Permanent Labor Certification Program

Final Regulation

Frequently Asked Questions

EFFECTIVE DATE

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

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

STANDARDS/ MAJOR DIFFERENCES

Question: What standards will be used in making labor certification determinations under the new, streamlined system?

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

Question: What provisions have changed in the new system?

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

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

Filing: Supporting documentation is not submitted with the application.

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

Refiling: An employer may, at any time, withdraw an application filed under the regulation in effect prior to March 28, 2005, refile under PERM, and maintain the

original filing date if the new application complies with the new regulation, the application is identical to the original application, and a job order has not been placed by the SWA for the original application.

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

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

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

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

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

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

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

Recruitment: Sunday edition newspaper advertisements are required.

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

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

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

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

FILING

HOW TO FILE

Question: How can an employer file an Application for Permanent Employment Certification, ETA Form 9089?

- ☞ The employer has the option of filing an application electronically (using web-based forms and instructions) or by mail. However, the Department of Labor recommends that employers file electronically. Not only is electronic filing, by its nature, faster, but it will also ensure the employer has provided all required information, as an electronic application can not be submitted if the required fields are not completed.

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

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

Question: How does the employer file an application electronically?

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

  NOTE: Additional information regarding personal identifiers will follow.

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

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

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

Question: Where does an employer file an application by mail and how can people contact the National Processing Centers to ask questions about an application?

- ☞ National Processing Centers have been established in Atlanta and Chicago. Employers submit their application to the processing center with responsibility for the state or territory where the job opportunity is located.

- ☞ The address and contact information for each processing center and the states and the territories within their jurisdictions are provided below.

United States Department of Labor
Employment and Training Administration
Atlanta National Processing Center
Harris Tower
233 Peachtree Street, N.E., Suite 410
Atlanta, Georgia 30303
Telephone: (404) 893-0101
FAX: (404) 893-4642

Alabama	Connecticut	Delaware	District of Columbia
Florida	Georgia	Kentucky	Maine
Maryland	Massachusetts	Mississippi	New Hampshire
New Jersey	New York	North Carolina	Pennsylvania
Puerto Rico	Rhode Island	South Carolina	Tennessee
Vermont	Virgin Islands	Virginia	West Virginia

United States Department of Labor
Employment and Training Administration
Chicago National Processing Center
Railroad Retirement Board Building
844 N. Rush Street
12th Floor
Chicago, Illinois 60611
Telephone: (312) 886-8000
FAX: (312) 886-1688

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

WHAT TO FILE/DOCUMENTATION

Question: What forms or documents must the employer include in an application?

- ☞ The employer must file a completed Application for Permanent Employment Certification, ETA Form 9089.

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

Question: How long must supporting documents be retained?

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

Question: When must applications be signed?

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

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

FILING TIMEFRAMES

Question: When is PERM effective and must the employer wait until the effective date to begin recruitment?

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

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

REFILING

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

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

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

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

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

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

ATTESTATION

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

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

RECRUITMENT

NOTICE OF FILING

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

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

Question: Must the ten consecutive business days posting of the notice of filing timeframe end at least 30 days prior to filing?

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

Question: What address must the employer provide on the posted notice of filing?

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

PROFESSIONAL/NON PROFESSIONAL

Question: How does an employer determine whether to advertise under the recruitment requirements for professional occupations or nonprofessional occupations?

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

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

☞ Generally, all the required steps must be different. Steps can not be duplicated nor can one step be used to satisfy two requirements, except in the case of copies of web pages generated in conjunction with the newspaper advertisements which can serve as documentation of the use of a web site other than the employers. For example, the employer can not count two advertisements in a local and/or ethnic newspaper, or two postings on a web site, as two steps. Similarly, the employer can not use a professional journal in lieu of a second Sunday newspaper advertisement

and then count it again as an additional "trade or professional organizations" recruitment step, or count the job order again as an additional "web site other than the employer's" step.

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

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

ADVERTISEMENT

Acceptable Publications

Question: What is considered an acceptable newspaper and/or acceptable journal and is there a published list?

☞ There is no published list of acceptable publications.

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

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

Time Frames

Question: When must the advertisements in the newspaper or professional journals be placed?

☞ Generally, the newspaper advertisements must be placed on two different Sundays at least 30 days, but no more than 180 days, prior to filing the application. The Sundays may be consecutive.

- ☞ However, if the job opportunity is located in a rural area that does not have a newspaper that publishes a Sunday edition, the employer may use the newspaper edition with the widest circulation.

- ☞ This exception applies to rural newspapers only. If a suburban newspaper has no Sunday edition, the employer must publish the Sunday advertisement in the most appropriate city newspaper that serves the suburban area.

- ☞ For journals, there is no specific edition requirement, however, the advertisement must be placed at least 30 days, but no more than 180 days, prior to filing the application.

Question: Must all recruitment take place at least 30 days, but no more than 180 days prior to filing?

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

Advertisement Content

Question: What level of detail regarding the job offer must be included in the advertisement?

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

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

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

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

Question: Does the job location address need to be included in the advertisement?

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

Question: Does the employer's address need to be included in the advertisement?

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

Question: Does the offered wage need to be included in the advertisements?

☞ No, the offered wage does not need to be included in the advertisement, but if a wage rate is included, it can not be lower than the prevailing wage rate.

Multiple Positions

Question: Can one advertisement be used for multiple positions?

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

NOTE: While employers have the option to place broadly written advertisements with few details regarding job duties and requirements, employers must prepare a recruitment report that addresses all minimally qualified applicants for the job

opportunity. If an employer places a generic advertisement, the employer may receive a large volume of applicants, all of whom must be addressed in the recruitment report. Employers placing general advertisements may wish to include a job identification code or other information to assist the employer in tracking applicants to the job opportunity.

