compensation of these workers, which includes both their salaries and benefits, and reflects the decrease in time that the

U.S. workers favored by the 180-day validity period stay unemployed. We estimate this benefit to be $10.7 million per year.25

The 180-day validity period decreases the opportunity for fraud through the lawful permanent resident process. The current indefinite validity of approved permanent labor certifications has contributed, along with substitution, to the growth of a secondary market in approved labor certifications. A 180-validity period promotes more security in the labor market test conducted, adding significant protections for U.S. workers in the strength of the tests regarding availability and adverse effects of the test on wages and working conditions of the affected U.S. worker population. Having a defined validity period in combination with the elimination of substitution does not lessen fraud as much as it enhances the validity of the labor market test that was done. Due to a lack of adequate data, however, we were not able to quantify or monetize this important benefit.

Enforcing a 180-day validity period will result in a small decrease in the number of applications dependent on a successful labor market test that are submitted to DHS and DOS. An employer that does not submit the permanent labor certification to DHS within 180 days will need to conduct a new labor market test and, if the test favors an alien, the employer must file a new application with the Department. If the test favors a U.S. worker, then the employer will not submit an application to the Department. Employers will submit fewer applications to DHS and DOS because after the original certifications expire, some of the new labor market tests will favor U.S. workers or may not be further pursued. In these cases, cost savings results from the reduced DHS staff time to review I-140 immigrant petitions and I-485 applications to adjust to permanent resident status. In addition, DOS will have fewer interviews to conduct with aliens seeking a lawful immigrant visa to obtain permanent residence. Because of data limitations, we are not able to provide a quantitative or monetary value of these benefits. 26

Costs

The 180-day validity period imposes several costs to society: Additional job advertising and recruiting from employers, increased employer staff time for filing labor certification applications, and increased staff time at the Department. In addition, a 180-day validity period requires employers to conduct labor market tests that will favor U.S. workers in some cases, which results in a small reduction in revenue to DHS from I-140 petitions and I-485 applications and to DOS from immigrant visa applications. We estimate the 10-year discounted costs to society to range between $132.4 and $160.8 million.

As described above, approved permanent labor certifications will expire if employers do not file the labor certification in support of an immigrant petition with DHS within 180 calendar days of the date the Department grants certification. If the certification expires, the employer must conduct a new labor market test if it chooses to pursue the foreign labor option. If the test favors a U.S. worker, then the employer will hire a U.S. worker. If the labor market test indicates that no qualified U.S. workers are available, then the employer must resubmit a permanent labor certification application.

A significant cost to employers of the 180-day validity period is the

increase in employer staff time to prepare, file, and track labor certification applications. We estimate this cost by multiplying the number of expired certifications leading to labor market tests not favoring U.S. workers by the number of employer staff hours to prepare, file, and track the labor certifications, by the compensation of the employer staff undertaking these activities.27

Another significant cost to employers of the 180-day validity period is the additional recruitment efforts, in particular job advertising, as well as the increased employer staff time to arrange for and track recruitment efforts and for receiving, compiling, interviewing, analyzing, and reporting the results of the recruitment. We estimate the costs for preparing recruitment reports by multiplying the staff time required to conduct such activities by the staff's compensation, by the annual number of additional labor certification applications. 28 We estimated the total annual costs to employers for processing labor certifications and additional recruitment efforts to be $18.5 million per year.

A small cost to the Federal Government resulting from the 180-day validity period is the increased time for Departmental staff time to review the relatively small number of applications that are resubmitted if the original certification expired and subsequent labor market test favor an alien. If employers resubmit applications, then our staff must spend additional time reviewing an increased number of applications. We estimated this cost by multiplying the time spent reviewing each application by the compensation of a foreign labor certification analyst, by the increased number of applications. 29 We also factored in the potential increase in our staff time to audit additional recruitment reports. We estimated this cost by multiplying the time spent auditing each recruitment report by the average compensation of a DOL auditor by the increased number of recruitment reports that will be audited. 30 We estimated the total annual costs to the Federal government to be $0.3 million per year.

