Summary of
Department of Labor, Employment and Training Administration, Regulations on Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System (PERM), Final Rule, 12/27/04,
20 CFR Parts 655 and 656

Prepared by AILA's PERM Implementation Working Group[1]

HIGHLIGHTS:

1. **Effective date: March 28, 2005**
2. **The prevailing wage standard is the same for both PERM and the recent H-1B amendments (100% of prevailing wage must be paid, but four wage levels available)**
3. **The goal for decisions on PERM electronically filed applications is 45 – 60 days**
4. **Conversion means withdrawal and refiling, and only for "identical job opportunities"**
5. **No fees (future rulemaking possible)**
6. **Anti-fraud provisions include verification that employer is a bona fide business entity with employees on its payroll**
7. **No money penalties or debarment for fraud or willful misrepresentation of a material fact (future rulemaking possible)**

STEP-BY-STEP ANALYSIS FROM PREVAILING WAGE DETERMINATIONS THROUGH THE APPEAL PROCESS

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[1] The Working Group consists of: Cheryl Lenz-Calvo, Chair; Rebecca P. Burdette; Susan Cohen; Carolyn Fuchs; Josie Gonzalez; Howard Gordon; Esther Greenfield; Allen Kaye; Linda Rose; Sharryn Ross; Grace Zimmerman.

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Prevailing Wages

Overview – Generally, the changes and clarifications related to the employer's obligation to pay prevailing wage and the manner for challenging a prevailing wage determination apply equally to H-1Bs and to Labor Certifications.

Payment of 100% of the Prevailing Wage

The final rule clarifies that the changes to prevailing wages in the Consolidated Appropriations Act of 2005, signed on December 8, 2004, related to the filing of H-1B applications applies equally to the labor certification program. The prevailing wage required to be paid is 100% of the prevailing wage; the 5% variance is no longer allowed.

Use of Four Skill Levels

Governmental surveys such as the OES shall provide for 4 levels of wages commensurate with experience, education, and the level of supervision. If only two levels are currently provided, two new levels can be created by dividing by 3 the difference between the two levels offered, adding the quotient obtained to the first level, and subtracting that quotient from the second level. Guidance to the State Workforce Agencies on how to apply the new four levels will be forthcoming

Note: Example – The OES salary for an Electrical Engineer in Ventura County, California Software Engineer:

OES I = $53, 747
OES II = $86,174
$86,174 - $53,747 = $32,427
1/3 of $32,427 = $10,809 (" Quotient")
New OES II = $53,747 + $10,809 = $64,556
New OES III = $86, 174 - $10,809 = $ 75,365

Use of the Davis Bacon Act and the McNamara-O'Hara Service Contract Act Not Mandated

Use of the DBA and SCA is no longer mandated but may be used by the employer. Note that if the employer chooses to rely on a DBA or SCA wage, that wage will be considered prima facie evidence of the prevailing wage, and the SWA will not question its use as long as it is applied appropriately, such as selecting the correct occupational classification and skill level.

Use of Alternate Surveys

Employers may continue to use private surveys as alternative sources for determining the prevailing wage as long as the survey complies with 656.40(g)(1)-(5) and the provisions set forth in section J of GAL 2-98 which set forth such factors as adequacy of survey methodology, geographic scope, and age of the survey. SWAs are encouraged to maintain records of approved surveys and to keep review of previously accepted surveys to a minimum.

Validates the Use of Surveys which Contain Just One Overall Skill Level

Surveys that provide one overall skill level, such as the Bureau of Labor Statistics (BLS), continue to be acceptable as long as the survey does not provide usable wage data for varying skill levels for the occupation. Example: A private survey provides one overall median or weighted average for an occupation and also has various intermediate skill levels but the sample size for those intermediate levels is inadequate. One can use the overall figure because the other skill levels have unusable data.

Provides for the Use of Surveys that Publish the Median Wage

Whereas currently surveys must provide the weighted average, the final rule clarifies that a survey will be acceptable if contains the median wage and not the arithmetic mean. If a survey provides both the median and the mean, then one must use the mean. If the survey doesn't provide mean wage data, and only provides the median, the median figure may be relied on.

Geographic Scope of Survey and Definition of "Similarly Employed"

CMSA surveys or statewide data may be acceptable if the employer can demonstrate it was not possible to obtain a representative sample of similarly employed workers within the MSA or PMSA based upon standard survey practices. Also, a CMSA survey will be accepted if the employer can demonstrate that all points in the survey are within normal commuting distance of the employer. Lastly, if the OES survey uses Level 2 (contiguous), Level 3 (statewide), or 4 (nationwide) data, a CMSA survey is acceptable.

Inclusion of Discretionary Bonuses, Commissions, Cost-of-Living Allowances

These items are included in the OES wage data. Under current policy, they can be included in determining the wage offered by the employer as long as such payments are guaranteed by the employer, and are thus not discretionary. However, the final rule does not change the attestation provisions under the General Instruction at section 656.10 (c) (2) that if the wages are based on commissions, bonuses or other incentives, an employer must guarantee a prevailing wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage. Note, there still remains the conflict that the OES survey measures the average rate of wages paid in the survey year's sample but the employer must guesstimate what are typically variable and discretionary pay factors on a guaranteed basis and must pay them on a periodic versus annual basis.

