U.S. Department of Labor
Employment & Training Administration

Graphical Version

Permanent Immigration

EFFECTIVE DATE

Question: What is the effective date of the new Labor Certification for the Permanent Employment of Aliens in the United States, or PERM, regulation?

- The PERM regulation is effective March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

Question: As of March 28, 2005, will all previously filed labor certification applications be converted and/or processed under PERM?

- No, labor certification applications filed prior to March 28, 2005, will not be automatically converted and/or processed under PERM. Applications filed under the regulation in effect prior to March 28, 2005, will continue to be processed at the appropriate Backlog Processing Center under the rule in effect at the time of filing. As of March 28, 2005, applications (Form 750) will no longer be accepted under the regulation in effect prior to March 28, 2005, and instead new applications (Form 9089) will need to be filed under PERM at the appropriate National Processing Center. Only if an employer chooses to withdraw an earlier application and refile the application for the identical job opportunity under the refile provisions of PERM will a previously filed application be processed under the PERM regulation.

Are any PERM regulation provisions applicable to applications filed under the regulation in effect prior to March 28, 2005?

- No, while many provisions in the PERM regulation are the same as, or similar to, the provisions found in the regulation in effect prior to March 28, 2005, the PERM regulation can not be applied to applications filed under the former regulation. At this point, all provisions of the PERM regulation are applicable only to applications filed on or after March 28, 2005, under the PERM regulation.

STANDARDS/ MAJOR DIFFERENCES

1. **What standards will be used in making labor certification determinations under the new, streamlined system?**

   - The standards used in making labor certification determinations under the new system will be substantially the same as those used in arriving at a determination in the former system. The determination will continue to be based on: whether there are not sufficient United States workers who are able, willing, qualified and available; whether the employment of the foriegn worker will have an adverse effect on the wages and working conditions of United States workers similarly employed; and whether the employer has met the procedural requirements of the regulations.

2. **What provisions have changed in the new system?**

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- This is a brief list of some of the changes; they are covered in greater detail in the particular topic areas below.

  Filing: Employers have the option of submitting the new form, the Application for Permanent Employment Certification, ETA Form 9089, electronically directly to a National Processing Center.

  Filing: Supporting documentation is not submitted with the application.

  Filing: Employers file applications directly with the U.S. Department of Labor and not with a State Workforce Agency (SWA).

  Refiling: An employer may, at any time, withdraw an application filed under the regulation in effect prior to March 28, 2005, refile under PERM, and maintain the original filing date if the new application complies with the new regulation, the application is identical to the original application, and a job order has not been placed by the SWA for the original application.

  Prevailing Wage: The offered wage must be equal to or greater than the prevailing wage. The wage must be at least 100% of the prevailing wage; the 5% deviation is no longer acceptable.

  Prevailing Wage: Where an acceptable employer-provided survey provides a median and does not provide an arithmetic mean, the median will be used as the prevailing wage.

  Prevailing Wage: The prevailing wage validity period will vary from no less than 90 days to no greater than one year depending on the wage source used.

  Notice of Filing: A notice of filing must be posted in specific locations for ten consecutive business days rather than merely ten days.

  Recruitment: The employer is required to conduct recruitment (more than 30 days and less than 180 days) prior to filing.

  NOTE: While pre-filing recruitment was the basis for reduction-in-recruitment under the regulation in effect prior to March 28, 2005, the recruitment provisions in the new system differ.

  Recruitment: Recruitment provisions are divided into professional and nonprofessional occupations and additional recruitment steps are required for professional occupations.

  Recruitment: Sunday edition newspaper advertisements are required.

  Recruitment: A job order, obtained through the SWA, is required.

  Recruitment: The special handling provision has been removed. Optional recruitment provisions for college and university teachers are in § 656.18. Provisions for college and university teachers of exceptional ability in the science and arts are covered in § 656.5.

  Revocation: Certifying Officers have the authority to revoke approved labor certifications.

  Adjudication: Certifying Officers will either certify or deny applications. The interim step under the previous regulations of issuing a Notice of Finding (NOF) has been eliminated.

  Schedule A, Professional Nurses: A Commission on Graduates of Foreign Nursing Schools (CGFNS) Certificate rather than merely passage of the CGFNS examination is required to qualify the foreign worker for Schedule A certification.

  Schedule A, Professional Nurses: Passage of the National Council Licensure Examination for Registered Nurses (NCLEX—RN) examination is a means by which to qualify the

foreign worker for Schedule A certification.

Schedule B: Schedule B has been eliminated.

FILING

HOW TO FILE

1. **How can an employer file an Application for Permanent Employment Certification, ETA Form 9089?**

   - The employer has the option of filing an application electronically (using web-based forms and instructions) or by mail. However, the Department of Labor recommends that employers file electronically. Not only is electronic filing, by its nature, faster, filing electronically provides prompts that assist in the completion of the ETA Form 9089.

   - An application for a Schedule A occupation must be filed by mail with the appropriate Department of Homeland Security office and not with a Department of Labor National Processing Center.

     NOTE: Employers will not be permitted to submit applications by facsimile.

2. **How does the employer file an application electronically?**

   - The employer can access a customer-friendly web site (http://www.plc.doleta.gov) and, after registering and establishing an account, electronically fill out and submit an Application for Permanent Employment Certification, ETA Form 9089.

     NOTE: The web site also provides an option to permit employers that frequently file permanent applications to set up secure files within the ETA electronic filing system containing information common to any permanent application the employer files. Under this option, each time an employer files an ETA Form 9089, the information common to all of its applications, e.g., employer name, address, etc., will be entered automatically and the employer will only need to enter the data specific to the application at hand.

3. **Is it possible to complete only portions of an application, save it, and retrieve it at a later date without having to submit it?**

   - Yes, the system provides the employer with the choice, upon finishing an online session, of either saving an application as a draft or submitting it to the Atlanta National Processing Center.

4. **Where does an employer file an application by mail and how can people contact the Atlanta National Processing Center to ask questions about an application?**

   - Applications for Permanent Employment Certification, ETA Form 9089, must be mailed to the following address:

     United States Department of Labor
     Employment and Training Administration
     Atlanta National Processing Center
     Harris Tower
     233 Peachtree Street, N.E., Suite 410
     Atlanta, Georgia 30303

   - The employer can contact the Atlanta National Processing Center at:

     EMAIL: plc.atlanta@dol.gov
     Telephone: (404) 893-0101

FAX: (404) 893-4642

5. **What is the process by which an employer registers and files an application on line?**

- In order to file permanent labor certification applications on-line, the employer must have a Permanent Online System account, username, password, and PIN. The account allows for the preparation and management of applications on-line, the username and password are necessary to access the account, and the PIN is required to submit applications on-line.

  Permanent Online System account – An account is created after an employer has submitted registration information on-line at www.plc.doleta.gov and the employer information is verified by DOL. Account creation is a means by which to control filing authorization and to provide account holders filing management capabilities. An employer must be registered and be in possession of a PIN in order to file applications on-line. Upon verification of the employer's information, a password and confirmation of the account holder's username are sent to the employer in one email and, for security reasons, the PIN in another. It must be noted that upon accessing the account for the first time, the system requires the DOL password be changed to a new password. It is critical that the employer be aware of and know the new password, as only an individual in possession of the account's valid username and password is able to access the account.

  Sub-account – The holder of a Permanent Online System account is able to create multiple sub-accounts with individual usernames and passwords for persons authorized by the employer to file applications in its name, to include attorneys and agents. It is a means by which to provide the employer the security of ensuring only persons authorized by the employer are filing on the employer's behalf. In creating a sub-account, the employer is able to designate whether the sub-account holder is the employer's employee, the employer's agent or the employer's lawyer. The employer is also able to designate the level of security access available to the sub-account holder.

  NOTE: While the employer is permitted the opportunity to designate persons to represent the employer in the application filing process, the employer must recognize that ultimate responsibility for the accuracy of all representations made by such designated persons rests with the employer. Therefore, the employer is encouraged to establish measures designed to ensure only legitimate dissemination and use of account information.

  Federal Employer Identification Number (FEIN) – The FEIN is provided to the employer by the IRS. It is a means by which the Department of Labor (DOL) verifies the bona fides of the employer and ensures that only legitimate employers are able to avail themselves of the labor certification process. In order to satisfy the definition of employer for purposes of labor certification, all employers, including employers of household domestic workers, must possess a valid FEIN.

  Username – The username is a log-in name provided by the employer registrant. After registration, upon successful employer verification, confirmation of the username is emailed to the employer by DOL. It is a means by which to identify the account holder and establish access authority. Each username is unique; duplications are not accepted.

  Password – An initial password is provided by the Permanent Online System. After registration, upon successful employer verification, the temporary password is emailed to the employer by DOL. Upon activation of an account after registration, the individual initially accessing the account is required to create a new password. The password is a means by which to identify the account holder and establish access authority. NOTE: An account can only be accessed by the holder of the username and password. Where the password is changed, only an individual with the user name and the **new password** will be able to access the account.

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Personal Identification Number (PIN) – The PIN is provided to the employer after registration upon successful employer verification by DOL. It is a means by which to safeguard on-line filing. Only an individual in possession of a PIN is able to actually submit a labor certification application on-line. The PIN used in submitting an application must be the PIN of the employer named on the application filing the application.

6. **Where the employer has established a sub-account for an attorney or agent, is the attorney or agent permitted to submit applications on-line?**

   - Yes, an attorney or agent may submit applications under the following circumstances. An employer must complete the registration process as explained at http://www.plc.doleta.gov, including the initial log-in. During the initial log-in, the employer will change the employer's temporary password (as assigned by the system during registration) and once logged-in, the employer can establish a sub-account for an attorney or agent. The employer will select a username for the attorney or agent, and the system will assign a temporary password. The attorney or agent will receive an e-mail with the username, temporary password, and the employer's PIN. When the attorney or agent logs in and changes the attorney's or agent's password, the attorney or agent is then permitted to complete and submit applications on-line on behalf of the employer using the PIN of the employer in whose name the application is being filed.

7. **How can the employer ensure that no unauthorized use of the employer's personal identification number (PIN) and/or usernames and passwords exists?**

   - The employer is able to view all applications filed under the employer's account, to include all applications filed under the employer's sub-accounts, and we recommend employers implement a mechanism by which to identify any unauthorized use of the employer's PIN and/or usernames and passwords. We also recommend employers require those persons to whom sub-accounts have been assigned to carefully monitor the accounts for unauthorized activity. If the employer uncovers unauthorized use of the PIN and/or usernames and passwords, the employer must immediately contact the Department of Labor at PLC.HELP@DOL.gov.

     NOTE: The employer is advised to set up a sub-account for the attorney or agent. Thereafter, the attorney or agent, using the sub-account's username and password, will be able to access the sub-account and be able to do what is required and/or needed to file labor certification applications on behalf of the employer, depending on the level of access granted by the employer. In filing applications for an employer, the attorney or agent must use the employer's PIN, which is provided to the attorney or agent upon creation of the sub-account along with the sub-account's own username and password. The employer is cautioned that ultimate responsibility for the representations of its attorney and/or agent rests with the employer.

8. **If a parent entity wishes to centralize administration/control over PERM filings of its subsidiaries having different FEINs, can the parent company create sub-accounts for each subsidiary and then permit each subsidiary to assume responsibility for its own filings?**

   - No, a parent company can not create sub-accounts for subsidiaries having FEINs different from that of the parent company in order to centralize administration and control. When an application is being completed using a sub-account, employer information from the main account, including FEIN and address, is automatically populated into the application and that information can not physically be changed or altered.

9. **Will the Atlanta National Processing Centers issue confirmations of receipt for mail-in applications?**

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- The Department is currently working to issue confirmations of receipt for mail-in applications. For further assurance that the DOL is in receipt of the application, it is recommended that a mail service which provides such documentation be used.

10. **Are there any circumstances under which mailing in a labor certification application would prove more successful than electronically submitting an application on-line?**

    - No, mailing in an application will not prove more successful, as the mailed-in application, upon receipt at the National Processing Center, is initially merely date stamped. Until the application is data entered into the electronic system by a data entry person (using the exact information shown on the ETA Form 9089), processing will not begin on the application. Once entered into the system, the mailed-in application receives the exact same automated analysis and manual scrutiny as an application submitted electronically. If there are two identical applications, one submitted electronically and one mailed-in, there will be no difference in how they are processed. The only difference may be in processing time; a mailed-in application will take longer, as not only mailing but also the data entry time will be involved. Remember: the on-line system will identify mistakes (e.g. entering four digits for a zip code instead of five digits) before allowing the application to be submitted, but the data entry person must enter the information exactly as shown on the application; a mistake on the form may trigger an audit or denial.

11. **Where can I email my questions?**

    - There are two locations where you may send your questions, depending upon the type of question asked.

      If you have a technical question (for example, if you forgot your password), then please email those questions to plc.help@dol.gov.

      If you have a program specific question (for example, if you have a question concerning the content of an advertisement) or a policy question, then please email your questions to PLC.Atlanta@dol.gov (the Atlanta National Processing Center)

      Please note: **Questions should no longer be e-mailed to perm.dflc@dol.gov.**

12. **Under PERM, is it permissible for an employer to have more than one labor certification application actively in process for the same foreign worker for the same job opportunity at any given time? What should an employer do if it has already filed multiple applications for the same foreign worker for the same job opportunity?**

    - Under the old and new permanent labor certification regulations, DOL certifies that there are not available U.S. workers for a particular "job opportunity." See, e.g., 20 CFR 656.10(c) (new PERM regulation) and 656.20(c) (prior regulation). DOL's longstanding policy has been that an employer is not prohibited from filing applications for the same foreign worker involving different, legitimate job openings to which U.S. workers may be referred. See, e.g., Field Memorandum 48-94 (May 16, 1994) (Policy Guidance on Alien Labor Certification Issues at § 6). However, DOL has not processed or certified multiple labor certifications for the same foreign worker and same job opportunity on grounds that the additional applications cannot represent a bona fide different job opportunity available to U.S. workers.

      In the months since the PERM regulation's streamlined procedures for filing and processing of permanent labor certification applications took effect on March 28, 2005, some employers have filed multiple electronic applications for the same foreign worker and same job opportunity. In some cases, the multiple applications are identical in all respects and may have been the result of inadvertently repeating the "submit" function.

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In other cases, the applications differ in minor respects, such as answering questions regarding job requirements differently or varying in descriptions of skill requirements. In some cases, these minor differences may have been intended to prematurely respond to electronic denials (that is, in advance of receiving the written denial letter) or to test the system's responsiveness and auditing criteria.

DOL intends to apply its longstanding policy regarding multiple applications to multiple applications filed under the new PERM regulation. Therefore, an employer may not have more than one Form 9089, Application for Permanent Employment Certification, in process under the PERM regulation for the same foreign worker for the same job opportunity at any given time.

Recognizing that multiple filings are already in the PERM queue for the same employer, foreign worker and job opportunity, we have developed the following procedures to transition in implementation of this policy to PERM:

- If an employer currently has multiple applications in process under PERM for the same foreign worker and job opportunity, the employer must withdraw, by January 19, 2006, all applications other than the one it wants processed. (For withdrawal information, see the separate FAQ on procedures for withdrawing an application.)

- As of January 19, 2006, if multiple applications from an employer for the same foreign worker and same job opportunity are still pending under PERM, we will assume that the employer wishes the last-filed application to be processed (since this presumably includes any corrections or clarifications from earlier filings) and the other pending PERM applications for the same foreign worker and the same job opportunity will be denied.

- After January 19, 2006, if an application for a particular employer/foreign worker/job opportunity is pending under PERM and a second application is filed under PERM for the same employer/foreign worker/job opportunity, we will continue to process the first-filed PERM application and deny subsequent PERM filings except where the employer follows the procedures outlined here. If the employer wishes to file a new or changed application under PERM for that same foreign worker and job opportunity, the employer should not file the new PERM application until the employer formally withdraws the PERM application currently in process or the employer has received the Final Determination form notifying the employer that the previous application is denied. **NOTE:** An employer may not file a new application for a foreign worker while a request for review is pending with the Board of foreign worker Labor Certification Appeals (BALCA) for that same alien, employer, and job opportunity. See 20 CFR 656.24(e)(6).

DOL will continue to apply its longstanding policy regarding multiple applications under Field Memorandum 48-94 where multiple cases have been filed and are being processed under the old regulation at Backlog Elimination Centers. DOL will continue to process and certify multiple permanent labor certification applications filed under the prior regulation for the same foreign worker if the employer is proposing to employ the foreign worker in multiple different bona fide job openings to which U.S. workers can be referred. DOL will not process or certify multiple labor certifications filed under the prior regulation for the same foreign worker, employer, and job opportunity on grounds that the additional applications cannot represent a bona fide different job opportunity available to U.S. workers.

If a BEC identifies multiple pending applications for the same employer, job opportunity, and foreign worker, the BEC will issue a Notice of Findings for all related applications, and provide the employer the opportunity to identify which application contains the bona fide

job opportunity. Should an employer currently have multiple applications pending at a BEC for the same employer, job opportunity, and foreign worker, the employer may take the initiative and notify the BEC as to which application it wishes to have processed and withdraw all other applications.

This FAQ does not address the situation in which an application for the same employer, foreign worker and job opportunity is pending under both the prior and new PERM regulation. DOL is considering stakeholder input on this situation, which in some cases may have implications for priority dates.

13. **In view of the past practice of allowing the filing of multiple applications by the same employer for the same foreign worker if the job opening was different, why, under PERM, is the employer precluded from having more than one application for the same foreign worker actively in process at any given time?**

    - We have removed the response to this question posted on August 8, 2005. The Department is considering questions and information stakeholders have submitted in response to this FAQ posting, and will be developing and posting a clarified response in the near future.

14. **For electronically filed applications, please provide a listing, and explanation, of the status indicators that appear on the website.**

    - The status indicators for an application filed on-line are as follows:

      Incomplete: A case number preceded by a "T" indicates that the application has not been formally "filed" by the employer or its agent, i.e., electronically submitted, and is still a temporary draft. When an application is electronically submitted to a National Processing Center, the "T" changes to an "A."

      In process: An "in process" status indicates the application is in the process of moving through the DOL's certification process. If the application is in a stage of review requiring further information/documentation from the employer, the employer will be notified.

      Withdrawn: A "withdrawn" status indicates the employer has withdrawn the application.

      Denied: A "denied" status indicates the application is denied. A Final Determination form, stating the reasons for the determination and advising the employer of how to request review, should the employer choose to do so, will be sent to the employer. The Final Determination must be included in any request for review, therefore, the employer must wait to receive the form before making such a request. The employer is also advised to wait for the Final Determination before filing a new application for the same foreign worker to avoid repeating errors made in the original application.

      Appeal: An "appeal" status indicates the application is under reconsideration and/or review and is considered "in process." No new application for the same foreign worker can be filed while an application is in a reconsideration and/or review queue.

      Certified: A "certified" status indicates the labor certification is granted. The certified application and a complete Final Determination form will be sent to the employer, or, if appropriate, to the employer's agent or attorney, indicating the employer may file all the documents with the appropriate office in the Department of Homeland Security (DHS).

WHAT TO FILE/DOCUMENTATION

1. **What forms or documents must the employer include in an application?**

    - The employer must file a completed Application for Permanent Employment Certification,

ETA Form 9089.

- Except as required for applications filed under § 656.5, Schedule A, supporting documentation need not be filed with the application, but the employer must provide the required supporting documentation if the employer's application is selected for audit or if the Certifying Officer otherwise requests it.

2. **How long must supporting documents be retained?**

   - The employer is required to retain all supporting documentation for five years from the date of filing the Application for Permanent Employment Certification, ETA Form 9089.

3. **When must applications be signed?**

   - Applications submitted by mail must contain the original signature of the employer, alien, and preparer, if applicable, when they are received by the processing center. Applications filed electronically must, upon receipt of the labor certification, be signed immediately by the employer, alien, and preparer, if applicable, in order to be valid.

     NOTE: Where the employer provides a copy of an application to a Certifying Officer pursuant to an audit or otherwise, the copy must be signed.

FILING TIMEFRAMES

1. **When is PERM effective and must the employer wait until the effective date to begin recruitment?**

   - PERM is effective March 28, 2005, and will apply to all applications filed on or after the effective date.

   - If all applicable provisions including timeframes of the regulation have been satisfied, an application may be filed under the PERM regulation on or after the effective date. Required timeframe provisions include, among others: that recruitment be conducted at least 30 days, but no more than 180 days, prior to filing under § 656.17; that filing must be within 18 months after selection under § 656.18; and that notice of filing be provided between 30 and 180 days prior to filing under § 656.10.

REGISTRATION

1. **Can an attorney, agent or law firm register to use the Permanent On-line System?**

   - No, only an employee or owner of the employer entity may register to use the Permanent On-line System because employers must make the attestations required for the permanent application process and a PIN will only be assigned to an employer. The registration must be submitted by an individual with actual hiring authority for the employer. The individual listed under the "Employer Contact Information" section of the registration page must be the individual with actual hiring authority for the employer and cannot be the attorney or agent. During the registration process, the employer may create sub-accounts for attorneys or agents. We will cancel or deny registrations submitted by non-employers. Submission of a permanent labor certification application using a PIN assigned to a non-employer will be grounds for denial or revocation of a permanent labor certification.

     NOTE: To withdraw or delete a registration account (as in a situation where the original registration was set up showing an attorney or representative as the "user" and/or where the contact person for the employer is not a person with actual hiring authority), please e-mail PLC.HELP@dol.gov, provide the user name and password, and request the account be deleted. At that point, the person with actual hiring authority can re-register with the

correct information.

REFILING

1. **Can the employer refile a labor certification application filed under the previous permanent labor certification regulations under the new streamlined system and retain the filing date of the original application?**

   - Yes, **if a job order has not been placed** pursuant to the regulations in effect prior to March 28, 2005, an employer may refile by withdrawing the original application and submitting, **within 210 days of withdrawing**, an application for an identical job opportunity which complies with all of the filing and recruiting requirements of the new PERM regulation.

     NOTE: Indicating on the Application for Permanent Employment Certification, ETA Form 9089, the desire to use the filing date from a previously submitted application, i.e., marking "yes" to question A-1, is deemed to be a withdrawal of the original application.

     NOTE: If a job order for an application has been placed by the State Workforce Agency (SWA) as part of the traditional recruitment process under the regulations in effect prior to March 28, 2005, the employer is prohibited from refiling the application and retaining the original filing date. However, if an employer placed a job order as a recruitment step in a reduction-in-recruitment application, the job order is not considered a job order placed by the SWA as part of the traditional recruitment process and the employer is permitted to withdraw and refile.

2. **Will the job opportunity on the original and refiled application not be considered identical if, for instance, the prevailing wage has changed?**

   - No, having a different prevailing wage on the refiled application from that on the original will not impact whether or not the job opportunity is identical. For a job opportunity to be identical, the regulation requires that the **employer (including address), alien, job title, job location, job requirements,** and **job description** be identical in both the original and refiled applications. It is quite possible that the prevailing wage in the new application, which must be filed in accordance with the PERM regulations and which must evidence a current prevailing wage, will not be the same as the prevailing wage in the original application.

3. **Should an employer withdraw an earlier application and refile under PERM?**

   - The Department of Labor does not provide counsel as to questions of this nature. However, employers are reminded refiled labor certification applications must conform to the provisions of the PERM regulation.

4. **How must the employer save and/or store the documentation necessary to support a labor certification application?**

   - No one method for saving and/or storing necessary documents is prescribed, nor is any particular method proscribed. The burden of establishing the validity of any documentation provided in support of a labor certification application rests with the employer. In establishing a method by which to save/store supporting documentation, the employer must remember that the responsibility for producing valid and defensible documentation in the event it is requested by a Certifying Officer rests solely with the employer. Such documentation must be retained by the employer for five years from the date of filing

5. **In the event an employer wanted to refile a reduction-in-recruitment (RIR) conversion application, what date would be considered the original filing date (priority date), i.e., is**

the filing date of the original application the date the traditional recruitment application was filed with the State Workforce Agency (SWA) or the date the application was accepted as a RIR conversion application?

- The original filing date (priority date) is the date the original application was initially accepted for processing by the SWA under the basic labor certification process; it is not the date the application was accepted as a RIR conversion application.

6. **Is it possible to refile an application under the PERM optional special recruiting provision for college and university teachers if eighteen months or more have passed since the selection of the foreign worker was made pursuant to a competitive recruitment and selection process?**

   - No, an application can not be refiled under the PERM optional special recruiting provision on behalf of an foreign worker selected pursuant to a competitive recruitment and selection process if eighteen months have passed since the selection of the foreign worker.

ATTESTATION

1. **What is meant by the "employer's being able to place the alien on the payroll" under § 656.10(c)(4)? How does it differ from having funds available to pay the foreign worker's wage or salary in § 656.10(c)(3)?**

   - The employer may be required, depending on the circumstances, to establish that the position offered is actually available at the time of the foreign worker's proposed entrance into the United States. For example, the employer may be asked to provide evidence that a plant or restaurant, which is in the planning stage or under construction at the time the application is filed, will be completed at the time of the foreign worker's proposed entrance into the United States. While the employer may be fiscally able to pay the foreign worker, other circumstances, such as non-viability of the business itself, may preclude the employer from placing the foreign worker on the payroll.

2. **What role does an attorney or agent play?**

   - Employers may have agents and/or attorneys represent them, however, the employer is required to sign in Section N of the Application for Permanent Employment Certification, ETA Form 9089, that the employer has designated the agent or attorney identified in Section E to represent it, and by virtue of its signature, is taking full responsibility for the accuracy of any representations made by the attorney or agent. In signing, the employer acknowledges that to knowingly furnish false information in the preparation of the application form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both under 18 U.S.C. §§ 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S.C. §§ 1546 and 1621.

     NOTE: An attorney or agent is not permitted to register to use the Permanent On-line System for the employer. Only an employee or owner of the employer entity may register. Nor is an attorney or agent of either the foreign worker or the employer permitted to participate in interviewing or considering U.S. workers for the job offered the foreign worker. The agent or attorney may only participate if the agent or attorney is the employer’s representative, i.e., the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the foreign worker, but which do not involve labor certifications.

WITHDRAWAL

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1. **How can a pending application filed under PERM be withdrawn?**

    - If the application was filed on-line, the application can be withdrawn by accessing the account wherein the application was filed and simply marking the appropriate box. If the application was filed by mail, a withdrawal request, in writing, must be sent to the National Processing Center.

2. **Must the employer wait to receive confirmation of withdrawal from a Backlog Elimination Center (BEC) prior to refiling an application?**

    - No, the employer does not need to wait to receive confirmation of withdrawal prior to refiling an application.