Finally, DHS and DOS will experience small decreases in revenue from application fees. Since employers must conduct a labor market test after a certification expires and since some of the labor market tests will favor U.S. workers, there will be a slight decease in the number of Forms I-140 and I-485 that would have been submitted to DHS and immigrant visa applications that would have been submitted to DOS. Because these forms have application fees, DHS and DOS will experience a small decrease in revenue.31 Due to a lack of adequate data, we could not quantify or monetize these costs.

3(B). Validity period of 45-days

In the proposed rule, the Department proposed a validity period of 45 calendar days. In response to public comments regarding the hardships associated with a 45-day validity period, we increased the validity period to 180 calendar days. The most important benefit of the validity period is increased employment opportunities for U.S. workers, and the primary cost is to employers that must conduct new labor market tests and file new applications with the Department if approved certifications are not filed with DHS within the validity period and the labor market test favors an alien.

In the section below, the Department analyzed the major benefits and costs. We assumed that twice as many certifications would expire

before reaching DHS with a 45-day validity period as compared to a 180-day validity period. We estimated the 10-year discounted benefits associated with a 45-day validity period to be between $149.6 and $181.7 million, and the total costs to be between $264.9 and $321.7 million. Thus, the net present value over a 10-year time horizon will range from -$115.2 to -$140.0 million.

Benefits

We estimate the monetary value of this benefit by examining the compensation earned by U.S. workers that would not have otherwise been hired. To estimate this benefit, we account for the number of U.S. workers that would be favored by requiring employers to conduct new labor market tests and the compensation of these workers, which includes both their salaries and benefits and reflects the decrease in time that those workers stay unemployed. We estimate this benefit to be $21.3 million per year. 32

Costs

The Department assumed that twice as many applications would expire under a 45-day validity period as compared to the 180-day validity period. The Department estimated the costs for a 45-day validity period by assuming the cost per application would be the same but the number of applications submitted by employers would double. We estimate the annual cost to employers to be $37 million per year. This cost includes additional job advertising, and employer staff time to arrange for and track recruiting efforts, prepare and file certification applications, and prepare and maintain recruitment reports.

The 45-day validity period imposes a cost to the Department resulting from the need for increased foreign labor certification staff time to review additional applications resulting from expired applications. We estimated this cost to be $0.7 million per year. Also, if employers rush to file the I-140 to satisfy a 45-day rule, this will slow processing at DHS and increase the number of requests for additional evidence issued by that agency. However, due to a lack of adequate data, we were unable to quantify or monetize this cost.

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

The Department is prohibiting improper commerce and certain payments related to permanent labor certification applications and certifications. We estimate that the 10-year discounted benefits associated with this provision of the Final Rule will be between $16.9 and $20.5 million. Due to a lack of adequate data, we were unable to specifically quantify the costs to this provision of the Final Rule.

Benefits

The prohibition on the sale, barter, or purchase of applications or certifications has several important benefits to society: Improved program integrity, a small cost savings to employers in the form of increased staff time to clear up their names when they are unknowingly used for fraudulent applications, and cost savings to the Federal Government in the form of reduced staff time resulting from

the reduction in fraudulent applications. We estimate the cost savings to be $2.4 million per year.

On the "black market," employers or agents agree to broker applications for permanent labor certification on behalf of aliens in exchange for payment. Such payments are not compatible with the purposes of the permanent labor certification program and may indicate a lack of a bona fide job opportunity that is and has been truly open to U.S. workers. The Department is instituting this ban because allowing the sale of a government benefit to continue is simply bad government. Due to a lack of adequate data, we were not able to quantify or monetize the benefits to society of increased program integrity as a result of this provision of the Final Rule.

The Department of Justice, DHS and DOL OIG spend a significant amount of time and resources to investigate fraudulent applications. Some of these applications are submitted by unscrupulous attorneys or agents filing on behalf of an alien, although the business named on the application did not provide authorization and may not even have been aware that its name was being used. When the Federal Government determines the application is fraudulent, the employer is often placed in an uncomfortable, precarious position and required to explain to the Department that it did not authorize the use of its name in the application.