Timing of Payment of the Prevailing Wage

The final rule continues to reaffirm the current regulation that the prevailing wage must be paid either from the time permanent residency is granted or from the time the alien is admitted to take up the certified employment. Note that when "an alien is admitted to take up the certified employment" also refers to admission as a permanent resident.

Offered Wage Not Required in Recruitment Except for Internal Posting

Contrary to the proposed regulations, the final regulations do not require that the offered wage be included in the recruitment efforts; however, it does have to be included in the internal posting but a range is permitted as long as the bottom is 100% of the prevailing wage, and the range must include the "offered wage," i.e. the wage offered to the alien at the time the labor certification is filed.

Schedule A Occupations Require a PWD and Posting

A PWD is required for Schedule A occupations and an internal posting listing the prevailing wage is required.

Prevailing Wage Form

In lieu of developing a new form that would be submitted with the labor certification application form as the proposed rule indicated, the final rule requires that one seek a PWD from the State Workforce Agency and permits the continued use of separate forms by each state. Presumably before the effective date of the regulations the DOL will ensure that there are SWAs that will provide for wage determinations for all applicants in all regions. Pertinent data such as wage, occupational code, level of skill, job title, tracking number, and date and validity of determination from the state's prevailing wage determination form is to be inserted in ETA Form 9089, Application for Permanent

Employment Certification. The state workforce form must be retained by the employer and submitted in the event of an audit.

Prevailing Wage Determination Response Time

The SWAs are expected to respond expeditiously to request for wage determinations but no specific timeframes were imposed.

Validity of Prevailing Wage Determinations

The validity will be no less than 90 days and no more than one year from the date of the determination.

Validity Period Related to Commencement of Recruitment and Filing

Employers must file their applications or commence the recruitment within the validity period specified by the SWA.

Review of Prevailing Wage Determination

If the employer disagrees with the PWD, it may file supplemental information, or file a new PWD request, or appeal under section 656.41.

Filing Supplemental Information

Employers may only submit supplemental information one time. An employer may choose to file an alternate survey with the PWD but if it submits it after an adverse determination, the submission of the alternate survey does not count as the one time submission of supplemental information under section 656.40(h). Supplemental information may be supplied to the SWA related to the choice of skill level, or erroneous selection of occupational category, or issues related to the rejection of the employer-provided wage survey.

File a New PWD

Filing a new PWD may be done at any time. The filing of a second alternative survey will be considered as a new request and a new review period will be initiated.

Appeal of a PWD under Section 656.41

Rather than create a new entity called the Prevailing Wage Panel (PWP) to adjudicate complaints arising from PWD under the proposed rule, the final rule provides that Certifying Officers from one of the two new processing centers will review complaints. Since both Center Directors report to the Chief, Division of Foreign Labor Certification, who now has line authority over the centers, it will be easier for the national office to review these complaints and help achieve some uniformity in decision-making.

Time Period for Requesting Review to the CO

A review of a PWD must be made within 30 days of the date of the determination. The CO does not have a time frame for adjudicating the request. The CO may affirm the decision; modify the decision; or remand the matter to the SWA for further action.

Time Period for Requesting Review of CO Decision to BALCA

An appeal to BALCA of the CO decision must be made within 30 days of the determination of the CO. Besides the supplemental information provided to the SWA, there will be no further opportunity to augment the record.

Prefiling Recruitment Steps

Posted Notice

The employer must post notice of the job opportunity for at least ten consecutive business days. The notice period must be between 180 and 30 days before filing. The notice must contain the salary, but may contain a wage range, so long as the lower level of the range meets or exceeds the prevailing wage. The comments clarify that the primary purpose of the posted notice is to give employees an opportunity to comment on the application and that the posted notice is not another way to recruit US workers. As required by IMMACT 90, the notice must say that any person may provide documentary evidence bearing on the application to the CO. This is similar to the current regulation.

Use of Other In-House Media

In addition to printed posted notice, the employer must use any and all in-house media, whether electronic or printed, in accordance with normal procedures used for recruitment for similar positions in the organization. This appears to allow employers to avoid listing executive-level positions in in-house media if it is not normal practice to do so. The new ETA 9089 form, which replaces Form ETA 750 for most types of cases, does not specifically require the employer to attest that he or she has advertised the job through in-house media. Duration of the in-house media notification, per the comment, may be as long as other comparable positions are posted.

Job Order

The employer must place a job order with the SWA for a period of 30 days. Form ETA 9089 requires the employer to list the start and end date of the job order. These dates serve as documentation of the job order.

