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BIL

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 656

[DOL Docket No. ETA-2026-0133]

RIN 1205-AC29

Modernizing the Labor Market Test and Improving Protections for U.S. Workers in the PERM Immigrant Visa Program

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Labor (Department or DOL) proposes to amend its regulations regarding the certification of job opportunities offered by employers seeking to employ aliens on a permanent basis in the United States. This Notice of Proposed Rulemaking (NPRM or proposed rule) strengthens the standards by which the Department receives and reviews employers' applications for permanent labor certification and improves the integrity of the overall employment-based immigrant visa program to more effectively protect the wages and job opportunities of U.S. workers similarly employed in the United States. Among the issues addressed in this proposed rule are eliminating further administration of Schedule A, which exempts certain job opportunities from the statutorily required labor market test; strengthening the minimum standards of recruitment to ensure all employers seeking labor certification access the broadest pool of high-quality U.S. workers using the latest technologies and methods; enhancing safeguards for U.S. workers impacted by layoffs, including those laid off by employers using third-party staffing companies and establishing standards for employers to report layoffs; expanding requirements for employers to provide U.S. workers with notice of filing (NOF) applications for permanent labor certification; improving employer

compliance with program requirements and consideration of qualified U.S. workers that is comparable to job opportunities for which permanent labor certification is not required; and codifying the Department's practice of electronically receiving, processing, and issuing final determinations on employer requests for prevailing wages and permanent labor certifications. The changes in this proposed rule are consistent with the Secretary of Labor's (Secretary) statutory responsibilities to certify that there are not sufficient workers in the United States who are able, willing, qualified, and available to fill the petitioning employer's job opportunity at the time of application for a visa and admission to the United States, and that the employment of such alien will not adversely affect the wages and working conditions of similarly employed workers in the United States.

DATES: Interested persons are invited to submit written comments on all aspects of this proposed rule and the changes to the information collection on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments electronically by the following method:

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions on the website for submitting comments. A plain language summary of the proposed rule is also available on that website.

Instructions: Comments should be confined to issues pertinent to the NPRM, identify the agency's name and public docket number ETA-2026-0133, explain the reasons for any recommended changes, and reference the specific section and wording being addressed, where possible.

Please be advised that the Department will post comments that relate to this NPRM to *https://www.regulations.gov,* including any personal information provided. The *https://www.regulations.gov* website is the Federal e-Rulemaking Portal and all comments posted there are available and accessible to the public. Please do not submit

comments containing trade secrets, confidential or proprietary commercial or financial information, personal health information, sensitive personally identifiable information (for example, social security numbers, driver's license or state identification numbers, passport numbers, or financial account numbers), or other information that you do not want to be made available to the public. Should the agency become aware of such information, the agency reserves the right to redact or refrain from posting such personally sensitive or other sensitive information. The agency also reserves the right to redact or refrain from posting such comments that contain threatening language or language that is obscene, indecent, or profane. Please note that depending on how information is submitted, the agency may not be able to redact the information and instead reserves the right to refrain from posting the information or comment in such situations.

FOR FURTHER INFORMATION CONTACT: For further information, contact Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Room N-5311, Washington, DC 20210, email: OFLC.Regulations@dol.gov.

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I. Acronyms and Abbreviations

AIE	Area of intended employment
ALJ	Administrative Law Judge
BALCA	Board of Alien Labor Certification Appeals
BLS	Bureau of Labor Statistics
CBA	Collective bargaining agreement
CDR	Center Director Review
CFR	Code of Federal Regulations
Chief ALJ	Chief Administrative Law Judge
CMSA	Consolidated Metropolitan Statistical Area
CO	Certifying Officer
DHS	Department of Homeland Security
DOJ	Department of Justice
DOL	Department of Labor
DOL-OIG	DOL Office of Inspector General
DOS	Department of State
EEOC	Equal Employment Opportunity Commission
E.O.	Executive Order
ETA	Employment and Training Administration
FEIN	Federal Employer Identification Number
FLAG	Foreign Labor Application Gateway
FR	Federal Register
FRFA	Final Regulatory Flexibility Analysis
FRN	Federal Register notice
FY	Fiscal year
HR	Human resources
IMMACT 90	Immigration Act of 1990
INA	Immigration and Nationality Act
IRCA	Immigration Reform and Control Act of 1986
IRFA	Initial Regulatory Flexibility Analysis
MSA	Metropolitan Statistical Area
NAICS	North American Industry Classification System
NOF	Notice of Filing
NOIR	Notice of Intent to Revoke

NORD	Notice of Reconsideration Decision
NPC	National Processing Center
NPRM	Notice of Proposed Rulemaking
OEWS	Occupational Employment and Wage Statistics
OFLC	Office of Foreign Labor Certification
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
O*NET	Occupational Network
OPT	Optional Practical Training
PERM	Permanent Labor Certification Program
PRA	Paperwork Reduction Act
PWD	Prevailing Wage Determination
RFA	Regulatory Flexibility Act
RFI	Request For Information
Secretary	Secretary of Labor
SOC	Standard Occupational Classification
Stat.	United States Statutes at Large
STEM	Science, Technology, Engineering, and Mathematics
SVP	Specific Vocational Preparation
SWA	State Workforce Agency
TFR	Temporary Final Rule
UMRA	Unfunded Mandates Reform Act
U.S.	United States
U.S.C.	United States Code
USCIS	U.S. Citizenship and Immigration Services

II. Revisions to 20 CFR Part 656

A. Statutory Framework

The Immigration and Nationality Act (INA or the Act), as amended by the Immigration Reform and Control Act of 1986, assigns responsibilities to the Secretary relating to the admission and employment of certain aliens who intend to work and live permanently in the United States. The Act prohibits the admission of certain employment-based immigrants to perform skilled or unskilled labor as permanent residents unless the Secretary has determined and certified to the Secretaries of Homeland Security and State that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor; and (2) the employment of such alien will not adversely affect the wages and

working conditions of workers in the United States similarly employed.[1] *See* section 212(a)(5)(A)(i), 8 U.S.C. 1182(a)(5)(A)(i). In addition, the Act specifies that for aliens who are members of the teaching profession, referring to college and university teachers, and those possessing exceptional ability in the sciences or the arts, the Secretary must consider only equally or more qualified United States (U.S.) workers as qualified for the job opportunity offered.[2] *See* section 212(a)(5)(A)(ii), 8 U.S.C. 1182(a)(5)(A)(ii). For all other job opportunities requiring the Secretary's determination and certification, each prospective U.S. worker who possesses the minimum qualifications required for the job opportunity and who will be available at the time and place needed to perform the services or labor required is considered available.

The INA provides for five "preference" categories, or immigrant visa classes, only two of which—the second and third preference employment categories (commonly called the EB-2 and EB-3 immigrant visa classifications)—generally require a labor certification.[3] An employer seeking to sponsor an alien worker for an immigrant visa under the EB-2 or EB-3 preference categories generally must file a visa petition with the Department of Homeland Security (DHS) on the alien's behalf, and the petition must

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[1] Although this provision references the Attorney General, the authority to adjudicate immigrant visa petitions was transferred to the Director of the Bureau of Citizenship and Immigration Services (an agency within DHS)—now known as U.S. Citizenship and Immigration Services (USCIS)—by the Homeland Security Act of 2002, Pub. L. 107-296, 451(b) (codified at 6 U.S.C. 271(b)). Under 6 U.S.C. 557, references in federal law to any agency or officer whose functions have been transferred to DHS shall be deemed to refer to the Secretary of Homeland Security or other official or component to which the functions were transferred.

[2] *See* 69 FR 77326, 77357-77358 (Dec. 27, 2004) (discussing legislative history and intent related to its amendments to INA section 212(a)(5)(A)(ii)).

[3] See 8 U.S.C. 1153(b)(2)-(3), 1182(a)(5)(D). Section 1153(b)(2) governs the EB-2 classification of immigrant visas granted to aliens who are either professionals holding advanced degrees (master's degree or above or foreign equivalent degree, or a bachelor degree or foreign equivalent degree plus five years of progressive experience in the specialty) or persons of "exceptional ability" in the sciences, arts, or business. To gain entry in this category, the alien must have prearranged an offer of employment with a U.S. employer that meets the requirements of labor certification, unless the work he or she is seeking admission to perform is in the "national interest," such as to qualify for a waiver of the job offer (and hence, the labor certification) requirement under 8 U.S.C. 1153(b)(2)(B). Section 1153(b)(3) governs the EB-3 classification of immigrant work visas granted to aliens who are either "skilled workers," "professionals," or "other" (unskilled) workers, as defined by the statute. To gain entry in this category, the alien must have a prearranged offer of employment with a U.S. employer that meets the requirements of labor certification, without exception.

include a labor certification from the Secretary.[4] Further, the Department of State (DOS) may not issue a visa unless the Secretary has issued a labor certification in conformity with the relevant provisions of the INA.[5] The INA provides one exception, which applies only to certain aliens eligible for the EB-2 visa classification. If the Secretary of Homeland Security determines it is in the national interest to waive the permanent job offer requirement—permitting the alien to self-petition under the EB-2 visa classification—the Secretary's certification is not required for admission to the United States.[6] *See* section 203(b)(2)(B); 8 U.S.C. 1153(b)(2)(B). All other EB-2 and EB-3 aliens cannot be admitted to the United States without being sponsored for permanent employment with a U.S. employer that first obtains the Secretary's statutory certification for the job offered. *See* section 203(b)(2)(A), (b)(3)(C); 8 U.S.C. 1153(b)(2)(A), (b)(3)(C).