3. **How can an employer withdraw a PERM application if the employer has difficulty withdrawing electronically or the application was originally filed by mail?**

    - In the event an employer is unable to withdraw electronically, the employer should send a **withdrawal request** by e-mail to the Atlanta National Processing Center at: PLC.Atlanta@dol.gov. To ensure the request is processed expeditiously, please include the following information in the e-mail request:

        - Show the words "Withdrawal Request" and the employer's name in the subject line of the e-mail.

        - In the body of the e-mail, include the following information:
            - Application Number
            - Employer's Name
            - Employer's EIN
            - Foreign worker's Name
            - Name and title of individual requesting withdrawal

    If the application was filed by mail or if the employer does not have access to e-mail, a letter must be mailed to the National Processing Center using the format as outlined above.

4. **How can an employer withdraw a PERM application if it has already been certified?**

    - An employer may withdraw a certified PERM application at any time. A certified PERM application may not be withdrawn electronically; therefore, the employer should send a withdrawal request by U.S. Mail to the Atlanta Processing Center:

        Atlanta National Processing Center
        ATTN: Certification Withdrawal
        Harris Tower
        233 Peachtree Street, Suite 410
        Atlanta, Georgia 30303

    The employer must enclose all pages of the original certified ETA Form 9089 issued by the National Processing Center and include the following information in the written withdrawal request:

    - Show the words "Withdrawal Request - Certified PERM Application" and the employer's name in the subject line of the letter.

    - In the body of the letter, include the following information:
        - Application Number
        - Employer's Name
        - Employer's EIN

- Foreign worker's Name
- Name and title of individual requesting withdrawal

NOTE: While an application may be withdrawn at any time, if the employer has received an audit letter, it is still required to comply with the audit procedure provisions of 20 CFR § 656.20. The employer must submit the documentation required by the Certifying Officer within 30 days from the date of the audit letter.

5. **Once an employer requests its application be withdrawn, how soon can the employer file a new application for the same foreign worker?**

   - After requesting a withdrawal, an employer may not file a new ETA Form 9089 for the same foreign worker until one of the following occurs:

     (A) Employer sees, using the online PERM system, that the status of the original case changes from "In Process" to "Withdrawn," or

     (B) Employer receives confirmation (via standard U.S. Mail or e-mail) from the NPC that the ETA Form 9089 currently in process has been withdrawn.

     The employer is reminded that an employer may not file a new application merely because the online status changed to "Denied." The employer must wait until it receives the Final Determination Form from the National Processing Center stating the reasons for the denial. This ensures the employer is apprised of all the application's deficiencies.

NOTICE OF FILING

1. **Can notices of filing for college and university teachers recruited under the competitive recruitment and selection process be posted after the selection process has been completed?**

   - Yes, for college and university teachers, notices of filing may be posted after the selection process has been completed. An application for a college or university teacher may be filed up to 18 months after the selection is made and a notice of filing must be provided between 30 and 180 days prior to filing the application either by providing notice to the bargaining representative, if one exists, or by posting notice at the facility or location of employment.

2. **Must the ten consecutive business days posting of the notice of filing timeframe end at least 30 days prior to filing?**

   - Yes, the last day of the posting must fall at least 30 days prior to filing in order to provide sufficient time for interested persons to submit, if they so choose, documentary evidence bearing on the application.

3. **What address must the employer provide on the posted notice of filing?**

   - The employer must provide the address of the appropriate Certifying Officer for the area of intended employment. Addresses for the National Processing Centers and Certifying Officers, including a chart of the states and territories within their jurisdiction, can be found under the section, How to File, above.

4. **For how long must the employer publish a notice of filing in the employer's in-house media?**

   - If the employer normally recruits for similar positions in the employer's organization through in-house media, then the employer must publish the notice of filing in its in-house media in accordance with the employer's normal procedures for recruitment of similar positions or for 10 consecutive business days, whichever is of longer duration.

5. **Could the publishing of the notice of filing in the employer's in-house media be counted as one of the additional steps required in the recruitment for professional occupations provision?**

   - No, posting of the notice of filing on in-house media, including an "Intranet," can not be counted as an additional recruitment step, as it is believed that potential job applicants would only view the notice as a legal or information notice, not as an advertisement for a job opportunity, and would not apply.

6. **Must the notice of filing contain the rate of pay for an application filed on behalf of a college or university teacher selected in a competitive selection and recruitment process?**

   - No, a rate of pay does not need to be included in a notice of filing for an application filed on behalf of a college or university teacher selected in a competitive selection and recruitment process. However, the notice of filing must include the required advertisement information in § 656.18(b)(3), i.e., the job title, duties, and requirements as well as the information specified in § 656.10(d)(3).

7. **May I post a Notice of Filing for a permanent labor certification indefinitely?**

   - Yes, an employer may post a Notice of Filing indefinitely, provided that at the time of filing the permanent labor certification application, the Notice of Filing was posted for at least 10 consecutive business days and those 10 consecutive business days all fell within 30 to 180 days prior to filing the application. In addition, the Notice of Filing must contain the correct prevailing wage information, the correct job description and must comply with all other Department of Labor regulatory requirements.

8. **I have multiple positions available for the same occupation and job classifications and at the same rate of pay. May I post a Notice of Filing for the same occupation and job classifications with a single posting?**

   - Yes, an employer can satisfy Notice of Filing requirements with respect to several positions in each of these job classifications with a single Notice of Filing posting, as long as the single posting complies with the Department of Labor's regulation for each application (e.g. contains the appropriate prevailing wage information and the Notice of Filing must be posted for 10 consecutive business days during the 30 to 180 day time window prior to filing the application). For instance, separate notices would have to be posted for an attending nurse and a supervisory nurse (e.g. nurses containing different job duties).

     NOTE: At the time of filing the labor certification, the prevailing wage information must not have changed, the job opportunity must remain the same and all other Department of Labor regulatory requirements must be followed.

9. **Where must I post a Notice of Filing for a permanent labor certification for roving employees?**

   - If the employer knows where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) where the employee will perform the work and publish the notice internally using in-house media--whether electronic or print--in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage indicated in the notice will be the wage applicable to the area of intended employment where the worksite is located.

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If the employer does not know where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) of all of its current clients, and publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage will be derived from the area of the staffing agencies' headquarters.

If the work-site(s) is unknown and the staffing agency has no clients, the application would be denied based on the fact that this circumstance indicates no bona-fide job opportunity exists. The employer cannot establish an actual job opportunity under this circumstance. A denial is consistent with established policy in other foreign labor certification programs where certification is not granted for jobs that do not exist at the time of application.

10. **Does the language on the electronic in-house media Notice of Filing need to be exactly the same as the language on the physical in-house Notice of Filing?**

    - The regulations require that the employer publish the notice internally using in-house media--whether electronic or print--in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The language should give sufficient notice to interested persons of the employer's having filed an application for permanent employment labor certification for the relevant job opportunity. It is not required to mirror, word for word, the physical posting. In most cases, the physical posting language will be the most efficient way to electronically post the Notice of Filing; in others, the software program used to create the electronic in-house posting may be unable to accept all of the language used in the physical Notice of Filing. In every case, the Notice of Filing that is posted to the employer's in-house media must state the rate of pay and apprise the reader that any person may provide documentary evidence bearing on the application to the Certifying Officer. If there is insufficient space to include the Certifying Officer's address, then information as to where the address can be found must be provided.

PROFESSIONAL/ NON PROFESSIONAL

1. **How does an employer determine whether to advertise under the recruitment requirements for professional occupations or nonprofessional occupations?**

    - The employer must recruit under the standards for professional occupations set forth in § 656.17(e)(1) if the occupation involved is on the list of occupations, published in Appendix A to the preamble of the final PERM regulation, for which a bachelor's or higher degree is a customary requirement. For all other occupations not normally requiring a bachelor's or higher degree, employers can simply recruit under the requirements for nonprofessional occupations at § 656.17(e)(2). Although the occupation involved in a labor certification application may be a nonprofessional occupation, the regulations do not prohibit employers from conducting more recruitment than is specified for such occupations. Therefore, if the employer is uncertain whether an occupation is considered professional or not, the employer is advised to conduct recruitment for a professional occupation.

2. **When advertising for a professional occupation, must the required steps, i.e., the job order, the two print advertisements, and the three additional recruitment steps be different?**

    - Generally, all the required steps must be different. Steps can not be duplicated nor can one step be used to satisfy two requirements, except in the case of copies of web pages generated in conjunction with the newspaper advertisements which can serve as documentation of the use of a web site other than the employers. For example, the

employer can not count two advertisements in a local and/or ethnic newspaper, or two postings on a web site, as two steps. Similarly, the employer can not use a professional journal in lieu of a second Sunday newspaper advertisement and then count it again as an additional "trade or professional organizations" recruitment step, or count the job order again as an additional "web site other than the employer's" step.

3. **Will placing an advertisement on America's Job Bank (AJB) satisfy the "web site other than the employer's" additional step requirement for professional occupations?**

   - Yes, but only if the placement is not being used to satisfy the job order requirement. Where the State Workforce Agency job order placement procedure consists of placement of the job order on AJB, then that job order placement can not be counted as one of the additional recruiting steps.

4. **Is it permissible to use forms of media other than the alternative steps listed in the professional occupations recruitment provision, i.e., is it permissible to count advertisements on movie theater screens, on screens in airports, on sides of buses, billboards, etc., as additional steps?**

   - No, it is not permissible to use other forms of media other than the alternative steps listed in the professional occupations provision as additional steps. The restriction on acceptable forms of media is governed, in part, by questions of verifiability. Employers, however, are not precluded from using these means as above and beyond the regulation requirements.

Acceptable Publications

1. **What is considered an acceptable newspaper and/or acceptable journal and is there a published list?**

   - There is no published list of acceptable publications.

   - Most employers, based on their normal recruiting efforts, will be able to readily identify those newspapers (or journals for certain professional positions) that are most likely to bring responses from able, willing, qualified, and available U.S. workers. The employer must be able to document that the newspaper and/or journal chosen is the most appropriate to the occupation and the workers likely to apply for the job opportunity.

     NOTE: In the case of a rural area where there is no newspaper with a Sunday edition and the employer chooses to use the edition having the widest circulation, the employer must be able to document the edition chosen does, in fact, have the widest circulation.

2. **Is the employer permitted to use an electronic national professional or trade journal?**

   - The employer may not use an electronic national professional journal to satisfy the provision found at 20 CFR 656.17(e)(1)(i)(B)(4) permitting the use of a journal as an alternative to one of the mandatory Sunday advertisements for professional positions. The employer may not use an electronic national professional journal to satisfy the provision found at § 656.18(b)(3) requiring an advertisement in a journal under optional special recruitment procedures for college and university teachers. The employer must use a print journal to satisfy these two requirements. However, if the employer wishes to use a professional or trade organization as a recruitment source to satisfy the additional recruitment required for professionals found at § 656.17(e)(1)(ii)(E), the employer may use that organization's electronic journal to place an advertisement. Dated copies of pages from the electronic journal showing the advertisement can serve to satisfy the documentation requirement.

Time Frames

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1. **When must the advertisements in the newspaper or professional journals be placed?**

   - Generally, the newspaper advertisements must be placed on two different Sundays at least 30 days, but no more than 180 days, prior to filing the application. The Sundays may be consecutive.
   - However, if the job opportunity is located in a rural area that does not have a newspaper that publishes a Sunday edition, the employer may use the newspaper edition with the widest circulation.
   - This exception applies to rural newspapers only. If a suburban newspaper has no Sunday edition, the employer must publish the Sunday advertisement in the most appropriate city newspaper that serves the suburban area.
   - For journals, there is no specific edition requirement, however, the advertisement must be placed at least 30 days, but no more than 180 days, prior to filing the application.

2. **Must all recruitment take place at least 30 days, but no more than 180 days prior to filing?**

   - No, while the majority of the recruitment must take place within the 30 - 180 day timeframe, one of the three additional steps required for professional occupations may consist solely of activity which takes place within 30 days of filing. However, none of the steps may take place more than 180 days prior to filing the application.

3. **What are the sequencing or timeframe requirements for the various additional recruitment steps?**

   - Beyond the standard "no greater than 180 days and no less than 30 days prior to filing" there are no further timeframe requirements. The only sequencing requirement is that the two Sunday advertisements must be placed on two different Sundays which may be consecutive.

     NOTE: There is one exception to the standard 30 – 180 days prior to filing timeframe: One of the additional steps required for recruitment for professional occupations may be conducted within 30 days prior to filing. However, no steps may have taken place more than 180 days prior to filing.

4. **When must the advertisement for the job opportunity be placed in the national professional journal under the optional special recruitment provision?**

   - The national professional journal advertisement for the job opportunity as required under the optional special recruitment provision must have been placed during the recruitment period prior to the selection of the foreign worker.

5. **How do I count days to establish recruitment timelines and time periods as outlined by the regulation?**

   - **Timelines** are the number of days prior to or after a required event. When counting a timeline, the day of the event is not counted, the next day is counted as one, and the last day is included in the count. Thus, when determining the required 30 day timeline prior to filing an application for a newspaper advertisement placed on Thursday, February 1, 2007, the Thursday is not counted because it is the day of the event. Friday, February 2nd, is counted as day 1 of the timeline; Saturday, February 3rd, day 2; etc., up until Saturday, March 3rd, which is day number 30. The application can be filed on the 30th day after the event, Saturday, March 3rd, but not before. The same result is achieved if counting back from the day of the filing. If the application is filed on Saturday, March 3rd, the 3rd, is not counted because it is the day of the event. Friday, the 2nd, becomes day 1, Thursday, the 1st, is day 2, back to February 1st, the 30th day. Under the limitation precluding filing in the 30 days prior to the date of filing, if an application was filed on

March 3, 2007, a newspaper or national journal advertisement could have been placed as late as February 1st, but no later.

Time Periods are the number of days during which an activity must take place. Examples of time periods are the requirement a job order must be placed for 30 days and the requirement that a Notice of Filing must be posted for ten consecutive business days. When counting a time period, both the start date and end date are included in the count. Thus, if a job order is on the State Workforce Agency web site from February 1, 2007, through March 8, 2007, February 1st, is day 1, February 2nd, is day 2, March 2nd, is day number 30, March 8th, is day number 36.

To determine the first date on which the application can be filed after posting a job order, the 30 day time period for the job posting and the 30 day prior to filing timeline must both be calculated. In the example we are using, March 2nd, [not March 8th] is the last day of the 30 day time period for the job order placement and is considered the event day so it is not counted in the timeline. Rather, the counting of the filing timeline starts on March 3rd, which is counted as day 1, March 4th, is day 2; etc., up until April 1st, which is day 30, the earliest possible filing date for an application. In counting backward from April 1st to February 1st, the first is only day 59, not day 60 as would be the outcome if the 30 day time period required for the job order plus the 30 day timeline restriction prior to filing were added. This is because two counting paradigms are being combined—one where the event (or start date) is counted, the other where it is not. Counting forward 60 days from the start of the 30 day job order time period does provide the correct calculation if the first day of the event is counted, as required, when counting days in a time period. To avoid mistakes, it is recommended that the time period and the timeline be counted separately.

As another example, the regulation requires a Notice of Filing posting for a time period of ten consecutive business days. If the order is posted on Monday, April 30, 2007, Monday is day 1, Friday, May 4th, is day 5; the following Monday, May 7th, is day 6; and Friday, May 11th, is day 10. May 11th, is the last day of this time period and is therefore defined as the event and is not counted when calculating the 30 day restriction prior to filing timeline. To calculate the 30 day timeline, May 12th, is day 1, May 13th, day 2, May 23rd, day 12; May 31st, day 20; and June 10th, is day 30. The application can be filed on June 10, 2007.

Examples of the earliest filing date permissible for a particular Notice of Filing posting or job order placement date are as follows:

If the Notice of Filing is posted on Thursday, June 28, 2007, the posting dates must be June 28 – July 12, and the earliest filing date permissible is Saturday, August 11, 2007, (the notice of filing must be posted for "ten consecutive business days and, therefore, neither weekends nor the Fourth of July are counted).

If the Notice of Filing is posted on Monday, August 20, 2007, the posting dates must be August 20 – August 31, 2007, and the earliest filing date permissible is Sunday, September 30, 2007 (the 30 day prior to filing limitation has no business day restriction and, therefore, weekends and holidays are included in the count).

If the job order start date is Monday, November 13, 2006, the end date must be Tuesday, December 12, 2006, and the earliest filing date permissible is Thursday, January 11, 2007 (neither the 30 day job order placement requirement nor the 30 day prior to filing limitation have a business day restriction and, therefore, weekends and holidays are included in the counts).

In Summary: There are two "types" of time calculations used by the Permanent Online System: timeline calculations and time period calculations.

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- Timeline calculations are those calculations verifying the number of days prior to or after an event. For example, verifying that advertisements did not run less than 30 days but no more then 180 days from the date of filing.
  - When calculating **timelines**, the day the event occurred is not counted. The next day is counted as day one and the last day of the event is included in the count.
- Time period calculations are those calculations verifying the number of days an activity took place. For example, verifying a job order ran for 30 days.
  - When calculating **time periods**, the day the event occurred is counted as day one and the last day of the event is included in the count.

Advertisement Content

1. **What level of detail regarding the job offer must be included in the advertisement?**

   - Employers need to apprise applicants of the job opportunity. The regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment. As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity. An advertisement that includes a description of the vacancy, the name of the employer, the geographic area of employment, and the means to contact the employer to apply may be sufficient to apprise potentially qualified applicants of the job opportunity.

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

2. **If the employer includes job duties and requirements in the advertisement, must they be listed on the Application for Permanent Employment Certification, ETA Form 9089, as well?**

   - Yes, if an employer wishes to include additional information about the job opportunity, such as the minimum education and experience requirements or specific job duties, the employer may do so, provided these requirements also appear on the ETA Form 9089.

3. **Does the job location address need to be included in the advertisement?**

   - No, the address does not need to be included. However, advertisements must indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity. Employers are not required to specify the job site, unless the job site is unclear; for example, if applicants must respond to a location other than the job site (e.g., company headquarters in another state) or if the employer has multiple job sites.

4. **Does the employer's address need to be included in the advertisement?**

   - No, the employer's physical address does not need to be included in the advertisement. Employers may designate a central office or post office box to receive resumes from applicants, provided the advertisement makes clear where the work will be performed.

5. **Does the offered wage need to be included in the advertisements?**

   - No, the offered wage does not need to be included in the advertisement, but if a wage

rate is included, it can not be lower than the prevailing wage rate.

6. **Why must the advertisement medium be different in order for advertisements to be counted as additional steps? For instance why is it not permissible to count advertisements on two separate web sites as two steps or to place a third advertisement in the same newspaper of general circulation rather than using a local or ethnic publication and have it count as an additional step?**

   - As with all the recruitment requirements, the purpose of requiring the employer to use three additional recruitment steps is to ensure that the greatest number of able, willing, qualified, and available U.S. workers are apprised of the job opportunity. It should be noted that each of the steps may target slightly different applicant populations. Using at least three of the additional steps normally used by businesses to recruit workers is a means of apprising a greater number of U.S. applicants of the job opportunity and more adequately substantiates an employer's claim there are no available U.S. workers for the job offer.

7. **Does the advertisement have to contain the so-called "Kellogg" language where the application requires it to be used on the application?**

   - Where the "Kellogg" language is required by regulation to appear on the application, it is not required to appear in the advertisements used to notify potential applications of the employment opportunity. However, the placement of the language on the application is simply a mechanism to reflect compliance with a substantive, underlying requirement of the program. Therefore, if during an audit or at another point in the review of the application it becomes apparent that one or more U.S. workers with a suitable combination of education, training or experience were rejected, the application will be denied, whether or not the Kellogg language appears in the application.

8. **Can jobs requiring experience be advertised through an on-campus placement office?**

   - For professional positions, the regulations at 20 CFR 656.17(e)(1)(ii)(D) permit, as an additional recruitment step, optional pre-filing recruitment at or through a college or university placement office. The preamble to the regulation (69 Fed. Reg. 77325, 77345 (Dec. 27, 2004)) assumed that this option would be used only if the employment opportunity requires a degree but no experience. The Department has examined this policy in light of the fact that many college and university placement offices maintain job listings that are used by alumni with experience as well as recent college or university graduates. Consequently, the job opportunities requiring experience are included in the listings making campus placement offices a viable recruitment source for professional job requiring experience as well as not requiring experience. As a result, the Department is clarifying its position and permitting this option to be used for employment opportunities even if the job requires experience in addition to the degree.

9. **Is the employer required to include the statement, "any suitable combination of experience of education, training, or experience is acceptable" on the application when the employer requires experience in an alternate occupation and not in the job offered?**

   - No, the employer is not required to include the statement on the application if the employer has indicated it requires experience in an alternate occupation and not in the job offered. The "any suitable combination of experience of education, training, or experience is acceptable" statement is only required where there are primary as well as alternative requirements and then only if the foreign worker is already employed by the employer and the foreign worker does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's "alternative" as opposed to its "primary" requirements.

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10. **After completing our recruitment, but before filing the ETA Form 9089, our company's name was changed after it was wholly acquired by another company. Does the company name used in the advertisements used for recruitment have to match the company name used on the ETA Form 9089?**

    - The employer must conduct recruitment using its legal name at the time of the recruitment. However, an Application for Permanent Employment Certification (ETA Form 9089) must be filed in the name of the employer's legal name at the time of submission. If a merger, acquisition, or any other corporate change in ownership occurs between the time of recruitment and the time of submission, resulting in a disparity between the employer's name shown on the advertising used to recruit for a job opportunity and the employer's name on the submitted ETA Form 9089, the employer must be prepared to provide documentation -- in the event of an audit -- proving that it is the successor in interest, a determination made based on the totality of the circumstances, including whether the current employer has assumed the assets and liabilities of the former entity with respect to the job opportunity.

Multiple Positions

1. **Can one advertisement be used for multiple positions?**

    - Yes, an advertisement for multiple positions may be used as long as all provisions in § 656.17(f), advertising requirements, have been met.

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

2. **Is it possible to provide more specific guidelines for drafting PERM advertisements? For example, where there are multiple openings for the job offered which of the following, if not all, would be acceptable: "5 Attorneys," "Attorneys" or "Attorneys, multiple openings"?**

    - As stated in the advertising requirements provision, the advertisement must provide a description of the vacancy specific enough to apprise U.S. workers of the job opportunity for which certification is sought. At issue in evaluating whether the advertisement meets this criterion is whether the advertisement is written to attract the interest of the greatest number of qualified U.S. workers and encourage them to apply, not whether specific words or phases have, or have not, been used. The advertisement will be reviewed to ensure that it reasonably describes the vacancy and reflects the job opportunity as described on the ETA Form 9089. With respect to the examples, any one of the three can be used as long as it is specific enough, under the circumstances, to apprise U.S. workers of the job opportunity. In any event, if employers feel it necessary, employers may always include more detail.

JOB ORDER

1. **Must the employer place a job order with the State Workforce Agency (SWA) or will a job order placed on America's Job Bank (AJB) be sufficient?**

    - The employer is required to place a job order with the SWA serving the area of intended employment. It is recognized that states vary in their job order placement procedures and that some may, in fact, place job orders on AJB, in which case, as long as the employer is working through the SWA, a job order placed on AJB would be sufficient.

NOTE: The employer is free to choose AJB as a means of satisfying one of the three additional steps required under professional occupations recruitment if the posting on AJB is not being used to satisfy the job order requirement.

2. **Must the required 30 day job order timeframe end at least 30 days prior to filing?**

   - Yes, the 30 day job order timeframe must end at least 30 days prior to filing. While the employer is not limited to the 30 day timeframe and may choose to post the job order for a longer period, 30 days of the posting must take place at least 30 days prior to filing.

3. **Should the employer seek the information required regarding the placement of job orders from the State Workforce Agency (SWA) in the area of intended employment?**

   - Yes, the employer should seek any information required regarding job orders from the SWA. If an employer is not clear on how to place a job order, the employer should check with the SWA responsible for the area of intended employment. Placement of job orders with a SWA must be in accordance with each SWA's rules and regulations. In other words, SWAs place labor certification job orders the same way they place any other job order.

4. **Must the employer contact all individuals identified as a "match" by a computerized state employment system or must the employer only contact those applicants who have submitted a resume and/or response as specified by the employer in the job order?**

   - The employer is responsible for considering/contacting those applicants who have affirmatively provided a response as specified by the employer in the job order.

PREVAILING WAGE

1. **Where and when does the employer obtain prevailing wage information?**

   - Prior to filing the Application for Permanent Employment Certification, ETA Form 9089, the employer must request a prevailing wage determination from the State Workforce Agency (SWA) having jurisdiction over the proposed area of intended employment. The employer is required to include on the ETA Form 9089 the SWA provided information: the prevailing wage, the prevailing wage tracking number (if applicable), the SOC/O*NET(OES) code, the occupation title, the skill level, the wage source, the determination date, and the expiration date.

     NOTE: The SWA prevailing wage determination documentation is not submitted with the application, but it must be retained for a period of five years from the date of filing the application by the employer.

2. **What is meant by "expiration date" in question 8 of Section F, Prevailing Wage Information, on the Application for Permanent Employment Certification, ETA Form 9089?**

   - The expiration date is the end date of the prevailing wage validity period as provided by the State Workforce Agency, which will range from no less than 90 days to no more than one year from the determination date.

3. **Will the wage offer set forth in a labor certification application be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages?**

   - No, the wage offered must equal or exceed the prevailing wage. The wage must be at least 100% of the prevailing wage. The 5% deviation permitted under the former

regulation, is no longer acceptable.

4. **Must the employer request a prevailing wage from a State Workforce Agency (SWA) if a Collective Bargaining Agreement exists or the employer is choosing to use a Davis-Bacon Act or McNamara-O'Hara Service Contract Act wage?**

   - Yes, the employer must always request a prevailing wage from the SWA having jurisdiction over the proposed area of intended employment. The SWA is responsible for evaluating whether the wage source chosen by the employer is applicable and/or acceptable.

5. **If the employer's job opportunity is for an occupation which is subject to a wage determination under the Davis-Bacon Act (DBA) or the McNamara-O'Hara Service Contract Act (SCA), must the employer use the DBA or SCA?**

   - No, the employer is not required to use a wage determination under the DBA or the SCA but may choose to do so.

6. **Must the employer obtain a prevailing wage determination before the employer begins recruitment?**

   - No, the employer does not need to wait until it receives a prevailing wage determination before beginning recruitment. However, the employer must be aware that in its recruiting process, which includes providing a notice of filing stating the rate of pay, the employer is not permitted to offer a wage rate lower than the prevailing wage rate. Similarly, during the recruitment process, the employer may not make an offer lower than the prevailing wage to a U.S. worker.

7. **Why did the prevailing wage two tier skill level structure change to four levels?**

   - Congress enacted the Consolidated Appropriations Act of 2005 amending the Immigration and Naturalization Act (Section 212(p), 8 U.S.C. 1182(p)) to provide:
     "Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the two levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level."