Advertisements

The employer must place two advertisements on two different Sundays in the newspaper of general circulation in the area of intended employment. Both ads must be placed more than 30, but not more than 180 days before filing. The ads may be placed on consecutive Sundays. If the job is located in a rural area with no Sunday edition, the employer may use the edition with the widest circulation. However, the use of a suburban newspaper on a day other than Sunday is not allowed. Placement of the ad under an inappropriate heading or keyword would be considered a failure to make good-faith efforts to recruit U.S. workers. The ad must list the name of the employer, the geographic area of employment (only if the job site is unclear, e.g., if applicants respond to a location other than the job site or if the employer has multiple job sites), and a description of the vacancy specific enough to apprise US workers of the job opportunity. The employer may include minimum education and experience requirements or specific job duties in the ad as long as those requirements also appear on Form 9089. The ad must direct applicants to send resumes or report to the employer, as appropriate. The employer's physical address is not required. A central office or post office box may be designated for receipt of resumes. The ad need not include the salary or a detailed listing of the job description and requirements. However, if the ad does include the salary, the salary stated must meet or exceed the prevailing wage. Documentation of the ad can be supplied by a copy of the newspaper page or proof of publication supplied by the newspaper. Form ETA 9089 requires the employer to list the name of the newspaper and date of publication for each ad. If the job requires experience and an advanced degree, the employer may use a professional journal in lieu of one of the Sunday ads. The proposed regulations had required use of a professional journal for such jobs, but DOL made this requirement optional in light of comments submitted.

Three Additional Recruitment Steps for Professional Jobs

The PERM regulation retains the requirement in the proposed regulations that applications for professional jobs must have additional recruitment. The list of permitted additional recruitment steps in the final PERM regulation include: 1) job fairs; (2) employer's web site; (3) job search web site other than employer's; (4) on-campus recruiting; (5) trade or professional organizations; or (6) private employment firms. (7) an employee referral program, if it includes identifiable incentives; (8) a notice of the job opening at a campus placement office, if the job requires a degree but no experience; (9) local and ethnic newspapers, to the extent they are appropriate for the job opportunity; and (10) radio and television advertisements. Further, a web page generated in conjunction with a print ad now counts as a website other than the employer's. The additional recruitment steps must take place no more than 180 days before filing. The employer is not required to take different steps each month. Only one of the additional recruitment steps may take place within 30 days of filing. Form ETA 9089 requires the employers to specify the dates of each additional recruitment step. The final rule specifies how each type of additional recruitment activity can be documented. Alternative recruitment steps only require employers to advertise for the occupation

involved in the application rather than for the job opportunity as is required for the newspaper ads.

Distinguishing between Professional and Non-Professional Jobs

A professional job is a job for which the attainment of a bachelor's or higher degree is a usual education requirement. DOL published a list of professional occupations in Appendix A to the PERM rule. If the occupation is listed on Appendix A, the employer must follow the recruitment regimen for professional occupations. However, the employer may also use the additional recruitment steps for other occupations. It may be a good idea to do so to bolster a claim that a non-listed occupation is also professional in nature.

Recruitment Report

Contents of Recruitment Report

The employer must prepare a recruitment report that describes the recruitment steps taken and the results. The recruitment report must include the number of hires and the number of US workers rejected, categorized by the lawful job-related reasons for rejection. The CO may, after reviewing the employer's recruitment report, request copies of the US workers' resumes, sorted by the reasons for rejection. The employer must sign the recruitment report. In response to numerous comments from employers who receive a large volume of unsolicited resumes, the final rule does not require the employer to identify the individual U.S. workers who applied for the job opportunity.

Failure to Meet the Minimum Requirements

An applicant's failure to meet the employer's stated minimum requirements is a lawful reason for rejection; however, if a worker lacks a skill that may be acquired during a reasonable period of on-the-job training, the lack of that skill is not a lawful basis for rejecting an otherwise qualified worker. This final rule does not specify what constitutes a reasonable period because the training period may vary by occupation, industry, and job opportunity.

Retention of Documentation

Supporting documents must be retained for five years from date of filing.

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How and Where to File—Basic Process

Using a new form, Application for Permanent Employment Certification (ETA 9089), employers can file either electronically or by mail to the appropriate ETA processing center. Faxing will not be allowed.

Electronic filing

Employers will go to the ETA website located at http://www.plc.doleta.gov. (currently not on display) to complete and file the form. The site will allow frequent users to set up a file with basic, repeat information, much like the LCA system (employer name, address, etc.). Passwords or identifiers also might be assigned to individuals (not businesses) for fraud prevention purposes. No G-28 is required. The employer signs the form declaring the attorney to be the legal representative. Once the ETA is certified, the employer must sign the form upon receipt from ETA. A copy must be maintained in the employer's files; the original, signed ETA must accompany the I-140 when it is filed with CIS. A priority date will be assigned as of the date the electronic submission is accepted for filing. Incomplete applications will not be processed, but simply denied.

Filing by mail

Applications can be mailed directly to the appropriate centralized processing center. The addresses of the processing centers will be listed at http://www.workforcesecurity.doleta.gov/foreign/. Applications filed by mail must bear the original signature. A priority date will be assigned as of the date of receipt, provided the form is accepted for filing.

Supporting documentation

Whether filed electronically or by mail, no supporting documentation will be filed with the ETA 9089. Instead, the employer must maintain supporting documentation in the event an audit is required or the Certifying Officer otherwise requests certain documents. Such documentation, along with a copy of the ETA form, must be retained for five years from the date of filing ETA 9089.