Within the Department, the Secretary has delegated authority to make the required determination and issue the related certification to the Assistant Secretary for the Employment and Training Administration (ETA).[7] The Assistant Secretary for ETA, in turn, has delegated that authority to the Office of Foreign Labor Certification (OFLC). As a result, OFLC reviews requests for permanent labor certification, issues certifications, and carries out other statutory responsibilities as required by 8 U.S.C. 1182(a)(5)(A).

B. Current Regulatory Framework

A U.S. employer sponsoring an alien for permanent admission based on the EB-2 or EB-3 visa classifications must demonstrate that the job requirements qualify for the

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[4] 8 U.S.C. 1154(a)(1)(F), 1182(a)(5)(A) and (D).
[5] 8 U.S.C. 1153(b)(2), (b)(3)(C), 1201(g).
[6] *See* 6 USCIS Policy Manual Vol. 6, Pt. F, Ch. 5, Advanced Degree or Exceptional Ability (discussing EB-2 eligibility and evidence guidance, including national interest waiver of the job offer), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5#footnotelink-3 (last accessed Apr. 13, 2026).
[7] DOL Secretary's Order No. 6-2010*, Delegation of Authority and Assignment of Responsibility*, 75 FR 66268 (Oct. 27, 2010).https://www.federalregister.gov/documents/2010/10/27/2010-27139/delegation-of-authority-and-assignment-of-responsibility-secretarys-order-6-2010.

visa classification it seeks, that the alien qualifies for the job opportunity, and—as it relates to a labor certification for the permanent labor certification program or PERM labor certification program—that qualified U.S. workers are not available to fill the position and that employment of the alien will not adversely affect wages and working conditions of similarly employed U.S. workers.

The Department's regulations, 20 CFR part 656, implement the statutory provisions that govern the permanent labor certification ("PERM labor certification") process and set forth the responsibilities of U.S. employers who seek to permanently employ aliens covered by the statutory labor certification requirements.

On May 6, 2002, the Department published an NPRM that proposed to streamline the permanent labor certification program.[8] A final rule implementing significant revisions to the permanent labor certification program was published on December 27, 2004, and took effect on March 28, 2005.[9] In addition, on February 13, 2006, the Department published an NPRM designed to enhance program integrity and reduce the incentives and opportunities for fraud and abuse in the permanent labor certification program.[10] The Department subsequently published a final rule on May 17, 2007, which took effect on July 16, 2007, commonly referred to as "the PERM fraud rule."[11] This rule prohibited, among other things, the substitution of beneficiaries on permanent labor certification applications and resulting certifications; established a 180-day validity period for the use of approved labor certifications filed in connection with an I-140 Immigrant Petition with USCIS; prohibited the sale, barter or purchase of permanent

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[8] *See* NPRM, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,* 67 FR 30466 (May 6, 2002).
[9] *See* Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 FR 77326 (Dec. 27, 2004).
[10] *See* Notice of Proposed Rulemaking (NPRM), *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity,* 71 FR 7656 (Feb. 13, 2006).
[11] *See* Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 FR 27904 (May 17, 2007).

labor certifications and applications; required employers to pay the costs of preparing, filing and obtaining certification, and strictly prohibited transferring such cost to the alien beneficiary; and established procedures for debarment of employers from the permanent labor certification program.[12]

To receive a PERM labor certification under current regulations, the employer must first obtain a prevailing wage determination (PWD), conduct a good faith test of the domestic labor market for qualified U.S. workers, and post a NOF to employees before submitting an *Application for Permanent Employment Certification* (the current Form ETA-9089) to OFLC for review and processing. A request for a PWD, which is collected through the *Application for Prevailing Wage Determination* (the current Form ETA-9141), enables OFLC to review the duties, requirements, and worksite location(s) of the job opportunity and provide the employer with the applicable prevailing wage rate(s).[13] The employer must offer a wage that equals or exceeds the PWD determined by OFLC and guarantee that the wage the employer will pay to the alien will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time of admission to take up the certified employment. The PWD ensures that the recruitment of U.S. workers based on the employer's job opportunity offers at least the average wage paid to similarly employed workers in the specific occupation in the area of intended employment (AIE) or the applicable collective bargaining agreement (CBA) rate, and if the employer permanently hires aliens at the wage rate offered, doing so will not adversely affect workers similarly employed in the United States.[14]

The statutorily required NOF, which must be provided to bargaining representative(s) or posted in conspicuous locations at all worksite locations, as

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[12] *See* Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 FR 27904 (May 17, 2007).
[13] *See* 20 CFR 656.40.
[14] *See* 20 CFR 656.40(b)(2).

applicable, helps inform the employer's employees of the job offered to the alien in the PERM labor certification process and provides U.S. workers and others with an opportunity to contact OFLC with information concerning the application.[15] The existing test of the domestic labor market generally involves the employer following a prescribed list of recruitment requirements, such as placing a job order with the State Workforce Agency (SWA) for 30 days and print newspaper advertisements on two different Sundays, which are intended to apprise U.S. workers of the job opportunity and give them an opportunity to apply.[16] Together, these pre-filing requirements enable the employer to provide information essential to OFLC's ability to reach the statutorily required determinations when reviewing an *Application for Permanent Employment Certification*.

Upon completion of pre-filing requirements, the employer typically submits the *Application for Permanent Employment Certification* electronically to OFLC using the Foreign Labor Application Gateway (FLAG) system, which contains a series of attestations made by the employer, guaranteeing the employer has taken or will take steps to comply with the PERM labor certification process under 20 CFR part 656. After performing an initial review of the application, OFLC may grant or deny a PERM labor certification, request further information, select one or more applications for audit examination, and/or require the employer to undergo additional recruitment of U.S. workers under OFLC's supervision.

Where a PERM labor certification is approved, OFLC issues a Form ETA-9089 – *Final Determination: Permanent Employment Certification Approval* (Final Determination), to the employer and the authorized attorney or agent, as applicable, that

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[15] *See* Immigration Act of 1990, Pub. L. 101-649, sec. 122(b); 8 U.S.C. § 1182 note; 20 CFR 656.10(d).
[16] The required recruitment steps for PERM are determined by the type of occupation: 20 CFR 656.17 is for non-professional and professional occupations, and 20 CFR 656.18 is an option for college and university teachers identified through a competitive recruitment and selection process.

can be used to file an Immigrant Petition with USCIS. If, however, OFLC denies a PERM labor certification, the employer may appeal the denial. An employer currently has the option of requesting the Department's reconsideration or requesting review before the Board of Alien Labor Certification Appeals (BALCA or the Board). Presently, the employer must request reconsideration or BALCA review no later than 30 days from the date of the denial.[17] Where OFLC upholds its denial decision on reconsideration, an employer may further seek BALCA review within 30 days of the decision on reconsideration. If the employer does not pursue an appeal or if the employer's appeal is unsuccessful in overturning the denial decision, the employer may file a new *Application for Permanent Employment Certification* with OFLC that meets the requirements of 20 CFR part 656.

The PERM labor certification program is largely an attestation-based program, requiring the employer to attest that it has completed the required steps for the PERM labor certification process, met the conditions of employment on the application, and retained all applications and supporting documentation demonstrating compliance with program requirements. For example, the employer attests that the position has been open to any U.S. worker; U.S. workers who did apply were rejected for lawful, job-related reasons; the pay offered is at least the prevailing wage rate; and the job opportunity's terms and conditions are not contrary to federal, state, or local law.[18] The Department has integrity measures in place to protect and strengthen the PERM labor certification program. OFLC conducts pre-certification audits to ensure employer compliance with the requirements of 20 CFR part 656. During audit review, OFLC currently requests all applications and supporting documentation to verify, among other requirements, that the employer posted the required NOF to its employees and conducted all applicable pre-

[17] *See* 20 CFR 656.24(g)(1) and 656.26(a).
[18] *See* ETA Form 9089, U.S. Dept. of Labor, p. 9, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/9089form.pdf.

filing recruitment steps, as required and as attested to on its application, and that no qualified U.S. worker was available for the job opportunity for which the employer seeks PERM certification.[19] In addition to audits, OFLC has the discretion to require an employer to conduct supervised recruitment to ensure an adequate and more current test of the U.S. labor market is performed to determine whether qualified U.S. workers are available to fill the employer's job opportunity.[20]

With respect to program integrity measures, if OFLC discovers after issuing a certification that certification was not justified, OFLC may take further action, such as revocation. Additionally, if the Department learns an employer, attorney, or agent is involved in possible fraud or willful misrepresentation in connection with the PERM program, OFLC will refer the matter to other government entities, as appropriate, for investigation, and send a copy of the referral to the DOL Office of Inspector General (DOL-OIG). In these cases, or if the Department is notified by other government entities that an employer, attorney, or agent is under investigation for possible fraud or willful misrepresentation in connection with the PERM program, OFLC may suspend processing of any *Application for Permanent Employment Certification* involving such employer, attorney, or agent for an initial period of up to 180 calendar days and may extend the suspension of processing until completion of any investigation and/or judicial proceedings. Where OFLC finds the employer, attorney, agent, or any combination thereof, has violated the regulatory requirement(s) under 20 CFR part 656, OFLC may pursue debarment action(s) in accordance with the standard and procedures set forth in 20 CFR 656.31(f) for a reasonable period of not more than 3 years.[21]

C. Recent Administrative Action Related to the Permanent Labor Certification Process

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[19] *See* 20 CFR 656.20.
[20] *See* 20 CFR 656.21.
[21] *See* 20 CFR 656.32 and 20 CFR 656.31.

