

Policy Guidance on Alien Labor Cert. Issues

DIRECTIVE: FIELD MEMORANDUM NO. 48-94

TO: ALL REGIONAL ADMINISTRATORS

FROM: BARBARA ANN FARMER
Administrator
for Regional Management

SUBJECT: Policy Guidance on Alien Labor Certification Issues

1. Purpose. To consolidate and disseminate policy guidance on a variety of recent issues pertaining to alien labor certification.
2. References. 20 CFR Parts 655 and 656 and Technical Assistance Guide No. 656.
3. Background. At various times, the Division of Foreign Labor Certifications (DFLC) has distributed copies of memos and letters dealing with recent labor certification issues. These communications serve to provide guidance and direction in critical areas of the program. This FM consolidates policy interpretations which the DFCLC has provided to immigration attorneys, employers, and specific Regions over the past year. It is important, therefore, that Regional Office and State agency staff be made aware of determinations on these timely issues so that uniform and consistent policies are followed in every Region.
4. Action Required. Regional Administrators are requested to:
 - A. Provide the attached policy interpretations to appropriate staff.
 - B. Instruct staff to follow these policies, as appropriate, in processing permanent and temporary labor certification applications.
5. Inquiries. Direct questions to Patrick Stange on (202) 219-5263.
6. Attachments. Policy guidance on Alien Labor Certification Issues Involving Nonagricultural Programs

Attachment to FM 48-94

**POLICY GUIDANCE ON ALIEN LABOR CERTIFICATION ISSUES
INVOLVING NONAGRICULTURAL PROGRAMS**

1. PROVIDING U.S. APPLICANTS WITH EMPLOYERS' REASONS FOR REJECTION

A U.S. worker should only be provided with those portions of the employer's post-recruitment report that are relevant to his/her reasons for being rejected. Information pertaining to other U.S. workers should not be furnished to the applicant. Information provided by the employer that is specifically relevant to the qualifications of the U.S. worker may be sent along with a follow-up questionnaire.

2. FULL-TIME VS. PART-TIME EMPLOYMENT

The Department determines whether a job is full-time or part-time by looking at the prevailing hours of work in that occupation. Full-time work in most occupations ranges from 35 to 40 hours per week. Therefore, a job offer is full-time if the weekly hours of work are within that range. If the hours are less than 35, the employer must document that fewer hours are prevailing for full-time employment in the occupation and area of employment.

3. ACCEPTABILITY OF COMPUTER-GENERATED FORMS

Computer-generated forms are acceptable as long as they are an exact facsimile of the government form. This policy applies to forms for all of the labor certification and attestation programs. ETA does not approve facsimiles of its forms in advance for general use. When one is submitted to a Regional Office, a determination is made by that office as to whether the form is acceptable.

4. WITHDRAWAL OF AN APPLICATION AFTER A NOTICE OF FINDINGS (NOF) HAS BEEN ISSUED

Withdrawal of an application after a NOF has been issued is inappropriate. NOFs are final actions unless rebutted within 35 days. If a rebuttal is not submitted in response to a NOF, the NOF becomes the final decision of the Secretary denying certification. A new labor certification application by the same employer involving the same occupation cannot be filed until after the expiration of 6 months from the date of the denial of the labor certification, except that if the certification was denied solely because the wage or salary offered was below the prevailing wage, the employer may refile immediately. This policy applies to all applications including those filed under the special handling procedures for college and university teachers.

5. IDENTIFYING THE ALIEN WHEN REQUESTING PREVAILING WAGE

An employer seeking a prevailing wage determination from a State agency is not required to name the alien. Although the identity of the employer is important for several reasons, the alien's name is not relevant to conducting a survey or providing a wage determination. Therefore, an employer's failure to provide the name of the alien does not constitute grounds for a State agency to refuse to issue a prevailing wage determination.

6. TWO OR MORE APPLICATIONS FOR THE SAME ALIEN

An employer is not prohibited from filing applications for more than one application involving different, legitimate job openings, to which U.S. workers may be referred, for the same alien. However, the Certifying Officer must determine that two different bona fide job openings existed before the applications could be certified.

7. STANDARD VOCATIONAL PREPARATION (SVP) THAT CAN BE CREDITED TOWARD AN ASSOCIATE, MASTER'S OR DOCTORATE DEGREE

(1) ASSOCIATE DEGREES: (a) General Associate Degree - None of the time required to earn a general associate degree should be counted as SVP. The course work covered in earning such a degree is similar to that covered during the first two years of the average 4-year college curriculum and cannot be counted in arriving at the SVP to be assigned to an employer's job offer. In this connection, it should be noted that the latest edition of The Revised Handbook for Analyzing Jobs provides that the average 4-year college curriculum should be counted as 2 years of SVP.