Prevailing wage determination as a pre-requisite to filing

Employers must file with the SWA and receive a prevailing wage determination prior to filing the ETA 9089. Employers will use the state-designated prevailing wage request form. Information from the prevailing wage determination will then be incorporated into the ETA 9089. The actual prevailing wage determination form should be retained as a supporting document, to be furnished to ETA in the event of an audit.

Inclusion of Attorneys' Fees

Attorney fees are discussed in reference to the beneficiary's financial involvement. If the beneficiary is "required" to pay attorney fees, it is possible the position will be challenged as to whether or not the job is open to U.S. workers. See 20 CFR § 656.10(c)(8). This issue is discussed briefly in the preamble but not addressed in the regulation.

Filing Fees

Breathe a sigh of relief. There is no filing fee, as was suggested in the proposed rule. Until Congress enacts legislation authorizing a fee, labor certification filing fees are not permitted.

Live-In Domestic Workers – Special Rules

The basic filing procedures will still apply to live-in domestic workers. However, the documentation requirements are weightier. Supporting documents should not be filed with the ETA, but should be retained in the employer's files in the event of an audit upon request by the Certifying Officer.

The following three documents must be maintained:

1. A statement describing the worker's living accommodations, including whether the residence is a house or apartment, number of rooms, number of adults and children in household, and free board and a private room is provided.

2. Two copies of the employment contract. Contract must include hourly/weekly wage, daily and weekly hours to be worked, worker's freedom to leave premises during off-hours (except that overtime pay will be provided), worker will reside on employer's premises, total amount of money to be advanced to the worker, worker not required to give more than two weeks' notice, employer must give worker at least two weeks notice of intent to terminate employment, a copy of the contract has been given to the worker, private room and board provided, any other agreement or condition not specified on the ETA form.

3. Documentation of worker's paid experience amounting to at least one year of full-time employment.

Conversion of Pending Cases

The regulation allows the withdrawing and re-filing of cases prior to the placement of a job order by the SWA under section 656.21(f)(1) of the current regulation. An employer who successfully withdraws and re-files a pending application will preserve the original filing date. This will be a key objective given the retrogression of the Third Preference anticipated on January 1, 2005. In addition, PERM applications will be processed in the order of receipt. However, all re-filed cases must comply with all the requirements of the new PERM final rules, including recruitment, minimum requirements, SVP, business necessity, audit procedures and prevailing wage.

Continued Processing of Pending Applications Without Conversion

Pending applications which are not withdrawn after PERM's effective date will continue to be processed under the current rules in backlog reduction centers and regional offices. Processing times for these applications should continue to be posted on the DOL website.

Withdrawal and Re-filing of Pending Applications Under PERM Limited to Identical Job Opportunity

ONLY applications which are withdrawn prior to the placement of a job order by the SWA may be re-filed under PERM's new procedures within 210 days of the request for withdrawal so long as the re-filed application is for the "identical job opportunity."

The final rule defines this term as applications which have the SAME employer, alien, job title, job location, job description and minimum requirements, including changes made in response to an assessment notice from the SWA prior to PERM's effective date. However, there is a conflict with the final rule as published and its Supplementary Comments, since the need for identical minimum requirements is not included in the Comments but is contained in the final rule.

Analysis of Issues Arising From the Identical Job Requirement

The limits imposed by the need for identical applications present a variety of problems, which will require DOL interpretation and resolution prior to advising a client to withdraw and re-file. If the applications are not found to be "identical," then the re-filed application will be processed under the new filing date and the original application will be withdrawn and the filing date on the withdrawn application will be lost and cannot be used on another application. Given the need to also preserve filing dates for seventh and subsequent H-1B extensions, as well as keeping section 245(i) on the radar screen, the conversion process has important tactical significance.

Applications Which Cannot Be Successfully Re-Filed Are Treated As New Applications Under PERM Rules

If the application cannot be successfully re-filed, it will be treated as a new application. No preference of any type is given to pending applications that are withdrawn and not successfully re-filed. The application will be assigned a filing date as of the date of the request and then will be processed in-turn. This is risky business since the re-filed application will have been prepared using new PERM recruitment based on the old data from the prior application. If there is any question with respect to the acceptability of the re-filed application, it may be a better strategy to restart the entire process anew.

It is clear that additional guidance and interpretation must be issued by DOL before we can know how rigidly the "identical" concept will be applied in practice, since it is unduly restrictive as drafted in the final rule.

Key Points Which Need to be Resolved by DOL and/or Considered Before Requesting Withdrawal and Re-Filing Under PERM:

Loss of priority date if application is not found to be "identical"

Under PERM, an "employer" is defined as having the same FEIN for purposes of determining if the employee gained the required experience on the job. If an employer has undergone a corporate restructuring and has a new FEIN, the DOL may not find the applications to be identical.

Similarly, the job site may have been transferred to another employer location which is still within commuting distance or even across the street.