Beginning in 1965 and for the purpose of reducing delays in processing an alien's requests for an employment-based immigrant visa, the Department established through rulemaking, schedules or listings of occupations where the Secretary could pre-certify whether sufficient qualified workers in the United States were available to fill the employer's need for permanent labor.[22] One such schedule, referred to as Schedule A, set forth a list of occupations that the Secretary designated as in short supply of qualified U.S. workers, which permitted employers to bypass the statutory labor certification requirement prior to filing an Immigrant Petition requesting admission of an alien to perform permanent skilled or unskilled labor.[23] During the ensuing thirty years, the occupational listings in Schedule A were periodically reviewed and only revised eight times, the last time in 2004.[24]

On December 21, 2023, the Department published a request for information, *Labor Certification for Permanent Employment of Foreign Workers in the United States; Modernizing Schedule A To Include Consideration of Additional Occupations in Science, Technology, Engineering, and Mathematics (STEM) and Non-STEM Occupations*.[25] The Department published the request for information to allow the public to provide input, including data, statistical metrics or models, studies, and other relevant information, on how the Department may establish a reliable, objective, and transparent methodology for revising Schedule A to include STEM and other non-STEM occupations where there may

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[22] NPRM, *Availability of and Adverse Effect Upon American Workers,*30 FR 14494, 14494 (Nov. 19, 1965), *available at https://www.govinfo.gov/content/pkg/FR-1965-11-19/pdf/FR-1965-11-19.pdf.*

[23] The 1965 regulation also proposed establishing Schedule B, which set forth a list of occupations for which the Secretary pre-determined were in sufficient supply of U.S. workers and, thus, the statutorily required certification could not be made on the employer's request.

[24] *See, e.g.,*31 FR 16412 (Dec. 23, 1966), 33 FR 12808 (Sept. 10, 1968), 36 FR 2462 (Feb. 4, 1971), 42 FR 3440 (Jan. 18, 1977), 45 FR 83933 (Dec. 19, 1980), 52 FR 20593 (June 2, 1987), 56 FR 54920 (Oct. 23, 1991), and 69 FR 77326 (Dec. 27, 2004). The most recent revisions to Schedule A listings in 2004 only added aliens of exceptional ability in the performing arts to Group II; the other revision in 2004 was procedural and clarified the professional qualifications for eligible nurses under Schedule A.

[25] *See* Request for Information, *Labor Certification for Permanent Employment of Foreign Workers in the United States; Modernizing Schedule A To Include Consideration of Additional Occupations in Science, Technology, Engineering, and Mathematics (STEM) and Non-STEM Occupations*, 88 FR 88290 (Dec. 21, 2023).

exist shortages of qualified U.S. workers, consistent with requirements of the INA. Specifically, the Department sought public comment on evaluating the utility of expanding Schedule A to include STEM and non-STEM occupations for which there may be an insufficient number of ready, willing, able, and qualified U.S. workers. Through the request for information, the Department requested input on the appropriate data sources and methods for determining whether labor shortages exist and asked the public how the Department could establish a reliable, objective, and transparent methodology for identifying both STEM and non-STEM occupations that are experiencing labor shortages.

The Department received over 2,000 comments in response to the request for information. The comments received ranged from opposition to the continuation of Schedule A to support for its expansion. Those opposed to the continuation and/or expansion of Schedule A characterized Schedule A as unnecessary, undermining statutory intent, a mechanism to bypass immigration rules, and/or harmful to U.S. workers. Additionally, none of the commenters who expressed support for Schedule A provided the Department with a suitable rationale or administratively feasible methodology to expand or maintain the current occupations listed on Schedule A. Several commenters supported either limiting or reducing Schedule A occupations, and provided some examples and citations, but they also did not provide a suitable rationale or administratively feasible methodology to determine which occupations to retain or remove from Schedule A. Although a handful of commenters made concerted efforts to respond to questions posed in the request for information, responses received from commenters overall did not provide sufficient substantive information that would allow the Department to proceed with proposing changes to the regulations governing Schedule A. While many commenters successfully identified potential specific sources of economic or labor data that could be used, the commenters almost uniformly failed to

specify which precise data markers or thresholds should be established or used to determine whether there was a labor shortage covering a particular geographic area warranting inclusion on Schedule A.

In terms of identifying STEM occupations, one consistent recommendation was that the Department should mimic DHS's "STEM Designated Degree Program List for the Optional Practical Training (OPT) STEM extension" to define STEM for purposes of identifying occupations for expanding Schedule A. However, the commenters failed to explain how a program which determines eligibility for aliens to engage in a limited period of post-graduation employment in the United States is applicable to the PERM program. The DHS STEM Designated Degree Program List enumerates the fields of study that DHS designates as STEM for purposes of the 24-month STEM OPT extension described at 8 CFR 214.2(f)(10)(ii)(C). It has nothing to do with labor shortages and the comments did not address how the process for updating OPT is applicable to defining labor shortages within those degree fields and related occupational classifications. There are considerable substantive differences between the OPT and PERM program requirements, so while many commenters suggested that DHS' program for updating OPT would be useful for PERM, these commenters did not explain how it could be shaped to meet the very different nature of the two programs, and the respective objectives of each program. Commenters also suggested adding numerous non-STEM industries to Schedule A, but the commenters likewise failed to provide information that would sustain a factual determination that there is a labor shortage of those occupations in any particular geographic area.

In the absence of a reliable, objective, and transparent methodology for updating Schedule A or the relevant substantive information needed to develop such a methodology, the Department decided it could not add new occupations to Schedule A nor demonstrate that the occupations currently listed in Schedule A are still shortage

occupations. The Department is now proposing through this rulemaking to eliminate Schedule A, which is explained further below in section III.C.

D. Need for Rulemaking

It is the policy of the Department to vigorously enforce all laws within its jurisdiction governing administration of the PERM labor certification program, which informs USCIS' approval of EB-2 and EB-3 immigrant visa petitions. The Department has not updated its regulations associated with the PERM labor certification process in nearly 20 years and changes in labor market dynamics, including increases in remote work, advances in electronic methods of recruiting highly qualified talent, high rates of turnover or layoffs in certain sectors of the U.S. economy, necessitate a need to strengthen the program's standards and procedures. Further, with the Trump Administration's executive actions to strengthen the nation's southern border, enhance interior enforcement efforts, and promote economic growth, employers may increasingly turn to legal labor pathways—like permanent and temporary employment work visas, and the Department must ensure that employers first access and consider the broadest pool of qualified and available U.S. talent before seeking to sponsor and hire an alien for permanent employment in the United States.[26]

This proposed rule is also part of a broader Government effort to more faithfully enforce the immigration laws of the United States as set out by Congress.[27] In

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[26] *See*, *e.g.*, Executive Order No. 14159, *Protecting the American People Against Invasion*, 90 FR 8443 (Jan. 29, 2025); *see also*, Executive Order No. 14431 (Sept. 18, 2026) Enhancing Program Integrity and interagency coordination in the administration of the H-1B Nonimmigrant Visa Program 91 FR 60501(Sept. 18, 2026).

[27] *See, e.g.,* The White House, "President Trump Is Delivering for American Workers" (Sept. 1, 2025), https://www.whitehouse.gov/articles/2025/09/president-trump-is-delivering-for-american-workers/; Lori Chavez-DeRemer, "100 Days In, Trump's Golden Age Puts American Workers First," U.S Dep't of Labor (Apr. 30, 2025), https://blog.dol.gov/2025/04/30/100-days-in-trumps-golden-age-puts-american-workers-first; The White House, "The Trump Effect: Higher Pay for American Workers" (June 6, 2025), https://www.whitehouse.gov/articles/2025/06/trump-effect-higher-pay-for-american-workers/; The White House, "Trump Administration Celebrates Successes for America's Workers" (Aug. 26, 2025), https://www.whitehouse.gov/articles/2025/08/trump-administration-celebrates-successes-for-americas-workers/; The White House, "America First Trade Policy" (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/america-first-trade-policy; The White House,

coordination with other federal agencies, the Department has launched major investigations and intensified enforcement actions, particularly related to third-party staffing firms in the technology sector, to combat fraud and abuse involving the PERM labor certification process and the H-1B visa classification where the majority of nonimmigrant workers are often sponsored for permanent employment in the United States.[28] In collaboration with other federal law enforcement partners, the DOL-OIG has uncovered widespread schemes in which employers and labor brokers submitted fraudulent applications, exploited aliens through coercive wage-kickback arrangements, and undercut American workers by flooding the market with below-wage labor. Where these federal law enforcement partners are investigating fraud or willful misrepresentations involving the PERM program, the Secretary has initiated suspensions of current and future filed PERM applications by certain employers.[29] Meanwhile, U.S. workers continue to face a challenging and disadvantageous labor market.[30] U.S. workers in computer-related occupations – particularly recent U.S. college graduates – are facing

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"Report to the President on the America First Trade Policy: Executive Summary" (Apr. 3, 2025), https://www.whitehouse.gov/fact-sheets/2025/04/report-to-the-president-on-the-america-first-trade-policy-executive-summary.

[28] *See, e.g.*, DOL, Office of the Secretary, DOL Press Release, *US Department of Labor launches Project Firewall to protect America's highly skilled workforce* (September 25, 2025), https://www.dol.gov/index.php/newsroom/releases/osec/osec20250919; Office of Inspector General, OIG Press Release, *U.S. Department of Labor, Office of Inspector General Launches Investigation into H-1B Visa Fraud and Human Trafficking to Protect American Workers* (July 8, 2026), https://oig.dol.gov/public/Press%20Releases/OIG-Press-Release-070826.htm. The term "third-party staffing" firms is similar to the concept of "outsourcing" firms that employ a business model involving the use of H-1B visas to bring relatively low-cost aliens into the United States and then contracting them out to other U.S. companies seeking their services; a business model that is also used in the immigrant visa program.