8. **When does the four wage level provision go into effect?**

   - The four wage level provision goes into effect on March 8, 2005, as does the requirement to pay 100% of the prevailing wage.

9. **Is the employer permitted to use a valid prevailing wage determination issued prior to March 8, 2005?**

   - Yes, but only if the wage source used to make the determination was one other than the wage component of the Occupational Employment Statistics (OES), i.e., an employer-provided survey, a McNamara-O'Hara Service Contract Act or Davis-Bacon Act wage, or a Collective Bargaining Agreement wage. To apply under PERM, those employers using the OES must obtain a prevailing wage determination after March 8, 2005.

     NOTE: In all labor certification applications filed (postmarked or electronically dated) on or after March 8, 2005, the wage offer must be 100% of the prevailing wage determination and, if the OES is used to make the prevailing wage determination, the determination must be based on the four wage level provision.

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10. **Is it permissible to use the same prevailing wage determination for more than one application?**

    - Yes, as long as provisions regarding the validity period are followed, the employer is permitted to use the same prevailing wage determination if the prevailing wage is for the same occupation and skill level; the same wage source is applicable; and the same area of intended employment is involved.

11. **Does a prevailing wage determination expire?**

    - Yes, a prevailing wage determination has a limited validity period as specified by the State Workforce Agency (SWA), which may range from no less than 90 days to no more than one year from the determination date.

      NOTE: To use a SWA prevailing wage determination, the employer must file its application or begin the recruitment required within the validity period specified by the SWA.

12. **When is it permissible to use the median in lieu of the arithmetic mean to establish the prevailing wage?**

    - If an employer provided survey acceptable under § 656.40(g) provides only a median and not an arithmetic mean, use of the median is permitted.

13. **When is the employer permitted to provide an alternate wage source?**

    - Unless the job opportunity for which certification is sought is covered by a Collective Bargaining Agreement or professional sports league's rules or regulations, the employer may request the State Workforce Agency use an employer-provided survey, or Davis-Bacon Act or McNamara-O'Hara Service Contract Act wage rate, if appropriate.

14. **What are the criteria for an acceptable employer-provided survey?**

    - The State Workforce Agency will make a determination on the acceptability of the employer-provided survey based on the provisions in §§ 656.40(g)(2) and (3).

15. **What options are available to an employer who disagrees with the State Workforce Agency (SWA) prevailing wage determination?**

    - If the employer disagrees with the skill level assigned to its job opportunity, or if the SWA informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer is afforded one opportunity to provide supplemental information to the SWA. Additionally, the employer may choose to file a new request for a wage determination or request review by the Certifying Officer.

16. **What additional documentation may the employer provide to the Certifying Officer when requesting a review of the prevailing wage?**

    - The single opportunity to submit supplemental information to the State Workforce Agency represents the employer's only opportunity beyond the initial filing to include materials in the record that will be before the Certifying Officer in the event of an employer request for review under § 656.41. The appeal stage of the process is not intended to serve as an avenue for the employer to submit new materials relating to a prevailing wage determination.

17. **Is the employer permitted to use a wage range as opposed to a single wage rate in**

advertisements for the job offer?

- Yes, the employer may advertise with a wage range as long as the bottom of the range is no less than the prevailing wage rate.

18. **What is meant by "domestic worker applicants" in the provision on actual minimum requirements?**

    - For purposes of § 656.17(i)(3), the provision on actual minimum requirements, the term "domestic" is being used as an alternative for "United States."

19. **What is meant by "contract employee" under the employer's actual minimum requirements provision?**

    - For purposes of the actual minimum requirements provision, the term "contract employee" is intended to include all persons contracted to work for the employer. The broad use of the term under the actual minimum requirements provision is intended to ensure the provision applies to experience gained working for the employer by the foreign worker, whatever the foreign worker's employment status.

20. **Must a prevailing wage determination be obtained from the State Workforce Agency (SWA) even if the employer is filing an application under the optional recruitment for college and university teachers and/or Schedule A provisions?**

    - Yes, a prevailing wage determination must be obtained from the SWA even if the employer is filing an application under the optional recruitment for college and university teachers and/or the Schedule A provisions.

21. **The Prevailing Wage Determination provided by the State Workforce Agency (SWA) was incorrect or incomplete. What do I do?**

    - In submitting a PERM application, the employer declares that it has read and reviewed the application and that the information contained in the application is true and accurate. The employer is responsible for ensuring the PWD information provided by the SWA and entered on ETA Form 9089 is correct and for taking steps to obtain corrected PWDs from the SWA as needed.

      We are aware there have been some issues with Prevailing Wage Determinations (PWD) provided by some SWAs, such as incorrect SOC codes or validity periods. Currently, we are working with all SWAs to ensure the new regulation and state requirements are clearly understood and implemented.

      To address denials based on SWA errors during the first months of implementation of the PERM regulation, the Department has developed the following option for employers. If you have an application that was denied due to an error associated with an incorrect or incomplete PWD, and the application was submitted before March 25, 2006, you may submit a request for review to the appropriate Certifying Officer. The request for review must include a copy of the corrected PWD provided by the SWA or a copy of the initial PWD obtained from the SWA together with an explanation of how it should be corrected.

      After March 25, 2006, the Department of Labor will hold the employer responsible for ensuring Prevailing Wage Determinations obtained from a SWA are complete and in compliance with the PERM regulation. DOL will deny requests for review that seek to correct or complete PWD information.

      Therefore, prior to filing a permanent labor certification application, the employer should review PWDs for completeness and compliance with the PERM regulation. If necessary,

the employer should request that the SWA fix any identified problems.

RECRUITMENT REPORT

1. **How detailed does the recruitment report have to be with respect to the lawful, job-related reasons U.S. workers were rejected?**

   - The employer must categorize the lawful job-related reasons for rejection of U.S. applicants and provide the number of U.S. applicants rejected in each category. The recruitment report does not have to identify the individual U.S. workers who applied for the job opportunity.

     NOTE: The Certifying Officer, after reviewing the employer's recruitment report, may request the U.S. workers' resumes or applications, sorted by the lawful job related reasons the workers were rejected.

JOB REQUIREMENTS/ DUTIES

1. **Can business necessity be used to justify requirements which exceed the occupation's Specific Vocational Preparation (SVP) and/or are not normal to the occupation involved in the employer's application?**

   - Yes, business necessity is a means to justify requirements which are not normal to the occupation and/or exceed the SVP. While the job opportunity's requirements, as a rule, must be those normally required for the occupation and must not exceed the SVP level assigned to the occupation as shown in the O*Net Job Zones, business necessity may be used to justify requirements not normal to the occupation and/or which exceed the SVP.

     NOTE: Business necessity can be established by the employer demonstrating that the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner.

2. **Can the employer include a requirement for a foreign language?**

   - Yes, the employer can include a foreign language requirement if it is justified by business necessity. The regulation requires that a foreign language requirement be justified by business necessity based on the nature of the occupation, e.g., translator, or the need to communicate with a large majority of the employer's customers, contractors, or employees who can not communicate effectively in English. Documentation necessary to establish such a business necessity is noted in § 656.17(h)(2).

     NOTE: Needing to communicate with co-workers or subordinates who can not effectively communicate in English and/or having a working environment where safety considerations would support a foreign language requirement have been added to the ways to justify business necessity for a foreign language requirement.

3. **How do you know if the job description contains requirements beyond those considered normal for the occupation? Does informing the State Workforce Agency (SWA) on a prevailing wage determination request that the job contains requirements not normal to the occupation meet an employer's obligation to inform the Department of Labor of these requirements?**

   - The job summary specific to the SOC/O*NET code and Occupation Title provided by the SWA on the prevailing wage determination is considered to identify the requirements normal to that occupation. Any requirements in addition to those listed in the summary will be considered not normal for the occupation and the employer should be prepared to provide proof of business necessity if requested by the Certifying Officer. These summary reports can be accessed at http://online.onetcenter.org. Even if the employer has

informed the SWA of these requirements in a prevailing wage determination request, the employer must still inform the Department of Labor by correctly attesting on the Application for Permanent Employment Certification, ETA Form 9089/Questions H-12 or H-13. Additionally, if the employer has not accurately attested on ETA Form 9089 that there are requirements not normal to the occupation, the application will be denied whether proof of business necessity is available or not.

ALIEN EXPERIENCE

1. **Under what circumstances may the foreign worker use experience gained with the employer as qualifying experience?**

   - If the foreign worker already is employed by the employer, the employer can not require U.S. applicants to possess training and/or experience beyond what the foreign worker possessed at the time of initial hire by the employer, including as a contract employee: (1) unless the foreign worker gained the experience while working for the employer in a position not substantially comparable to the position for which certification is sought; or (2) the employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

     NOTE: A substantially comparable job or position means a job or position requiring performance of the same duties more than 50 percent of the time.

2. **For purposes of determining whether the foreign worker gained experience with the employer, would an affiliate abroad or an acquiring company be considered an employer?**

   - For purposes of determining whether the foreign worker gained experience with the employer, an employer is "an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3."

3. **Does the foreign worker need to have a bachelor's or higher degree to qualify for a professional occupation?**

   - No, the foreign worker does not need to have a bachelor's or higher degree to qualify. However, if the employer is willing to accept work experience in lieu of a baccalaureate degree, such work experience must be attainable in the U.S. labor market and the employer's willingness to accept work experience in lieu of a degree must apply equally to U.S. applicants and must be stated on the application form.

4. **Is the employer permitted to accept an equivalent foreign degree?**

   - Yes, the employer may accept an equivalent foreign degree. However, the employer's willingness to do so must be clearly stated on the Application for Permanent Employment Certification, ETA Form 9089.

5. **Is the employer permitted to accept alternative job experience/qualifications?**

   - Yes, an employer may specify alternative experience or qualification requirements, provided the alternative requirements and primary requirements are substantially equivalent to each other with respect to whether the applicant can perform the proposed job duties in a reasonable manner. As discussed in the preamble to the final regulation, this is the standard developed by the Board of Alien Labor Certification Appeals in Matter of Francis Kellogg.

     NOTE: Even when the employer's alternative requirements are substantially equivalent, but the foreign worker does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, the alternative

requirements will be considered unlawfully tailored to the foreign worker's qualifications unless the employer has indicated on the application that applicants with any suitable combination of education, training or experience are acceptable.

6. **I need to enter the years of experience, education, or training on my ETA Form 9089. How do I do this? What if it's a range?**

   - When entering the years of experience, education, or training on ETA Form 9089, the questions asking for this type of information specify the answer be provided in the number of months necessary. Therefore, if the employer requires 1 year experience in the job offered in ETA Form 9089, the number 12 (for 12 months) would be entered for the answer to Question H-6A.

     However, if the employer would accept a range of experience in the job offered (such as 1 to 3 years), the employer must identify the actual minimum years/months of experience required to perform the job (please see 656.17(i) for additional information on Actual Minimum Requirements). The number that represents the Actual Minimum Requirement for the number of years/months experience would be the number entered in Question H-6A. If a range is indeed the Actual Minimum Requirement, the employer should use the low end of the range as the answer, since that represents the minimum level of requirement.

7. **If the employer's minimum requirements include some period of training, must the foreign worker's training be listed on the Application for Permanent Employment Certification, ETA Form 9089, Section K, as well as attested to in Section J?**

   - An employer must list the actual minimum requirements for the job opportunity sought to be filled through the filing of the labor certification application. If training is required, the employer must list the training required for the position in Section H.5, noting the number of months of training required in H.5.A, and the field of training in H.5.B. The employer and foreign worker must also attest that the foreign worker meets the training requirement in section J.17.

     The employer is also required to list in Section K, as noted on the Form ETA 9089, "any other experience that qualifies the foreign worker for the job opportunity for which the employer is seeking certification." Accordingly, an employer seeking certification should list in Section K any training experience possessed by the foreign worker that qualifies the foreign worker for the job opportunity, regardless of how the training was secured. The source of the training should also be identified. For example, an application for the job opportunity of physician filed on behalf of a foreign worker that requires 36 months of medical residency training in H.5 should not only mark section J.17 as "yes" but also list in Section K all training experience by which the foreign worker meets that training requirement, as well as any other experience requirement. An employer filing an application for a job opportunity that requires 12 months of training in section H.5 should also list the training received by the foreign worker in section K, regardless of whether it was a paid training opportunity, and also list the source of the training.

     When completing section K, enter the training provider in the employer information section, to include the address. For the type of business, enter 'training provider' unless the training is of a work study type such as an apprenticeship or medical residency. The job title should be 'Training' unless there is an actual job title, in which case it should begin with 'Training –' followed by the title, such as 'Training – Apprentice Carpenter'. The employer should enter the beginning and end dates of the training. When there is an actual number of hours of training, the employer should enter those actual hours, otherwise the employer should enter the average number of hours per week spent in training. In the "Job Details" the employer should list the topics covered by the training, any certification of completion issued and, when applicable, the organization issuing the

certificate, if different from the training provider, and the final test completion or certification date.

For example:
Employer A completes Section K as follows:
1. Large Teaching Hospital
2. 111 Main Street
3. Anytown, DC 99999 USA
4. Hospital
5. Training-First Year Resident
6. 01/01/2000
7. 12/31/2000
8. 60
9. Basic hospital procedures. Patient care techniques. Staff duties and responsibilities.
10. First Year Residency Certificate, 12/31/2000

Employer B completes Section K as follows:
1. Independent Project Management School
2. 111 Main Street
3. Anothertown, DC 99999 USA
4. Training Provider
5. Training
6. 01/01/2000
7. 12/31/2000
8. 20
9. Basic project management concepts. Use of graphics tools. Resource allocation.
10. Professional Project Manager Certificate, Project Management Institute, 01/12/2001

COLLEGE AND UNIVERSITY TEACHERS—RECRUITMENT

1. **Are college and university teacher occupations included in Schedule A?**

   - No, only college and university teachers of exceptional ability in the sciences or arts who have been practicing their science or art during the year prior to application and who intend to practice the same science or art in the United States fall under Schedule A, Group II, Sciences or Arts.

2. **If an application is for a college or university teacher who does not qualify as a college or university teacher of exceptional ability what provisions apply?**

   - Applications for college and university teachers who do not qualify under the Schedule A, Group II, Sciences or Arts provision may be filed either under the provision for optional special recruitment and documentation procedures for college and university teachers, § 656.18, or under the provision for the basic process, § 656.17.

3. **If an application for a Schedule A college or university teacher is denied, is the employer permitted to file for a labor certification under § 656.17?**

   - Yes, the employer may file an application previously denied under Schedule A for a college or university teacher either under the provision for optional special recruitment and documentation procedures for college and university teachers, § 656.18, or under the provision for the basic process, § 656.17.

4. **Are the recruitment provisions different for college and university teachers?**

   - Yes, while the employer may choose to recruit for college and university teachers under the basic process, the employer may choose to recruit under § 656.18, optional special recruitment and documentation procedures for college and university teachers.

NOTE: The employer must support hiring of the foreign worker by documenting that the foreign worker was found to be more qualified than each U.S. worker who applied for the job opportunity.

5. **Is the employer required to provide notice of filing if an application is filed on behalf of a college and/or university teacher selected in the competitive selection and recruitment?**

   - Yes, the employer must provide a notice of filing which must include the advertisement information in § 656.18(b)(3), i.e., the job title, duties, and requirements as well as the information specified in § 656.10(d)(3).

6. **Does the use of an electronic national professional journal satisfy the advertisement requirement under the college and university teachers' special recruitment and documentation provision?**

   - No, use of an electronic national professional journal does not satisfy the optional special recruitment provision's advertising requirement. The employer must use a print publication.

7. **Must the notice of filing contain the rate of pay for an application filed on behalf of a college or university teacher selected in a competitive selection and recruitment process?**

   - No, a rate of pay does not need to be included in a notice of filing for an application filed on behalf of a college or university teacher selected in a competitive selection and recruitment process.

8. **Must a prevailing wage determination be obtained from the State Workforce Agency (SWA) if the employer is filing an application for a college or university teacher under the optional recruitment and documentation procedures provision?**

   - Yes, a prevailing wage determination must be obtained from the SWA even if the employer is filing an application for a college or university teacher under the optional recruitment and documentation procedures provision. The attestation provision of the PERM regulation requires the employer certify that the offered wage equals or exceeds the prevailing wage determined pursuant to the prevailing wage provision which, in turn, requires the employer to obtain a prevailing determination from the SWA having jurisdiction over the proposed area of intended employment.

9. **When must the advertisement for the job opportunity be placed in the national professional journal under the optional special recruitment provision?**

   - The national professional journal advertisement for the job opportunity as required under the optional special recruitment provision must have been placed during the recruitment period prior to the selection of foreign worker.

SCHEDULE A—QUALIFIED PHYSICAL THERAPISTS, PROFESSIONAL NURSES, OR ALIENS OF EXCEPTIONAL ABILITY IN THE PERFORMING ARTS, SCIENCES OR ARTS, TO INCLUDE COLLEGE AND UNIVERSITY TEACHERS

1. **What is Schedule A and who qualifies?**

   - Schedule A lists those occupations for which a determination by the Department of Labor has been made that there are not sufficient United States workers who are able, willing, qualified, and available and the wages and working conditions of United States workers similarly employed will not be adversely affected by employment of foreign workers in

those occupations. An employer seeking a labor certification for a physical therapist, a professional nurse, or an alien of exceptional ability in the performing arts, sciences or arts, to include college and university teachers, should review § 656.5, Schedule A, to determine whether the foreign worker's qualifications meet the provision's requirements.

2. **Is an application for a labor certification for Schedule A occupations filed with a Department of Labor National Processing Center?**

   - No, an application for a labor certification for Schedule A occupations is filed, in duplicate, with the appropriate Department of Homeland Security (DHS) office.

3. **What form is used to file an application for a labor certification for Schedule A occupations?**

   - The employer must use an Application for Permanent Employment Certification, ETA Form 9089, which includes a prevailing wage determination.

4. **Must the employer request a prevailing wage determination from the State Workforce Agency (SWA) if filing under Schedule A?**

   - Yes, a prevailing wage determination must be requested from the SWA having jurisdiction over the proposed area of intended employment.

5. **If filing an application under Schedule A, must an employer provide notice of filing?**

   - Yes, an employer must comply with the posting requirement in § 656.10(d) to file applications under Schedule A with the appropriate Department of Homeland Security office.

6. **If an application for a Schedule A occupation is denied is the employer permitted to file for a labor certification for a physical therapist or professional nurse under the basic process, § 656.17?**

   - No, labor certifications for professional nurses and for physical therapists will not be considered under § 656.17.

7. **Is it true that the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination is not acceptable as a means of obtaining a labor certification for professional nurses under Schedule A?**

   - Yes, the passage of the examination alone is not acceptable; the foreign worker is required to have a CGFNS Certificate. A CGFNS Certificate documents that, in addition to having passed the nursing skills examination, the foreign worker has demonstrated English language proficiency and CGFNS has made a favorable evaluation of the individual's nursing credentials.

8. **What documentation must the employer file when seeking a Schedule A labor certification for a professional nurse?**

   - The employer must file, as part of its labor certification application, documentation the foreign worker meets one of three requirements: the foreign worker has a Commission on Graduates of Foreign Nursing Schools (CGFNS) Certificate, the foreign worker has passed the National Council Licensure Examination for Registered Nurses (NCLEX—RN) exam, or the foreign worker holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment.

     NOTE: Unlike the filing requirements under other PERM provisions, for Schedule A

occupations, the employer is required to submit the applicable documentation when the employer files the application with the appropriate Department of Homeland Security office.

HOUSEHOLD DOMESTIC SERVICE WORKERS, BOOKKEEPERS, LABORERS, ETC.

1. **Does PERM have a provision similar to, or the same as, the Schedule B provision in the regulation in effect prior to March 28, 2005?**

   - No, the former regulation's Schedule B provision has been eliminated; there is no similar provision in PERM.

2. **If Schedule B under the regulation in effect prior to March 28, 2005, has been eliminated and there is no longer a waiver provision for those occupations listed in Schedule B such as household domestic service workers, bookkeepers, laborers, etc., does that mean employers are not permitted to obtain a labor certification for those occupations?**

   - No, the elimination of the former regulation's Schedule B and its waiver provision does not prevent employers from seeking labor certifications for the occupations listed in Schedule B. To the contrary, employers are free to file applications under the provisions of PERM, as appropriate, for occupations found in the former regulation's Schedule B and are not required to obtain a waiver in order to do so.

PERFORMING ARTS

1. **What are the procedures to be followed in filing applications on behalf of aliens of exceptional ability in the performing arts formerly processed under the special handling procedures in the former regulations?**

   - Aliens of exceptional ability in the performing arts are now included in § 656.5, Schedule A, under Group II. Accordingly, such applications must be filed in duplicate with the appropriate office of the Department of Homeland Security. The documentation that must be filed in support of such applications is listed in § 656.15, Applications for labor certification for Schedule A occupations.

AUDIT

1. **Will there be certain responses to questions on the Application for Permanent Employment Certification, ETA Form 9089, that will automatically trigger an audit?**

   - Questions regarding audit criteria will not be addressed. The criteria was purposely not included in the regulation in order to retain the flexibility to change audit criteria, as needed, for example, to focus on certain occupations or industries when information indicates program abuse may be occurring. The regulation grants authority to increase the number of random audits or change the criteria for targeted audits. Making the audit process predictable would defeat the purpose of the audits and undermine the program's integrity.

2. **When, during an audit, is there a 90 day suspension of the audit?**

   - Under § 656.31(a), Department of Labor processing of an application, including audit procedures, may be suspended in certain circumstances. Specifically; "If possible fraud or willful misrepresentation involving a labor certification is discovered before a final labor certification determination; the Certifying Officer will refer the matter to the Department of Homeland Security (DHS) for investigation, and must send a copy of the referral to the Department of Labor's Office of Inspector General (DOL OIG). If 90 days pass without the filing of a criminal indictment or information, or receipt of a notification from DHS, DOL OIG, or other appropriate authority that an investigation is being conducted, the

Certifying Officer may continue to process the application."

3. **In the event of an audit, can an application be withdrawn?**

   - An application can not be withdrawn once it has been selected for audit. If circumstances have changed such that the application is no longer valid or applicable, the application must be withdrawn. If an application is selected for audit, the employer can not forego the audit by claiming the application is no longer valid or applicable. The employer will be held to the audit provision standards and possible resulting consequences.

4. **Can the employer submit alternative evidence in the absence of primary evidence in response to an audit request?**

   - Under the procedures outlined in 20 CFR 656.20, in response to an audit, employers must present the required documentation. The documentary evidence the regulations require the employer to maintain in its compliance file is what is sought in an audit request. For example, the use of an employer's web site is to be documented by dated copies of pages from that site advertising the occupation involved in the application. However, if the employer does not have the primary evidence suggested by the regulation, it may attempt to satisfy the request through the use of alternative evidence not specifically listed in 656.17. In the case of the employer's web site, in the absence of a copy of the posting, the employer may provide an affidavit from the official within the employer's organization responsible for the posting of such occupations on the web site attesting, under penalty of perjury, to the posting of the job. Whether such evidence will be accepted depends upon the nature of the submission and the presence of other primary documentation. The more primary evidence is not provided, the more likely the audit response will be found to be non-responsive.

5. **The United States Citizenship and Immigration Services (USCIS) has posted a sample of a Notice of Filing for a Schedule A permanent labor certification on their website. Will the Department of Labor accept/honor such a posting as sufficient proof of the Notice of Filing for a non-Schedule A permanent labor certification?**

   - An employer may use the posting sample of a Notice of Filing issued by the USCIS and such a posting will be honored by the Department of Labor (DOL) provided that the Notice of Filing includes the employer's name when filing under the basic labor certification process. DOL will honor the use of the sample form, but is not endorsing or requiring its use. Employers may use other forms, as long as they comply with the PERM regulation. Please note that, while the USCIS sample does not include an employer name field, the Notice must contain the name of the employer if the application is filed under 20 CFR 656.17.

CERTIFICATION

1. **Procedure for requesting a Duplicate Labor Certificate. ETA-9089.**

   - Requests for a duplicate ETA-9089 can be made by contacting the Department of Labor or by requesting that USCIS assist with obtaining a duplicate labor certificate ETA-9089 from DOL. The following steps are suggested when requesting a duplicate ETA-9089 through USCIS. Please include on the top of the I-140, Petition for Alien Immigrant Worker, a cover sheet (preferably highlighted with colored paper) stating the following:

     LOST OR MISPLACED LABOR CERTIFICATION, REQUEST FOR DUPLICATE, DO NOT REJECT

     On the same sheet, the following information should also be included:

     - Attorney name;

- Petitioner's name;
- Beneficiary's name;
- ETA case number;
- Priority Date;
- Specify whether you want USCIS to initiate the request for duplicate certificate ETA-9089 or you have contacted DOL to initiate the request for duplicate;
- Proper fee, signature and all required supporting documents;
- A print screen showing that the case has been certified.
- Provide the reason(s) for requesting that the Service Center secure a duplicate, approved labor certificate from DOL, e.g. "Case was certified, original approved labor certificate was never received in the mail."

Once the duplicate certificate ETA-9089 is received by USCIS, the petitioner and/or his representative will be contacted via a Request For Evidence (RFE) notice in order to secure the petitioner's signature on the duplicate certificate. The certificate must be signed by the petitioner before USCIS can accept it for filing purposes.

- Petitioners must send the signed duplicate ETA-9089, along with a copy of the RFE notice requesting the signature. Failure to do so may result in significant delays in processing or denial.

- Petitioners are reminded not to submit concurrent I-140 and I-485, Application for Permanent Residence, when submitting petitions without the labor certificate, and with a request that USCIS secures a duplicate ETA-9089 from DOL or evidence of having requested the duplicate from DOL.

- If Forms I-140 and I-485 are concurrently filed without the ETA-9089, but with a request for duplicate labor certificate, the I-140 may be accepted and the I-485 rejected. However, if the fees for both forms are remitted with a single check, both forms will be rejected.

- Applicants who have submitted a Form I-140 with a request for duplicate labor certificate ETA-9089 are encouraged to wait until approval of the Form I-140 before submitting Form I-485. When submitting the Form I-485 subsequent to approval of the Form I-140, the approval notice of the Form I-140 must be submitted as well, along with appropriate fees and supporting documents.

REMEMBER THAT DOL WILL NOT SEND THE DUPLICATE CERTIFICATE TO YOU. DOL WILL SEND IT TO USCIS.

REVOCATION

1. **What is revocation?**

   - If the granting of a labor certification is found not to be justified, whether based on unintentional or willful conduct of the employer, a previously approved labor certification will be revoked.