Employers frequently change job titles, and aspects of the job description evolve, where the original application has been pending for a substantial amount of time, such changes are not unlikely. Many computer jobs see turnover of software on a frequent basis. Job functions are moved to different divisions in large companies.

"Minimum requirements" were generally not specified in RIR applications, but DOL has allowed some flexibility if it could be found within the four corners of the original application. If the PERM recruitment is tied to applications that do not contain minimum requirements, it may not be worth re-filing.

Financial burden, and repetitive retesting and re-recruiting for the re-filed application

Once the application is withdrawn, it must comply with all the new PERM rules prior to re-filing. This includes new recruitment, two Sunday ads, a new job order, and three other steps for professional jobs detailed under the new recruitment procedures.

In its comments, DOL concludes that employers should not obtain the benefits of the new system if they have not complied with all of its new requirements. This remark will be of little assistance to attorneys who have to advise clients to repeat the process as well as sustain the costs of new recruitment, administrative costs, as well as additional attorney fees.

Will the data from the old application meet PERM's new requirements?

The final rule's focus on "identical" applications does not appear to allow for any flexibility with amending the data, so the existing data which will form the basis for the new application must be measured by PERM criteria

- Does the salary meet 100% of the current prevailing wage?
- Will the employer be subject to lay-off issues that have occurred within 6 months of re-filing?
-Does the elimination of the SVP based on DOT and the SOC job zone limitation require that you submit a business necessity statement?

- If the employee gained experience with the employer, will it meet PERM's requirement that the jobs are not "substantially comparable?" Will the employer be able to document via position descriptions, organization charts and payroll records that the position does not require performance of the same duties more than 50% of the time?
- Will the employer be able to document the same information as above if the employee was previously a contractor and gained the necessary experience while working as a contractor?
- Will the employer be able to sustain the proof burden if audited?

DOL intends to post specific instructions for the withdrawing of cases that are to be re-filed under PERM at http://workforcesecurity.doleta.gov/foreign/

Qualifications and Job Content: Qualified Workers, Business Necessity, ONET's Job Zones and SVP Levels, Alternative Experience, Experience Gained on the Job. Combination of Occupations, Alien's Influence and Control

Definition of "Qualified Worker"

Job Qualification through Reasonable Period of On-the-Job Training: What it does not mean – DOL clarified that it does not mean that a U.S. worker who failed to meet the employer's stated minimum requirements, such as education, training or years of experience, must be deemed qualified.

What it does mean – If a worker lacks a skill that may be acquired during a reasonable period of on-the-job training, the lack of that skill is not a lawful basis for rejecting an otherwise qualified worker. No definition is provided as to what constitutes a "reasonable period" of training as it may vary by occupation, industry, and job opportunity.

Note: The discussion in the Supplementary Remarks seem to clarify that the DOL will be looking at item 14 of section H of the ETA 9089, which refers to specific skills and other requirements, to see whether these requirements could be learned within a reasonable period.

Educational Equivalency

The final rule eliminated a requirement that employers consider whether a U.S. worker's experience, training and education is the equivalent of a required degree.

Business Necessity

The proposed regulations would have disallowed any requirements other than years of experience, and education unless special conditions were met. The final rule eliminates this provision and it retains the Business Necessity standard adopted by BALCA in Information Industries (88-INA-92, February 9, 1989)(en banc). To establish business

necessity an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. (§656.17(h)(1)).

O*NET's Job Zones and SVP levels

Unless documented as arising from business necessity, the job duties and requirements 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 documentation will be required in an audit.

Note that there is great confusion today regarding how to correct interpret the job zones in O*NET. The final regulations ignore the pleas of commentators to the regulation seeking clarification of the interpretation of these job zones. Many commentators also felt that the SVP levels did not adequately reflect the employer's true requirements. The final rule merely explains that a business necessity test can be used if the requirements exceed the SVP, and that a revision of the SVP is beyond the scope of this rule. Apparently, a clarification of the SOC job zones is also beyond the scope of the rule.

Foreign Language Requirements and Expansion of Rule

The final rule continues to allow for "business necessity" to justify the requirement of a foreign language. Furthermore, DOL has expanded the rule to include other possible business justifications for a foreign language requirement such as the need to communicate effectively with one's co-workers or subordinates. Safety considerations in certain working environments may also support a foreign language requirement.

The regulations at 656.17(h)(2) list the factors which may be used to demonstrate business necessity such as the need to communicate with a large majority of the employer's customers, employees, and contractors. It also describes the type of documentation that must be retained: the number and proportion of its clients, contractors, or employees that do not speak English; detailed plans to market to a foreign country; and detailed explanation why the duties include frequent communication with such individuals.

Combination of Occupations

The final rule retains the current standard in section 656.17 (h)(3) allowing justification for combination of occupations showing that the employer normally employs such individuals, or that it is customary in the industry, or it is a business necessity.

Alternative Experience Requirements –Some Restrictions Retained

Under section 656.17(h)(4) of the final rule, an employer may specify alternative requirements that meet the standards set forth by BALCA in *Matter of Francis Kellogg*,

(94-INA-465, February 2, 1998)(en banc). However, DOL cautions that even where the employer's alternative requirements are substantially equivalent but the alien does not meet the primary job requirement and qualifies through the alternative requirements, such alternative requirements will be viewed as unlawfully tailored to the alien's qualifications unless the employer indicates that applicants "with any suitable combination of education, training or experience are acceptable."