[29] See, e.g., DOL, Employment and Training Administration, DOL Press Release, *US Departments of Labor, Justice announce enforcement actions against Cloudera Inc. for alleged Immigration and Nationality Act violations (May 12, 2026), https://www.dol.gov/index.php/newsroom/releases/eta/eta20260512;* DOL [@Sonderling47, @DOLOIG]. (2026, September 8). *Fighting fraud is a TEAM SPORT. @Sonderling47 and I are for real. @Cognizant's PERM filings are suspended. @DOLOIG is on the hunt. Threats to American workers will NOT be tolerated. Alongside @WHFraudTF, we're following facts, fraud and finances. Handcuffs await*. X. https://x.com/USLaborIG/status/2097321316995232030.

[30] Presidential Proclamation 10973, Restriction on Entry of Certain Nonimmigrant Workers (Sept. 19, 2025), https://www.whitehouse.gov/presidential-actions/2025/09/restriction-on-entry-of-certain-nonimmigrant-workers/.

high unemployment and underemployment rates.[31] In FY 2025, job opportunities in computer and technology related occupational classifications constituted the vast majority of H-1B and PERM jobs certified by DOL.[32] Further, employers in the technology sector are laying off large numbers of their U.S. workers while simultaneously filing applications requesting DOL certification for temporary H-1B and/or permanent workers.[33] As noted in Presidential Proclamation 10973 of September 18, 2026, *Restriction on Entry of Certain Nonimmigrant Workers*, certain employers, including information technology (IT) staffing and outsourcing firms, have abused the system to suppress wages and displace American workers, flooding the domestic labor market with an abundant supply of low-paid entry-level workers and making it more difficult for American workers and recent graduates, especially in science, technology, engineering, and math (STEM) fields, to find employment.[34]

Through its program experience, the Department observes that many employers seeking to employ H-1B workers in these skilled positions, including those who engage in layoffs or utilize third-party staffing firms, are often concurrently sponsoring foreign

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[31] *See, e.g.,* Federal Reserve Bank of New York, The Labor Market for Recent College Graduates: Labor Market Outcomes of College Graduates by Major in 2024, (released Feb. 4, 2026, based on data from 2024), https://www.newyorkfed.org/research/college-labor-market#--:explore:outcomes-by-major (last visited Mar. 23, 2026); Suzanne Blake, "A Popular College Major Has One of The Highest Unemployment Rates," Newsweek (May 23, 2025), https://www.newsweek.com/computer-science-popular-college-major-has-one-highest-unemployment-rates-2076514 (last visited Mar. 16, 2026); Natasha Singer, "Goodbye, $165,000 Tech Jobs. Student Coders Seek Work at Chipotle," N.Y. Times (Aug. 10, 2025).

[32] Based on a review of OFLC H-1B and PERM Program Selected Statistics for FY 2025 available at *https://www.dol.gov/agencies/eta/foreign-labor/performance*, 8 of the top 10 H-1B jobs and 7 of the top 10 PERM jobs certified by DOL were in computer and technology related occupational classifications.

[33] *See, e.g.,* Lawmakers seek answers from major US firms over H-1B visa use amid layoffs, Reuters (Sept. 25, 2025), https://www.reuters.com/business/finance/us-lawmakers-scrutinize-tech-firms-over-h-1b-visa-use-amid-other-job-layoffs-wsj-2025-09-25/; Simon Hankinson, "Amid Big Tech Layoffs, Demand Still High for Foreign Workers With H-1B Visas. Something Doesn't Add Up," The Heritage Foundation (Mar. 6, 2023), https://www.heritage.org/jobs-and-labor/commentary/amid-big-tech-layoffs-demand-still-high-foreign-workers-h-1b-visas; David North, "Tech Employers Lay Off Workers, but Get New Rounds of H-1Bs," Center for Immigration Studies (Dec. 7, 2023), https://cis.org/North/Tech-Employers-Lay-Workers-Get-New-Rounds-H1Bs; and Hira and Costa, "Tech and outsourcing companies continue to exploit the H-1B visa program at a time of mass layoffs," Economic Policy Institute (Apr. 11, 2023), https://www.epi.org/blog/tech-and-outsourcing-companies-continue-to-exploit-the-h-1b-visa-program-at-a-time-of-mass-layoffs-the-top-30-h-1b-employers-hired-34000-new-h-1b-workers-in-2022-and-laid-off-at-least-85000-workers/.

[34] Presidential Proclamation 10973, Restriction on Entry of Certain Nonimmigrant Workers (Sept. 18, 2026), https://www.whitehouse.gov/presidential-actions/2026/09/restriction-on-entry-of-certain-nonimmigrant-workers-faad/.

nationals for PERM labor certification where a good faith test of the domestic labor market is a prerequisite to obtaining a certification from the Secretary, as Congress intended. In light of these circumstances, the Department is concerned that current regulations governing the PERM labor certification process do not require employers to conduct a sufficiently robust labor market test – one that utilizes methods that align with modern recruitment practices – and creates incentives for some employers to use different, potentially discriminatory, procedures for considering qualified U.S. applicants that they would otherwise not employ for the same or comparably similar job opportunities not subject to PERM labor certification.

Accordingly, this proposed rule seeks to strengthen the integrity of the PERM labor certification process to improve the program's protections for the U.S. workforce while ensuring that, consistent with statutory obligations, employers with true workforce shortages can access legal immigrant labor possessing the highest quality talent, without undue cost or administrative burden. In particular, and as discussed in detail within this preamble, this rule proposes the following major changes to the Department's PERM labor certification regulations, followed by a section-by-section discussion of all proposed changes:

Modernizing Recruitment to Attract High-Quality American Talent

- Establishes a single set of recruitment requirements for all occupations and, except as permitted by Congress, eliminates the Department's continued management of Schedule A that administratively exempts certain occupations from the statutory labor certification requirement. Additionally, this rule proposes replacing PERM's print-intensive and self-selective menu of recruitment options with a modern set of electronic recruitment requirements that leverages use of the employer website(s), job search website(s), social media platform(s), and other job fairs or on-campus recruiting methods. These provisions will better align PERM's labor market test with

modern recruitment practices and ensure employers conduct a more robust labor market test to access the broadest pool of qualified and available U.S. workers.[35]

- Expands the length of time advertisements are available to prospective U.S. applicants, including the job order placed with the SWA, to a period of no less than 90 calendar days or the total number of days the employer has customarily advertised for job opportunities in the same occupational classification during the most recent 12 months that did not require PERM labor certification, whichever is longer. This proposed rule also requires that all recruitment be completed no more than 60 calendar days and no fewer than 30 calendar days before the expected filing of the application with the submission of a recruitment report to DOL. Finally, this rule clarifies the minimum advertising content for all recruitment efforts and extends long-standing optional competitive recruitment procedures for college and university teachers, with minor updates, to professional athletes and professional sports team coaches. These provisions will provide U.S. workers with a fair chance to apply for permanent job opportunities and ensure that employer advertising and consideration of qualified U.S. workers is performed in the same manner as other job opportunities for which PERM labor certification is not required.

Improving Safeguards for U.S. Workers Impacted by Layoffs

- Prohibits employers who have laid off U.S. workers in the same or similar occupation and at the place(s) of employment within the most recent 2 years from the date on which the employer requests PERM labor certification.
- Expands the current requirement that employers engaging in layoffs consider qualified U.S. workers to a post-filing requirement—from the date on which the

[35] *See* Gafner, Jocelyne, "20 Years of Job Hunting: How Getting a Job Has Changed and What It Means for You," (Nov. 14, 2024), https://www.indeed.com/career-advice/news/indeed-20-years (noting that the process of finding a job is starkly different today compared to twenty years ago due to changes in technology).

employer requests PERM labor certification through the date on which the Form I-140 petition is approved by USCIS or the final determination date, if the *Application for Permanent Employment Certification* or Form I-140 petition is denied or withdrawn, whichever is later. If such layoffs occur, requires employers to document and provide such documentation to DOL that it has offered the job opportunity to those laid-off U.S. workers and, where not rejected for a lawful, job-related reason(s), the U.S. worker was offered the job opportunity. Additionally, this rule prohibits third-party staffing companies from placing the alien(s) with another employer engaging in layoffs where there are indicia of an employment relationship between the alien and that other employer during the same layoff timeframe. These provisions will safeguard the rights of U.S. workers impacted by layoffs when such employers are concurrently seeking PERM labor certification from DOL and admission under an EB-2 or EB-3 visa classification from DHS.

- Establishes an affirmative obligation for employers engaging in layoffs, including the placement of the alien(s) with another employer engaging in layoffs, to affirmatively notify DOL and, where a Form I-140 petition is pending for the alien(s), DHS not later than 5 business days after such layoff(s) occurs, and continually update their recruitment reports throughout the expanded layoff timeframe. The notification will trigger the INA 204(b) consultation process between the departments whereby DOL will determine the adequacy of the employer's compliance with the post-certification obligation to consider laid off U.S. workers, and inform USCIS of the continued validity, or revocation of the underlying labor certification based on DOL's assessment of the employer's compliance. These provisions will provide greater transparency to DOL and DHS, as applicable, on employers engaging in layoffs who are concurrently seeking PERM labor certification and better align the consideration of U.S. workers impacted by layoffs with the Department's statutory mandate to

certify an insufficient number of qualified U.S. workers available at the time of application for a visa and admission of the alien(s) into the United States to perform the skilled or unskilled services for permanent employment.