We estimate this cost savings by calculating the monetary value of the increase in employer staff time to discuss the findings and write an explanation to the Department. We estimate this cost savings by multiplying the staff time required to conduct such activities by the staff compensation, by the number of fraudulent applications submitted to the Department. We estimate the annual cost savings to employers to be $2.4 million per year. 33

Enforcing a prohibition on the sale, barter, or purchase of applications of permanent labor certifications or approved permanent labor certifications will deter unscrupulous attorneys, employers, and agents from submitting fraudulent applications. Thus, all else being equal, the prohibition will result in fewer applications that are submitted to the Department, DHS, and DOS. Cost savings result from reduced OIG staff time to review and audit permanent labor certification applications and reduced DHS staff time to review I-140 and I-485 applications. In addition, DOS will have fewer interviews to conduct with aliens seeking permanent residence. Finally, DOJ staff time can be expected to be reduced from avoided investigation and prosecution of fraudulent applications (for example, under existing racketeering laws). Because of data limitations, we were not able to quantify or monetize this important benefit.

Costs

The prohibition of the sale, barter, or purchase of permanent labor applications and certifications imposes several costs to the Federal Government in terms of increased DOJ staff time to prosecute unscrupulous agents, attorneys, or employers that submit fraudulent applications, and a small reduction in revenue to DHS from I-140 petitions and I-485 applications and to DOS from immigrant visa applications. Due to a lack of adequate data, we were unable to quantify the costs to this provision of the Final Rule.

The main cost to the Federal Government is the increased DOJ staff

time to investigate and prosecute unscrupulous agents, attorneys, or employers suspected of violating this prohibition. In addition, DHS and DOS will experience small decreases in revenue from application fees. Since unscrupulous agents, employers, and attorneys will no longer submit fraudulent applications to the Department, there will be a slight decease in the number of I-140 petitions and I-485 applications that would have been submitted to DHS and an immigrant visa application that would have been submitted to DOS. Because both these forms have application fees, DHS and DOS will experience small decreases in revenue.34

Issues raised by public comment

At least two commenters stated that a large financial impact would result from the proposed rule's prohibition on payment or reimbursement of the employer's attorneys' fees or other employer costs. One of those commenting reported that it "heard [f]rom several large companies and universities" that the application process may cost as much as $15,000 to $20,000, including attorneys' fees, although it conceded that the numbers were informal and not based on systematic research.

The Department has considered comments from several sources regarding the prohibition on payment or reimbursement by alien workers of the employer's expenses. We believe there are compelling reasons to maintain in substantial part the prohibitions proposed in the NPRM, including the prohibition against employers seeking reimbursement of employers' attorneys' fees. The Department has detailed these reasons above. We reiterate, in addition, that assistance of counsel is at the employer's option, and not a requirement of the program.

The ban on sale, barter, purchase and certain payments related to permanent labor certifications is also justified for its social purpose, which is to prevent labor certifications from becoming a commodity that can be sold by unscrupulous employers, attorneys, and agents to aliens seeking a "green card." The public disclosure that permanent labor certifications cannot be sold, bartered, or purchased reduces information asymmetry in the sense that alien beneficiaries are now informed that they should no longer be purchasing these certifications under any circumstances.

5. Debarment

The Department may suspend processing of any permanent labor certification application if an employer, attorney, or agent connected to that application is involved in either possible fraud or willful misrepresentation or is named in a criminal indictment or information related to the permanent labor certification program. The Department has instituted a public debarment mechanism to effectively deter individuals or entities from engaging in fraudulent permanent labor certification activities or prohibited transactions, and provide employers who seek assistance from attorneys or agents with better information about which individuals or entities have committed fraud or abuse. In addition, this regulatory action will increase government efficiency in processing legitimate permanent labor certification applications as debarred employers, attorneys, or agents are prevented from participating in the program for a specified period of time (i.e., up to three years).