2. **What are the criteria for revoking approved labor certifications?**

   - Certifying Officers have the authority to revoke an approved labor certification for fraud and willful misrepresentation, obvious errors, or for grounds or issues associated with the labor certification process.

3. **Is there a time limitation for revocations?**

   - No, a time limit has not been imposed on the authority of Certifying Officers to revoke labor certifications.

INVALIDATION

1. **What is invalidation?**

    - The Department of Homeland Security and a Consul of the Department of State have the authority to invalidate an issued labor certification if a determination is made, either in accordance with the agencies' procedures or by a court, that fraud or willful misrepresentation of a material fact involving the labor certification application exists.

CERTIFYING OFFICER REVIEW AND BOARD OF ALIEN LABOR CERTIFICATION APPEALS (BALCA)

1. **Is the employer permitted to request a review by the Certifying Officer of a State Workforce Agency (SWA) prevailing wage determination?**

    - Yes, the employer may request a review by the Certifying Officer of a SWA prevailing wage determination by sending a request for review to the SWA that issued the prevailing wage determination within 30 days of the date of the determination

2. **Is the employer permitted to request a review of the Certifying Officer's prevailing wage determination?**

    - Yes, the employer is permitted to request a review by the Board of Alien Labor Certification of the Certifying Officer's prevailing wage determination by submitting, in writing and within 30 days of the date of the decision of the Certifying Officer, a request to the Certifying Officer who made the determination.

3. **What recourse does the employer have in the event a labor certification is denied or revoked?**

    - If a labor certification is denied or revoked, the employer may make a request for review to the Board of Alien Labor Certification Appeals (BALCA) by submitting, in writing and within 30 days of the date of the determination, a request to the Certifying Officer who denied or revoked the application.

4. **For prevailing wage appeals, when does the 30 day clock start running to file an appeal of the State Workforce Agency (SWA) determination?**

    - The 30 days to file an appeal to the Certifying Officer begins on the date that the SWA makes a final decision on the case. If the employer submits supplemental information (as permitted one time), the 30 days begins after the SWA considers and makes a decision on the supplemental information.

5. **If my application for certification is denied, how long do I have to wait before I can re-apply?**

    - Upon receipt of the denial notification via U.S. mail, a new application may be filed at any time unless a request for review by the Board of Alien Labor Certification Appeals (BALCA) has been submitted. While a request for BALCA review is pending, a new application for the same occupation and the same foreign worker cannot be filed. See 20 CFR 656.24(e)(6). (For more information, please see the FAQ "When does the Department of Labor consider a request for review to be pending with the Board of Labor Certification Appeals (BALCA) and how will the Department process such appeals?")

6. **When does the Department of Labor consider a request for review to be pending with the Board of Labor Certification Appeals (BALCA) and how will the Department process such appeals?**

    - The Department of Labor considers a request for review to be pending with BALCA under

20 CFR 656.24(e)(6) at the time either a request for BALCA review or a request for reconsideration is submitted to the Certifying Officer.

PROHIBITION ON SUBSTITUTION (Fraud Rule)

1. **What is the effective date for the prohibition on substitution?**

   - Section 656.11(a) of 20 CFR part 656 prohibits any request to change the identity of an foreign worker beneficiary on any application for permanent labor certification that is submitted after July 16, 2007.

2. **What is the scope of validity of a permanent labor certification for which a substitution request has been made?**

   - As revised, §656.30(c)(2) states that a permanent labor certification is valid only for the particular job opportunity, the foreign worker named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the application (either Form ETA 750 or Form ETA 9089). As the Department made clear in the Supplementary Information that accompanied the Final Rule, 'approved' for purposes of the substitution request means approved by DOL at the DOL stage in processing such a request. Pursuant to §656.11(a), the Department will consider a request for substitution made prior to July 16, 2007, even if it does not make a determination or complete action on that request until after the Final Rule's effective date.

PROHIBITION ON IMPROPER PAYMENTS AND TRANSACTIONS (Fraud Rule)

1. **How does the Department define "sale, barter, or purchase" of a labor certification?**

   - No application for labor certification or approved labor certification may be sold, bartered, or purchased as of July 16, 2007. A "sale" means an agreement between a seller and a buyer to transfer ownership of a labor certification in consideration of monetary payment or promise of monetary payment. "Barter" means the transfer of ownership of a labor certification from one person to another by voluntary act or agreement in exchange for a commodity, service, property, or other valuable consideration. "Purchase" means the voluntary agreement to transfer ownership of a labor certification from one person to another based on valuable consideration. The Final Rule adds these definitions to §656.3.

2. **How does the Department define prohibited payments for "activity related to obtaining permanent labor certification?"**

   - Pursuant to §656.12(b), an employer may not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, except from a party with a legitimate, pre-existing business relationship with the employer, and when the work to be performed by the foreign worker will benefit that party. "Payment" includes, but is not limited to, monetary payments; deductions from wages or benefits; kickbacks, bribes, or tributes; goods, services, or other "in kind" payments; and free labor. This includes the prohibition against the foreign worker paying the employer's attorneys' fees in connection with the labor certification application.

3. **What are activities relating to obtaining permanent labor certification?**

   - "Activity related to obtaining permanent labor certification," for purposes of §656.12(b), includes, but is not limited to, recruitment activity, the use of legal services, and any other action associated with the preparation, filing, or pursuit of an application. This section prohibits any such payment. A foreign worker may pay his/her own costs, including attorneys' fees for representation of the foreign worker, except that when the same attorney represents both the foreign worker and the employer, all costs related to

preparing, filing, and obtaining the permanent labor certification must be borne by the employer

4. **Does the rule prohibit reimbursement agreements?**

   - The regulation prohibits payment by the foreign worker or others of employer-incurred costs related to labor certification, including attorneys' fees. If, for example, a reimbursement agreement would require the employee to reimburse the employer for some or all of the attorneys' fees it incurred associated with preparing, filing and obtaining the labor certification, such reimbursement agreement would violate the Final Rule.

5. **What should employers do who have entered into contracts where payments from foreign workers are either owed after July 16, or owed prior to July 16 but not paid until after July 16?**

   - Section 656.12(b) prohibits an employer from seeking or receiving payment of any kind for activity related to obtaining permanent labor certification, including the employer's attorneys' fees. If the payment obligation, however, accrued *prior* to July 16, the employer has the right to seek the payment after the effective date.

     For applications filed on or after July 16, 2007, an employer who has *sought* this type of payment from the foreign worker beneficiary of the application must answer "yes" to Question I-23 on ETA Form 9089 ("Has the employer received payment of any kind for the submission of this application?"), even if the employer has not yet *received* payment from the foreign worker. Employers should describe the payment and from whom, and when appropriate clarify on the application, for the record, that the payment was for an obligation that accrued prior to the effective date of this provision (ie, July 16, 2007). Employers answering "yes" to Question I-23 must be prepared, if requested by the Certifying Officer, to explain and support the details of such payment.

6. **What should attorneys do who have entered into contracts where payments from foreign workers for labor certification preparation and filing are either owed after July 16, or owed prior to July 16 but not paid until after July 16?**

   - Both because the Final Rule governs the payment or reimbursement of an employer's attorneys' fees, and because an attorney is the employer's legal representative (and so stands in the place of the employer), the rule prohibits payments to an attorney for the employer's legal fees when such payments would not be permissible directly to the employer. If the payment obligation accrued, however, prior to July 16, the attorney has the right to seek the payment after the effective date and should note on the application, for the record, when the obligation accrued.

     For applications filed on or after July 16, 2007, if an attorney or firm completing the application represents the employer, or the employer and foreign worker jointly, and has either *sought* or *received* a payment from the foreign worker that is directly related to the employer's labor certification costs as outlined in the regulation, the attorney must answer "yes" to Question I-23.

     Attorneys answering "yes" to Question I-23 must be prepared to explain and support the details of such payments. The attorney should describe the payment, explain that the payment was to the attorney and from whom, and when appropriate clarify on the application, for the record, that the payment was for an obligation that accrued prior to the effective date of this provision (ie, July 16, 2007).

7. **Do the regulations require attorneys to modify contracts for dual representation entered into before July 16, 2007?**

AILA Doc. No. 09011470. (Posted 1/14/09)

- The regulations state that an employer may not seek or receive payment from the employee (or a third party except in specific circumstances) after July 16 2007. Attorneys may represent employers in the preparation, filing and obtaining of a labor certification and may be paid for that activity by the employer. Attorneys may represent foreign workers in their own interests in the review of a labor certification (but not in the preparation, filing and obtaining of a labor certification, unless such representation is paid for by the employer), and may be paid by the foreign worker for that activity. To the extent, however, that a contract exists between the attorney and the employee, which calls for the receipt on or after July 16 of payment for services rendered on or after July 16 in connection with the preparation, filing or obtaining of a labor certification, such services are to be paid for, under the regulation, by the employer.

8. **Do the regulations permit counsel for the foreign worker to voluntarily represent the employers on a pro bono basis?**

   - No. But for the attorney's representation of the foreign worker, the attorney would not be furnishing such services to the employer. This is prohibited by the regulations.

DEBARMENT (Fraud Rule)

1. **When may the Department debar an employer, attorney, or agent?**

   - Pursuant to §656.31(f), the Department may debar an employer, attorney, and/or agent from the permanent labor certification program for up to three years, when it determines such employer, attorney, and/or agent has facilitated or participated in one or more of the following actions, if such action was prohibited at the time it occurred:
     - Sale, barter, or purchase of an application for labor certification or approved labor certification;
     - Prohibited payment for an activity related to obtaining permanent labor certification;
     - Willful provision or assistance in the provision of false or inaccurate information for an application for labor certification;
     - Pattern or practice of failure to comply with the terms of Form ETA 9089, Application for Permanent Employment Certification, or Form ETA 750, Application for Alien Employment Certification;
     - Pattern or practice of failure to comply with the Permanent Labor Certification audit process;
     - Pattern or practice of failure to comply with the Permanent Labor Certification supervised recruitment process; or
     - Fraud or willful misrepresentation involving a Permanent Labor Certification, as determined by a court, the Department of Homeland Security, or the Department of State.

2. **When does an approved labor certification expire?**

   - The expiration date of an approved labor certification depends on when it was approved. For labor certifications approved prior to July 16, 2007, the labor certification expires 180 days after July 16, 2007 - that is, January 12, 2008-- unless filed prior to its expiration with the Department of Homeland Security in support of a Form I-140 Immigrant Petition for Alien Worker. Labor certifications approved on or after July 16, 2007, will expire 180 days from their date of issue, unless filed prior to expiration with the Department of

Homeland Security in support of a Form I-140 Immigrant Petition for Alien Worker.

FAQS ON SUPERVISED RECRUITMENT

1. **Under what authority can the Department of Labor's Office of Foreign Labor Certification select an employer's application for supervised recruitment?**

    - 20 CFR 656.21 provides, "Where the Certifying Officer determines it appropriate, post-filing supervised recruitment may be required of the employer for the pending application or future applications pursuant to 20 CFR 656.20(b)," and 20 CFR 656.24(f) provides, in part, "If the Certifying Officer determines the employer substantially failed to produce required documentation, or the documentation was inadequate, or determines a material misrepresentation was made with respect to the application, or if the Certifying Officer determines it appropriate for other reasons, the employer may be required to conduct supervised recruitment pursuant to §656.21 in future filings of labor certification applications for up to two years from the date of the Final Determination.

2. **How will the employer know it has been selected for Supervised Recruitment?**

    - The employer will be notified by the Office of Foreign Labor Certification/Atlanta National Processing Center (OFLC/ANPC).

3. **What does the Supervised Recruitment process entail?**

    - The supervised recruitment process generally consists of the following steps:

        - The employer will receive a Notification of Supervised Recruitment letter. Using the advertisement's general content requirements outlined in the Notification of Supervised Recruitment letter, the employer must supply a draft advertisement of the job opportunity to the Certifying Officer for review within 30 calendar days from the date of the notification letter. The employer may submit a request for one extension (for good cause) of the 30-day timeframe, to be granted at the Certifying Officer's discretion. In drafting the advertisement, the employer cannot substantively deviate from the job opportunity's requirements as listed in Section H of the submitted ETA Form 9089.

        - Upon receipt and review of the draft advertisement, the Certifying Officer may issue an Assessment/Correction Letter to the employer, identifying any changes/additions that must be made before recruitment can begin.

        - Once the draft advertisement is approved, the Certifying Officer will send the employer a Recruitment Instructions letter identifying in what sources or publications, as well as when, the employer's advertisement(s) must be placed. The employer must not initiate recruitment for U.S. workers until it receives this letter.

        - The employer's advertising will direct applicants to send resumes and or applications to an OFLC or ANPC post office box address as outlined in the Recruitment Instructions letter. The Certifying Officer will send all resumes and applications received in response to the employer's advertisement(s) along with a cover letter listing the resumes/applications to the employer's attorney or agent of record, if any, with a copy of the cover letter to the employer. If the employer is not represented by an attorney or agent, the resumes and or applications will be sent directly to the employer. The employer will be required to consider all U.S. applicants for this job opportunity and any rejections must be made only for lawful reasons.

        - A Recruitment Report Letter outlining the requirements set forth under 20 CFR 656.21(e) will be sent to the employer requiring it to submit a written recruitment

report to the OFLC/ANPC within 30 calendar days of the request. The employer may request one extension (for good cause) of the 30-day timeframe, to be granted at the OFLC/ANPC's discretion.

- The Certifying Officer will utilize all recruitment information and supporting documentation to determine whether to grant or deny the employer's application.

4. **What is the average time it takes for an application to be processed in Supervised Recruitment?**

   - A "clean" application undergoing supervised recruitment – i.e., one that does not require additional information or clarification from the employer, should take approximately 180 days to process and receive a final determination. The process may take longer, depending upon whether the employer requests extensions of time or the analyst requires additional time to review documentation and make a determination.

5. **What will happen if the employer fails to timely respond or request an extension of time at any point in the Supervised Recruitment process?**

   - In accordance with the regulation, failure to adhere to any timeframe throughout the supervised recruitment process will result in a denial of the employer's application. A pattern or practice of failing to comply in the supervised recruitment process is a ground for debarment of an employer, attorney, agent, or any combination thereof from the permanent labor certification program for a reasonable period of up to three years.

6. **When should an exployer undergoing Supervised Recruitment provide notice that it has changed its attorney/agent?**

   - The employer must provide notification of a change of representation as soon as the decision to hire the attorney or agent is finalized. The notification may be included with other correspondence or communication with the OFLC/ANPC. If the employer's communication with OFLC/ANPC is via e-mail, a copy of the notification, in PDF format, must be attached to the email and, thereafter, the signed original must be mailed to the OFLC/ANPC. **Please note:** Communication will not be held with an attorney or agent who is not listed on the ETA Form 9089 and for whom no notification establishing employer representation is provided to the OFLC/ANPC.

7. **What documentation and/or notice is needed when an employer undergoing Supervised Recruitment changes its attorney/agent?**

   - The employer and/or the newly retained attorney or agent must provide documentation signed by the employer establishing that it intends to be represented by the attorney or agent named, providing all applicable information as requested in Section E, Agent or Attorney Information, of the ETA Form 9089, and containing the statement, "I hereby designate the agent or attorney identified in this letter to represent me for the purpose of labor certification. I take full responsibility for the accuracy of any representations made by the agent or attorney identified above."

8. **Can the employer list a wage range in its advertisement(s)?**

   - Yes. If the employer wishes to state a wage range in the advertisement, the bottom of the range must not be lower than the prevailing wage or the wage being offered to the foreign worker named on the ETA Form 9089, whichever is higher.

9. **Must the employer advertise at the prevailing wage it listed at the time of filing the ETA Form 9089 OR, if different, the current prevailing wage?**

AILA Doc. No. 09011470. (Posted 1/14/09)

- Where the employer includes a wage in its advertisement, the wage must be equal to or greater than the current prevailing wage for the job opportunity. Where necessary, the OFLC/ANPC will provide the employer with the new prevailing wage applicable to the job opportunity. If the employer chooses to use a source other than the Occupational Employment Statistics (OES) survey, the employer must provide an acceptable survey, as outlined in 20 CFR 656.40(g), to the Certifying Officer.

10. **What is the extent to which the employer must provide any additional information requested in the notification of Supervised Recruitment Letter?**

    - All documentation required by the OFLC/ANPC as part of the supervised recruitment process must be provided in full. Where one form of documentation lends itself more readily for submission to the OFLC/ANPC, e.g., electronic versus hardcopy, arrangements can possibly be made to accommodate the one form over the other.

11. **To whom will the Office of Foreign Labor Certification send any resumes received in response to the advertisement(s)?**

    - Resumes and or applications received by the OFLC/ANPC in response to the employer's advertisement(s) will be sent to the employer's attorney or agent of record, if any, with a copy to the employer. If the employer is not represented by an attorney or agent, the resumes and or applications received by the OFLC/ANPC in response to the employer's advertisement(s) will be sent directly to the employer.

12. **What are the consequences of an employer requesting to withdraw an application undergoing Supervised Recruitment?**

    - While OFLC/ANPC may grant an employer's request to withdraw an application undergoing supervised recruitment and the employer then files a new application meeting all regulatory requirements, the future application for the same foreign worker as in the withdrawn application will be subject to supervised recruitment pursuant to 20 CFR 656.21. Additionally, where the OFLC/ANPC determines it appropriate, all other applications filed by the employer for any foreign worker or job opportunity may also be subject to supervised recruitment.

      An employer that wishes to file a future application for the same foreign worker as in an application withdrawn while undergoing supervised recruitment must do so by completing the ETA Form 9089, **except Section I, Recruitment Information**, which will be completed after submission at the instruction of the OFLC/ANPC. The employer must file the above referenced application by **mail** to the Atlanta National Processing Center at the following address:

      U.S. Department of Labor
      Employment and Training Administration
      Foreign Labor Certification
      National Processing Center
      Harris Tower
      233 Peachtree Street, Suite 410
      Atlanta, Georgia 30333

      Repeated requests to withdraw different applications undergoing supervised recruitment will be carefully reviewed and may evidence a pattern or practice of the employer's failure to comply with the supervised recruitment process, and may subject the employer to debarment from the permanent labor certification program for a reasonable period of no more than three years pursuant to 20 CFR 656.31(f)(1)(v).

AILA Doc. No. 09011470. (Posted 1/14/09)

Backlog Elimination Centers

Elimination Center Phasedown Part 1

1. **Are the Backlog Elimination Centers (BECs) still open, or did they close?**

   - As of September 30, 2007, the Backlog in the Permanent Labor Certification program has been eliminated, with nearly 99% of cases completed and the remainder awaiting responses from employers. Both of the BECs have started a transition and shutdown phase that will continue into December.

     The BECs will continue to use the general information email boxes as the communication source for a limited period. These addresses are: info@dal.dflc.us (Dallas BEC) or info@phi.dflc.us (Philadelphia BEC).

2. **My case is not yet completed; can I still find out the status of the case?**

   - The online Backlog Public Disclosure System (PDS) will continue to be active. Case status can be checked at http://pds.pbls.doleta.gov.

3. **My case is still listed as "In Process" on PDS. Will the BEC complete my case?**

   - Both of the BECs have started a transition and shutdown phase that will continue through December. During this time, they will complete any remaining cases. Employers or their designated attorneys or agents are strongly encouraged to respond to any dated (time sensitive) correspondence as soon as possible – and prior to specified deadlines to the extent possible – regarding remaining cases to facilitate a final disposition.

4. **My case is listed as Certified on PDS, but I have not yet received my certification in the mail.**

   - It may take up to three weeks to receive the certification by mail. The certification will be sent to the attorney of record, or to the employer if there is no attorney of record. If the certification is not received after three weeks from the time it is listed on PDS as certified, email the appropriate BEC at the information email box as listed above. On the subject line, please use the identifier "Post-Certification Issue."

5. **My case was closed at the State or Regional Office; will the BEC be contacting me about my case?**

   - No. Cases that received a final disposition at either the State or regional level, including being denied, closed, or withdrawn, would not have been sent to a BEC. Since the appeal period has expired on all such cases, there is no additional action that can be taken.

6. **The applicant, attorney, or representative for the case did not respond in a timely manner to correspondence and the case was closed. Will the BEC consider re-opening the case?**

   - No. When OFLC (*i.e.*, the BEC) corresponds with employers, their attorneys, or agents, specific dates (deadlines) are given for required actions by the applicant to continue the case. If the appropriate, complete response is not received by OFLC postmarked by the required date, the decision regarding the case remains final. Likewise, if a timely response had not been received to a Notice of Findings, the decision to deny the case is final.

7. **An application was sent to the State years ago, but I have not heard anything from the BEC. What is the status of such a case?**

AILA Doc. No. 09011470. (Posted 1/14/09)

- As stated in the answer to question #5, there are several reasons why an application may have received a disposition at the state level and was never sent to a BEC.

  For all applications sent to a BEC, several notification actions were taken to: 1) ask employers if they wanted to continue the application, 2) notify employers of any issues through clarification letters or Notices of Findings, 3) notify employers when recruitment actions had commenced and to provide recruitment instructions, and 4) provide recruitment report instructions.

  In addition to the normal procedures, OFLC published on its website two special procedures for backlog cases. OFLC published a procedure in July of 2006 for employers or their representatives to follow if they had not been contacted by a BEC with a 45-day Center Receipt Notification Letter.

  OFLC then published a procedure in September of 2006 for employers or their representatives to follow if they had not been contacted in any way by a BEC.

  OFLC published both of these procedures on its website, transmitted the information to stakeholder groups for dissemination on their websites, and publicly explained the procedures at several national forums. The procedures had specific timeframes in which to contact the BECs. All of these timeframes have expired.

  The procedures remain substantially unchanged. If an employer has not received ***any*** communication from the BEC regarding a case, then the BEC does not have a record of having received the application.

  In many cases, employers can file a new application using the PERM program. Instructions for establishing an account and filing an application online can be found at http://www.plc.doleta.gov.

8. **My case was denied by the Certifying Officer at the BEC, but the employer or their attorney has appealed this decision to BALCA. Who will handle the case if further action is required by the BALCA decision?**

   - In the event that a BALCA decision is not reached prior to the closing of the BECs in December 2007, OFLC will track the appeal and take any further actions required by a BALCA decision. The employer will be contacted at the appropriate time regarding new contact information.

Extended RIR Conversion Date

1. **Why might an employer want to convert a TR application to RIR?**

   - Because RIR applications do not undergo the same recruitment process, these applications generally reach final resolution (certification or denial) in significantly less time than TR applications. Therefore, it is often to the employer's advantage to convert applications from TR to RIR

2. **Is there a date by which an employer's original application must have been filed in order to be eligible for conversion from TR to RIR?**

   - Yes, applications must have been postmarked on or before **March 28, 2005**. This is an extension from the prior deadline and essentially includes all open TR cases in the backlog for which a job order has not been initiated.

3. **Who may request RIR conversion?**

AILA Doc. No. 09011470. (Posted 1/14/09)

- The employer, or its designated attorney or agent, may file the request for RIR conversion.

  Aliens are not eligible to request conversion, and the Backlog Elimination Centers (BECs) will not respond to such requests.

4. **Are applications for Schedule B occupations eligible for RIR conversion?**

   - No, under existing regulations, Schedule B applications are not eligible for the RIR process.

5. **Is there a date before which an employer or their agent must send a request for RIR conversion to the BEC?**

   - There is no specific date by which an employer or their agent may request RIR conversion. **However, by regulation, once the BEC has posted the job order to begin the recruitment process, the application is no longer eligible for RIR conversion.** Since applications are processed by filing date, recruitment for TR applications is begun on a rolling basis based on priority date as cases are processed. Therefore, it is to the advantage of an employer who would like to request an RIR conversion to do so as soon as possible to minimize the possibility that the BEC begins recruitment on the application.

6. **Will the BEC delay recruitment on a TR application so that the employer can request RIR conversion?**

   - No. Due to the Office of Foreign Labor Certification's (OFLC) intensive effort to eliminate the backlog, it is not practical for the BEC to delay recruitment on applications to await RIR conversion requests. Therefore, BECs will not delay recruitment to allow for RIR conversion. Requests for RIR conversion must be received prior to the beginning of supervised recruitment to be considered. Employers should send their requests and appropriate documentation as soon as possible to maximize their opportunity for RIR conversion.

7. **What is the supporting documentation required for a request for RIR conversion?**

   - The supporting documentation required for conversion to RIR processing is the same as that required for an application initially filed under the RIR process, with the addition of a written request for conversion. Employers or their attorneys should ensure the request includes:
     1) A written request for conversion;
     2) Documentation demonstrating that a pattern of recruitment has been established within the six months preceding the date the conversion request is received by the BEC, and that any U.S. workers were rejected solely for lawful, job-related reasons. Documentation must provide a description of the recruitment process used and the results of the recruitment process;
     3) Contact information regarding the application including an e-mail address where a reply to the RIR conversion request can be sent.

8. **How should an employer or the employer's attorney send in an RIR Conversion request to the BEC?**

   - Send the required information listed above **by mail** to the appropriate BEC based on where the case was filed. The information should be addressed:

For Philadelphia BEC:
ATTN: RIR Conversion Request & Documentation
U.S. Department of Labor
AILA Doc. No. 09011470. (Posted 1/14/09)

Employment and Training Administration
1 Belmont Avenue, Suite 200
Bala Cynwyd, PA 19004

For Dallas BEC:
ATTN: RIR Conversion Request & Documentation
U.S. Department of Labor
Employment and Training Administration
700 North Pearl St., Suite 400N
Dallas, Texas 75201

9. **How will the BECs process requests for RIR conversion?**

   - The BECs will process the requests for RIR conversion on a first-come, first-serve basis. Response times to requests will vary depending on the volume of responses. Employers will **not** receive a confirmation that the request was received.

     BECs will review the documentation provided and determine whether the documentation provided is sufficient.

10. **What happens if the RIR conversion request is granted?**

    - If the request is granted, the employer or their designated attorney will be notified by e-mail and the application will be moved from the TR processing queue to the RIR processing queue. Applications will continue to be processed by filing date.

11. **What happens if the RIR conversion request is not granted?**

    - If BEC determines that the documentation provided is insufficient to warrant RIR conversion, the case will remain in the TR processing queue and be processed in priority order. An e-mail will be sent notifying the employer or their attorney that RIR conversion was denied.

12. **What if an employer has already had their RIR status denied, or has attempted to convert to RIR previously, is such an application eligible for RIR conversion?**

    - Yes. If the employer is able to remedy the shortcomings in the pattern of recruitment or documentation, requests for RIR conversion may be made even if RIR was denied previously up until the BEC begins supervised recruitment on the application, at which time the case is no longer eligible for conversion.

