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20 CFR Part 656

**Labor Certification for the Permanent
Employment of Aliens in the United
States; Backlog Reduction; Interim Final
Rule**

DEPARTMENT OF LABOR**Employment and Training Administration****20 CFR Part 656**

RIN 1205-AB37

Labor Certification for the Permanent Employment of Aliens in the United States; Backlog Reduction**AGENCY:** Employment and Training Administration, Labor.**ACTION:** Interim final rule; request for comments.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (Department or DOL) is issuing this interim final rule to address an existing backlog in pending applications for labor certification for the permanent employment of aliens in the United States. This amendment to the regulations governing labor certification applications for permanent employment will allow the National Certifying Officer to transfer to a centralized ETA processing center(s) applications now awaiting processing by State Workforce Agencies (SWAs) or ETA Regional Offices. This interim final rule does not affect the pending proposal to streamline procedures for permanent labor certification under 20 CFR part 656, which was published in the *Federal Register* of May 6, 2002, and which is expected to be finalized in 2004. This interim final rule affects only applications filed under existing regulations, while the streamlined certification regulation will govern processing of new applications filed after that regulation takes effect.

DATES: This interim final rule is effective August 20, 2004. Interested persons are invited to submit written comments on this interim final rule. To ensure consideration, comments must be received on or before August 20, 2004.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB37, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the website instructions for submitting comments.
- E-mail: Comments may be submitted by e-mail to blcomments@dol.gov. Include RIN 1205-AB37 in the subject line of the message.
- Mail: Submit written comments to the Assistant Secretary for Employment and Training Administration, U.S.

Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210, Attention: William Carlson, Chief, Division of Foreign Labor Certification. Because of security measures, mail directed to Washington, DC is sometimes delayed. We will only consider comments postmarked by the U.S. Postal Service or other delivery service on or before the deadline for comments.

Instructions: All submissions received must include the RIN 1205-AB37 for this rulemaking. Receipt of submissions, whether by U.S. mail or e-mail will not be acknowledged. Because DOL continues to experience delays in receiving postal mail in the Washington, DC area, commenters are encouraged to submit any comments by mail early.

Comments will be available for public inspection during normal business hours at the address listed above for mailed comments. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this interim final rule may be obtained in alternative formats (e.g., large print, Braille, audiotape, or disk) upon request. To schedule an appointment to review the comments and/or to obtain the proposed rule in an alternative format, contact the Division of Foreign Labor Certification at 202-693-3010 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Contact Denis Gruskin, Senior Specialist, Division of Foreign Labor Certification, Employment and Training Administration, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210; Telephone: (202) 693-2953 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:**I. Statutory Standard**

Before the United States Citizenship and Immigration Services (CIS) of the Department of Homeland Security¹ may approve petition requests and the Department of State may issue visas and admit certain immigrant aliens to work permanently in the United States, the Secretary of Labor first must certify to the Secretary of State and to the Secretary of Homeland Security that:

(a) There are not sufficient United States workers who are able, willing, qualified, and available at the time of

the application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(b) The employment of the alien will not adversely affect the wages and working conditions of similarly employed United States workers. See *Immigration and Nationality Act (INA)*, 8 U.S.C. 1182(a)(5)(A).

If the Secretary of Labor, through ETA, determines that there are no able, willing, qualified, and available U.S. workers and that employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers, DOL so certifies to CIS and to the Department of State by issuing a permanent alien labor certification.

If DOL cannot make one or both of the above findings, the application for permanent alien employment certification is denied.

II. Current Department of Labor Regulations

DOL has promulgated regulations, at 20 CFR part 656, governing the labor certification process for the permanent employment of immigrant aliens in the United States. Part 656 was promulgated under section 212(a)(5)(A) of the INA. 8 U.S.C. 1182(a)(5)(A).

Part 656 sets forth the responsibilities of employers who desire to employ immigrant aliens permanently in the United States. Under current regulations, employers file an "Application for Alien Employment Certification" with the State Workforce Agency (SWA) serving the area of intended employment. The SWA is responsible for various processing steps, including date stamping the application, calculating the appropriate prevailing wage, and placing the job opening into the state's employment recruitment system.

The current process for obtaining a labor certification requires employers to actively recruit U.S. workers in good faith for a period of at least 30 days for the job openings for which aliens are sought. The employer's job requirements must conform to the regulatory standards.

Job applicants either are referred directly to the employer or their résumés are sent to the employer. The employer has 45 days to report to the SWA the lawful job-related reasons for not hiring any referred U.S. worker. If the employer hires a U.S. worker for the job opening, the process stops at that point, unless the employer has more than one opening, in which case the application may continue to be processed. If, however, the SWA

¹ See 6 U.S.C. 236(b), 552(d), and 557.

believes that able, willing, and qualified U.S. workers are not available to take the job, the application, together with the documentation of the recruitment results and prevailing wage information, is sent to the appropriate ETA Regional Office. There, it is reviewed and a determination made as to whether to issue the labor certification based upon the employer's compliance with program regulations. If DOL/ETA determines that there is no able, willing, qualified, and available U.S. worker, and that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers, DOL/ETA so certifies to the CIS and the Department of State by issuing a permanent labor certification. See 20 CFR part 656; see also section 212(a)(5)(A) of the INA, as amended.