Strengthening Employer Compliance and Program Integrity

- Revises the standards and procedures for employers to provide notice to U.S. workers and the bargaining representative(s), as applicable, of filing the application by clarifying the requirements for providing such notice electronically to U.S. workers, including the intended placement of the alien(s) at third-party worksite locations, and expanding the timeframe to begin within 10 business days before the application is filed and remain available to U.S. workers through the date on which the Form I-140 petition is approved or the date of determination, if the *Application for Permanent Employment Certification* or Form I-140 petition is denied or withdrawn, whichever is later. These provisions will better align with the statutory requirement and strengthen program integrity by permitting any person or employee of the employer, particularly those impacted by layoffs during the post-filing adjudication process of the application or who may have information related to fraud or misrepresentations, to take action and report such information bearing on the application to OFLC for appropriate action.
- Clarifies the definitions of "employer" and "attorney" and "agent," the use of these terms in the filing of an application, and enhances the obligations employers seeking to employ aliens must declare, under penalty of perjury, to assure compliance with terms and conditions of employment and program requirements, including the recruitment and consideration of U.S. workers in "good faith" and in a manner that is comparable to job opportunities that do not require PERM labor certification. These provisions will strengthen protections for similarly employed U.S. workers by providing better clarity regarding the responsibilities of employers and their

authorized attorneys or agents, as applicable, and promote greater program compliance.

- Enhances the Department's debarment authority by holding agents and attorneys, and their successors in interest, accountable for their own misconduct independent of the employer's violation(s) and extending debarment from the PERM labor certification program to all of the Department's labor certification and labor condition application programs. Prohibiting debarred entities from filing any new applications with OFLC or receiving any approvals from OFLC during the debarment period strengthens the debarment penalty, when imposed. Any application requesting PERM labor certification filed by debarred entities during the period of debarment will be denied without review. These provisions will improve program integrity and prevent unscrupulous employers from circumventing the PERM labor market test requirements.

Modernizing the Prevailing Wage and PERM Application Process

- Establishes a single point of entry by requiring that employers, except in limited circumstances, electronically file applications requesting PWDs and PERM labor certifications and all supporting documentation through a centralized electronic system maintained by DOL and permits the use of electronic signatures meeting valid signature standards. These provisions will minimize unnecessary costs and burdens on DOL and employers, improve the quality of applications, reduce the frequency of delays associated with deficient applications, and better facilitate information sharing with other federal agencies.
- Requires electronic methods for the OFLC Certifying Officer (CO) to send notices and requests to employers and issue PWDs and PERM labor certification decisions directly to USCIS. These provisions will codify OFLC's standard operating procedures to minimize delays, reduce unnecessary administrative costs for the

employer and DOL, and expedite the delivery of final decisions to employers and their authorized attorneys or agents, as applicable, and to other federal agencies, while maintaining program integrity.

The Department invites all interested parties to participate in this rulemaking by submitting comments on all aspects of this rule, as described above. Comments that include written data, sources, and specific feedback on all aspects of this proposed rule would be most helpful to the Department.

III. Summary of Proposed Revisions to 20 CFR Part 656

A. Discussion of Proposed Technical and Summary Changes to 20 CFR Part 656

The Department proposes to revise various terms and phrases used throughout the regulation. These revisions are intended to improve readability, accuracy, or clarity and increase consistency within part 656 and across OFLC regulations and program administration. These modifications are explained below.

The Department proposes to use the term "*Application for Permanent Employment Certification*," the current Form ETA-9089 form title, when referring to Form ETA-9089 and the related Form ETA-9141, *Application for Prevailing Wage Determination*, which contains information about the job opportunity necessary to the CO's review of the employer's request for permanent labor certification. This term would replace the form number throughout part 656 for clarity, and create consistency with other OFLC programs, with one exception—where Form ETA-9089 is used in section 656.3 for the definition of *Application for Permanent Employment Certification*.

The Department proposes to replace the term "Form ETA 750" throughout part 656, with *Application for Permanent Employment Certification*. "Form ETA 750" has been eliminated as the form's use is no longer needed and the information collection has been discontinued. Consistent with directions provided to the public when implementing the form changes, the persons and entities that used the Form ETA 750 now must use the

Form ETA-9089, which is now true for all *Applications for Permanent Employment Certification* processed under part 656.[36] The use of the terms "Form ETA-9089" and "Form ETA 750" is being deemphasized to ensure the continuing accuracy of the regulation regardless of changes to the form, the form number, or its associated appendices and related information collections.

The Department proposes to change the term "labor certification" to "permanent labor certification" throughout part 656 for clarity. This change would more clearly distinguish the type of labor certification program addressed in part 656—permanent (*i.e.*, immigrant)—from the labor certifications addressed in OFLC's regulations in part 655—temporary (*i.e.*, nonimmigrant).

The Department proposes to change the terms "alien labor certification" and "alien employment certification" to "permanent labor certification" for internal consistency throughout part 656.

The Department proposes to use the term "permanent employment" throughout part 656 wherever the term "employment" alone could be unclear and to ensure consistency with the definition of "permanent employment" in section 656.3.

The Department proposes to use the term "U.S. worker," rather than "United States worker," throughout part 656 to ensure consistency throughout the regulation and with the definition in section 656.3.

The Department proposes additional changes throughout the text to correct typographical errors and improve clarity and readability, including the use of acronyms, such as using "DOL" for "Department of Labor" or "Department," "BALCA" or "Board"

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[36] Forms ETA-750A and ETA-750B were used to process professional athlete applications and National Interest Waiver applications, prior to the Department eliminating these forms. The Department received approval to discontinue the use of the Form ETA-750A and ETA-750B, on October 25, 2022. *See* Office of Information and Regulatory Affairs, ICR – OIRA Conclusion, No. 202102-1205-001, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202102-1205-001. The Department stopped accepting the Form ETA-750A and -750B, after a transition period, upon implementing PERM processing in the Foreign Labor Application Gateway, in Summer 2023.

in place of "Board of Alien Labor Certification Appeals," or "CO" for "Certifying Officer," where appropriate. Such changes are non-substantive and do not change the meaning of the current text. Substantive changes to the current regulatory text are discussed in the corresponding section of the preamble.

As warranted, the Department is proposing to retitle numerous sections to align with the subject matter as it has been reorganized, which includes retitling or removing the title for various paragraphs, subparagraphs, clauses, etc.

B. Discussion of Proposed Revisions to 20 CFR Part 656, Subpart A

Under this proposed rule, subpart A would be expanded and renumbered from 20 CFR 656.1 through 656.3 to now include 20 CFR 656.1 through 656.7. Section 656.5, which currently is in subpart B, would be relocated to be repurposed under subpart A.

1. Proposed 20 CFR 656.1, Purpose and Scope.

The Department is proposing to revise part 656, subpart A, and rename subpart A, "*General Provisions.*" The Department proposes to reorganize and revise the content of current paragraphs (a) and (b) in proposed paragraph (a) in addition to revising the remaining language that will be placed under proposed paragraph (b). Specifically, paragraph (a) will be subtitled "Purpose" and paragraph (b) will be subtitled "Scope." The Department is proposing to add new language on the scope of this subpart at proposed section 656.1(b). The Department believes that this reorganization and proposed revisions will make this subpart clearer and easier to follow.

For proposed section 656.1(a), which discusses the purpose of this subpart and the Department's responsibilities under the INA, the Department proposes to eliminate content from current section 656.1(a) that restates the INA and to relocate content from current section 656.1(b) that describes the purpose of part 656 to proposed section 656.1(a), with revisions. After relocating content from current paragraph (b) to proposed paragraph (a), the Department proposes revisions to update terminology and to better

address the purpose of part 656, which is to establish the requirements and procedures by which the Department makes determinations in connection with requests for permanent labor certification and certifies its determination to DHS and DOS. For example, the Department is proposing to revise the language at current section 656.1(b), which states that the regulations "set forth procedures through which such immigrant labor certifications may be applied for, and granted or denied," and replace it with language stating that part 656 establishes "the requirements and the procedures by which the Department of Labor makes a determination in connection with applications for permanent employment certification and certifies its determination to the Department of Homeland Security and Department of State." In addition, the Department proposes to retain the current sections containing the two statutory requirements for the Secretary's determination and certification—at current and proposed sections 656.1(a)(1) and (2)—with revisions to update terminology and improve readability. The Department believes that this proposed language simplifies the explanation for the regulations by using plain English, to make them easier to understand by the general public, and addresses the necessary details more thoroughly than the previous regulatory text.

The Department is also proposing new language at section 656.1(b), which discusses the scope of this part. The proposed language in this paragraph reiterates that part 656 contains the procedures that govern the PERM process. In addition, the new language proposed in section 656.1(b) makes clear that this part establishes standards and obligations regarding the terms and conditions with which employers must comply for permanent labor certification and sets forth integrity measures for ensuring employers' good faith recruitment of U.S. workers.

The Department is also taking this opportunity to remind stakeholders that compliance with the requirements contained in this part is the minimum standard for granting permanent labor certification. Compliance with this part does not establish

compliance with, and is not a defense to separate liability under, Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), 8 U.S.C. 1324b, or any other Federal, State, or local law governing employment. As discussed in this proposed rule, information obtained by the Department under this part may be provided to other federal enforcement agencies, including the Equal Employment Opportunity Commission (EEOC) and the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (DOJ-IER).