On a practice note, this means that if one checks item H10 of ETA 9089 that experience in an alternate occupation is acceptable and item J20 that the alien employee has the experience in the alternate occupation, one should note somewhere on the application (item H 14 perhaps), or in recruitment report that the employer considered applicants who presented any suitable combination of education, training or experience for the job opportunity.

Experience Gained On-the-Job: New Standards

Although the NPRM provision that flatly prohibited any experience gained working for the employer in any capacity was not retained, some new standards are promulgated -- some are restrictive, some surprisingly liberal.

Dissimilar Jobs

An employer may use experience gained by the alien in a different job if it can prove that the experience is not "substantially comparable" to the job for which certification is being sought. "A substantially comparable job or position means a job or position requiring performance of the same duties more than 50% of the time." Evidence would include "position descriptions, percentages of time spent on various duties, organizational charts, and payroll records." (pp. 122-123).

Note that under 656.17(i)(3)(i), DOL includes both alien "employees" and "contract employees." The latter category appears to refer to employees whom the employer previously contracted perhaps as independent contractors, but not to the individuals used by a contracting firm that were employed by that entity.

Disallows any Education or Training Paid by the Employer

Although experience may be gained in a different job, an employer may not use any educational or training requirements that it paid for. Presumably this might include educational or training courses in advanced information technology such as Microsoft or other certifications. Question J23 of ETA-9089 asks: "Did the employer pay for any of the alien's education or training necessary to satisfy any of the employer's job requirements for the position"?

New, Expanded Definition of "Employer"

DOL had intended to expand the definition of employer to disallow experience gained with predecessor organizations (such as entities that were acquired), successors-in-interest, a parent, branch or subsidiary, or affiliate, wherever located. In the face of overwhelming opposition to the provision, even from union organizations, DOL agreed that this definition was too broad and set forth a new definition. Section 656 17(i)(5)(i) states: "The term 'employer' means an entity with the same Federal Identification Number (FEIN), provided it meets the definition of an employer at section 656.3. Persons temporarily in the U.S. cannot be employers.

Note: This new rule appears to allow employers to use experience gained by foreign entities, since presumably they do not have federal FEINS, as well as experience gained while employed with acquired companies, and even subsidiaries and branches of the same employer, as long as the FEINS are distinct. DOL appears to have heeded the admonition of numerous commentators to the NPRM that a contrary rule would impede business expansion and drive valuable employees who had been trained by the employer to competitors because they could not be sponsored effectively by their own employer.

Alien Influence and Control Over Job Opportunity

In determining whether the job is subject to the alien's influence and control, the criteria listed in Modular Container Systems' (89-INA-228, July 16, 1991) (en banc) will be employed as set forth in section 656.17(l). No single factor, such as a closely held corporation or partnership, or familial relationships, or the size of the employer, is controlling.

In order to demonstrate the existence of a bona fide job opportunity, in the event of an audit, the regulations require that the following documentation be provided:

(1) Business related documents such as articles of incorporation
(2) List of corporate officers, titles, positions and relationships to the alien
(3) The financial history including the total investment of each individual
(4) Name of individual responsible for interviewing and hiring job applicants
If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien

<u>Schedule A</u>

Employers will continue to file Schedule A applications with the Department of Homeland Security (DHS) as part of the I-140 petition process. The application must contain the ETA Form 9089, "Application for Permanent Employment Certification," a

prevailing wage determination, and evidence that a notice to a bargaining representative (if applicable) or employees has been made in regard to the application. As with cases filed with the Department of Labor (DOL), the notice must be posted for at least 10 consecutive business days in conspicuous places where the employer's U.S. workers would be expected to see it, as well as in any and all in-house media that might normally be used for the recruitment of similar positions in the company. The notice should include the address of the appropriate Certifying Officer, be provided between 30 and 180 days of filing, and contain information that would normally be included in an advertisement, as well as the rate of pay. A copy of the posting and other related documentation should be included with the Form I-140 filing. Failure to include evidence of the notice may lead to the denial of the I-140 petition.

Group I of Schedule A continues to include professional nurses and physical therapists, and Group II includes aliens to be employed aliens of exceptional ability in the sciences and arts. The final rule also provides that performing artists of exceptional ability will be included as in Group II of Schedule A. Under the current process, employers wishing to file for performing artist of exceptional ability utilize Special Handling procedures.

Substantive requirements remain largely unchanged, though professional nurses may now demonstrate eligibility though passage of the National Council Licensure Examination for Registered Nurses (NCLEX-RN). Alternatively, eligibility may continue to be demonstrated by a full and unrestricted (permanent) license to practice nursing in the state of intended employment or a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS). The supplementary material included with the final rule clarifies that (1) a state license must be permanent; (2) passage of the CGFNS skills test without the certificate will not suffice in terms of allowing for eligibility; and (3) a prevailing wage determination for professional nurses will be required. As stated earlier, the regulations require that all Schedule A positions include a prevailing wage determination.