JOB ORDER

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

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

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

Question: Must the required 30 day job order timeframe end at least 30 days prior to filing?

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

PREVAILING WAGE

Question: Where and when does the employer obtain prevailing wage information?

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

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

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

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

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

☞ No, the wage offered must equal or exceed the prevailing wage. The wage must be at least 100% of the prevailing wage. The 5% deviation, permitted under the former regulation, is no longer acceptable.

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

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

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

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

Question: Must the employer obtain a prevailing wage determination before the employer begins recruitment?

☞ No, the employer does not need to wait until it receives a prevailing wage determination before beginning recruitment. However, the employer must be aware

that in its recruiting process, which includes providing a notice of filing stating the rate of pay, the employer is not permitted to offer a wage rate lower than the prevailing wage rate. Similarly, during the recruitment process, the employer may not make an offer lower than the prevailing wage to a U.S. worker.

Question: Why did the prevailing wage two tier skill level structure change to four levels?

☞ Congress enacted the Consolidated Appropriations Act of 2005 amending the Immigration and Naturalization Act (Section 212(p), 8 U.S.C. 1182(p)) to provide:

"Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the two levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level."

Question: When does the four wage level provision go into effect?

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

Question: Is the employer permitted to use a valid prevailing wage determination issued prior to March 8, 2005?

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

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

Question: Is it permissible to use the same prevailing wage determination for more than one application?

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

Question: Does a prevailing wage determination expire?

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

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

Question: When is it permissible to use the median in lieu of the arithmetic mean to establish the prevailing wage?

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

Question: When is the employer permitted to provide an alternate wage source?

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

Question: What are the criteria for an acceptable employer-provided survey?

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

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

☞ If the employer disagrees with the skill level assigned to its job opportunity, or if the SWA informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer is afforded one opportunity to

provide supplemental information to the SWA. Additionally, the employer may choose to file a new request for a wage determination or request review by the Certifying Officer.

Question: What additional documentation may the employer provide to the Certifying Officer when requesting a review of the prevailing wage?

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

RECRUITMENT REPORT

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

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

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

JOB REQUIREMENTS/DUTIES

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

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

NOTE: Business necessity can be established by the employer demonstrating that the job duties and requirements bear a reasonable relationship to the occupation in

the context of the employer's business and are essential to perform the job in a reasonable manner.

Question: Can the employer include a requirement for a foreign language?

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

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

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

☞ The job summary specific to the SOC/O*NET code and Occupation Title provided by the SWA on the prevailing wage determination is considered to identify the requirements normal to that occupation. Any requirements in addition to those listed in the summary will be considered not normal for the occupation and the employer should be prepared to provide proof of business necessity if requested by the Certifying Officer. These summary reports can be accessed at http://online.onetcenter.org. Even if the employer has informed the SWA of these requirements in a prevailing wage determination request, the employer must still inform the Department of Labor by correctly attesting on the Application for Permanent Employment Certification, ETA Form 9089/Questions H-12 or H-13. Additionally, if the employer has not accurately attested on ETA Form 9089 that there are requirements not normal to the occupation, the application will be denied whether proof of business necessity is available or not.

ALIEN EXPERIENCE

Question: Under what circumstances may the alien use experience gained with the employer as qualifying experience?

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

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

Question: For purposes of determining whether the alien gained experience with the employer, would an affiliate abroad or an acquiring company be considered an employer?

☞ For purposes of determining whether the alien gained experience with the employer, an employer is ‘‘an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.’’

Question: Does the alien beneficiary need to have a bachelor's or higher degree to qualify for a professional occupation?

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

Question: Is the employer permitted to accept an equivalent foreign degree?

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

Question: Is the employer permitted to accept alternative job experience/qualifications?

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

NOTE: Even when the employer's alternative requirements are substantially equivalent, but the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, the alternative requirements will be considered unlawfully tailored to the alien's qualifications unless the employer has indicated on the application that applicants with any suitable combination of education, training or experience are acceptable.

COLLEGE AND UNIVERSITY TEACHERS—RECRUITMENT

Question: Are college and university teacher occupations included in Schedule A?

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

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

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

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

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

Question: Are the recruitment provisions different for college and university teachers?

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

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

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

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

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

Question: What is Schedule A and who qualifies?

☞ Schedule A lists those occupations for which a determination by the Department of Labor has been made that there are not sufficient United States workers who are able, willing, qualified, and available and the wages and working conditions of United States workers similarly employed will not be adversely affected by employment of aliens in those occupations. An employer seeking a labor certification for a physical therapist, a professional nurse, or an alien of exceptional ability in the performing arts, sciences or arts, to include college and university teachers, should review § 656.5, Schedule A, to determine whether the alien's qualifications meet the provision's requirements.

Question: Is an application for a labor certification for Schedule A occupations filed with a Department of Labor National Processing Center?

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

Question: What form is used to file an application for a labor certification for Schedule A occupations?

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

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

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

Question: If filing an application under Schedule A, must an employer provide notice of filing?

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

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

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

PERFORMING ARTS

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

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

AUDIT

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

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

Question: When, during an audit, is there a 90 day suspension of the audit?

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

REVOCATION

Question: What is revocation?

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

Question: What are the criteria for revoking approved labor certifications?

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

Question: Is there a time limitation for revocations?

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

INVALIDATION

Question: What is invalidation?

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

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

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

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

Question: Is the employer permitted to request a review of the Certifying Officer's prevailing wage determination?

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

Question: What recourse does the employer have in the event a labor certification is denied or revoked?

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