We estimate that the 10-year discounted benefits associated with this

provision of the Final Rule ranges from $175.9 to $213.6 million. Due to a lack of adequate data, we were unable to quantify the costs to this provision of the Final Rule.

Benefits

The debarment provision has several important benefits to society, including improved program integrity and cost savings to the Federal Government in the form of reduced staff time resulting from the reduction in fraudulent applications.

We are implementing this provision to promote the program's integrity and to assist the Department in obtaining compliance with existing program requirements and this rulemaking. Given the breadth and increased sophistication of the immigration fraud that has been identified in the recent past, the Department added this provision to attain the necessary flexibility to respond to potential improprieties in labor certification filings.

Debarring unscrupulous employers, attorneys, or agents who willfully or repeatedly violate program requirements will prevent such conduct in the future. To the extent that these provisions deter, prevent, or forestall inaccurate, inappropriate, or fraudulent applications, debarment will reduce the number of applications received by the Department, all other factors being constant. We estimate this cost savings by multiplying the number of fraudulent applications submitted by the average number of hours spent by foreign labor certification staff on each fraudulent application, by the average compensation of staff reviewing fraudulent applications. We estimate the annual cost savings to the Federal Government associated with debarment to be $25 million per year. 35

In addition, the Department anticipates that there will be other cost savings associated with the debarment provision but, because of data limitations, no quantitative or monetary values could be provided. One portion of cost savings results from reduced DHS staff time to review I-140 petitions and I-485 applications. In addition, DOS will have fewer interviews to conduct with aliens seeking lawful residence.

Costs

The debarment provision imposes a small cost to the Federal Government in the form of reduced revenue to DHS and DOS related to fewer I-140 petitions and I-485 applications and immigrant visa applications. We were unable to monetize these costs because of inadequate data.

The cost to the Department associated with debarment can be expected to be low, since we have experience creating and implementing electronic tracking systems to prevent debarred individuals from filing applications with the Department. For example, the Department's H-1B Labor Condition Application (LCA) System already includes a "debarment" table that is automatically updated with the names of debarred individuals. LCAs filed by individuals on the list are electronically flagged, and there is minimal staff time associated with this process. Although the Department does not possess data to estimate this cost, we do not believe that enforcing the debarment provisions in this rule will require a significant amount of resources.

Finally, DHS and DOS will experience small decreases in revenue from application fees. Debarred individuals will not be able to submit applications to the Department, and thus will be unable to proceed to the next steps of the process in DHS and DOS. Because these forms have application fees, DHS and DOS will experience a small decrease in revenue.36 The Department does not have sufficient data to estimate this cost.

D. 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 Fairness Act of 1996 (SBREFA). The standards for determining whether a rule is a major rule as defined by section 804 of SBREFA are similar to those used to determine whether a rule is an "economically significant rule under Executive Order 12866." Because we certified that this is not a major rule under Executive Order 12866, we also certify it is not a major rule under SBREFA. The rule 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.

One commenter took the position that the rule would constitute a "major rule" within the meaning of SBREFA. The commenter assumed that employers must spend approximately $10,000 for each new application that must be submitted in light of the substitution prohibition. Based on that analysis, and noting that as many 100,000 applications are filed each year, the commenter argues that the impact could amount to $1 billion.

While we are aware of and sensitive to the costs employers incur as part of the labor certification process, our regulatory analysis, as detailed above, indicates the rule will not have a significant economic effect. Separately, as pointed out earlier in this preamble, the costs borne by employers are not unanticipated by the statute. Therefore, under SBREFA, the rule is not "major."

E. Executive Order 13132

This Final Rule will not have a substantial direct effect 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. Therefore, in accordance with Executive Order 13132, we have determined this rule does not have sufficient federalism implications to warrant the preparation of a summary impact statement. The Department received no comments that addressed Executive Order 13132.

F. Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988. The Department received no comments regarding this Executive Order.

G. Paperwork Reduction Act

The collection of information under part 656 is currently approved