Schedule B

The final rule eliminates Schedule B.

Special Handling

Applications for certification of employment of college and university teachers are filed by submitting a completed ETA Form 9089, "Application for Permanent Employment Certification," with the Department of Labor. The supplementary material to the final rule clarifies that only college and university teachers are covered by special handling. Litigation broadening those teachers defined by the Act as eligible for special handling was considered and disregarded, at those filed for teachers outside of Alaska. The supplementary material also clarifies that colleges and universities may utilize special handling or regular procedures. In either case, the employer must be able to document that the alien was found to be more qualified than each U.S. worker who applied for the job opportunity.

Documentation of "competitive recruitment and selection process" under special handling procedures would include (1) a statement, signed by an official who has actual hiring authority outlining in detail the recruitment procedures undertaken, including the total number of applicants for the job opportunity and the specific lawful job related reasons why the beneficiary is more qualified than each of the U.S. workers who applied for the job. Documentation would also include a final report of the body making the selection, as well as a copy of an advertisement in a national professional journal, evidence of other recruitment sources utilized, and a written statement attesting to the degree of the beneficiary's educational or professional qualifications and academic achievements. The posting of a notice is also required. Applications must be made within 18 months of the selection. It is expected, however, that previous practice will continue whereby after the 18 months has passed, the employer can again test the labor market in compliance with Special Handling requirements and file under special handling procedures.

Team Sports

Employers filing applications on behalf of foreign nationals to be employed in professional sports teams will continue using existing special procedures and will continue using ETA Form 750, "Application for Alien Employment Certification." Applications will continue to be filed at the national office of the Department of Labor. The DOL is expected to issue a further directive detailing the procedures to be followed in filing for individuals who are to be employed by professional sports teams.

Further, as is currently the practice, in computing the prevailing wage for a professional athlete when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in the rules is regarded as the prevailing wage.

Layoffs

Although the NPRM required employers to document that it had notified and considered all potentially qualified laid-off US workers in the area of intended employment, the final rule only requires that employers notify and consider workers it has laid off in the 6 months immediately prior to filing the application, not those laid off by other employers. The employer is required to notify and consider those laid-off workers in the occupation for which certification is sought or in a related occupation (defined as any occupation that requires workers to perform a majority of the essential duties involved in the job). A layoff is defined as any involuntary separation of one or more employees without cause or prejudice, and includes personnel actions such as reductions-in-force, restructuring, or downsizing. The employer must document that they offered the position to those laid-off workers who are able, willing and qualified for the job, and document the results of their consideration of such workers.

The CO may order post-filing supervised recruitment based on labor market information and may at that time take notice of industry layoffs. However, the employer must only attest on the ETA 9089 form to whether it has laid off its own workers.

Audit Procedures

The CO of the PERM Processing Center can request an audit of any permanent labor certification either for cause or randomly. If selected for audit, the Employer will receive an audit letter specifically stating the additional documentation to be submitted, set a date 30 days from the date of the audit letter for submission and advise that the application will be denied if the information is not received by the deadline. If the employer does not respond as required, this will be considered a refusal to exhaust administrative remedies and no review is available either administratively or judicially. At the discretion of the CO, the Employer may also be required to conduct supervised recruitment for any future labor certification filings for up to 2 years. The CO may grant one extension up to 30 days from the initial 30 period in which to respond to the audit letter. After receipt of the response from the Employer, the CO may also request additional information and/or documentation or require that the Employer conduct supervised recruitment.

Supervised Recruitment

When supervised recruitment is requested by the CO, either after receipt of an audit response or as part of the mandated supervised recruitment when an Employer has previously failed to respond to an audit letter, the requirements are similar to supervised recruitment under the old basic procedure. The Employer is advised to place an ad in a newspaper of general circulation for three days including a Sunday or for one edition of a professional, trade or ethic publication. The Employer must submit a draft of the proposed ad to the CO for approval within 30 days of the notification that supervised recruitment is required. The CO will approve the ad and direct the timing of the advertisement. The Employer shall notify the CO when the ad will appear.

The approved ad must advise applicants to send resumes or applications to the Certifying Officer including an identification number and address as designated by the Certifying Officer. The ad must describe the job opportunity including a wage rate that meets or exceeds the prevailing wage rate and summarizes the minimum job requirements as contained in the application form and offer training if the job would normally require the Employer to provide training. The wages, terms and conditions of employment must be as least as favorable as those offered to the alien. The CO may also require other specific recruitment efforts containing the same information.

The recruitment report must be submitted within 30 days of the CO's request for the report. The Employer must submit a detailed written report signed by the Employer and contain the following specific information:

Identify each recruitment source by name and document contact by letters to sources such as unions, trade associations and colleges and universities with responses if any.

- Ads should be documented with tearsheets, publication affidavits or dates copies from web pages.

- Also include the number of U.S. workers that responded with names, addresses and resumes except for those who sent resumes to the CO and specify number of interviews and job title of person who conducted the interview.