On May 6, 2002, the Department published a Notice of Proposed Rulemaking (NPRM) to substantially streamline part 656, which governs the permanent labor certification program. The proposed streamlined certification regulation, which is expected to be finalized in 2004, will "implement a new system for filing and processing" permanent labor certification applications. Among other things, State Workforce Agencies will no longer receive or process applications as they do under the current system, and employers will be required to conduct recruitment before filing applications. The new processing system will apply to all applications for permanent labor certifications filed on or after the revised regulation's effective date.

The interim final rule in this document does not alter the separate streamlined certification regulation, but rather is focused on reduction of the backlog of labor certification applications filed under existing regulations with State Workforce Agencies, as described in the next section. The streamlined certification regulation, once finalized, will stabilize the backlog volume, since applications will no longer be filed with a SWA on or after that regulation's effective date and streamlined procedures will govern.

III. Background

ETA's Permanent Labor Certification Program is currently experiencing an enormous backlog in pending applications for permanent employment of alien immigrants. This backlog largely stems from amendments enacted in December 2000 to section 245(i) of the INA. The amendments allow aliens who entered the United States without inspection or who fall within certain statutory categories to adjust their status

to that of a lawful permanent resident if a labor certification application was filed on their behalf with a SWA on or before April 30, 2001. See 8 U.S.C. 1255(i)(1)(B)(ii). We estimate that approximately 236,000 applications were filed to meet the deadline of April 30, 2001, at a time when less than 100,000 applications were filed in an entire year. At the start of April 2003, over 280,000 permanent labor certification applications were in the SWA processing queues throughout the nation, with another 30,000 applications in the various ETA Regional Office queues.

To address the backlog, ETA funded a study to identify strategic options and estimate costs. The study recommended establishing centralized processing centers to achieve the economies of scale inherent in processing large numbers of applications in one location and in consolidating the functions currently performed separately by the SWAs and the ETA Regional Offices. Building upon this recommendation, ETA initiated a pilot program testing the feasibility of centralized processing, which indicated that substantial time and economic savings could be achieved.

Accordingly, this interim final rule amends part 656 by adding a new section 656.24a to provide that the National Certifying Officer (Chief, Division of Foreign Labor Certification) has the discretion to direct SWAs and ETA Regional Offices to transfer pending labor certification applications to centralized processing centers for completion of processing. The centralized processing centers will perform the required functions of the SWAs and ETA Regional Certifying Officers, consolidating steps now performed separately by the SWAs and the ETA Regional Offices to achieve efficiencies and economies of scale. The Chief will issue a directive to SWAs and the ETA Regional Offices stating how pending applications are to be identified for centralized processing, and where they are to be sent. The extent of centralized processing and the speed with which the current backlog will be reduced may vary based upon program priorities.

IV. Administrative Information

Executive Order 12866—Regulatory Planning and Review: We have determined that this interim final rule is not an "economically significant regulatory action" within the meaning of Executive Order 12866. The procedures for backlog reduction will not have an economic impact of \$100 million or more because they will not

add to or change requirements for employers applying for permanent labor certification, but rather create a means for consolidated processing at centralized locations. While it is not economically significant, the Office of Management and Budget (OMB) reviewed this interim final rule because of the novel legal and policy issues raised by this rulemaking.

Regulatory Flexibility Act: We have notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act (RFA) at 5 U.S.C. 605(b), that this interim final rule will not have a significant economic impact on a substantial number of small entities.

The factual basis for that certification is as follows: The interim final rule will affect only a portion of those employers whose applications for permanent employment certification are among the approximately 310,000 currently backlogged applications, or who file an application prior to the effective date of the regulations streamlining permanent labor certification. The interim final rule will not add to or change paperwork requirements for employer applicants, including small entities, but rather create a means for consolidated processing at centralized locations. Consequently, the Department believes there will be no additional economic burden on employer applicants, including small entities within that group. However, even assuming some impact on employers from the proposed changes, this impact will not fall "on a substantial number of small entities." As noted, the universe of pending applications is approximately 310,000. Based on Department experience, we estimate that about forty percent of permanent labor certification applications are filed by employers who have submitted multiple applications. Thus, the number of different employers submitting applications is approximately 186,000 (310,000 × 60%). We do not inquire about the size of employer applicants, however, the number of small entities applying is certainly less than the applicant total and significantly below the potential universe of small businesses to which the program is open. Because applications come from employers in all industry segments, we consider all small businesses as the appropriate universe for comparison purposes. According to the Small Business Administration's publication *The Regulatory Flexibility Act—An Implementation Guide for Federal Agencies*, there were 22,900,000 small businesses in the United States in 2002.