13. **In order to establish a "pattern of recruitment," which date is used as the reference point – the date the original application was received or the date the RIR conversion request is received?**

    - The point of reference for the pattern of recruitment is based upon the date the RIR conversion request was received. In other words, the earliest acceptable published advertisement or other recruitment activity must have occurred within six months prior to the date the RIR conversion request was received by the BEC. Earlier advertisements or other recruiting activities will not be considered by the BEC in determining whether a pattern of recruitment has been established.

14. **Can an employer requesting RIR conversion lose their "priority date" for the application?**

    - No, an application converted to RIR processing retains the priority date of the original

application. Likewise, if the request for RIR conversion is denied, the case continues processing in the TR queue under the original priority date.

15. **Does the original application need to be withdrawn to request RIR conversion?**

    - No, simply send the request and appropriate documentation to the BEC as described above.

16. **Does the Prevailing Wage used to establish a pattern of recruitment need to be 100% of the current prevailing wage for the occupation?**

    - Yes, as per current regulation governing recruitment for Foreign Labor Certification applications, recruitment should be done at 100% of the prevailing wage.

17. **Can an employer request RIR conversion for a closed or withdrawn application?**

    - No, only cases currently open and in process at the BEC are eligible.

      However, if the employer is using the "No BEC Contact" procedure to reconstruct a case or the "Reopen" procedure to request reopen for a case you believe was closed in error as described in prior FAQs, you may submit your RIR conversion request and supporting documentation along with your reconstructed case. If requesting RIR conversion with another action, employer submissions should be clear that multiple actions are being requested, and documentation for each should be provided.

Public Disclosure System

1. **What should I do if my case status is "Closed" but I do not believe it should be closed because I never received a 45-day letter?**

    - Please see our policy and FAQs regarding Requests for Reopening based on 45-day letters here.

2. **What should I do if I do not have a case number because I never received a 45-day letter or any correspondence from a Backlog Elimination Center (BEC)?**

    - Please see the procedure regarding "No BEC Contact" here.

3. **I have a case number but it begins with a "T", the Public Disclosure System says I need a D- or P- case number. What should I do?**

    - Until cases were fully data entered, they may have had numbers that began with a "T". These case numbers have since been converted and now begin with a "D" if the case is located in the Dallas BEC or a "P" if the case is in the Philadelphia BEC. The state in which the case was originally filed will determine the location of the appropriate BEC. You can check here to determine which state has your case, or you can try both a D and a P prefix to see which returns your case.

4. **I entered my case number but no case information was found. What should I do?**

    - First, check to make sure you entered the correct case number. Even a slight variation from the correct number can cause no case information to be found. If you are sure you entered the correct case number and no case information is found, contact the appropriate BEC that has your case at Dallas info@dal.dflc.us or Philadelphia info@phi.dflc.us.

5. **My case has been "In process" the last few times I checked. Is something wrong? Is my**

case stuck?

- No. The PDS will return a status of "in process" as a case moves through the various stages of the case review and analysis process at a BEC. Depending on the case type and filing date, some cases may show a status of "in process" for some time as the case moves through the various stages.

  Again, depending on the case type and any issues that arise with the case, you may hear from the BEC while your case is in process and to facilitate faster processing, you should respond as quickly and completely as possible.

What if I have not been contacted?

The BECs have sent all 45-Day Center Receipt Notification Letters (CRNL) to employers or their attorneys for cases shipped to the BECs by State and Regional Offices. OFLC recognizes that there may be some employers or their agents that believe they should have an application pending but have still heard **nothing and received no information** from the appropriate BEC about the application. In order to provide employers with the opportunity to have their case processed while also guarding against potential fraud, OFLC has established specific steps for employers or their attorneys to follow.

1. **Why have I not been contacted by the BEC or received any information about my case?**

   - There are several possible reasons an employer or their attorney might not have heard anything from the BEC about the case. Some examples include, but are not limited to: 1) the State or Regional office may have disposed of the case prior to shipping and the applicant did not receive notification; 2) The State or Regional office may have inadvertently not shipped the case to the BEC; 3) the BEC may have attempted to contact the applicant but the contact information was incorrect; or 4) the BEC inadvertently omitted the case during data entry.

2. **What should I do if I have not been contacted by a BEC <u>at all</u> about my case?**

   - If you have not done so already, send an e-mail request to the No BEC Contact box at nobeccontact@dal.dflc.us for the Dallas BEC or at nobeccontact@phi.dflc.us for the Philadelphia BEC. The e-mail must contain the following information:

     A. Attorney's name and address and contact information including e-mail address
     B. Employer's name and address and contact information including e-mail address
     C. Alien's name and address
     D. Filing date
     E. State or Regional location filed
     F. Any case identification number associated with the case
     G. A statement that you have not heard from the BEC about your case.

   - Provide as much information as possible about the case.

   - Each e-mail should only discuss one case.

     Note: This process is **ONLY** for cases for which the applicant, or their designated attorney or agent has had **no contact from a BEC at all** about the case. If you received a 45-day Center Receipt Notification Letter, a case closure letter, or other correspondence from the BEC, you are ineligible for this process. Likewise, if you have a BEC case number (starting with a D- or P- or T-), then you have had contact about the case from the BEC and should not use this process.

3. **Do I have to send my request within a specific time period?**

   - Yes, your request must be e-mailed to the appropriate BEC no later than 30 calendar days after the posting of this announcement on the OFLC website.

4. **What response can I expect from the BEC to my request?**

   - The BEC will send an e-mail to acknowledge your request. Depending on the volume of inquiries, response time may vary.

5. **What will the BEC do about my case when they receive a request?**

   - The initial step for the BEC will be to conduct a search to reconfirm that the BEC does not have the case in question.

   - If a case is NOT found, an e-mail will be sent to the employer or attorney indicating that the case could not be located and will provide instructions regarding what information the employer should provide. You will be required to send the following information (**via regular mail**) to the BEC:

     a. Contact information including e-mail address for the employer or attorney
     b. Photocopies of documents that reconstruct the application in its entirety, including supporting documentation originally submitted with the application (750A, 750B, G-28, etc.) and any subsequent correspondence between the employer or attorney and the State Workforce Agency (SWA). The employer or attorney should include any other information that may be useful in reconstructing the case.
     c. Two copies of the application with **new signatures** from the employer and the alien,
     d. Whatever proof is available that the application was filed with the SWA (e.g., correspondence from the SWA acknowledging receipt)
     e. If available, evidence that application was transmitted from SWA to the BEC

   - Information should be postmarked **within 30 days** of being contacted by the BEC about the case

   - In the unlikely event the case IS found at the BEC, steps will be taken to move the case into the appropriate stage of processing, and the employer or their attorney will be notified.

6. **To whom should I send my case documentation for a case that could NOT be located at the BEC?**

   - Send the above information to the appropriate BEC based on where the case was filed. The information should be addressed:

For Philadelphia BEC:
ATTN: No BEC Contact – Case Documentation
U.S. Department of Labor
Employment and Training Administration
1 Belmont Avenue, Suite 200
Bala Cynwyd, PA 19004

For Dallas BEC:
ATTN: No BEC Contact – Case Documentation
U.S. Department of Labor
Employment and Training Administration
700 North Pearl St., Suite 400N
Dallas, Texas 75201

7. **How will a decision be made regarding the sufficiency of information for my case after I have sent in the documentation?**

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- Decisions about whether sufficient information has been provided about the case to continue processing will be made by BEC staff on a case-by-case basis, based on the information provided and the ability of the BEC to adequately reconstruct the case. Therefore, it is to your advantage to locate and send as much of the above-requested information about your case as possible.

8. **What response will I get from the BEC after I send in the documentation for my case that could not be located?**

    - Upon receipt of the requested information, BEC staff will review the documentation provided to determine if it sufficient to continue processing the case.

        - **If Documentation is Sufficient:** The case will be opened, a case file created at the BEC, and the case will proceed as normal and processed according to filing date.

        - **If Documentation is Not Sufficient:** The employer will be informed of this decision by e-mail and instructed that they may file under the new PERM system.

9. **Who may make the request regarding a "no contact" case?**

    - Only the employer or attorney of record may make the request. A request from an alien will not be addressed.

10. **If I send in the required information about my case, will I have to respond to a Center Receipt Notification Letter (CRNL) indicating that I want to continue?**

    - If the information you provide is sufficient to reconstruct the case, you will not have to respond to a CRNL as the request about the case will be taken as proof of a desire to continue. However, if information is missing that is required to continue processing, you may receive a CRNL with a corrections list of information required to continue processing. You should respond to this letter within the 45-day timeframe.

11. **Should I use the procedure described here if I have already heard from the BEC that my case was closed, or have another question about a case?**

    - No. This process is only for cases about which the employer or their attorney has not heard from the BEC about the case **at all**. If you believe your case was closed in error due to non-receipt or non-response to a 45-day letter, you should send your request to the BEC where the closed cased was pending, the Dallas BEC at reopenrequest@dal.dflc.us or the Philadelphia BEC at reopenrequest@phi.dflc.us.

      If you have another question about a case, it should go to the general information box at info@dal.dflc.us for the Dallas BEC or at info@phi.dflc.us for the Philadelphia BEC.

12. **I've already e-mailed a request about a "no contact" case to the "no BEC contact" e-mail address prior to this announcement, but have not heard anything, should I send another request?**

    - No. BECs did not process e-mail to these boxes pending the release of this procedure. You should receive an initial acknowledgement of your request soon, depending on the volume of cases.

Case Processing

1. **During the public briefings, the Department indicated that there will be 2 processing tracks—Reduction in Recruitment (RIR) and Traditional Recruitment (TR). As to the First in-First out (FIFO) principle, does this mean RIR cases will be separated or**

distinguished from permanent TR cases?

- Yes, there will be two processing tracks—RIR and TR. Each track will have a separate FIFO queue. At the centers we will allocate resources so that RIR and TR cases receive equitable treatment in processing

2. **Will the Backlog Processing Centers (BPC) maintain separate tracks for a) traditional filings; b) RIR filings; and c) special handling filings? If not, why not?**

   - The Centers will maintain separate tracks for traditional filings and RIR filings. At this point, all cases identified as special handling will be forwarded to on-site federal staff for processing. As an enhancement to the operating system, we are investigating how these cases can be electronically expedited.

3. **How is the 2 track system going to work, that is the RIR and TR streams? What resources will be allocated to each? What is the time period for each? Will the resources be allocated such that the last TR case and RIR case will be adjudicated together at the end of the 24-30 months?**

   - At this time we are not able to answer questions which are this specific other than to say that it is our goal to treat RIR and TR cases in an equitable manner.

4. **Does the 24-30 month processing projection apply to both RIR and TR cases or will the RIR queue get some preference?**

   - No queue will automatically get preference. We plan to allocate resources based on the number of cases in each queue. However, we anticipate that the processing time for RIR cases will be shorter that that for TR cases.

5. **Are cases being assigned a new case number or is the current SWA or Regional Office number being retained for tracking purposes?**

   - All cases are being assigned new case numbers once entered into the Permanent Backlog System (PBLS). Once a case has been entered into PBLS, the BPC will send the employer and attorney of record (if applicable) a letter with the new case number.

6. **When will I receive my 45-day letter?**

   - Due to the large volume of files transferred to the two Backlog Processing Centers, we cannot determine when your "45-day" Center Receipt Notification Letter (CRNL) will be mailed to you. As soon as your case is entered into the U.S. DOL Permanent Backlog System (PBLS), a "45-day" CRNL will be generated and sent to you and your attorney/agent of record, if one exists. Once you receive the "45-day" CRNL, all requested corrections, supporting documents, and the enclosed Selection of Continuation Option Letter must be returned to the appropriate Backlog Processing Center. In the designated space at the bottom of the Selection of Continuation Option Letter, please indicate your decision as to whether "I wish to withdraw this application" or "I wish to continue the processing of this application" with a check mark.

7. **The alien has a child who is about to "age-out." What can be done to expedite this application?**

   - The policy of the U.S. DOL/ETA National Office prohibits the expediting of applications.

8. **The employer has been acquired by another company. The new company still wants to hire the alien. What do we need to do?**

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- The new employer must submit a copy of the employer's articles of incorporation, business license, state registration, or other official documents that establish the employer as a bona fide business entity and establishes the legal buyout or "successor in interest" position. In addition, a new Form ETA 750 Part A and Part B must be provided to continue the permanent foreign labor certification process.

9. **The message on my Corrections List states, "The Employer's name/address is not the same on Form ETA 750 Part A and Part B." What do I need to do?**

   - Please refer to item 6 on Form ETA 750 Part A and item 8 on Form ETA 750 Part B. These items must match exactly on your application. Initial and date any corrections you make on your application and return it to the appropriate Backlog Processing Center.

10. **The message on my Corrections List states, "Basic Rate Per is a required entry." The amount of pay is included on the application. What's the problem?**

    - Item 12a/b on Form ETA 750 Part A must include both a rate of pay (in dollars and cents) and a period (hourly, daily, weekly, bi-weekly, monthly, or annually). Please correct, initial, and date your application accordingly and return the application to the appropriate Backlog Processing Center.

11. **Does the BPC case continuance letter need to be signed only by the employer or can the attorney of record sign?**

    - The Selection of Continuation Option Letter may be signed and submitted by either the employer or the employer's attorney/agent of record. We request, however, that employers and attorneys coordinate to determine who will submit the Selection of Continuation Option Letter to ensure that the appropriate Backlog Processing Center does not receive conflicting or duplicate responses. In the instance of conflicting responses, we will default to the employer's response.

12. **I am the attorney of record for a permanent foreign labor certification case. Our firm has moved and wishes to notify your office of this change. How do I do this?**

    - Please send the appropriate Backlog Processing Center a letter that states the change requested and enclose a signed and dated G-28 with the updated information. A separate G-28 should be submitted for each case for which a change is requested. The form must be signed and dated by the employer and/or alien, depending on which party you represent. The attorney may send an individual letter for each case or a combined letter with the change of address and listing all affected cases (include name of employer and alien and the case number, if known).

13. **Is there any centralized way to get an attorney's current address into your system at the BPCs?**

    - No, any correction or change must be sent to the appropriate Center following the instructions above.

14. **I am a new attorney of record for a permanent foreign labor certification case. Our firm wishes to notify your office of this change. How do I do this?**

    - Please send the appropriate Backlog Processing Center a letter stating the requested change and enclose a new signed and dated G-28 with the updated information. A separate G-28 is required for each case for which you want to make a change. Each G-28 must be signed and dated by the employer and/or the alien, depending on which party you represent.

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15. **The message on my Corrections List states, "Failed Existence Check: Employer's address/phone number does not reference back to employer's name." What should I do to resolve this problem?**

    - You must submit a copy of the employer's articles of incorporation, business license, state registration, or other official documents that establish the employer as a bona fide business entity at a specific address to the appropriate Backlog Processing Center.

16. **The message on my Corrections List states that, "Consulate Location is a required entry." The alien is currently in the U.S. and will apply for adjustment here. Why must I enter a consulate location?**

    - Entries are needed in items 10a or 10b on Form ETA 750, Part B. Please mark the appropriate box with an (X) and enter a complete city and foreign country (10a) or city and state (10b) on the application. Initial and date any corrections made to your application and then return the application to the appropriate Backlog Processing Center.

17. **The employer has moved to a new address. How should we notify the Backlog Processing Center of this change?**

    - Please send the appropriate Backlog Processing Center a written request to return the original Form ETA 750 Part A and Part B. Make the appropriate change of address, date and initial the change, and return the Form ETA 750 Part A and Part B to the appropriate Backlog Processing Center. Employers who have already recruited for the position in a labor market are cautioned that a move to a new work location may require a new labor market test.

      Please note that changes, additions, or deletions to the application must be initialed and dated by the employer on Part A and by the alien on Part B. It is unacceptable for the attorney representing the employer and/or alien to make amendments to the Form ETA 750.

18. **The employer has changed names. Do we have to submit a new application or may we change the original application? How should this be done?**

    - The employer must submit a copy of the employer's articles of incorporation, business license, state registration, or other official documents that establish the employer as a bona fide business entity. In addition, a new ETA 750 Part A and Part B must be provided to continue the permanent foreign labor certification process. If the Form ETA 750 Part A and Part B have been returned for correction, the changes may be made on those existing documents.

      Please note that the new employer or entity must be connected to the old one (a successor-in-interest) and cannot be an entirely new employer.

19. **Our office recently received a request for "corporate documents" from the BPC. The petition was for a housekeeper. Is this request sent in error or how do we respond?**

    - If the application is for a domestic servant in a private household, the employer should provide a recent tax return and/or leases, utility bills, etc. that establish the domestic employer at the address on the application.

20. **Are all cases filed between 1/1/05 and 3/28/05 to be processed by the BPC rather than the Atlanta or Chicago Processing Centers?**

    - All cases filed between 1/1/05 and postmarked before 3/28/05 will be processed by the Backlog Processing Centers.

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21. **Many clients are anxious because we have not received the 45-day letters from the Backlog Processing Centers in connection with their application. How can we follow up on status of cases and at what point should we worry about not getting a letter?**

    - Due to the large volume of files transferred to the two Backlog Processing Centers, we cannot determine when your "45-day" Center Receipt Notification Letter (CRNL) will be mailed to you. As soon as your case is entered into the U.S. DOL Permanent Backlog System (PBLS), a "45-day" CRNL will be generated and sent to you and your attorney/agent of record, if one exists. Once you receive the "45-day" CRNL, all requested corrections, supporting documents, and the enclosed Selection of Continuation Option Letter must be returned to the appropriate Backlog Processing Center within 45 days.

22. **How will RIR and TR priority be handled over PERM cases?**

    - Backlogged cases will be processed in Philadelphia and Dallas. PERM cases will be processed in Chicago and Atlanta.

REDUCTION in RECRUITMENT (RIR) Conversion Hold Harmless Opportunity

1. **What is the Conversion Opportunity?**

    - On October 6, 2006, the Department of Labor's Employment and Training Administration (ETA) issued a TEGL that extended the time available to convert a permanent labor certification application filed under traditional processing ("TR case") to a case requesting reduction in recruitment ("RIR") processing. This TEGL enabled the Department to assess additional interest in RIR conversions for cases still pending at ETA Backlog Elimination Centers (BECs). The Department has determined that additional guidance would further enable applicants to accurately assess their eligibility to request their case(s) be considered for conversion. Specifically, by this FAQ, the Department is addressing stakeholder community concerns that the employer will be "held harmless" for making such a request in light of simultaneous or subsequent recruitment instructions coming from the BEC in accordance with applicable regulations. Accordingly, the Department has developed the following limited policy whereby employers may better ascertain their eligibility to participate in this conversion opportunity.

2. **Why would an employer want to convert its TR case to RIR using the hold harmless opportunity being offered?**

    - The employer applicant can be assured it will be "held harmless" in the sense that the BEC will not deny the RIR conversion request simply because the BEC has initiated job order activity for traditional case recruitment. Instead, in cases where it has received notice from the employer of intent to convert, the BEC will hold the recruitment of the case in abeyance until the end of the specified conversion window, thus enabling the employer to comply with the recruitment for RIR purposes and promptly submit the RIR package.

      RIR cases generally are completed and reach a disposition faster than TR cases. This enables the employer and alien beneficiary to move the case further to completion in the permanent labor certification process.

      In addition, to assist the employer, the BEC will provide the prevailing wage determination for the petitioned job when acknowledging the conversion request.

3. **Who is generally eligible for RIR conversion under this "new" opportunity?**

    - An employer may file a request to convert to RIR if it has a currently pending TR

application in one of the BECs (Dallas or Philadelphia) that meets the following conditions:

- The case has not already received a disposition, e.g. certification, denial;
- A Notice of Findings (NOF) has not been issued for the application, or a NOF has been issued but successfully rebutted at the time of sending the email request;
- The application is not for a Schedule B occupation; and
- The applicant or its attorney/agent has not received a **Recruitment Report Instructions Letter** from the BEC indicating that supervised recruitment has ended and providing instructions for the results.

4. **What is the "hold harmless" benefit for RIR conversion?**

- The "hold harmless" benefit allows the employer to commence recruitment without concern that the BEC will initiate job order activity before the employer can submit the recruitment request along with the recruitment, making the applicant ineligible to convert.

  Any applicant who sends in an e-mail with the specified language before January 20, 2007, indicating its intent to request conversion of its TR case to RIR status will be granted the assurance that the RIR conversion will not be denied solely because the BEC has initiated TR recruitment activities. Therefore, the employer is free to engage in recruitment for preparation for the RIR package without the concern that the BEC will begin TR recruitment activities.

  If the BEC does initiate TR recruitment activity, the BEC's recruitment activity will be superseded by the "intent to convert" e-mail submitted under this opportunity and the employer will be allowed to apply for conversion, as long as the employer has not received a recruitment report instructions letter from the BEC, and if the application meets the requirements for an RIR conversion.

5. **What are the steps under this opportunity?**

- a) No later than January 20, 2007, the applicant or its designated attorney sends an e-mail to the appropriate BEC using the language specified (see question 9 below) indicating its intent to convert a TR case to RIR status. The e-mail should also contain any proposed amendments (see question 20 below).
  b) The BEC will place the applicant's case in "hold" status pending receipt of the RIR conversion package.
  c) The BEC will send the applicant a receipt e-mail with the new prevailing wage for the position upon which to base the wage offered in its recruitment, and the status of any proposed amendments, i.e., accepted or not.
  d) The BEC will send the employer any resumes the BEC has received in response to any job order activity or advertisement for the employer to consider in preparing its RIR recruitment results package. (Note: This only pertains to cases where a job order activity has been initiated or advertisement was posted by the employer before the employer sent the intent to convert e-mail. In such an instance, this advertisement may be submitted for consideration as part of the RIR conversion recruitment package.)
  e) The applicant engages in recruitment and prepares the RIR recruitment results report and supporting documentation (the RIR conversion package).
  f) The applicant or its designated representative sends the RIR conversion package to the appropriate BEC in hard copy, by regular mail, certified mail, or mail courier, with the subject "RIR Conversion Package – [case number]" no later than **April 1st, 2007.** ***If no package is postmarked for receipt by this date, the case will be closed. These applications do not revert to the TR queue and the decision to close is not subject to appeal.***
  g) Once the RIR conversion package is received by the BEC, the BEC staff will evaluate the package and determine whether the case can be converted to RIR status.
  h) If the case meets the criteria for RIR conversion, the case will be converted and

processed as an RIR application. If the case is not eligible, or exhibits other deficiencies that make it ineligible for RIR conversion, the employer will receive a letter advising that the RIR conversion request has been denied and the case will be processed as a TR case retaining its original priority date.

6. **What types of cases are appropriate for RIR conversion?**

   - For purposes of clarity, we are defining appropriate job opportunities for approval for RIR conversion as any position which has an SOC code falling into the following:
     1. "In (high) demand" Occupations as listed on O*NET
     2. High growth industries identified by ETA
     3. Any position(s) identified by SWA information as in-demand or shortage occupations.

7. **If an employer's job opportunity has a SOC code that is not within one of these categories, is the employer prohibited from filing an RIR conversion request?**

   - No. However, the applicant will have to provide evidence at the time of filing the RIR conversion package that the job opportunity is in an occupational field in a demand, high growth, or shortage occupation that is appropriate for a request for a waiver of supervised recruitment. The only exception is for Schedule B occupations. By regulation, the Department cannot accept job opportunities listed among the occupations on Schedule B as appropriate for RIR conversion and processing.

8. **Under this opportunity, how long does the employer have to recruit and prepare the RIR conversion package once the employer sends in the "intent to convert to RIR" e-mail?**

   - This depends upon how quickly the applicant decides to take advantage of the "hold-harmless" opportunity and send in an "intent to convert to RIR" e-mail. The sooner the applicant or its representative sends in the intent to convert to RIR e-mail, the more time it will have to recruit before the package is due. All RIR recruitment report submissions for this opportunity must be received by or postmarked to the appropriate BEC no later than April 1, 2007.

9. **What do I need to do to participate and ensure that I can begin recruitment for RIR conversion under this "hold-harmless" opportunity?**

   - Send in an e-mail to the appropriate BEC, using the language provided below, to the e-mail address of the BEC that has the case:
     RIRConversion@DAL.DFLC.US for Dallas, and
     RIRConversion@PHIL.DFLC.US for Philadelphia.
     The e-mail subject line should state: **"Intent to Convert to RIR - [case number]"**.
     Employers should use the following language for the Intent to Convert to RIR E-mail filling in the appropriate information as needed (employer, case number, alien):

Language for Intent to Convert to RIR E-mail

DRAFT

_____ the employer applicant (the applicant) for Permanent Foreign Labor Certification hereby notifies the Backlog Elimination Center (BEC) run by the Department of Labor Office for Foreign Labor Certification of the applicant's intent to convert the Traditional Recruitment Application, with Case # _____ for Alien _____ to a Reduction in Recruitment (RIR) case.

It is acknowledged that:

This request must be received by the appropriate BEC no later than January 20, 2007, and the applicant or its attorney/agent has **not** received a **Recruitment Report Instructions Letter** from the BEC indicating that supervised recruitment has ended and providing instructions for the results.

The applicant understands that their case will be placed "on hold" and will not receive further processing pending receipt of the employer's recruitment results.

The applicant must demonstrate a pattern of recruitment for the job for the RIR conversion request to be accepted.

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The applicant understands that recruitment must take place at **100% of the prevailing wage** to be provided by the BEC in a subsequent communication.

The applicant understands any proposed amendments to the application should be attached to this communication.

The applicant understands that they must send the recruitment results demonstrating a test of the labor market that has identified no qualified US applicants no later than **April 1, 2007**.

Finally, the applicant understands that **failure** to return the results of the recruitment by April 1, 2007 will result in the case being closed, and no further processing will take place for the case. The application will not revert to TR processing and the decision to close will not be subject to appeal.

Signed,

_____ _____

Applicant or Designated Attorney or Agent Date

Each e-mail should refer only to one application.

The employer should then begin recruitment and, when completed, send the RIR conversion package to the BEC in hard copy. The cover sheet should include the following reference: **"RIR Conversion Package - [case number]"**

10. **Will the employer get an e-mail confirming receipt of its request?**

    - The employer or its designated representative will receive an e-mail with the prevailing wage determination and the status of any proposed amendments to the application included by the employer in its intent to convert e-mail. The speed of the response will depend upon the volume of requests sent to the BECs.

11. **Can an employer send one "intent to convert to RIR" e-mail for multiple cases?**

    - No. To make tracking and processing possible for the BECs, and expedite the conversion process, requests for multiple applications should be sent in multiple e-mails, each addressing only one application.

12. **What if the BEC has already initiated job order activity on the employer's case before the employer sends in the e-mail indicating the intent to convert to RIR status under this opportunity?**

    - Once the BEC receives the intent to convert to RIR status e-mail, the case will be put in "hold" status pending receipt of the RIR conversion package to ensure the employer has an adequate chance to recruit and evaluate the recruitment results.