- Specific lawful job-related reasons for not hiring each U.S. workers must be provided. If an applicant is rejected because of lack of skills to perform the job duties, additional documentation must be provided that the applicant could not acquire the skills during a reasonable period of on-the-job training.

If the Employer does not respond within the 30 days, the CO shall deny the application. The CO has discretion to grant one extension to the Employer.

Labor Certification Determinations

The Chief, Division of Foreign Labor Certification is the National Certifying Officer. The NCO and the COs of the PERM Processing Centers have authority to certify or deny labor certification applications. Labor certification applications with special or unique problems can be referred to the NCO. The NCO can request that certain types of labor certifications be handled at the ETA national office.

The decision to grant or deny a labor certification is based on a decision of whether or not the Employer has met the requirement that there are no U.S. workers who are able, willing, qualified and available for and at the place of the job opportunity. The Employer must consider whether a U.S. worker could acquire the necessary skills during a period of on-the-job training. For a job opportunity as a college or university teacher, the U.S. worker must be at least as qualified as the alien. The CO must also consider whether the employment of the alien will adversely affect the wages or working conditions of U.S. workers similarly employed.

The CO shall notify the Employer in writing either electronically or by mail of the determination. If granted the CO must send the certified application and Final Determination form to the Employer or if appropriate his agent or attorney. If the labor certification is denied, the Final Determination will state the reasons, advise of review procedure contained in the regulations and advise that failure to request review within 30 days of the date of determination constitutes failure to exhaust administrative remedies. If a request for review is not timely made, the denial becomes the final determination of the Secretary. If no request for review is made, a new labor certification can be filed at any time. If a request for review is made, no new application in the same occupation for the same alien can be filed until the review procedures are completed.

If the CO determines that the Employer substantially failed to produce required documentation, produced inadequate documentation or made a material misrepresentation or for other reasons, the CO may require the Employer to conduct supervised recruitment in future filings of labor certifications for up to 2 years from the date of the Final Determination. The Employer may request reconsideration of this determination within 30 days of the date of the denial. The request for reconsideration may not include evidence not previously submitted. The CO can reconsider the determination or treat it as a request for review.

Request for Review

If a labor certification application is denied, or revoked, a request for review of the denial or the revocation may be made to the Board of Alien Labor Certification Appeals (BALCA) by the Employer. The Request for Review (RFR) is filed with the Certifying Officer (CO) who denied the application and must be filed within 30 days of the date of the determination. It must set forth the grounds for the request, include the Final Determination, and may not include evidence not already in the record.

Upon receipt of a RFR, the CO must assemble an Appeal File and send it to the BALCA and send a copy to the Employer. The Employer may furnish or suggest to the BALCA that additional information be made part of the Appeal File if such information was submitted to DOL before issuance of the Final Determination.

In considering RFR's the BALCA must afford all parties 30 days in which to submit or decline to submit a legal brief or Statement of Position. The BALCA must either (a) affirm the denial or revocation of the labor certification, or the affirmation of the PWD; (b) direct the CO to grant certification, overrule the affirmation of the PWD; or (c) direct that a hearing be held to consider the case.

Invalidation of Labor Certification

After issuance, a labor certification may be invalidated by DHS or a Consul of the Department of State upon a determination, either by one of those agencies or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of fraud or a willful misrepresentation becomes known to the CO or the Chief, Division of Foreign Labor Certification, he/she shall notify the DHS or Department of State, as appropriate, in writing, as well as the DOL's Office of Inspector General (OIG).

If possible fraud or willful misrepresentation is discovered before a final labor certification determination, the CO will refer the matter to DHS for investigation and must send a copy to the DOL's Office of Inspector General. If 90 days passes 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 CO may continue to process the application. If DOL learns a criminal indictment or

information is filed, the processing of the application will be halted until the judicial process is completed. The CO must notify the Employer of this fact in writing and must send a copy of the notification to the alien and to the OIG.

If a court finds there was no fraud or willful misrepresentation, or if the DOJ decides not to prosecute, the CO is to decide the case on its merits. If a court, the DHS or Department of State (DOS) determines there was fraud or willful misrepresentation, the application will be considered invalidated, processing will be terminated, the CO must send the Employer (and attorney or agent, if appropriate) a notice of the termination and the reason therefore, with a copy to the alien and to the OIG.

Revocation of Approved Labor Certification

The CO, in consultation with the Chief, Division of Foreign Labor Certification, may revoke an approved labor certification if he/she finds that the certification was not justified. The CO must send the Employer a Notice of Intent to Revoke containing a detailed statement of the grounds for revocation and the time period allowed for the Employer's rebuttal. The Employer has 30 days within which to submit a response. If the Employer fails to submit a rebuttal, the Notice of Intent to Revoke becomes final. If the Employer files rebuttal evidence and the CO determines the certification should be revoked, the Employer may file an appeal under Sec. 656.26. The CO must inform the Employer within 30 days of receiving any rebuttal evidence whether or not the labor certification will be revoked. If the labor certification is revoked, the CO will send a copy of the notification regarding the revocation to the DHS and the DOS.