The Department is also proposing to eliminate section 656.1(c), which currently describes how stakeholders may send written correspondence or queries regarding the Department's regulations under part 656. The address provided in this section is no longer accurate and, rather than continually having to update an office or physical location address through future regulatory changes, the Department prefers to provide current contact information to stakeholders through more efficient means that allow for faster updates to the public, such as on OFLC's website and on its form instructions. Further, given OFLC's proposal to transition to full electronic processing, providing a street address would be less relevant, and the Department prefers to offer stakeholders alternative means of communication using e-mail and online portal platforms.

2. Proposed 20 CFR 656.2, Statutory Authority and Burden of Proof.

The Department proposes to revise the heading of section 656.2 of subpart A from "Description of the Immigration and Nationality Act and of the Department of Labor's role thereunder" to "Statutory Authority and Burden of Proof" and the content of this section by removing and replacing the content of current paragraph (a), revising the content of current paragraph (b), and eliminating current paragraph (c).

The proposed revisions to section 656.2 are consistent with the Department's efforts in this rulemaking to simplify part 656 by removing unnecessary statutory

restatements and content that extends beyond the Department's authority. The topics addressed in proposed section 656.2 are the delegation of the Secretary's statutory authority to issue permanent labor certifications and carry out other responsibilities required by 8 U.S.C. 1182(a)(5)(A) and the burden of proof when an employer requests permanent labor certification. In proposed sections 656.2(a) and (b), the Department proposes new and revised content that more clearly and simply states the delegation of the Secretary's statutory authority to OFLC and the employer's burden of proof.

Currently, section 656.3 defines relevant components of DOL. However, part 656 does not clearly address the delegation of the Secretary's authority within DOL. The proposed new language at 656.2(a) states in plain English that the Secretary's authority to issue permanent labor certifications and carry out other responsibilities required by 8 U.S.C. 1182(a)(5)(A) has been delegated to OFLC. Within OFLC, the OFLC Administrator makes determinations on *Applications for Permanent Employment Certification* and designates staff (*e.g.*, a CO) to share this responsibility. The proposed provision is consistent with the Department's current practice in the permanent labor certification program and with the Department's temporary labor certification program regulations.[37] In addition, the proposed changes offer clarity about the delegation of authority to OFLC, the OFLC Administrator, and COs and closes a regulatory gap in part 656.

Under this proposed rule, the OFLC Administrator and COs will continue to exercise the Secretary's authority to review *Applications for Permanent Employment Certification* and, where the employer establishes eligibility to receive certification of an *Application for Permanent Employment Certification* (*i.e.*, all statutory and regulatory requirements are met), to issue the PERM labor certification to DHS or DOS.

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[37] *See* 20 CFR 655.2(a) (Authority and role of the Office of Foreign Labor Certification (OFLC)) for the H-2B program and 655.101(a) (Authority and role of the Office of Foreign Labor Certification) for the H-2A program.

3. Proposed 20 CFR 656.3, Definition of terms.

This rule proposes several changes to section 656.3, which includes the definitions of the terms used in part 656. Throughout this section, the Department proposes changes to add definitions for terms used throughout part 656 but not previously defined in 656.3; to align the definitions across the Department's administration of employment-based visa programs, specifically the H-2A, H-2B, and H-1B visa classifications; and to improve accuracy and clarity of definitions.

First, the Department is proposing to add the definition of ***Administrative Law Judge (ALJ)*** to this section. While this definition is already included at sections 655.5 and 655.103 for the H-2B and H-2A programs, respectively, the Department is proposing to include the same definition at section 656.3, as it is also used in this section.

The Department is also proposing to add definitions of ***Actual minimum requirements*** and ***Business Necessity*** to this section. These terms are currently used at sections 656.17(h) and (i) to explain the CO's assessment of job duties and requirements on the *Application for Permanent Employment Certification*, but they are not currently defined. Current section 656.17(i)(1)—at section 656.19(d) in this proposed rule—states that the job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity. In that provision, the Department outlines scenarios for which employers are required to demonstrate certain requirements as a business necessity (*e.g.*, a foreign language requirement or a combination of occupations). Current section 656.17(h)(1)—at section 656.19(c) in this proposed rule—extends beyond those enumerated scenarios, providing that job requirements must be those normally required for the occupation and must not exceed the Specific Vocational Preparation (SVP) level assigned to the occupation as shown in the Occupational Network (O*NET) Job Zones, unless the employer justifies the requirements as arising from business necessity.

The proposed definition of "actual minimum requirements" states that they are the minimum requirements for education, experience, training, skills, licenses, or other requirements that are necessary to perform the employer's job opportunity in a normally acceptable manner. In addition, consistent with current section 656.17(h), the proposed definition also provides that the employer's stated actual minimum requirements must be normal to the occupation and must not exceed the SVP for the Standard Occupational Classification (SOC) code applicable to the employer's job opportunity, unless justified as arising from business necessity. Through O*NET, the Department makes occupational information available to the general public, such as the academic preparation (*e.g.*, Bachelor's degree) and SVP (*e.g.*, career and technical education, training, and experience) normally required for average performance in an occupation. Under the proposed rule, the CO would continue to use the occupational information in the O*NET as one source to assess the normalcy of the employer's asserted actual minimum requirements. To help guard against employers "tailoring" the requirements of a permanent position to the specific qualifications of a foreign national, the Department is also proposing a revision to its review of applications by comparing the actual minimum requirements stated in the *Application for Permanent Employment Certification* to the requirements stated in the employer's postings for job opportunities in the same or substantially comparable occupational classifications that were not subject to PERM labor certification for the 12 months preceding the date on which recruitment began for the job opportunity stated in the *Application for Permanent Employment Certification*. In the event of an audit and where the PERM job opportunity imposes materially more stringent job requirements, including any combination of education, experience, training, skills, licenses, or other requirements, than the employer's most recent efforts to recruit U.S. workers for non-PERM positions, the employer will be required to submit written justifications for each material difference under the business necessity standard.

Current section 656.17(h)(1)—proposed section 656.19(d)(1)—states that to establish "business necessity" an employer must demonstrate 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. The Department proposes to include this definition in proposed section 656.3.

The proposal to define these terms in proposed section 656.3 is to make the terms and their meaning easier to locate. The proposed definitions are consistent with the Department's longstanding practice with some revisions to reflect both the Department's program experience reviewing applications and the experience of other federal agencies enforcing the current regulatory framework. The Department invites comments about whether and how these terms could be further clarified or defined to strengthen program integrity and ensure qualified U.S. workers are provided first access to these job opportunities and fairly considered for hire.

The Department proposes to revise the definition for ***Agent*** to make it similar to the definition of agent included in the Department's H-2B and H-2A regulations at sections 655.5 and 655.103, respectively.

The Department proposes only minor revisions to the definition of the term ***Applicant***, such as deleting the reference to the form number. Under both the current and proposed rules, the term ***Applicant*** means a U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Permanent Employment Certification*. The current definition of ***Applicant*** identifies the form number for the *Application for Permanent Employment Certification*, a detail that is not relevant to this definition. By deleting unnecessary information, the Department's proposal simplifies part 656.

The Department also proposes revising the currently defined term ***Application*** for clarity and better align with the Department's current approach to information collection.

The Department proposes to change the term from ***Application*** to ***Application for Permanent Employment Certification*** and revise the definition to include the form number, which could be helpful for identifying the required form. In addition, the proposed definition clarifies the term ***Application for Permanent Employment Certification*** encompasses both the Form ETA-9089 and the Form ETA-9141, *Application for Prevailing Wage Determination*, and includes a reference to appendices and potential successor forms. When the Department last revised Form ETA-9089 in preparation for adding the PERM labor certification program process to the FLAG system in June 2023, the Department took steps to reduce duplicative information collected from employers through Form ETA-9141 and Form ETA-9089 and leverage efficiencies available in the FLAG system. As a result, the Department removed duplicative fields from the Form ETA-9089 and instead incorporates the information collected on the Form ETA-9141 into the CO's review under section 656.40. The proposed definition continues to include the purpose of the form, with minor revisions for conformity with terminology used throughout the proposed rule, which is to secure a permanent labor certification determination from the Department.

The Department is also proposing to revise the definition of ***Area of intended employment (AIE)*** to increase consistency of defined terms across the Department's programs, while simplifying the definition by deleting old terminology. The Department proposes to eliminate language in the current definition that includes the Primary Metropolitan Statistical Area and the Consolidated Metropolitan Statistical Area (CMSA), which are no longer commonly used when describing an AIE. The Department proposes not to replace CMSA with an updated term—Combined Statistical Area (CSA)—so that the definition proposed in section 656.3 aligns with the same term's definition in the H-2A and H-2B programs, at sections 655.103(b) and 655.5, respectively. The proposed revision of the definition of AIE is not intended to change the

CO's assessment of normal commuting distance, for example, in employer-provided surveys submitted with an *Application for Prevailing Wage Determination*.

The Department proposes minor revisions to the definition of ***Attorney***, which includes adding clarification that an attorney who is under suspension, debarment, expulsion, or disbarment from practice before any court may not represent an employer under this part.

DOL is also proposing minor revisions to ***Barter***, such as deleting the references to form numbers from the definition.

The Department proposes minor revisions to the definition of ***Board of Alien Labor Certification Appeals (BALCA or Board)***, which includes deleting the reference to BALCA's location.

The Department proposes to define the term ***Business Day*** to mean any day other than a Saturday, Sunday, or Federal holiday, and notes that use of the terms "business day" and "working day," wherever used in this part, have the same meaning. The Department notes that this proposed definition follows the convention used in other programs, which calculate deadlines by reference to Federal holidays as defined at 5 U.S.C. § 6103 and roll due dates to "the next business day if the due date falls on a Saturday, Sunday or Federal holiday" (e.g., 20 CFR § 655.11 (H-2B)). Fed. R. Civ. P. 6(a) follows this convention too.