      However, the Department acknowledges that some e-mails will be received after the BEC begins to initiate job order activity. If the conversion request meets the eligibility criteria stated above, once the employer or its designated agent sends in the e-mail with a notice of intent to convert to RIR between December 20, 2006 and January 20, 2007, the employer will be allowed to make the RIR conversion even if the BEC has initiated recruitment activity (assuming the RIR conversion package is complete and the case exhibits no other deficiencies that would otherwise lead to RIR conversion denial).

      In the event that job order activity was initiated by a BEC prior to the intent to convert e-mail being received, and/or if the employer has published an advertisement, the BEC will compile all resumes received from applicants and send them to the employer on or around February1, 2007. Employers must consider these resumes in preparing its RIR conversion package, and provide to DOL the specific, job-related reasons for disqualification of any qualified U.S. workers.

13. **What if the employer has begun recruitment to convert the application to RIR status and has published ads? Can the employer still file for RIR conversion under this**

opportunity?

- If the employer has already placed an advertisement and begun recruitment under TR, it is unlikely that conversion at that point will result in a substantially faster resolution to the application. Such an employer may wish to simply continue with its TR application.

  If the employer in this instance chooses to convert, the requirements for RIR applications have not materially changed. If you have recruited for RIR conversion prior to December 20, 2006, that recruitment should be sufficient for this purpose if it meets the criteria listed below. The recruitment must have taken place within the 180 days prior to submitting the RIR conversion package, and must have been undertaken with the correct prevailing wage.

  In the event that job order activity was initiated by a BEC prior to the intent to convert e-mail being received, and/or if the employer has published an advertisement, the BEC will compile all resumes received from applicants and send them to the employer on or around February 1, 2007. Employers must consider these resumes in preparing its RIR conversion package, and provide to DOL the specific, job-related reasons for disqualification of any qualified U.S. workers.

14. **What if an empoyer submitted an "Intent to Convert to RIR" e-mail prior to the January 20, 2007 deadline, but shortly thereafter, received a letter explaining that the BEC has initiated job order activity on the case and informing the employer to begin recruitment?**

- This likely means that the letter from the BEC had been mailed prior to the e-mail being received and the case being put on hold pending the employer's RIR conversion package under the hold-harmless opportunity. The employer should continue to recruit and prepare the RIR conversion package. The BEC will defer to the e-mail sent before the timeline and allow the conversion if the case meets all the appropriate conversion requirements.

  In the event a BEC initiated job order activity prior to the intent to convert e-mail being received, and/or if the employer has published an advertisement, the BEC will compile all resumes received from applicants and send them to the employer on or around February 1, 2007. Employers must consider these resumes in preparing its RIR conversion package, and provide to DOL the specific, job-related reasons for disqualification of any qualified U.S. workers.

15. **How will an employer know that a TR case has been successfully converted to RIR?**

- The public disclosure system (PDS) will be modified to include TR and RIR case designations. An employer or its designated attorney or agent will be able to check PDS and see whether a given case has been converted to RIR.

  If the conversion is denied for any reason, a letter will be sent to the employer and its designated attorney or agent.

16. **What if an employer receives a prevailing wage from the BEC and wants to challenge it?**

- The employer must submit the challenge documentation to the BEC Certifying Officer (CO). Employers are encouraged to submit documentation refuting the prevailing wage as quickly as possible to avoid problems in meeting their obligation to submit the RIR recruitment package by the deadline (April 1, 2007). If the employer wishes to challenge the BEC determination with a prevailing wage which it has already obtained from the SWA, it may do so. However, SWAs are under no obligation to provide prevailing wage determinations for RIR conversion applications.

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17. **What if the application in not sufficiently complete for the BEC to make a prevailing wage determination?**

    - If a case is not sufficiently complete to allow the BEC to make an appropriate prevailing wage determination, the employer will receive an e-mail to indicate that the RIR conversion cannot continue at this time for the reason stated above. The application will continue being processed as a TR application.

18. **When an employer or its representative receives an e-mail with the prevailing wage determination from the BEC in response to the intent to convert request, does that mean that the BEC has determined that the application is free of deficiencies?**

    - No. For some cases, the BECs may be performing only preliminary application screening sufficient to provide prevailing wage determinations to employers to assist in recruiting and preparation of the RIR conversion package. There may still be deficiencies in the application that result in the RIR not being approved, in a Notice of Findings being issued, etc.

19. **What will the BECs accept as constituting a Pattern of Recruitment for the purpose of an RIR conversion request?**

    - The standard for RIR conversion remains similar to the standard that was in place in the past. The Department, however, recognizes that employers may not have sufficient assurance of an acceptable pattern and may thus be reluctant to file. Therefore, the Department will find an RIR request acceptable in terms of amount of recruitment if it contains at a minimum the following:
        1. One print advertisement in a newspaper of general circulation or an appropriate national journal which includes the same minimum requirements as the ETA-750A.
        2. One other additional recruitment step, to be taken from
            a. GAL 1-97, Change 1, "Measures for Increasing Efficiency in the Permanent Labor Process," such as newspaper ads, job fairs, internet advertising,

            OR

            b. The list of additional recruitment steps for professional positions now listed in 20 CFR 656.17(e)(ii), which include the following:
                - Job fairs
                - Employer's web site
                - Job search web site other than the employer's
                - On-campus recruiting
                - Trade or professional organizations
                - Private employment forms
                - Employee referral program
                - Campus placement office
                - Local and ethnic newspapers
                - Radio and television advertisements

      These will be acceptable even if the recruitment is for a non-professional position.

      The employer must also post the job opportunity internally and/or with the collective bargaining representative for 10 consecutive days.

      As before the recruitment must establish a pattern of recruitment within the six months prior to filing the request to convert to RIR under the "hold harmless" opportunity.

20. **What changes is an employer permitted to make to its application prior to RIR conversion?**

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- The policy for amending an application at a Backlog Elimination Center has not changed. Amendments may be submitted up until recruitment begins. If an employer wishes to amend a case that it also wishes to convert to RIR, it may seek to do so. However, changes to the original Form ETA-750 will not be accepted if they collectively constitute a new job opportunity.

  Amendments must be submitted with the e-mail declaring intent to convert to RIR status. The employer or its attorney or agent may submit the amendment(s) in the body of the e-mail or as an attachment to the e-mail.

21. **What should an employer's recruitment package look like? What should be in the recruitment results report?**

- The RIR "hold harmless" opportunity does not seek to materially change the RIR conversion process. A recruitment report should be substantially similar to all other reports generated and submitted for an RIR conversion request. A report should summarize recruitment activities and results. It does not have to be supported by the resumes of all applicants, but should discuss the recruitment results.

  If, however, U.S. workers were rejected, the reasons for those rejections must be sufficiently clear to enable the BEC to determine if the job opportunity was sufficiently open to U.S. workers. In addition, if the employer received resumes from the BEC in connection with TR recruitment initiated by the BEC and/or the employer prior to the declaration of intent to convert to RIR, employers must consider these resumes in preparing their RIR conversion package and provide to DOL the specific, job-related reasons for disqualification of any qualified workers.

22. **What if an applicant or its designated attorney or agent sends in an e-mail indicating an intent to convert to RIR, but fails to send the RIR conversion package to the BEC postmarked by April 1, 2007?**

- An applicant taking advantage of the hold-harmless opportunity but failing to return the RIR package in a timely manner will result in the case being closed by the BEC.

  The BECs are operating under a date certain to eliminate the permanent labor certification backlog. OFLC has created this "hold harmless" opportunity to alleviate employers' concern that they will begin recruitment only to find out that they are not eligible because the BEC initiated recruitment in the meantime. However, given the date certain to complete the backlog, the BECs cannot place cases in "hold" status for an extended (or indefinite) period of time without assurance that the RIR conversion will take place. Therefore, the BEC will close cases where the RIR conversion package is not postmarked or received by the appropriate BEC by April 1, 2007. As stated above, these applications will not revert to the TR status and the decision to deny the application will not be subject to appeal.

23. **What if an employer sends in an RIR conversion package on time, but the BEC denies the request to convert to RIR?**

- If the case cannot be converted to RIR for reasons other than those covered by the "hold harmless" opportunity (i.e., the BEC completing recruitment), then the case will continue processing as a TR case. The employer may attempt to convert to RIR again after remedying the reasons for denial; however, the "hold harmless" assurance will no longer be in place. In other words, if an RIR conversion package is submitted and the request for RIR conversion is denied, the employer may submit a second request, but if the BEC has begun the recruitment the second request will be denied.

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24. **What are reasons an RIR conversion would be denied?**

    - A request to convert would be denied if the job is not appropriate for RIR conversion (including, but not limited to, a Schedule B occupation). It could also be denied if:
        - The recruitment is insufficiently documented.
        - The recruitment was undertaken at a prevailing wage less than the prevailing wage provided by the BEC and not successfully challenged by the employer
        - There are otherwise eligible U.S. workers found as a result of the recruitment.

25. **If an applicant is unsure at this time whether it wishes to convert to RIR, may it still convert to RIR later? Will the applicant still receive the "hold harmless" benefit?**

    - Employers may continue to submit RIR conversion requests under the TEGL of October 6, 2006.

      However, the hold harmless policy will only be in effect for cases for which an intent to convert request is obtained between December 20, 2006 and January 20, 2007. An employer who files for RIR conversion after the "hold harmless" period (that is, does not submit a request prior to January 20, 2007) will not receive the benefit of the "hold harmless" opportunity and may be denied RIR conversion if the BEC has initiated job order activity.

26. **Can an employer conduct all recruitment in 30 days or less?**

    - The Department is cognizant of the strict timeline imposed by this hold harmless opportunity. It reminds employers that under RIR, recruitment may be conducted within a 30-day time period, as long as it is undertaken to recruit for a bona fide job opportunity and all U.S. workers who apply for any job opportunity are fully considered. In some cases, recruitment may be conducted in a 30-day time period. In others, in order to fully consider the applicant pool, a longer time frame may result. This is why the Department is allowing all employers sufficient time to conduct recruitment and submit the recruitment report, as long as it is postmarked by April 1, 2007.

REDUCTION in RECRUITMENT (RIR)

1. **We are receiving letters from BPCs that are out of order from the dates that they were received by DOL in San Francisco. We have several RIR cases filed 4 months before other RIR cases that we have not received letters. Please explain given First In-First Out.**

    - We are receiving large numbers of cases from numerous sources and data entering them as quickly as possible so it is possible that "newer" cases could be receiving the 45-day letter before "older" cases. When a full and complete response is received, the case is then put in the RIR or TR queue. These queues arrange cases automatically by order of filing date.

2. **Will an RIR case that has been pending at the federal level for about 1 year be transferred to the Backlog Center, if there has been no decision or notice of finding issues?**

    - Yes, all outstanding cases will be transferred to the Backlog Processing Centers.

3. **We called EDD (CA) and heard they will be accepting RIR cases for "another month or so," but we are not sure where do we send RIR cases after EDD cut off date but before 3/28/05?**

    - The SWAs received and date stamped all cases with a postmark date of 3/27/05 or earlier. Cases received by a SWA after that postmarked date will be returned to the applicant for submission to the appropriate National Processing Center in either Chicago

or Atlanta.

TRADITIONAL RECRUITMENT (TR)

1. **We have some long pending traditional cases that were transferred from Iowa to Chicago in October 2002 and beyond and are still pending. We have not received notice that the cases have been transferred. When do we start to worry?**

    - All cases that were at the Chicago Regional Office have been shipped to the Dallas Backlog Processing Center. All cases that were at the Atlanta Regional Office have been shipped to the Philadelphia Backlog Processing Center. As soon as data entry is completed, a Center Receipt Notification Letter (CNRL) or 45-day letter will be sent out.

Procedure for requesting a Duplicate Labor Certificate. ETA-750.

1. Procedure for requesting a Duplicate Labor Certificate. ETA-750.

    - Requests for a duplicate ETA-750 must be initiated by USCIS. The following steps are suggested when requesting a duplicate ETA-750 through USCIS. Please include on the top of the I-140, Petition for Alien Immigrant Worker, a cover sheet (preferably highlighted with colored paper) stating the following:

      LOST OR MISPLACED LABOR CERTIFICATION, REQUEST FOR DUPLICATE, DO NOT REJECT

      On the same sheet, the following information should also be included:
        - Attorney name;
        - Petitioner's name;
        - Beneficiary's name;
        - ETA case number;
        - Priority Date;
        - Specify that the case was filed on ETA-750;
        - Proper fee, signature and all required supporting documents;
        - A print screen showing that the case has been certified.
        - Provide the reason(s) for requesting that the Service Center secure a duplicate, approved labor certificate from DOL, e.g. "Case was certified, original approved labor certificate was never received in the mail."

      * Petitioners are reminded not to submit concurrent I-140 and I-485, Application for Permanent Residence, when submitting petitions without the labor certificate, and with a request that USCIS secures a duplicate ETA-750 from DOL.

      * If Forms I-140 and I-485 are concurrently filed without the ETA-750, but with a request for duplicate labor certificate, the I-140 may be accepted and the I-485 rejected. However, if the fees for both forms are remitted with a single check, both forms will be rejected.

      * Applicants who have submitted a Form I-140 with a request for duplicate labor certificate ETA-750 are encouraged to wait until approval of the Form I-140 before submitting Form I-485. When submitting the Form I-485 subsequent to approval of the Form I-140, the approval notice of the Form I-140 must be submitted as well, along with appropriate fees and supporting documents.

      REMEMBER THAT DOL WILL NOT SEND THE DUPLICATE CERTIFICATE TO YOU. DOL WILL SEND IT TO USCIS.

TRANSFER OF CASES

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1. **How can we know where a case goes?**

   - In terms of cases that were at the Regional Offices, the Philadelphia BPC will have all cases that were in Philadelphia and Atlanta Regional offices. The Dallas Backlog Processing Center will have all cases that were in Dallas and Chicago Regional Offices. Also approximately 20,000 cases from the San Francisco Regional Office were split evenly between Philadelphia and Dallas.

     All SWAs have also been assigned to a Backlog Processing Center as follows:

     Philadelphia Backlog Processing Center: Alabama. Connecticut, Delaware, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Vermont, Virgin Islands, Virginia, Washington, DC, West Virginia

     Dallas Backlog Processing Center: Alaska, Arizona, Arkansas, California, Colorado, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma. Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, Wyoming

2. **When were state cases sent to the BPC?**

   - All SWAs were instructed to make three shipments to the assigned Backlog Processing Centers:

     Shipment 1 by 12/31/04--all unopened cases with filing dates of 12/31/02 and earlier
     Shipment 2 by 3/31/05--all unopened cases with filing dates between 1/1/03 and 12/31/04
     Shipment 3 by 4/22/05--all remaining cases (cases submitted between 1/1/05 to 3/27/05, processed cases, and cases opened but not completed)

3. **Are "unopened" cases from the SWA also being transferred or just "unopened" cases that have reached the DOL Regional Offices?**

   - All SWA cases are being transferred according to the schedule described above. By 4/22/05, there should be no cases left in SWAs. All cases will be at one of the Backlog Processing Centers.

4. **How do you know if any cases transferred from San Francisco Regional Office to the BPCs were lost?**

   - The Backlog Processing Centers perform a reconciliation of the contents of each box with the manifest provided by the sender whether it is a Regional Office or a SWA. There have not been any lost cases.

5. **Can we assume that if our Region's cases have already been moved to a BPC, then these cases are among the earlier filing dates and we can expect them to be processed soon according to FIFO?**

   - All cases, regardless of whether they were in a Regional Office or a SWA, will be processed according to FIFO, once entered into PBLS.

TIMING and ACCESS to INFORMATION on CASE STATUS

1. **Are all backlogged cases expected to be entered in the database by 3/28/05 so that employers can check status on-line?**

   - We are not able to enter all cases into the database by 3/28/05. We are currently exploring steps that may be taken to accommodate inquiries regarding case status.

2. **When do you expect the BPC will begin adjudicating cases?**

    - The Backlog Processing Centers have begun to process cases from the Regional Offices that have been completely entered into PBLS and for which the Backlog Processing Center has received a response to the Notification Receipt letter.

3. **In order for attorneys to be able to make a decision as to withdrawing a current case and refiling it as PERM, it is necessary to know (approximately) what the backlog is (or the priority date) of cases that are being handled at the BPC. Will something like this be made available?**

    - We are currently exploring how we can inform the public of estimated processing time at a BPC.

4. **What will happen to SWA opened cases if a SWA fails to complete the processing by 3/28/05? Will they go to the national processing queue for processing?**

    - No, these cases will be forwarded to the Backlog Processing Centers. As noted earlier, by 4/22/05 all backlog cases will be at the Centers in Dallas and Philadelphia.

5. **When will a public case information system be up and how will we access it?**

    - We will be posting dates the Regional Offices and SWA shipped files to the BPCs on the home page of the Division of Foreign Labor Certification which is http://www.foreignlaborcert.doleta.gov/contacts.cfm.

6. **Once the 45-day letter is received by a backlog center, approximately how soon will labor certification determinations be made?**

    - We are unable to provide an exact timeframe for processing cases after the response to the 45-day letter is received. The processing of a case is dependent upon the timely and complete response of the applicant to all issues and to the FIFO status of a case.

REGIONAL OFFICES

1. **Regarding RIR cases sent from Atlanta: a) which BPC has them; b) how can we get an idea of processing times, and c) where we have a situation with children who are aging out in July, who can we contact?**

    - Philadelphia will have all Atlanta cases and you should contact that Center, but please note that both BPCs operate under a "no expedite" policy.

2. **How many Regional Offices are there now?**

    - There are two Backlog Processing Centers (Philadelphia and Dallas), two National Processing Centers (Atlanta and Chicago), and three satellite offices (New York, Boston, and San Francisco).

3. **Since Atlanta and Chicago are the only national processing centers, what are the functions of all other Regional Offices other than Dallas and Philadelphia?**

    - All Division of Foreign Labor Certification (DFLC) field staff now report to the Chief of DFLC and are responsible for processing both temporary and permanent labor certification applications. Staffs in Philadelphia, Dallas, San Francisco, Boston and New York are involved with the backlogged permanent labor applications and as of 3/28/05 staff in Atlanta and Chicago will process applications filed under the new PERM regulation.

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H-1B Specialty Workers

1. **What is an H-1B?**

   - An employer seeking to employ a foreign worker temporarily in a specialty occupation uses the H-1B program. Specialty occupations require theoretical and practical application of a body of highly specialized knowledge along with at least a bachelor's degree or its equivalent. Examples include architecture, engineering, mathematics, physical sciences, medicine and health, education, and business specialties, etc. H-1B is also used for fashion models of distinguished merit ability.

2. **How do I apply for an H-1B visa?**

   - The H-1B visa classification requires a sponsoring U.S. employer. The employer must file a labor condition application (Form ETA 9035) with the DOL. The application includes declarations including payment of prevailing wages for the position and working conditions offered. The employer must then file an I-129 petition with the USCIS and, unless specifically exempted under law, pay filing fees. Based on USCIS petition approval, the foreign worker may apply for the H-1B visa, admission or a change of nonimmigrant status.

3. **Must I file the LCA online?**

   - Yes. Employers are required to file LCAs electronically using the Department's LCA Online System. The LCA Online System allows employers or their agents, who intend to employ alien worker(s) for a temporary period in professional occupations or as fashion models, the ability to file LCAs (Form ETA 9035E) electronically via the website.

4. **Can I file the LCA by fax?**

   - No. The Department no longer accepts LCAs that are filed by fax.

5. **Can I file the LCA by U.S. mail?**

   - No. The only exceptions are for employers with physical disabilities that prohibit them from filing electronic applications or employers without internet access. These employers must submit a written request to file their LCA by U.S. mail prior to submitting an application. The request should be addressed to:

     Administrator, Office of Foreign Labor Certification
     Employment & Training Administration
     U.S. Department of Labor
     Room C-4312
     200 Constitution Avenue, NW
     Washington, DC 20210

6. **How long will it take to receive the certification or denial?**

   - The Online application system will automatically determine, within minutes, if the submitted LCA is certified or denied based on information that was entered.

7. **Is there a way to check on the status of a case?**

   - If you do not receive a determination within 10 business days, you should resubmit the application.

8. **Can an H-1B worker change employers?**

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- Yes, if the H-1B worker has a new petitioning employer. For more information, you should contact USCIS.

9. **How long can a foreign worker remain in an H-1B status?**

   - Under current law, a foreign worker may be in H-1B status for a maximum period of six years.

10. **Must an H-1B worker be employed full time?**

    - An H-1B worker may work full or part-time and remain in status, depending upon the attestations made on the LCA.

11. **Can a foreign worker travel outside the U.S. while under an H-1B status?**

    - The USCIS regulates the rights of an H-1B worker. For more information, you should contact USCIS.

12. **Can an H-1B status worker immigrate permanently to the U.S.?**

    - An H-1B foreign worker may be the beneficiary of an immigrant petition, apply for adjustment of status, or take other steps toward lawful permanent residence in the U.S. This is known as "dual intent" and has been recognized in immigration law since passage of the Immigration Act of 1990.

13. **How can I get H-1B Disclosure Information?**

    - You can access H-1B disclosure information from our website at http://www.flcdatacenter.com.

14. **How do I file an H-1B complaint?**

    - Complaints should be filed with the Wage and Hour office which has jurisdiction over the physical location of the employer. Check the 'blue pages' in the local telephone book or http://www.dol.gov/esa/contacts/whd/america2.htm.

      The form to file a complaint (Form WH-4) can be downloaded at http://www.dol.gov/esa/forms/whd/WH-4.pdf.

      Complaints on not fulfilling the attestations and pay go to Wage and Hour, while complaints of fraudulent or misrepresented applications (e.g. the company does not exist or never employs the individuals, or someone who is not a representative of the employer signs the application) go to the Office of Inspector General (OIG) which then generally works with the Department of Justice (DOJ) to investigate. Wage and Hour will forward fraud cases appropriately.

H-1C nurses in disadvantaged areas

1. **What is the H-1C visa program?**

   - The Nursing Relief for Disadvantaged Areas Act of 1999 created a new nonimmigrant category for registered nurses (RNs) who will work in areas designated as "Health Professional Shortage Areas" by the U.S. Department of Health and Human Services.

2. **What criteria must a hospital meet to employ temporary foreign RNs under the H-1C program?**

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- The sponsoring hospital/employer must:
  - be a "Subpart D" hospital under the Social Security Act;
  - be located in a health professional shortage area as of March 31, 1997;
  - have at least 190 acute care beds according to the 1994 Cost Report;
  - be reimbursed by medicare for at least 35% of acute care inpatient days (according to the 1994 Cost Report);
  - be reimbursed by medicaid for at least 28% of acute care inpatient days (according to the 1994 Cost Report); and
  - be located in a health professional shortage region or area.

3. **Where can I find a list of Health Professional Shortage Areas as of 1997?**

   - You can find the lists of designated Health Professional Shortage Areas as designated by the Secretary of Health and Human Services (HHS) in the Federal Register, Vol. 62, No. 104, dated Friday, May 30, 1997.

4. **What qualifications must a foreign individual have to qualify as a "registered nurse" under this program?**

   - The criteria a foreign worker must meet to qualify as a "registered nurse" under the H-1C program is as follows:
     - Have obtained a full and unrestricted license to practice nursing in the country where the nurse obtained a nursing education, or have received a nursing education in the U.S. For example:
       (a) Have passed the examination given by the Commission on Graduates for Foreign Nursing Schools (CGFNS);
       (b) Have a full and unrestricted license to practice as a RN in the state of employment or;
       (c) Have a full and unrestricted RN's license in any state and received temporary authorization to practice as a RN in the state of employment; and

     - Be fully qualified and eligible, under the state laws governing the place of employment, to practice as an RN immediately upon admission to the U.S., and be authorized under such laws to be employed by the hospital.

5. **How does a qualified hospital obtain authority to employ H-1C nurses?**

   - The sponsoring hospital must file an application (Form ETA 9081) with the Department of Labor's Employment and Training Administration and, after the application has been accepted by the Department, file a Petition for Nonimmigrant Worker (Form I-129) with the USCIS.

6. **What special obligations must a hospital employing foreign RNs meet under the H-1C program?**

   - Provide every RN who works at the hospital with a copy of its application (Form ETA 9081) which specifies certain terms and conditions of employment;
   - Notify U.S. workers of the intent to petition for H-1C RNs;
   - Pay at least the prevailing wage for the local area in which all RNs are employed by the hospital (including U.S. RNs);
   - Pay at least the same wage paid to similarly employed U.S. RNs;
   - Take timely and significant steps to recruit and retain U.S. RNs to reduce its dependence on temporary foreign nurses;
   - Not hire H-1C RNs during a strike/lockout involving RNs at the hospital;
   - Not lay off any U.S. RNs during the period from 90 days before until 90 days after filing any H-1C petition with the USCIS;
   - Limit the total number of H-1C RNs employed to no more than one-third of the total number of RNs employed at the facility;

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- Not allow any H-1C RN to perform nursing services at any location (worksite) other than a worksite controlled by the facility;
- Not transfer the H-1C RNs from one work place to another.
- Keep certain documents available for public viewing, including the application, prevailing wage determination, and petitions.

7. **Can I hire a nurse under a different program?**

   - Yes. Employers that do not qualify for the H-1C program may hire nurses using the Permanent program or the H-1B program. Since a professional nurse is a Schedule A occupation, employers may file a Form ETA 750 directly with the USCIS. Employers may also hire a nurse as an H-1B. However, the H-1B program requires that a nurse on an H-1B have a bachelor's degree and the job that the nurse is hired to perform requires a bachelor's degree. USCIS ultimately makes the decision as to whether or not a job qualifies for an H-1B visa.

H-2A temporary labor certification (agricultural)

1. **What is an H-2A certification?**

   - The H-2A labor certification program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature.

2. **How long is an H-2A valid?**

   - The H-2A certification is valid for up to 364 days. As temporary or seasonal agricultural employment, the work is performed at certain seasons of the year or for a limited time period of less than one year when the employer can show that the need for the foreign worker is truly temporary.

3. **What constitutes a temporary need for H-2A temporary labor certification?**

   - The employer's need for a worker must be of a seasonal or other temporary basis. A seasonal basis is the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A temporary basis is for a limited time only or is contemplated for a particular piece of work, usually of a short duration.

4. **What is the required time frame for filing an H-2A temporary labor certification application?**

   - Employers are advised to file requests for H-2A certifications at least 45 days before certification is needed.

5. **If my application is denied, can I still file with United States Citizenship and Immigration Service (USCIS)?**

   - Yes. The DOL decision is only an advisory to USCIS in H-2A cerification applications.