In comparison to the universe of all small businesses, the approximately 186,000 employers with pending applications would represent at most 0.8 percent of all small businesses $[(186,000 / 22,900,000) = 0.008; 0.008 \times 100 = 0.8\%]$. DOL asserts that 0.8% of small businesses does not represent a significant proportion of small entities.

The Department welcomes comments on this RFA certification.

Unfunded Mandates Reform Act of 1995: This interim final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996: This interim final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996 (SBREFA). The standards for determining whether a rule is a major rule as defined by section 804 of SBREFA are similar to those used to determine whether a rule is an "economically significant regulatory action" within the meaning of Executive Order 12866. Because we certified that this interim final rule is not an economically significant rule under Executive Order 12866, we certify that it also is not a major rule under SBREFA. It will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132—Federalism: This interim final rule will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, we have determined that this interim final rule does not have sufficient federalism implications to warrant the preparation of a summary impact statement.

Assessment of Federal Regulations and Policies on Families: This interim final rule does not affect family well-being.

Paperwork Reduction Act: The collection of information under part 656

is currently approved under OMB control number 1205-0015. This interim final rule does not include a substantive or material modification of that collection of information, because it will not add to or change paperwork requirements for employers applying for permanent labor certification, but rather creates a means for consolidated processing at centralized locations. Accordingly, the Department believes the Paperwork Reduction Act is inapplicable to this interim final rule. The Department invites the public to comment on its Paperwork Reduction Act analysis.

Publication as an Interim Final Rule: The Department has determined that it is unnecessary and contrary to the public interest to publish this technical amendment to the permanent labor certification regulations as a Notice of Proposed Rulemaking, with the delays inherent to the process of publishing a proposed rule, receiving and reviewing comments, and clearing and publishing a final rule. This interim final rule will allow ETA's Division of Foreign Labor Certification to take more rapid action to reduce the serious backlog in permanent labor certification applications through transfer of applications from the SWAs and ETA Regional Offices to centralized processing sites. This processing change is based on results of a pilot program that demonstrated that centralized processing would create economic and time-saving efficiencies and speed reduction of the backlog. Centralized processing will not alter substantive requirements for certification. It will not impose an additional burden on employers who have filed permanent labor certification applications or on the immigrant aliens on whose behalf applications have been filed. Rather, centralized processing is expected to benefit applicants by reducing anticipated processing time. For these reasons, it would be contrary to the public interest, as well as unnecessary; to delay implementation of this technical regulatory amendment to establish centralized processing procedures. Therefore, the Department finds pursuant to 5 U.S.C. 553(b)(3)(B) that good cause exists for publishing this regulatory amendment as an interim final rule. While notice of proposed rulemaking is being waived, the Department is interested in comments and advice regarding this interim final rule.

Catalogue of Federal Domestic Assistance Number: This program is listed in the Catalog of Federal Domestic Assistance at Number 17.203, "Labor Certification for Alien Workers."

List of Subjects in 20 CFR Part 656

Administrative practice and procedure, Agriculture, Aliens, Crewmembers, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Guam, Health professions, Immigration, Labor, Longshore and harbor work, Migrant labor, Passports and visas, Reporting and recordkeeping requirements, Students, Unemployment, Wages, and Working conditions.

■ For the reasons stated in the Preamble, the Employment and Training Administration, Department of Labor, amends 20 CFR part 656 as follows:

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

■ 1. The authority citation for part 656 continues to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A) and 1182(p); 29 U.S.C. 49 *et seq.*; sec. 122, Pub. L. 101-649, 109 Stat. 4978.

■ 2. Part 656, subpart C, is amended by adding section 656.24a, to be placed immediately after section 656.24, to read as follows:

§ 656.24a Centralized processing.

(a) To facilitate processing of applications and elimination of backlogs, the National Certifying Officer (Chief, Division of Foreign Labor Certification) may direct a SWA or an ETA Regional Office to transfer to a non-State centralized processing site some or all pending applications filed under part 656. The Chief will issue a directive to the SWAs and ETA Regional Offices stating how pending applications are to be identified for centralized processing and where they are to be transferred. For each transferred application, the centralized processing site will perform all required functions of the SWA (as described in § 656.21) and the Regional Certifying Officer (as described in § 656.21 and § 656.24).

(b) If the labor certification presents a special or unique problem, the centralized processing site, in consultation with or at the direction of the National Certifying Officer, may refer the application to the National Certifying Officer for determination. If the National Certifying Officer has directed that certain types of applications or specific applications be handled in the national office, the centralized processing site shall refer such applications to the National Certifying Officer.

Signed at Washington, DC, this 13th day of
July, 2004.

Emily Stover DeRocco,

*Assistant Secretary, Employment and
Training Administration.*

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