DOL proposes revising the definition of ***Certifying Officer (CO)*** to add that the OFLC Administrator is the national CO and that other COs may be designated by the OFLC Administrator, similar to definition at sections 655.5 and 655.103.

The Department proposes adding a definition of ***Chief Administrative Law Judge (Chief ALJ)*** to this subpart to align with the definition of Chief Administrative Law Judge in sections 655.5 and 655.103.

DOL proposes adding a definition of ***Department of Homeland Security (DHS)*** to this subpart to state that this agency is established by 6 U.S.C. 111.

The Department proposes adding a definition of ***Employee*** to this subpart to align with the definition provided in sections 655.5 and 655.103.

The Department proposes revising the definition of ***Employer*** for clarity and improve alignment with similar definitions in sections 655.5 and 655.103. The revised definition describes an employer as an individual or entity (including a partnership, association, corporation, cooperative, firm, joint stock company, trust, public institution, or other organization with legal rights and duties), rather than a "person" followed by a nonexclusive list of entity types. The definition continues to require an "employer" to possess a valid Federal Employer Identification Number (FEIN) and a social security number cannot be used in lieu of an FEIN. In addition, the definition continues to require that the "employer" offer full-time, permanent employment at a place within the United States and to have a place of business (physical location) in the United States to which U.S. workers can be referred for employment. In addition to having a place of business in the United States to which U.S. workers may be referred for employment, the NPRM adds that an "employer" must also have a means by which it may be contacted for employment. The Department proposes to remove the explicit exclusion of independent contractors from the definition of "employer," and add, instead, that an "employer" must have—or will have after hiring—an employment relationship (such as the ability to hire, pay, fire, supervise, or otherwise control the work of the employee) with respect to a worker, which includes the alien and U.S. worker applicants, as it relates to this program. Additionally, in proposed paragraph (2), the Department retains the language excluding "persons who are temporarily in the United States" and the associated list of examples from the definition of "employer." Finally, the Department is proposing a new paragraph (3) to exclude foreign missions from this definition. As defined by the Foreign Missions

Act under 22 U.S.C. § 4302(a)(3), a foreign mission means "any mission or entity in the United States involved in diplomatic, consular, or other activities that is substantially owned or effectively controlled by a foreign government, or by an organization representing a territory or political entity that has been granted diplomatic or other official privileges and immunities under the laws of the United States, or that engages in some aspect of the conduct of the international affairs of such territory or political entity, including any real property of such a mission." The Department notes that foreign missions have special accommodations while operating in the United States and are not subject to the same level of obligations and accountability (e.g., immunity from suit under the Foreign Sovereign Immunities Act) and their employee compensation is exempted from federal, state, and local income and other taxes as domestic employers, which may undermine the ability of federal agencies to investigate, audit, and enforce compliance with PERM requirements. Thus, the Department invites public comments on this proposed revision to exclude foreign missions, as defined by the Foreign Missions Act under 22 U.S.C. § 4302(a)(3), the definition of "employer" for purposes of obtaining PERM labor certification from DOL.

The Department invites comments about whether additional revisions to the definition of "employer" should be made for clarity or to avoid unintended results, such as leaving any doubt that self-petitioning (i.e., being both employer and employee) on an *Application for Permanent Employment Certification* is prohibited.

The Department also proposes eliminating the current definition of ***Employment*** from this section. The Department is proposing several modifications related to term "employment" throughout this proposed rule and does not believe the limited definition in this section is useful.

The Department is proposing to add a definition of ***Familial relationship*** to clarify the types of relationships between an employer, or its employees, and the alien

that must be disclosed on the *Application for Permanent Employment Certification*. The proposed definition is intentionally broad as it is designed to ensure the integrity of the labor certification process by requiring the disclosure of all relationships that could influence the employer's recruitment or suggest the absence of a bona fide job opportunity. In addition, the proposed definition retains the current requirement that the employer must prepare and maintain documentation of the relationship(s), for submission upon request by the CO, in compliance with proposed 656.10(e)(2). For job opportunities subject to such review under proposed section 656.10(e)(2), the Department reiterates that familial relationships must be disclosed on the *Application for Permanent Employment Certification.* Failure to disclose familial relationships, currently and under the proposed rule, may be grounds for a finding of material misrepresentation.

The Department is proposing to add the definition of ***Federal holiday*** as a legal public holiday as defined at 5 U.S.C. 6103. This definition aligns with the definition of Federal holiday in sections 655.5 and 655.103.

The proposed rule would eliminate the definition of ***Immigration Officer***—a term used to identify adjudicators within USCIS—from this section. This deletion would further the Department's goal of removing regulatory text from current part 656 that discusses topics that are under the purview of another agency.

The Department is proposing to add the definition of ***Immigrant Petition*** to part 656, which will define this as the USCIS Form I-140, *Immigrant Petition for Alien Workers*, or successor form, and accompanying documentation required by DHS for employers seeking to employ foreign persons under an employment-based immigrant visa.

The Department is proposing minor revisions to the definition of ***Job opportunity*** to clarify that a job opportunity must be full-time employment at a place in the United States to which U.S. workers can be referred. Consistent with long-standing practice and

in the event of an audit, the employer must be prepared to document the permanent and full-time nature of the position by furnishing position descriptions and payroll records for the job opportunity involved in the *Application for Permanent Employment Certification*.

The Department is proposing to add definitions of ***Job offer***, ***Job order,*** and ***Layoffs*** to align with similar definitions in sections 655.5 and 655.103 that cover H-2B regulations.[38] While these definitions are included elsewhere in DOL regulations specific to other OFLC programs, they are not currently included in section 656.3, despite the terms being repeatedly used throughout part 656. The Department is also proposing to add the definition of ***Metropolitan Statistical Area (MSA)*** to this part to align with the definition in sections 655.5 and 655.103.

The Department proposes to delete the terms ***Nonprofessional occupation*** and ***Professional occupation*** from section 656.3, since this proposed rule does not distinguish between nonprofessional occupations and professional occupations in the filing and recruitment requirements sections.

The Department proposes to retain its current definition of the term ***Non-profit or tax-exempt organization***, with one change. The Department proposes to delete the reference to section 656.40, as it could be misunderstood as limiting the definition to PWD purposes.

The proposed rule would add the term ***Offered wage*** in section 656.3. The proposed definition of ***Offered wage*** is the salary or wage, or salary or wage range, offered by the employer for the job opportunity. In addition, the definition clarifies that the offered wage must be included in the employer's *Application for Permanent Employment Certification* and advertisements and must equal or exceed the highest of the prevailing wage or Federal, State, local minimum wage. The proposed definition is consistent with a similar definition at section 655.5 and conforms with other provisions in

[38] 20 CFR 655.103 includes definitions of job offer and job order, but not layoffs.

this proposed rule, such as section 656.17(e)(2)(iv) (advertisement content) and section 656.13(c) (offered wage assurances), where the Department discusses wage requirements further.

The Department proposes to retain the definitions of ***Office of Foreign Labor Certification*** and ***O*NET*** in section 656.3, with minor conforming changes.

The proposed rule also would add the term ***OFLC Administrator***, defined as the primary official of OFLC, or, within the context of the regulation, the OFLC Administrator's designee. In addition, the Department proposes adding a definition of ***National Processing Center (NPC)*** to identify and clarify the term for the offices within OFLC out of which the COs operate and adjudicate *Applications for Permanent Employment Certification.*

The proposed rule would add the terms ***Permanent employment*** and ***Permanent labor certification*** to the definitions at section 656.3. Through the proposed definition of ***Permanent employment***, the Department clarifies that a "permanent" job opportunity is employment of indefinite duration, in which an employee will ordinarily have an expectation of continued employment that will not end in the near, definable future. In addition, the definition clarifies that to establish a job opportunity offered in an *Application for Permanent Employment Certification* as "permanent," an employer would be required to establish, at a minimum, that it: (1) has a bona fide need for a worker to fill a job opportunity whose services or labor are performed year-round, except for job opportunities such as members of the teaching profession and professional athletes, for which less than year-round performance is normal to the occupation; and (2) the employer will not require breaks or periods of inactivity, except where such periods stem from an established employer policy for leave that applies to other employees similarly employed by the employer. The Department invites comments on other occupations in which permanent employment does not require performance in all months of the year.

The proposed definition of the term ***Permanent labor certification*** explains that it is a certification made by the OFLC Administrator for an employer seeking to file an Immigrant Petition with DHS to employ an alien under an immigrant visa, pursuant to section 212(a)(5)(A) of the Act, 8 U.S.C. 1182(a)(5)(A), and this part. The definition clarifies that the certification is based on the *Application for Permanent Employment Certification* and all supporting documentation.

The Department proposes adding a definition for ***Place of employment***. The proposed definition aligns with a similar definition in section 655.5 and emphasizes that the actual work under the job order will be performed at the worksite(s) or physical location(s) indicated in the *Application for Permanent Employment Certification*.

In addition to adding "place of employment" as a defined term, the Department is considering changes to how this term is applied to *Applications for Permanent Employment Certification* both for job opportunities that will require work in various locations either throughout a geographic area or throughout the United States, where some locations cannot be anticipated at the time of filing, and which, currently, are commonly referred to as job opportunities for "roving" and "peripatetic" work (used synonymously herein), and for job opportunities covering modern concepts such as telework. The Department has determined that the current policy guidance does not adequately reflect the geographic area(s) where the job opportunity will be performed in some instances, such as for roving and telework employment where the worker reports to employer-designated worksite(s), routinely, to perform tasks but the location may change across a local or regional area. The current guidance does not allow the Department to fully assess U.S. worker availability and adverse impact on wages and working conditions in such scenarios.