TEGL 11-07, Change 1 Questions from SWA Training Webinars – Round 1

Positive Recruitment

1. **For states in which H-2A processing takes place in only certain locations, should employers' advertisements direct applicants to the nearest local State Workforce Agency (SWA) office or the nearest location that processes H-2A applications?**

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- Because the employer must advertise in the area of intended employment, advertisements should direct applicants to the nearest local SWA office. If the nearest local SWA office does not have access to the H-2A job offer, it should request a copy from the nearest location in the state designated for processing H-2A applications.

Job Orders

2. **Now that America's Job Bank is no longer operable, is there a list of acceptable or preferred sites on which SWAs should circulate electronic job orders?**

   - With the advent of the Internet, the need to "clear labor" among states (i.e., connect job seekers and employers across state lines, is no longer a challenge, as the Internet has enabled easy and universal access to job openings. State-sponsored job banks, private job banks, and private business job listings on the Internet are equally available to everyone, regardless of area of residence. SWAs are encouraged to communicate with other SWAs to decide on an effective way to disseminate job orders (e.g., via fax or email).

50% Rule

3. **How will a SWA know the date foreign workers depart for the place of employment? Who determines what amount of time is reasonable to allow foreign workers to travel from their homes to the place of employment?**

   - Title 20 CFR § 655.106(e)(1)(i) sets forth the guidelines for determining the date foreign workers depart for the place of employment. Unless the employer informs the SWA in writing of a different departure date, the date H-2A workers depart for the place of employment is considered to be three days before the employer's date of need.

4. **Why must the SWA, and not the employer, make a determination that certain workers are eligible to work legally in the United States?**

   - Section 274A(a)(1)(B) of the Immigration and Nationality Act, as amended (INA), requires every person or entity who hires workers to verify employment eligibility of every such hired worker. Section 274A(a)(1)(B) also requires every agricultural association, agricultural employer, or farm labor contractor who recruits or refers workers for a fee, to verify employment eligibility of every such recruited or referred worker. However, § 274A(a)(5) of the INA stipulates that SWAs may verify employment eligibility of referred workers and issue a certification of such verification. Employers in possession of such a certification are deemed to have complied with the verification process. Section 218(c)(3)(A) of the INA stipulates that H-2A labor certifications may only be issued if DOL determines there are not sufficient "eligible individuals who have indicated their ability to perform such labor or services." The Department of Labor (Department or DOL) fulfilled its statutory mandate by publishing regulations at 20 CFR § 655.106(a) that state "no U.S. worker-applicant shall be referred unless such U.S. worker…is able, willing, and eligible to take such a job." Section 218(i)(1) of the INA defines an eligible individual, with respect to employment, as "an individual who is not an unauthorized alien…with respect to that employment." Taken together, these provisions prohibit SWAs from referring ineligible (including non-work authorized) workers to an H-2A job order. In order to perform their referral function under the H-2A program, SWAs must verify work authorization. Therefore, SWAs are instructed to complete the I-9 process to determine whether a worker is eligible to work in the job opportunity prior to referring such worker to an H-2A job opportunity. U.S. Citizenship and Immigration Services (USCIS) regulations at 8 CFR § 274a.6 set forth the process by which SWAs may complete Forms I-9 prior to referral and issue certifications to employers. Employers in possession of a SWA-issued certification for a referred worker are not required to complete Form I-9 for that worker.

5. **Which SWA official must complete Form I-9 and retain related records?**

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- The SWA official who actually refers the worker to an H-2A job order must ensure Form I-9 has been completed by the SWA. Because original (not photocopied) documents must be examined and recorded, any SWA official who has personal contact with the worker may complete Form I-9. If multiple SWA officials at various levels have personal contact with the worker, the SWA may implement its own plan for delegation of responsibilities to ensure Form I-9 is completed prior to referral. While the SWA that completes Form I-9 must retain the completed form and accompanying certification for three years, such retention may take place on-site or off-site, so long as the SWA is able to retrieve the records within three days of a request made by a Department of Homeland Security (DHS), Department of Justice (DOJ), or DOL official.

6. **Why are SWAs only required to verify employment eligibility for workers referred to H-2A job orders?**

   - At this time, SWAs are only required to verify employment eligibility for workers referred to H-2A job orders. The reasons for requiring verification for H-2A referrals are discussed elsewhere in this document. In the future, the Employment and Training Administration may expand the employment eligibility verification requirement to include referrals to other types of job orders.

7. **Is it discriminatory to verify employment eligibility only for workers referred to H-2A job orders? Does it matter whether the majority of workers referred to H-2A job orders are of a particular national origin?**

   - It is not discriminatory to verify employment eligibility only for workers referred to H-2A job orders. Such workers must by statute be eligible workers, authorized to work in the job opportunity. The verification requirement applies to all H-2A applicants, regardless of national origin, which ensures the provision will not be applied in a discriminatory fashion.

I-9 Process

8. **The Form I-9 handbook indicates Forms I-9 should not be completed for job applicants, but should only be completed for people actually hired. When should SWAs complete the I-9 process?**

   - USCIS regulations at 8 CFR § 274a.2 apply to employers; USCIS regulations at 8 CFR § 274a.6 apply to SWAs and incorporate some, but not all, portions of § 274a.2. The Form I-9 handbook reflects the requirements found in § 274a.2, only some of which apply to SWAs. While § 274a.2 instructs employers to complete Forms I-9 for new hires, but not job applicants, § 274a.6 states that SWAs may complete Forms I-9 for workers prior to referral.

9. **When must a SWA issue a certification to an employer? Should SWAs send copies of completed Forms I-9 to employers?**

   - USCIS regulations at 8 CFR § 274a.6(c) stipulate that SWAs that complete the I-9 process in accordance with regulatory requirements must issue a certification for each referred worker whose employment eligibility was verified through the process. The certification must be issued directly to the employer, in person or by mail, within 21 business days. SWAs should not send employers a copy of Form I-9. The employer must retain the certification in lieu of completing Form I-9.

10. **What information must be contained in the referral notice?**

    - A SWA-issued job order or other referral form serves as evidence of the employer's compliance with § 274A(a)(1)(B) of the INA during the period of time between SWA

referral and employer receipt of the SWA certification. USCIS regulations at 8 CFR § 274a.6(c)(2) state that such job orders or other referrals forms must contain the following: (1) The worker's name; (2) The date of referral; (3) The job order number or other identifying referral number; (4) The name and title of the SWA official who referred the worker; and (5) The SWA's telephone number and address.

11. **If a SWA refers the same worker to multiple H-2A job orders, must the SWA complete a new I-9 for each referral?**

- If a SWA refers to an H-2A job order a worker who was previously referred by the SWA to another H-2A job order, the SWA may choose to either: (1) complete a new Form I-9 and issue a new certification to the employer, or (2) examine the old, previously completed, Form I-9 and take appropriate action. IF the SWA chooses to examine the worker's old Form I-9 AND no more than three years have passed since completion of the old Form I-9 AND Form I-9 shows the worker is still authorized to work, THEN the SWA should update Form I-9 by completing section 3 AND the SWA should issue a new certification to the employer. Otherwise, the SWA should complete a new Form I-9 and issue a new certification to the employer. To complete section 3: (1) If the worker has a new name, different from listed in section 1, enter the new name in part A. (2) Because the SWA is not making a hiring decision, do not complete part B. (3) If the worker's work authorization expires on or after the date of updating Form I-9 and the worker chooses to present a new combination or work document with a later expiration date, annotate the new document information in part C and include the new expiration/restriction information on the employer certification. The new document may be a different type of combination or work document than initially presented. If the work authorization has already expired, the SWA must complete a new Form I-9 and may not merely update the old Form I-9. (4) Sign and date the attestation at the bottom of section 3.

12. **What will happen if a SWA completes Form I-9 and DHS discovers the worker is not actually authorized to work?**

- A SWA cannot be charged with a verification violation if it properly completes Form I-9. The SWA will have a good faith defense against sanctions (unless the government can show it had knowledge of the unauthorized status of the worker) if the SWA has done the following: (1) Ensured the worker fully and properly completed section 1 of Form I-9 prior to referral; (2) Reviewed the required documents, which reasonably appeared genuine and related to the person who presented them; (3) Fully and properly completed section 2 of Form I-9, and signed and dated the employer certification (minus the date of hire); (4) Retained Form I-9 for the required period of time; and (5) Made Form I-9 available upon request of a DHS, DOJ, or DOL officer.

13. **Are SWAs required to complete Forms I-9 for all H-2A referrals on/after December 15, 2007?**

- TEGL 11-07 and superseding guidance TEGL 11/07, Change 1, became effective immediately upon issuance. The guidance clarified SWAs' responsibility to verify employment eligibility of each worker prior to referral in response to an H-2A job order. Because the Department was aware that many SWAs did not currently have reliable employment verification systems in place, the Department advised it was granting SWAs a grace period and would begin enforcing the verification requirements beginning December 15, 2007. SWAs are instructed to verify such employment eligibility through the basic I-9 process. Once E-Verify training has been finalized, SWAs may elect to verify employment eligibility through the E-Verify I-9 process. The E-Verify I-9 process involves the E-Verify process in addition to the basic I-9 process.

Acceptable Documents

14. **What relevance did the document portion of the training have on TEGL 11-07, Change 1?**

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- TEGL 11-07, Change 1, clarifies that SWAs must verify the employment eligibility of any worker referred to an employer in response to an H-2A job order. As specified in the training, SWAs must comply with the I-9 process outlined in USCIS regulations to verify such eligibility. That process requires SWAs to examine required documents and record document information in section 2 of Form I-9. The Office of Foreign Labor Certification (OFLC) does not expect SWAs to become document experts or remember the background details of every acceptable document. The document portion of the training was intended to familiarize SWAs with various acceptable documents. The complete list of acceptable documents is found on page 2 of Form I-9. SWAs are encouraged to refer to the training materials and/or the Handbook for Employers (M-274) if additional guidance is needed to determine which documents are acceptable.

15. **Form I-9 instructions indicate an employer may accept a receipt for a document. Why did the training indicate SWAs may not accept receipts?**

    - USCIS regulations at 8 CFR § 274a.2 apply to employers; USCIS regulations at 8 CFR § 274a.6 apply to SWAs and incorporate some, but not all, portions of § 274a.2. Form I-9 instructions reflect the requirements found in § 274a.2, only some of which apply to SWAs. While § 274a.2 allows employers to accept receipts during the I-9 process, § 274a.6 states that SWAs may not accept receipts.

16. **May a SWA accept a document that expires on the day it is examined?**

    - For documents that must be unexpired, each document must contain an expiration date that is on or after the date the SWA is examining the document. A document is considered valid through 11:59pm on its expiration date.

17. **When must a SWA require a document with a photograph?**

    - A worker may choose to submit either a combination document from list A, or an identity document from list B and an employment eligibility document from list C. If a SWA uses E-Verify, and a worker presents an identity document from list B, that identity document must contain a photograph. Otherwise, the SWA may not limit the documents on lists A, B, or C which are acceptable for the I-9 process.

18. **When may a worker present an I-94 as documentary evidence of identity and employment authorization?**

    - A foreign passport with an I-94 that authorizes work in the job opportunity is listed on Form I-9 as an acceptable combination document under list A. An I-94 is only evidence of employment eligibility if the class of admission allows work in the specific job opportunity. The class of admission on an I-94 indicates the type of temporary visa under which the foreign national was admitted. A foreign worker admitted under a temporary work visa (e.g., H-1B, H-1C, H-2A, H-2B, L-1A, L-1B, O-1, O-2, P-1, P-2, P-3, Q-1) is only allowed to work for the employer that filed a subsequently approved I-129 petition with USCIS. Furthermore, the worker is only allowed to work in the specific job opportunity for which USCIS approved the I-129 petition. Any person admitted to the United States under a temporary work visa (including H-2A) will report directly to the petitioning employer, and will not need to apply with a SWA for referral. There are only a few classes of foreign nationals for which an I-94 would authorize work for any employer in any job opportunity: (1) refugees; (2) asylees; and (3) certain nationals of the Federated States of Micronesia, the Marshall Islands, and Palau. The I-94 will contain an annotation that clearly indicates such status. A foreign national admitted under any other class of temporary admission (including H-2A) is automatically precluded from referral to an H-2A job order on the basis of an I-94 alone. If such a person is subsequently granted "open market" work authorization (i.e., is authorized to work for any employer in any job

opportunity), USCIS will issue an Employment Authorization Document (e.g., Form I-766), listed separately on Form I-9 as an acceptable combination document under list A.

19. **Must the second identity document under List B be issued by a U.S. government entity, or may it be issued by a foreign government entity?**

- List B allows workers to submit as an identity document an identification card issued by a Federal, state, or local government entity that contains a photograph or identifying information. Such document must be issued by a U.S. Federal government entity, a U.S. state government entity, or a U.S. local government entity. It may not be issued by a foreign government entity. The term "state" refers to any of the 50 states in the United States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

E-Verify

20. **When will E-Verify be available?**

- E-Verify is expected to be available in January 2008 for a pilot program with a limited number of SWAs. E-Verify will likely be available for all SWAs by June 2008. The Department is entering into a separate Memorandum of Understanding (MOU) with DHS and the Social Security Administration (SSA) whereby SWAs may participate in E-Verify with responsibilities different from those under which employers or designated agents operate (e.g., SWAs will verify employment eligibility prior to a hiring decision). Once the MOU has been approved by all three agencies, OFLC will advise SWAs of training opportunities on SWA use of the E-Verify system. Those SWAs who are interested in being part of the E-Verify pilot program should contact OFLC via e-mail at oflc.e-verify@dol.gov.

21. **How can a SWA comply with the TEGL if state law prohibits the use of E-Verify?**

- SWAs must verify employment eligibility of each worker prior to referral in response to an H-2A job order. SWAs are instructed to verify such employment eligibility through the basic I-9 process. Once E-Verify training has been formalized, SWAs may elect to verify employment eligibility through the E-Verify I-9 process. The E-Verify I-9 process involves the E-Verify process in addition to the basic I-9 process. While DOL strongly recommends SWAs to use E-Verify, E-Verify is a voluntary process. Those SWAs who are prohibited by law to participate in E-Verify may elect to continue verification through the basic I-9 process. No state may pass a law to prohibit the basic I-9 process, as § 274A of the INA mandates the process for every person or entity who hires workers and for every agricultural association, agricultural employer, or farm labor contractor who recruits or refers workers for a fee.

22. **Is there an advantage to using E-Verify?**

- E-Verify is the best means available for determining employment eligibility and the validity of Social Security numbers. In addition, E-Verify's Photo Screening Tool is the first step in giving users the tools they need to detect identity theft in the employment eligibility process. E-Verify reduces unauthorized employment, minimizes verification-related discrimination, is quick and non-burdensome to users, and protects civil liberties and worker privacy. Initial verification returns results within three to five seconds.

23. **Is there a cost associated with E-Verify? Which SWA staff will have access to E-Verify?**

- E-Verify is a free and simple-to-use Web-based system that electronically verifies employment eligibility. Users may access E-Verify using any Internet-capable Windows-based personal computer and web browser of Internet Explorer 5.5, Netscape 4.7, or higher (with the exception of Netscape 7.0). To participate, a SWA must register

and accept the MOU that details the responsibilities of DHS, SSA, and the SWA. Each site that will perform employment verification queries must register to use E-Verify and sign an individual MOU. Multiple individual users at one site may access the system under the same site MOU. Once a user has completed a tutorial, he or she may begin using the system to verify employment eligibility.

24. **How can SWAs use E-Verify if E-Verify can only be used after a worker is hired?**

- USCIS regulations at 8 CFR § 274a.2 apply to employers and require employers to complete Form I-9 within three days of hire. The E-Verify MOU used by employers prohibits employers from utilizing E-Verify to verify employment eligibility of a worker before that worker is hired and/or before the employer completes Form I-9. In contrast, USCIS regulations at 8 CFR § 274a.6 apply to SWAs and allow SWAs to complete Form I-9 prior to referral. DOL is entering into a separate MOU with DHS and SSA whereby SWAs may participate in E-Verify with responsibilities different from those under which employers or designated agents operate. This MOU will allow SWAs to utilize E-Verify to verify employment eligibility of workers prior to referral.

25. **Is there any concern regarding reports that E-Verify is an inaccurate system, especially for naturalized U.S. citizens?**

- The recent report entitled "Findings of the Web Basic Pilot Evaluation" prepared by Westat and submitted to DHS September 2007 suggests that such media reports are unfounded. See http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf. According to the report, the overall rate of erroneous tentative non-confirmations from October 2006 through March 2007 was approximately 0.51%. Because the erroneous tentative nonconfirmation rate is higher for foreign-born U.S. citizens than for non-citizens or native-born U.S. citizens, DHS has indicated it is currently in the process of exploring and implementing many of the Westat recommendations that address the higher erroneous tentative nonconfirmation rate for naturalized U.S. citizens. It should be noted that no adverse action may be taken based solely on a tentative nonconfirmation. Every worker who is issued a tentative nonconfirmation has the opportunity to resolve such tentative nonconfirmation by phone or in person. After a worker is offered an opportunity to contest and resolve the tentative finding, the E-Verify system will issue an authorized determination, an unauthorized determination, or a final nonconfirmation. During the interim period in which the tentative finding is being resolved, the SWA will refer the worker to the H-2A job order.

Other

26. **Who will be monitoring SWA participation in the I-9 process?**

- OFLC will be monitoring SWA participation in the I-9 process.

27. **What steps will be taken to protect SWAs from abuse by agents who wrongfully accuse SWAs of non-compliance with DOL regulations?**

- TEGL 11-07, Change 1, as explained during the training sessions, requires the following additional activities: (1) SWA completion of Form I-9 for every worker referred to an H-2A job order, and (2) SWA issuance of a certification to the employer for each worker found eligible for employment after completion of a Form I-9. A SWA that complies with such activities will be in compliance with DOL regulations and agency guidance. Should a situation arise in which an agent accuses a SWA of non-compliance with DOL regulations, the SWA should consult its own legal counsel for the best course of action.

28. **Please define the term "SWA."**

- The acronym SWA stands for "State Workforce Agency." USCIS regulations at 8 CFR §

274a.1(i) defines the term "State employment [workforce] agency" as "any State government unit designed to cooperate with the United States Employment Service in the operation of the public employment service system."

29. **Please define the term "employment eligibility."**

    - Section 218(i)(1) of the INA defines eligibility, with respect to employment, as "an individual who is not an unauthorized alien…with respect to that employment." The following groups of persons are authorized to work: (1) U.S. citizens and nationals, (2) lawful permanent residents of the U.S., and (3) foreign nationals with work authorization that permits employment in the job opportunity (e.g., refugees, asylees, foreign nationals granted employment authorization by USCIS because of their Temporary Protected Status, foreign nationals granted employment authorization by USCIS because of a pending USCIS Application for Adjustment of Status).

H-2B temporary labor certifications (Nonagricultural)

1. **What is an H-2B certification?**

    - The H-2B labor certification program establishes a means for U.S. nonagricultural employers who anticipate a shortage of domestic workers, to bring temporary nonimmigrant foreign workers into the U.S. H-2B eligibility requires that the job and the U.S. employer's need for the foreign worker be of a temporary nature. The need must be for one year or less and can be either a one-time occurrence, seasonal, peakload or intermittent. Temporary employment should not be confused with part-time employment which does not qualify for temporary (or permanent) labor certification.

2. **How long is the H-2B labor certification valid?**

    - The H-2B labor certification application shall be valid for the period of employment indicated on the Form ETA 750; however, in no event shall the validity period exceed 364 days. The employer may apply for re-certification for an additional two years, but on each new application, the employer must justify the reason for the renewal request. H-2B certification is not transferable from one employer to another. Certificaiton is issued only or a specific job opportunity, for a specific number of workers, and for a specific employment period.

3. **What constitutes a temporary need for H-2B temporary labor certification?**

    - The job must be temporary in nature and the need is for one year or less. The employer's need cannot be ongoing or continuous. The employer has the burden of establishing the facts necessary to support a finding that the need is either a one-time occurrence, seasonal, peakload or intermittent need.

4. **What is the required time frame for filing an H-2B temporary labor certification application?**

    - Employers are advised to file requests for H-2B certifications no more than 120 days but at least 60 days before certification is needed. SWAs have been instructed to return H-2B certification applications filed more than 120 days before the worker is needed.

5. **What if my application is denied, can I still file with USCIS?**

    - Yes. The DOL decision to grant or deny certification is only an advisory to USCIS.

6. **Does the USDOL have a checklist that H-2B stakeholders can use to verify that all the required information and documentation is included in the H-2B application?**

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- Yes. Please visit our website to download a copy of the *H-2B Stakeholder Filing Tips* sheet at http://www.foreignlaborcert.doleta.gov/h-2b.cfm

7. **What form do I use for "returning" H-2B workers?**

   - H-2B labor certification program requirements do not distinguish between returning foreign workers and first-time (i.e., new) foreign workers. For purposes of labor certification, an employer must prepare and submit to the Department of Labor Form ETA 750, Part A, and go through the same process for all H-2B workers. Employers whose certifications are approved by DOL identify returning workers when filing their non-immigrant worker petitions with the Department of Homeland Security, United Stated Citizenship and Immigration Services (USCIS), to exempt those workers from the H-2B annual numerical cap.

8. **Who is authorized to make changes to the ETA Form 750, Part A?**

   - Employers, attorneys, and/or agents are authorized to make modifications to the ETA Form 750, Part A, as long as each modification is initialed and dated on the original form. If the employer is represented by an attorney, the attorney must file a Notice of Appearance (G-28) with the application package. If the employer's agent files, the "Authorization of Agent of Employer" portion of the ETA Form 750 must be signed. Having established such individual is the employer's authorized representative, an attorney or agent may make representations on the ETA Form 750, Part A, as long as the attorney or agent initials and dates each modification on the original form.

9. **Is it permissible for an employer to file a single application that will cover all his temporary employees during the entire period of need where the work will be performed in disparate states, e.g., in California and Florida?**

   - No. Training and Employment Guidance Letter (TEGL) 21-06, Section III, states that an employer desiring to use foreign workers for temporary non-agricultural employment must file a complete ETA Form 750, Part A, with the State Workforce Agency (SWA) serving the area of intended employment. Section VII further notes that a temporary labor certification is valid only for the number of aliens, the occupation, the area of intended employment, the specific occupation and duties, the period of time, and the employer specified on the Application for Alien Employment Certification, ETA Form 750. The area of intended employment means the area within normal commuting distance of the place of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA) (including a multistate MSA, *see below*), then any place within the MSA is deemed to be within normal commuting distance. In the circumstance described above, the employer must file two (2) separate applications for temporary labor certification; one with the California SWA and one with the Florida SWA.

10. **What defines a Metropolitan Statistical Area (MSA)?**

    - MSAs are geographic entities defined by the U.S. Office of Management and Budget for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but less than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measures by commuting to work) with the urban core. For more information on MSAs, please visit the U.S. Census Bureau at http://www.census.gov/population/www/estimates/metroarea.html

11. **Assuming we have more than one (1) work site location within an MSA and different prevailing wage rates exist, which rate do we write on the ETA Form 750, Part A, and**

use in subsequent advertising for recruiting U.S. workers?

- In this circumstance, the employer shall offer the highest prevailing wage across all the states and counties covered by the MSA on the ETA Form 750, Part A.

12. **Assuming we have more than one (1) work site location within an MSA that cross SWA jurisdictions, where do we file the H-2B application?**

    - Although the foreign workers may be working in multiple states within the MSA, the employer should submit a single application to the SWA where the employment will begin. In those instances where the employment crosses NPC jurisdictions as well, the NPC that has jurisdiction over the SWA where the employment will begin shall process the application. In accordance with Section IV.C of TEGL 21-06, the SWA shall clear the job order for 10 calendar days with the appropriate state(s) where the work is to be performed and accept for referral to the employer qualified applicants from the state(s).

13. **When completing the ETA 750 form(s), specifically item #7, how should we indicate the multiple locations within the MSA?**

    - To be consistent with the guidance provided in TEGL 21-06, the employer should do the following:
        - (1). Under Item #7, list the work site address where the employment will begin, since this should correspond to the SWA where the application is initially filed;
        - (2). Under Item #7, write the phrase "see addendum for additional worksites within MSA"; and
        - (3). Attach an addendum to the ETA Form 750, Part A, which includes a listing of all the worksite locations.

14. **With regard to the required supporting documentation to support Item 18b, should this documentation be filed with the initial ETA 750, or is this information that is not needed and/or reviewed until the final determination. For example, is it sufficient to send all of the supporting documentation with the final application, which also will include advertising and recruitment efforts?**

    - In accordance with TEGL 21-06, Section III.D, every H-2B application must include supporting evidence and documentation that justifies the chosen standard of temporary need. The entry made by the employer on Item 18b is an integral part of justifying that the nature of the employer's need is temporary. Such supporting evidence and documentation must be submitted to the State Workforce Agency along with: (a) two (2) originals of the ETA Form 750, Part A, signed and dated by the employer; (b) documentation of any efforts to advertise and recruit U.S. workers prior to filing the application, which can be described in Item 21 of the ETA Form 750, Part A; and (c) a detailed temporary need statement. No variance to this application filing requirement will be granted.

15. **Is it permissible for an employer to file a single application where multiple worksites are located within a Metropolitan Statistical Area (MSA) and the worksites <u>do not</u> cross SWA jurisdictions?**

    - Yes. Training and Employment Guidance Letter (TEGL) 21-06, Section III, states that an employer desiring to use foreign workers for temporary non-agricultural employment must file a complete ETA Form 750, Part A, with the State Workforce Agency (SWA) serving the area of intended employment. The "area of intended employment" means the

area within normal commuting distance of the place of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA), then any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. In the circumstance describe above, the employer may file a single application that covers all of the worksite locations within a MSA within the jurisdiction of the same SWA.

Important Note: If the SWA determines that different prevailing wages exist for the occupation being requested for certification within the MSA, then the employer shall offer the highest prevailing wage across all the cities/counties covered by the MSA on the ETA Form 750, Part A.

16. **Please clarify the difference between seasonal and peakload. We have a landscaping business, which requires more workers in the spring, summer, and fall. Are we seasonal or peakload?**

- Your need is peakload. If your business completely shuts down for the winter, your need for the services to be performed would be seasonal.

17. **Are employers required to submit the summarized monthly payroll report to substantiate a seasonal or peakload need under the H-2B visa classification?**

- No. As stated in Training and Employment Guidance Letter (TEGL) 21-06, each H-2B application must contain supporting evidence or documentation that justifies the chosen standard of temporary need. Employers may submit any combination of evidence or documentation, and examples of acceptable documentation for the most common standards of seasonal and peakload need include, but are not limited to, the following:
  a. Signed work contracts, letters of intent from clients, and/or monthly invoices from previous calendar year(s) clearly showing work will be performed for each month during the requested period of need on the ETA Form 750, Part A, Item – 18b. This type of documentation will demonstrate the employer's need for the work to be performed is tied to a season(s) of the year and will recur next year on the same cycle;

  b. Annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed for each month during the requested period of need on the ETA Form 750, Part A, Item – 18b.; or

  c. Summarized monthly payroll reports for a minimum of one previous calendar year that identifies, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system. Employers should be prepared to provide the documents utilized to generate the summarized monthly payroll reports if requested by the NPC Certifying Officer.