(b) Associate Degree for specific job preparation - An associate degree provided by junior and community colleges which prepares an individual for a specific job can be counted fully in arriving at the appropriate SVP level. Such programs are, for example, commonly offered to prepare individuals to work as engineering technicians; e.g., civil engineering technicians, electrical and electronic technicians, industrial engineering technicians, mechanical engineering technicians. In such situations where the 2-year program generally consists of extensive technical training, it would be appropriate to count an associate degree as 2 years of SVP.

(2) MASTER'S AND DOCTORATE DEGREES: The years of specific vocational preparation to be credited for a Master's or Doctorate should be based on the time it would generally take a person to earn the degree in question from a graduate school in the United States, if a person matriculated towards the degree on a full-time basis. This of course may vary somewhat with the academic discipline involved in the labor certification application. As a "rule of thumb," it has been determined that it would be appropriate, based on a survey of educational institutions, to count 2 and 3 years of SVP for a master's and doctorate degrees, respectively, or a total of 5 years for both.

To summarize:

DEGREE SVP

General Associate's 0
Specific Associate's 2
Baccalaureate 2
Master's 4 (2+2)
Doctorate 7 (2+2+3)

8. APPLICATIONS INVOLVING COLLEGE/UNIVERSITY TEACHERS: DEFINITION OF "COLLEGE" OR "UNIVERSITY" FOR LABOR CERTIFICATION

PURPOSES

Regulations for the Labor Certification process provide for special handling of applications involving college and university teachers. In determining which type of schools may use the special handling procedures, the following definition should be used:

"College or University" means an educational institution: (A) which admits as regular students only individuals having a certificate or diploma of graduation from a high school, or the recognized equivalent of such a certificate or diploma; (B) which is legally authorized by the Federal and/or State government(s) to provide a program of education beyond high school; and (C) which provides an educational program for which it awards a baccalaureate (Bachelor's) or higher degree, or provides a program which is acceptable for full credit for such a degree. This would include those junior or community colleges which award associate degrees, but which teach courses which can be credited toward a baccalaureate degree at another college or university.

9. APPLICATIONS INVOLVING COLLEGE/UNIVERSITY TEACHERS: WHETHER AND TO WHAT EXTENT ACTUAL CLASSROOM TEACHING IS INVOLVED

No minimum hours of actual classroom teaching is required to bring an application within the scope of the special handling procedures for college and university teachers. However, some amount of actual classroom teaching is required to bring an application within the scope of the special handling procedures. In those instances where it is not possible to determine from the application whether or not the job opportunity involves "actual classroom teaching," the Certifying Officer can seek information from the employer regarding this issue in a Notice of Findings (NOF). The Certifying Officer can also require the employer in the NOF to specify how many of the work hours will involve actual classroom teaching.

10. LABOR CERTIFICATION APPLICATIONS WHERE ALIENS WILL BE WORKING AT VARIOUS UNANTICIPATED SITES

Applications involving job opportunities which require the beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Service office having jurisdiction over the area in which the employer's main or headquarters office is located.

In Item 7 (address where alien will work) of part A of the Application for Alien Employment Certification, the employer should indicate that the alien will be working at various unanticipated locations throughout the U.S. A short statement should also be included explaining why it is not possible to predict where the work sites will be at the time the application is filed.

11. APPROPRIATENESS OF EMPLOYERS RECRUITING THROUGH FEE AGENCIES

It is appropriate to have an employer recruit through private employment agencies, if the Certifying Officer is able to determine that it is the prevailing practice for employers in the geographic area to recruit through private employment agencies to fill the job that is involved in the labor certification application. If so, the Certifying Officer can have the employer recruit through fee agencies whether the employer or the applicants are charged a fee by the private employment agencies.

12. ALIENS WHO ARE APPARENTLY OUT OF STATUS

Each Regional Office should provide notice to the Immigration and Naturalization Service (INS) where an alien beneficiary on an ETA 750 appears to be out of status or presently employed without appropriate INS authorization.

Technical Assistance Guide No. 656 - Labor Certifications (TAG) provides that:

[i]f the certifying officer believes from information in the case file that the alien for whom certification is requested is presently employed without authorization or illegally in the United States, the certifying officer should . . . advise the Immigration and Naturalization Service in writing . . . of the alien's whereabouts, the date and country of the alien's birth the alien's A number if shown on the Application for Alien Employment Certification, and the disposition of the application.

13. CLARIFICATION REGARDING THE USE OF INTERIM DICTIONARY OF OCCUPATIONAL TITLES (DOT) CODES

Except in unusual circumstances, jobs submitted for labor certification can be classified under standard codes in the bound volumes of the DOT. Interim DOT codes will not be accepted in the labor certification process unless the code request was made by the Regional Certifying Officer through the Division of Foreign Labor Certifications. Therefore, when a local office receives an Application for Alien Employment Certification, every effort should be made to classify the job offered with an existing code that appears in the DOT (Revised 4th Ed.). If the local office believes that there is no existing code which adequately reflects the duties and responsibilities of the employer's job opportunity, or if the employer insists that a position has been erroneously classified, the application should be forwarded to the Regional Certifying Officer for a determination.

The Certifying Officer should review the facts surrounding the application to determine if an existing code adequately reflects the job offer in question. If the Certifying Officer believes that no published code exists which fits the employer's job offer, the Division of Foreign Labor Certifications (DFLC) will assist the Certifying Officer in obtaining an interim DOT code. The Certifying Officer should send a copy of the application and a completed Form ETA 741 Occupational Code Request (OCR) to the DFLC. The DFLC and occupational analysis staff in the National Office will assist in obtaining a proper DOT classification for the position, either by selecting an existing code or by forwarding the OCR to the Occupational Analysis Field Center in Raleigh, North Carolina.

14. WHERE A JOB OPPORTUNITY'S EXPERIENCE REQUIREMENT EXCEEDS THE STANDARD VOCATIONAL PREPARATION (SVP) LEVEL FOR THAT OCCUPATION

The SVP is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. Only in rare circumstances, where an employer's job opportunity is truly unique, would time needed for average performance in the specific job opportunity exceed the SVP level as defined in the DOT.

Therefore, unless the employer submits to the Regional Certifying Officer adequate rebuttal documentation to substantiate the business necessity for a restrictive requirement, a labor certification cannot be issued. The employer, on rebuttal, must either document the business necessity of the restrictive requirement or reduce the amount of experience required to that specified in the SVP level.

15. COMPLAINTS BY GOVERNMENT AGENCIES UNDER ATTESTATION PROGRAMS

The Employment Standards Administration (ESA), Wage and Hour Division, has determined that complaints from any party, including a government agency, alleging non-compliance with the immigration programs enforced by ESA should be forwarded to the nearest Wage and Hour Office for appropriate action. The programs enforced by ESA involve: D-1 Crewmembers, F-1 Students, H-1A Nurses, H-1B Specialty Workers, and H-2A Agricultural Workers. Wage and Hour will review the complaint in accordance with established regulatory criteria prior to taking any further action.

16. WHETHER A COMPUTERIZED INFORMATION SERVICE MAY QUALIFY AS A NEWSPAPER OF GENERAL CIRCULATION FOR LABOR CERTIFICATION PURPOSES

The labor certification regulations require that the employer as part of its recruitment efforts "place an advertisement . . . for the job opportunity in a newspaper of general circulation (emphasis supplied), or in a professional, trade, or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified and available U.S. workers." The purpose of the regulation is to test adequately the labor market in the area of employment specified on the labor certification application.

The phrase "newspaper of general circulation" includes newspapers that are printed and distributed daily, weekly or at some other regular, and usually short interval, and contains the current news, matters of general interest, features, editorials, and advertisements, to which the general public would resort to be informed of the news and intelligence of the day.

A computerized information service would not qualify as a newspaper of general circulation, since such a service is not a printed medium and is available only to those individuals and/or entities that have access to computers. This is a much smaller portion of the general public than those that read newspapers of general circulation. Advertising in a publication of such limited availability would not constitute an adequate test of the labor market in an area of intended employment.

17. EQUIVALENCY OF MEDICAL LICENSING EXAMINATIONS FOR PHYSICIANS

The determination by the Department of Health and Human Services (HHS) that the National Board of Medical Examiners Examination and the United States Medical Licensure Examination programs are equivalent to the Federation Licensing Examinations, applies only to alien physicians seeking a temporary nonimmigrant H-1B visa status. These examinations are not equivalent for purposes of permanent labor certification.

18. UNTIMELY APPEAL REQUESTS

The TAG provides for appeal files to be prepared and transmitted to the Board of Alien Labor Certification Appeals (BALCA) notwithstanding the timeliness or untimeliness of the request for review. In those instances where the request is not timely, Certifying Officers may now transmit the appeal request to BALCA without the appeal file. In the cover memorandum to BALCA, the Certifying Officer should request dismissal of the appeal because it was not filed timely.