The types of supporting evidence/documentation listed under Section III.D.4 of TEGL 21-06 is not exhaustive, but rather suggestive of the types of acceptable evidence/documentation the Department of Labor would recommend employers use in substantiating their temporary need. For example, if the employer chooses to substantiate his/her temporary seasonal or peakload need for foreign workers based solely upon letters of intent from clients, then the SWA should accept such evidence as the official documentation supporting the H-2B application.

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18. **Do we have to provide all the documents listed TEGL 21-06, e.g., contracts, letters of intent, invoices, and payroll reports? How many supporting documents are necessary in order to establish a need for foreign workers with respect to monthly invoices, contracts and letters of intent?**

    - The documents listed in TEGL 21-06 constitute examples of supportive evidence or documentation for the most common standards of seasonal and peakload need. These documents can best provide adequate documentation of a seasonal or peakload need because they are most likely to contain the information that demonstrates the need is temporary. The TEGL provides indications of what information must be in each document in order to provide the necessary proof. Most importantly, all of these documents need to have dates of service that correspond to the period of need stated on the ETA 750. Each case must be analyzed based on its own documentation, but every case will be reviewed to see if the documents supporting the statement of temporary need contain the basic indicators of a true temporary need. In many cases, employers can use a combination of the documents listed in the TEGL supplemented with any other documents that are appropriate for their industry, such as hotel occupancy and staffing reports, in order to draw a complete picture that will show seasonality or peakload need.

19. **How many letters of intent, contracts, or monthly invoices do we send to prove our need? If we have 150 invoices, does DOL want them all?**

    - The employer must submit documents that adequately demonstrate the temporary need. If that is accomplished with three invoices that show the nature of a seasonal need for the months required and for the number of employees requested, then the employer need only provide three. If, on the other hand, the need for the total number of months and employees requested can only be documented through 150 invoices, then the application should include all 150. In most cases, a sample set of work contracts or invoices can demonstrate the need for the requested months and employees.

20. **What documents should a new company provide if they have no records for temporary need such as payroll records or invoices from the previous year?**

    - The documentary list is not exhaustive and an employer is not required to provide every item on the list. An employer may submit any combination of documentation necessary, as long as the documents sufficiently show the temporary nature of the need. See TEGL 21-06, Part III (D)(4). A new business might not have employee records to provide from the previous year, but should have signed contracts or letters of intent from clients sufficiently detailed to clearly show that work will be performed for each month during the requested period of the need stated on the ETA Form 750. Ancillary documents such as newspaper articles, promotional materials, and official Visitor Bureau's documents might be added to the documents to augment the showing of the temporary need in the case of new businesses. However, the documentation of the business' own activities is essential to show the need for services of H-2B workers.

21. **If we did not receive our approval this year until May, but needed the workers in March, and could not open until we received our workforce, how will we be able to prove our need next year for March?**

    - The employer is encouraged to indicate that its previous year's workers arrived late due to NPC delays in processing cases on its temporary needs statement. The employer must also submit supporting documentation from previous years to prove its standard of need.

22. **Are payroll reports required for all positions in the facility or company or just for the position for which H-2B workers are requested?**

    - The Department only requires payroll reports to demonstrate the temporary need for the

specific job opportunity being requested on the ETA Form 750, Part A.

23. **Should we include American workers, other foreign workers (non-H-2B) and H-2B workers in the temporary column of the payroll summary reports?**

    - Yes, all temporary full-time workers, including U.S. temporary workers, non H-2B foreign workers, and H-2B workers should be included in the payroll summary reports under the temporary column.

24. **Are employers required to submit a sample advertisement to the SWA for approval prior to publication in a newspaper of general circulation?**

    - No. Pre-approval of the employer's job advertisements is an unnecessary step and causes excessive delays in SWA processing. Once the SWA is satisfied (i.e., following correction of all deficiencies) that the employer's job opportunity, as written on the ETA Form 750, Part A, is offering at least the prevailing wage, does not contain unduly restrictive job requirements or a combination of duties not normal to the occupation or terms and conditions that inhibit the effective recruitment and consideration of U.S. workers, the employer is then responsible for complying with the newspaper advertising and recruiting instructions issued by the SWA and the Department's policies and procedures set forth in TEGL 21-06, Section IV. If it is determined that the job opportunity contained requirements or conditions which preclude consideration of U.S. workers or which otherwise prevented their effective recruitment, the NPC Certifying Officer will deny the temporary labor certification. In making such a determination, the NPC Certifying Officer will consider all information disclosed on the ETA Form 750, Part A, the content of the employer's newspaper advertisements, and the disposition of all referrals of qualified U.S. workers on the recruitment report.

25. **Are employers required to advertise on a Sunday in circumstances where the SWA has recommended a newspaper with a daily circulation?**

    - No. TEGL 21-06, Section IV, contains no requirement that the employer advertise on a Sunday. The Department only requires the employer to advertise the job opportunity in a newspaper of general circulation for 3 consecutive calendar days or in a readily available professional, trade or ethnic publication, whichever the SWA determines is most appropriate for the occupation and most likely to bring responses from U.S. workers.

26. **Is it necessary that a union be contacted in every instance when engaging in recruitment with the State Workforce Agency (SWA)?**

    - No, it is not necessary in every instance to contact a union to solicit potential U.S. workers for a job opportunity. Unions should be contacted only if they exist for the occupation being requested for temporary labor certification. TEGL 21-06, Section IV, states the employer shall document that union and other recruitment sources, appropriate for the occupation and customary to the industry, were contacted and either unable to refer qualified U.S. workers or non-responsive to the employer's request. If no union exists for the occupation, the employer should indicate this under Item 19 of the ETA Form 750, Part A, regardless of whether the employer was requested to contact a union by the SWA.

27. **Many newspapers have gone to electronic tear-sheets. Are these acceptable?**

    - Electronic tear-sheets provide too much potential for fraud. The employer must provide either the actual page from the newspaper, which shows the name of the newspaper, the ad, and the date it ran (a copy is acceptable as long as all three things can fit on one page without folding over any part of the newspaper) or an affidavit from the newspaper confirming the date the ad ran and the exact wording that appeared in the ad.

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28. **Is an employer required to engage in advertising and recruitment prior to submitting an H-2B application with the State Workforce Agency?**

    - No. As stated in Training and Employment Guidance Letter (TEGL) 21-06 under Section III, D.2, every H-2B application shall include "documentation of any efforts to advertise and recruit U.S. workers prior to filing the application with the SWA." The employer can meet this application filing requirement by completing Item 21 of the ETA Form 750, Part A, and Application for Alien Employment Certification. If the employer has engaged in advertising and recruitment efforts prior to submitting the ETA Form 750, then Item 21 should clearly describe those efforts (e.g., dates and length of advertising, referrals received) by recruitment source. If additional space is needed, the employer may attach a separate document with the application.

      In circumstances where the employer has not made any efforts to advertise and recruit prior to submitting the H-2B application, the employer should provide such notification in Item 21 and indicate that the employer is waiting for and will comply with supervised recruitment instructions from the SWA. Therefore, although the employer is not required to engage in advertising and recruitment prior to submitting the H-2B application, the employer must complete Item 21 of the ETA Form 750, Part A, as instructed above, in order to fulfill the application filing requirement under Section III, D.2.

29. **Regarding advertising efforts, would we need to advertise in each specific county/state within the MSA, or is it sufficient to advertise with ONE NEWSPAPER that covers all States within the MSA where the employees will be employed during the peak season?**

    - In accordance with Section IV.D of TEGL 21-06, during 10-day posting of the job order, the employer shall advertise the job opportunity in a newspaper of general circulation for 3 consecutive calendar days or in a readily available professional, trade or ethnic publication, whichever the SWA determines is most appropriate for the occupation and most likely to bring responses from U.S. workers. The phrase "a newspaper" explicitly refers to a single newspaper of general circulation. In the circumstance described above, the SWA should recommend a newspaper with the widest circulation that covers the MSA.

30. **Is it permissible for multiple employers to recruit for U.S. workers using a single newspaper advertisement?**

    - Training and Employment Guidance Letter (TEGL) 21-06, Section III, states that an employer desiring to use foreign workers for temporary non-agricultural employment must file a complete ETA Form 750, Part A, with the State Workforce Agency (SWA) serving the area of intended employment. An association or other organization of employers is not permitted to file master applications on behalf of its membership under the H-2B program. Section VII further notes that a temporary labor certification is valid only for the number of aliens, the occupation, the area of intended employment, the specific occupation and duties, the period of time, and the employer specified on the Application for Alien Employment Certification, ETA Form 750. In the vast majority of cases, it is not permissible for multiple employers to use a single newspaper advertisement to recruit for U.S. workers, since the locations, wages, job duties and requirements, and/or periods of employment differ among employers. Such a situation is inconsistent with the Department's policies preventing, a bona fide test of the labor market and the effective recruitment of U.S. workers.

      However, in circumstances where multiple employers are each filing separate H-2B applications and the occupation, duties to be performed, location(s) of work, job requirements, rate of pay, duration of employment, work hours and days, and State Workforce Agency (SWA) to which U.S. workers will be referred are all identical, it is permissible for multiple employers to use a single newspaper advertisement, as long as

the information contained in the advertisement meets all the requirements for advertising contained in TEGL 21-06, Section IV.E. In this limited circumstance, the SWA must post a job order to advertise the job opportunity for each employer, and the single newspaper advertisement must clearly show the name of each employer, the total number of job openings to be filled, and the SWA job order number for each employer (see example below). Please note that each employer's individual ETA Form 750 A must comport and be consistent with the information provided in the employer's advertisement. Advertisements that do not clearly show these items will be rejected and the cases will be denied.

Sample Newspaper Advertisement – For Illustrative Purposes only

Temporary Positions Available
Racehorse Groom
2-1-2007 thru 10-15-2007
Monmouth Park Racetrack, New Jersey

This portion of the advertisement should describe the job opportunity with particularity, including duties to be performed, work hours and days, rate of pay, the duration of the employment, and the minimum job requirements.

Send resume to:

Name of State Workforce Agency
SWA Address 1
City, State, Zip Code

Attention to any of the following:
Employer #1 No. of Openings SWA Job Order No. #1
Employer #2 No. of Openings SWA Job Order No. #2
Employer #3 No. of Openings SWA Job Order No. #3
…
etc.

31. **USCIS approves a work permit for the employee in accordance with the Department of Labor's certification. If employers must file a separate ETA 750 for each STATE where the H-2B worker is working, is the employee required to carry multiple work permits with him for the State that he is working in at that time?**

- This question should be addressed to USCIS. The Department of Labor does not issue the work permits of H-2B workers.

32. **How should an employer advertise if the area of intended employment does not have a newspaper that runs 7 days a week?**

- Department of Labor guidance states that an employer must advertise the job opportunity in a newspaper of general circulation or in a readily available professional, trade or ethnic publication, whichever the State Workforce Agency (SWA) determines is the most appropriate for the occupation and most likely to bring responses from U.S. workers. If the job opportunity is located in a rural area that does not have a newspaper with a daily edition that runs 7 days a week, the employer will be instructed to use a daily edition with the widest circulation in the nearest urban area or such other publication, as the SWA may direct. (Training and Employment Guidance Letter (TEGL) No. 21-06, Change 1, Section IV.D.)

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33. **Can the DOL develop a process to accelerate the labor certification process for occupations where there is currently a labor shortage?**

    - In essence, there is a labor shortage for every position included on a labor certification application. To ensure fairness to each employer that applies for temporary labor certification under the H-2B program, all applications are processed on a first in, first out basis, with no exceptions. Employers are encouraged to ensure that they have submitted a complete application to the SWAs and all the necessary supporting documentation to avoid any unnecessary delay.

34. **Once the visa cap for the first half of a fiscal year has been reached, assuming the visas continue to be granted on this basis, can the DOL amend previously certified labor applications so that the date of need can start in the second half of the fiscal year?**

    - No. A temporary labor certification is valid only for the number of foreign workers, the area of intended employment, the specific occupation and duties, the period of time, and the employer specified in the Application for Alien Employment Certification, ETA Form 750. Employers must file a new application with a valid test of the labor market and include all supporting documentation to support a new date of need.

35. **What are the typical forms of supporting documentation to justify a temporary need for horse groomers?**

    - To substantiate their temporary need, horse show employers generally provide a copy of their show schedule(s), if applicable, and a summarized monthly payroll report for a minimum of one previous calendar year showing the permanent and temporary groom-related positions. Department of Labor regulations require that a payroll report identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earning received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system. Employers should also be prepared to provide the documents utilized to generate the summarized monthly payroll reports if requested by the NPC Certifying Officer. (Training and Employment Guidance Letter (TEGL) 21-06 Change 1, Section III.D.4.c.)

36. **Is a seasonal or peakload need established if the employer's customers, because of budget constraints or a holiday season, do not request the labor/services during one certain period of the year?**

    - In order to establish a seasonal need, the employer must establish that its services or labor is traditionally tied to a season of the year by an event or pattern, and is of a recurring nature. The employer can establish a seasonal need for temporary foreign workers if it can establish a clear pattern of when temporary foreign workers are needed regardless of the reasoning behind the need. The employer must specify the period(s) of time during each year in which it does not need the services or labor. An employer providing services whose clients no longer require those services because of a predictable cyclical budget constraint or a holiday season, and can demonstrate that its own need for workers during those weeks or months is then eliminated, demonstrates a temporary need. (Training and Employment Guidance Letter (TEGL) 21-06, Change 1, Section II.D.2.)

37. **What is the process if an employer needs to extend its period of need for H-2B workers?**

    - If there are unforeseen circumstances where the employer's need exceeds one year, a new application for temporary labor certification is required for each period beyond one

year. However, an employer's seasonal or peakload need of longer than 10 months, which is of a recurring nature, will not be accepted. Training and Employment Guidance Letter (TEGL) No. 21-06, Change 1; DHS regulations at 8 CFR 214.2(h)(6)(ii),)

38. **How should an employer request a copy of its final determination letter indicating that its application has been denied?**

- An employer whose application has been denied will receive a final determination letter by mail. The employer may request a duplicate of the denial letter by fax, email or mail from the appropriate National Processing Center that processed the application. The contact information for the National Processing Centers is as follows:

  Atlanta NPC:
  U.S. Department of Labor
  Employment and Training Administration
  Harris Tower
  233 Peachtree Street, Suite 410
  Atlanta, GA 30303
  Fax: (404) 893-4643
  Email: TLC.Atlanta@dol.gov

  Chicago NPC:
  U.S. Department of Labor
  Employment and Training Administration
  844 N. Rush Street
  12th Floor
  Chicago, IL 60611
  Fax: (312) 353-3352
  Email: TLC.Atlanta@dol.gov

  The DOL will send a copy of the final determination letter to the employer with a stamp indicating that the denial letter is a copy.

39. **If a foreign worker would like to work for a new employer (in a different state, but similar position), must the new employer file a new ETA Form 750 and begin the H-2B process as though it were for a new employee?**

- Yes. All employers must have a valid labor certification to support any H-2B worker.

40. **What type of supporting documentation should be submitted by an employer seeking temporary labor certification based on a one-time need?**

- An employer seeking to justify a one-time need must establish that (1) it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or (2) it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. Evidence that has been used in cases of one-time need includes contracts showing the need for the one-time services, letters of intent from clients, news reports, event announcements, and similar documentation. (Training and Employment Guidance Letter (TEGL) 21-06, Change 1, Section II.D.1)

41. **Is it permissible for a recruiting agency to pass the employer's legal and administrative costs of applying for H-2B visa certification onto the H-2B workers?**

- There are currently no ETA regulations that expressly prohibit passing the legal and administrative costs of applying for H-2B visa certification onto the H-2B workers.

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42. **According to TEGL 21-06, Change 1, Section IV.F, an employer shall document that union and other recruitment sources appropriate for the occupation and customary in the industry, were contacted and either were unable to refer qualified U.S. workers or were non-responsive to the employer's request. When an employer is instructed by the SWA to contact a union, who determines what is appropriate for the occupation and customary in the industry?**

    - Item 19 of the ETA Form 750, Part A require the employer to indicate whether the temporary position is unionized. The State Workforce Agency serving the area of intended employment may also determine whether unions that are appropriate for the occupation and customary in the industry exist and may, instruct the employer to contact a specific union to determine if qualified U.S. workers are available for the position. Once the application is forwarded from the SWA to the NPC, the NPC Certifying Officer may determine whether there are other appropriate sources of workers from which the employer should have recruited in order to obtain qualified U.S. workers. If the NPC Certifying Officer determines that an appropriate union was not contacted, the NPC Certifying Officer may remand the case to the SWA with specific instructions on contacting the union.

43. **Is it permissible for the State Workforce Agency to refer U.S. candidates who applied for the position after the conclusion of the 10-day job order? And should SWAs be required to issue an end of recruitment report?**

    - ETA has encouraged SWA staff to provide employers with a definitive "cut-off" time for the recruitment period to ensure timely processing and ample time for applicants to respond to the contact. The SWA should notify the employer no later than 10 days after the end of the recruitment period, as to each applicant referred (i.e., names and contact information) or the SWA must issue a statement indicating that no applicants were referred for hiring consideration. (Training and Employment Guidance Letter 21-06, Change 1)

44. **When a SWA is referring a candidate to the employer, what can be done to establish consistency for the SWA's method of communicating to employers? If employers include prepaid FedEx envelopes for SWAs to forward the case to USDOL, will SWAs be required to use the prepaid FedEx?**

    - The communication methodology utilized by SWAs remains a state decision.

45. **Is there a required time period in which DOL must process cases?**

    - The INA and regulations do not set time limits for DOL's processing of H-2B applications. However, it is DOL's practice, consistent with available program resources, to process cases within 60 days.

46. **What are the remedies available to an employer if the SWA did not forward an employer's necessary supporting documentation to the National Processing Center?**

    - In such an instance, the employer should contact the appropriate ETA National Processing Center for assistance using the e-mail box noted earlier.

47. **How can an employer obtain a duplicate certified ETA Form 750?**

    - Only the U.S. Citizenship and Immigration Services (USCIS) may request a duplicate certified ETA Form 750. USCIS may do so through a written request to DOL in connection with a petition to employ the H-2B worker(s).

      Employers requesting USCIS to obtain a duplicate certified ETA Form 750, should include

on the top of the I-129, Petition for Nonimmigrant Worker -- a cover sheet (preferably highlighted with colored paper) stating the following:

LOST OR MISPLACED LABOR CERTIFICATION, REQUEST FOR DUPLICATE, DO NOT REJECT

On the same sheet, the following information should also be included:

1. Attorney or agent name, if applicable;
2. Employer's name;
3. ETA case number;
4. Specify that you want USCIS to initiate the request for a duplicate certified ETA Form 750;
5. Proper fee, signature and all required supporting documents;
6. Provide the reason(s) for requesting that the Service Center secure a duplicate, approved labor certification from DOL, e.g., "Case was certified, original approved labor certification was never received in the mail."

Once the USCIS receives the duplicate certified ETA Form 750, the USCIS will contact the employer and/or his representative via a Request for Evidence (RFE) in order to secure the employer's signature on the duplicate certification.

REMEMBER THAT DOL WILL NOT SEND THE DUPLICATE CERTIFICATION TO THE EMPLOYER. DOL WILL SEND IT ONLY TO USCIS.

48. **Will an employer's case be delayed if the employer requests assistance from a Member of Congress? During an inquiry from the employer's Member of Congress, will the DOL continue to communicate with the employer's agent/attorney?**

- An employer's case will not be delayed if the employer requests assistance from a Member of Congress. To ensure fairness to all H-2B applicants, the DOL will continue to process all applications on a first in, first out basis, regardless of whether the employer has requested assistance from a Member of Congress. Therefore, the employer's application will neither be delayed nor expedited due to a Congressional inquiry.

49. **If the employer clearly identifies and describes a temporary need in its needs statement, is it necessary to specify whether that temporary need is peakload or seasonal?**

- Yes. Every H-2B application must include a detailed statement explaining (a) why the job opportunity and number of workers being requested reflect a temporary need, and (b) how the employer’s request for the services or labor meets one of the standards of a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. This statement of temporary need must be submitted separately on the employer's letterhead and with the employer's signature. An employer should specify how it meets one of the standards, and identify which standard. (Training and Employment Guidance Letter (TEGL) 21-06, Change 1, Section III.D.3)

50. **If a criminal background check is required for domestic workers and is company policy, can this be listed as a requirement on the ETA Form?**

- Yes. As with all such requirements, if a background check is warranted for the job opportunity and required for U.S. workers in such job opportunities, it must also be required for foreign workers.

51. **When the application clearly establishes representation by an agent or an attorney, is it appropriate for the SWAs to discourage an employer from utilizing their services?**

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- Neither DOL nor the SWAs advise employers on the best procedures for submitting an H-2B labor certification application.

52. **Does the DOL recognize any distinctions between job and labor contractors?**

- No. The Department considers labor contractors to be the same as job contractors; job and labor contractors undertake the same activities with respect to their employment of workers for hire by other entities and are, therefore, under the same policies and procedures. (Training and Employment Guidance Letter (TEGL) 21-06, Change 1, Section III.C.)

53. **What steps should a farm labor contractor applying for temporary workers in tree planting and related reforestation occupations take if its Certificate of Registration will expire before its listed period of need in its ETA Form 750, but has not expired when it submitted the application to the DOL?**

- The Farm Labor Contractor should submit a copy of its existing Certificate of Registration with the application for alien labor certification, as well as a signed, written assurance that all registrations will be valid during the entire period of use.

54. **I have a need for a worker to perform similar combined duties. May I advertise and seek to employ an H-2B worker to perform a combination of duties?**

- Yes. An employer may require that an H-2B worker perform a combination of duties as long as the employer can prove that: (1) the employer has normally employed workers with these combination of duties in the occupation; (2) workers customarily perform these combination of duties in the area of intended employment; or (3) requiring the combination of duties is a business necessity. In any event, the employer will be required to pay the salary that is the higher of the salaries of the two positions that are combined, based on the combination of the skill sets, regardless of the amount of time the worker will spend performing each respective duty.

55. **Are landscape workers permitted to perform activities that involve construction of pathways and patios?**

- The current Occupational Information Network (O*NET) description states that landscape workers may perform installation of mortar-less segmental concrete masonry wall units. Therefore, landscape laborers may construct pathways and patios that do not involve the laying of the masonry with mortar. If the employer wishes to employ landscape workers to construct pathways and patios involving mortar, the employer is essentially searching for an H-2B worker to perform a combination of duties. In this instance, the employer may employ an H-2B worker to perform a combination of job duties as long as the employer can prove that: (1) the employer has normally employed workers with these combination of duties in the occupation; (2) workers customarily perform these combination of duties in the area of intended employment; or (3) requiring the combination of duties is a business necessity. Additionally, the employer will be required to pay the salary that is the higher of the salaries of the two positions that are combined (e.g., landscape worker and mason or bricklayer), based on the combination of the skill sets, regardless of the amount of time spent performing each respective duty.

56. **In circumstances where the employer is requesting certification for a job opportunity (e.g., landscaping, construction) containing multiple worksite locations within the area of intended employment, how should the employer complete the ETA Form 750, Part A, specifically item #7, and conduct the required advertisement to recruit U.S. workers?**

- To be consistent with the guidance provided in TEGL 21-06, Change 1, the employer should do the following:

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ETA Form 750, Part A

Under Item #7, the employer should complete the application as follows:
(1). Write the phrase "Multiple worksites within MSA" or "Multiple Worksites within area of intended employment";

(2). Providing as much geographic detail as possible, write the work site address where the employment is expected to begin in Item #7, since this should correspond to the SWA where the application was initially filed; and

(3). Submit an addendum to the ETA Form 750, Part A, which includes a listing of all the worksite locations where the work will be performed during the period of employment indicated on the form. Employers are not required to provide a comprehensive listing of all worksites at the street address level, but must provide enough geographic detail (e.g., county/state, township/state, or city/state) to cover all of the worksite locations so that the SWA staff understands where the work will be performed within the area of intended employment.

Content for Newspaper Advertisements

TEGL 21-06, Change 1, Section IV.E, specifies the employer's advertisement must "identify the employer's name, location(s) of work, and direct applicants to report or send resumes to the SWA for referral to the employer by disclosing the SWA contact information and job order number." In order to meet the content requirements for newspaper advertisements and apprise US workers of where work will be performed, employers must provide enough geographic detail (e.g., county/state, township/state, or city/state) to cover all of the worksite locations where the work will be performed in the area of intended employment. For instance, the employer can disclose a listing of all the counties where work will be performed within the area of intended employment in order to meet the advertising requirements and apprise U.S. workers of the potential travel requirements for the job opportunity. This level of geographic detail is typically provided in advertisements for job opportunities under the H-2B program where the work will be performed in multiple worksite locations (i.e., covering multiple counties) within the area of intended employment. Employers are not required to disclose a listing of all worksite locations at the street address level in the newspaper advertisements.

Important Note: A common practice of landscaping and construction companies is to provide transportation to the worksite by picking up workers at a centralized location. Only listing the geographic location of the centralized "pick up" location in the advertisement is not appropriate and does not apprise US workers of where the actual work will be performed. The advertisement must identify the geographic location of the worksite, as well as the geographic location of the pick-up site, and disclose that the employer will provide transportation to the worksites through that centralized pick up location. Applications and/or newspaper advertisements where the employer discloses or otherwise apprises U.S. workers to provide their own transportation to the worksites will be considered by the NPC Certifying Officer to be an unduly restrictive job requirement that is not normal to the occupation.

D-1 crewmembers certification

1. **What is a D-1 crewmember certification?**

   - Performance of longshore work at U.S. ports by D-1 crewmembers on foreign vessels is generally prohibited with few exceptions. One such exception requires an employer to file an attestation stating that it is the prevailing practice for the activity at that port, there is no strike or lockout at the place of employment, and that notice has been given to U.S. workers or their representatives.

2. **Are there other exceptions?**

- Another exception requires that, before using alien crewmen to perform longshore activities in the State of Alaska, the employer will make a bona fide request for and employ U.S. longshore workers who are qualified and available in sufficient numbers from contract stevedoring companies, labor organizations recognized as exclusive bargaining representatives of United States longshore workers, and private dock operators.

Employment and Training Administration
U.S. Department of Labor
Frances Perkins Building
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1-877-US-2JOBS
Contact Us
Pagemaster (Page content/style questions)
Webmaster (Technical issues)

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