The Department is considering new approaches, which may be adopted through this rulemaking, to better approximate the geographic area for roving and peripatetic job

opportunities, and to notify U.S. workers who would be impacted by roving work, remote work, and telework job opportunities. There are various modern employment scenarios due to technological advancements, whether roving, remote, or telework (including hybrids thereof), for which the Department seeks better ways to identify the geographic area of such job opportunities for purposes of better apprising U.S. workers of the job opportunities available and further ensuring that the employment of aliens for such job opportunities will not adversely affect U.S. workers.

Employers have followed the 1994 policy guidance provided in Field Memorandum No. 48-94, *Policy Guidance on Alien Labor Certification Issues,* in which the then-ETA Administrator for Regional Management, Barbara Ann Farmer, instructed employers to indicate "various unanticipated locations throughout the U.S." on the permanent labor certification application and use the employer's main or headquarters office for recruitment and other program requirements linked to the location where work is to be performed (*e.g.*, current requirements for PWD, NOF, job order placement with the SWA).[39] Currently, when completing the worksite information for the *Application for Permanent Employment Certification*, employers indicate "various unanticipated locations throughout the U.S." on the application, and, also, identify the employer's main or headquarters location on the application. This has allowed the Department to collect some available details on job opportunities identified as involving unanticipated worksites throughout the U.S., and to base the wage assessment on the employer's main or headquarters location. Based on the Department's program experience in recent years, however, the employment scenarios that exist in the current labor market are not adequately covered by the current policy guidance and the employer's main or headquarters office may not always be the most appropriate physical location to use for

[39] *See* Field Memorandum No. 48-94, *Policy Guidance on Labor Certification Issues* (May 16, 1994) (on file with DOL).

PERM labor certification program purposes. The Department seeks better approaches to protect U.S. workers from adverse effects from these employment scenarios under the PERM program.

Place of Employment for Roving or Peripatetic Situations

For these jobs, the nature and requirements of the job's functions necessitate changes of worksite locations within the United States, likely frequent changes, and often of undetermined duration and scenario, to perform tasks or assignments for the employer either at the employer's own offices or worksite locations, and/or, at third-party or client locations at the employer's direction. This may include traveling to the employer's facilities to perform tasks, traveling to third-party sites or client sites to perform tasks, or other travel within set or varying geographic locations to perform work tasks or assignments for the employer. This, also, may include jobs for which the nature of the job opportunity requires travel to locations throughout the United States, whether local or non-local, whether regional or national, from location to location to perform work for the job as a part of the worker's normal or routine duties, or the job duties require the employee to spend most work time at one location, but there is occasional travel for short or brief periods of work at other locations.

For a roving or peripatetic job opportunity under this NPRM, the Department proposes that the place of employment used for compliance with part 656 requirements would be the employer's nearest business office in the United States that is closest to where the work will be performed, not the location in the United States where the worker may reside, or travels from, to perform work, assignments, or tasks for the employer. Therefore, for completion of the *Application for Prevailing Wage Determination*, the employer would add the known physical address(es) of the employer's nearest business office(s) as the place(s) of employment or worksite(s), and for the *Application for Permanent Employment Certification*, for the place(s) of employment or worksite

location(s). In addition, the employer would continue to add the phrase "various unanticipated locations throughout the U.S." along with the physical address(es) of the employer's nearest business office(s) to the work to be performed. This would replace the current requirement from the *Farmer memo* where the employer adds to the *Application for Permanent Employment Certification* "various unanticipated locations throughout the U.S." and adds the employer's main or headquarters address for the place of employment information. This proposed change is intended to better capture the geographic area or region for the work, to better apprise U.S. workers of the job opportunity, and to give better insight into any regional aspect(s) of the work to be performed, rather than listing only the employer's main or business headquarters. The collection of the nearest employer's office will, in many instances, provide U.S. workers with a better idea of the geographic area for travel or residence associated with the job duties. In such scenarios involving roving work, the employer would be required to provide all known places of employment (i.e., the phrase "various unanticipated locations throughout the U.S." and the employer's nearest business office(s) for the work to be performed) that the employer knows of at the time it initiates the PERM application process. For a roving or peripatetic job opportunity, the employer's obligations regarding the NOF, the prevailing wage, and working conditions would be based on the employer's nearest office location(s) to where the work will be performed.

As an example, if an employer has offices in Atlanta, GA and Charlotte, NC and the job opportunity is for roving work in locations in the State of Georgia, the employer would identify the physical address for its Atlanta, GA office location, and all known locations for the work to be performed, as the place(s) of employment on the *Application for Prevailing Wage Determination* and *Application for Permanent Employment Certification* as well as indicating "various unanticipated locations throughout the U.S." on the *Application for Permanent Employment Certification* to comply with part 656

requirements. The Department proposes use of the employer's nearest office as the place of employment in efforts to reach as many U.S. workers as possible and inform U.S. workers of the geographic or regional area. Nonetheless, the Department recognizes that an employer's closest office may not be close—e.g., an employer may only have one office on the west coast, while the job opportunity is in Miami, FL, at a third-party client location. The Department invites comments from the public that provide practical approaches for identifying the place(s) of employment on the *Application for Prevailing Wage Determination* and *Application for Permanent Employment Certification*, where work cannot be easily tied to an employer's nearest office or geographic region.

Place of Employment for Remote Work and Telework (and Hybrid Telework) Situations

For purposes of this NPRM, a job opportunity is considered remote when the job opportunity will not be performed at the employer's office or worksite location(s), nor at a third-party client location where the worker is assigned, but, rather, will be performed offsite or virtually by the worker (e.g., at the worker's residence, a co-working space, shared workspace, or another place of the employer or worker's discretion, that is not under the control or operation of the employer). Also, for purposes of this NPRM, a job opportunity is considered to be a telework (or a hybrid telework opportunity) when the employer divides some combination of work time for the job opportunity between tasks performed at the employer's office(s) or worksite location(s), place(s) of business, or third-party or client worksite(s), with offsite or virtual work (e.g., at a worker's residence or a co-working space).

For remote work, where the worker will not routinely travel to different locations to perform work, assignments, or tasks for the employer, and the work can be performed virtually at any fixed site location, the place of employment for purposes of the *Application for Prevailing Wage Determination* and the *Application for Permanent*

Employment Certification would be the city, state, county (i.e., county, borough, parish, township), ZIP code, and Bureau of Labor Statistics (BLS) area for the alien subject to the *Application for Permanent Employment Certification*. Therefore, on the *Application for Permanent Employment Certification*, for the place of employment or worksite location, the employer would add the alien's city, state, county (i.e., county, borough, parish, township), ZIP code, and BLS area within the United States, rather than a residential address, or the employer's address. This would replace the current requirement to list a full address for a remote job opportunity. For remote work, the Department proposes to require the employer to post the NOF electronically, if there is no applicable bargaining representative to be notified. *See* discussion in proposed section 656.14. In addition, both the NOF and recruitment would be required to notify U.S. workers that the job opportunity is a remote job opportunity, without geographic restrictions on where in the United States the worker may reside.

The Department also recognizes that fully remote employment presents distinct and novel questions under the PERM program, including whether positions that do not require physical presence at an employer's worksite should qualify for labor certification. The Department is considering whether to exclude fully remote positions from eligibility for PERM labor certification to protect U.S. workers and advance the objectives of the program. The Department solicits comments on whether, and to what extent, fully remote positions should be eligible for certification, including whether a categorical exclusion, minimum onsite-work requirement, or other restriction would be appropriate. Fully remote positions also raise questions about the appropriate geographic basis for determining the prevailing wage, particularly where employees may work from anywhere in the United States. The Department solicits comments on whether the prevailing wage should be based on, or the highest of, the alien's location, the employer's nearest physical location, or another geographic measure (e.g., national prevailing wage), and what

safeguards are most appropriate for apprising prospective U.S. applicants of the job opportunity and necessary to protect U.S. workers similarly employed in higher-wage labor markets.

For telework situations, where the worker splits time between the employer's worksite location and the worker's virtual telework site, but does not routinely travel to different employer locations or client-site or third-party locations to perform roving or peripatetic work, the place of employment for purposes of the *Application for Prevailing Wage Determination* and the *Application for Permanent Employment Certification* would be the physical location where the worker is expected to perform the job opportunity, rather than a residential address. The NOF and recruitment would be required to notify U.S. workers that the job opportunity is a telework opportunity in efforts to fully apprise U.S. workers of the applicable telework flexibilities.

Examples of Roving Employment and Peripatetic Work

Roving and peripatetic job opportunities may function as technicians doing brief work at different locations, or short-term consultants for third-party clients on a project-to-project basis, while others may require independent work within a third-party client's organization for longer term periods, based on a contract-for-services agreement. Some employers may assign a worker for rotations or assignments at its own location(s) or at third-party client's location(s), perhaps within a particular geographic area or region of the United States, or where the worker will provide services to a variety of third-party clients, while other job opportunities may assign a worker to an employer's location or a single third-party client site for an extended period. Some examples may include computer technicians, pharmaceutical sales representatives, consultants, sales representatives, plumbers, maintenance workers, and project engineers, etc.

Examples of Remote and Telework

For some job opportunities, employees may perform some or all of their job duties virtually. Workers who exclusively perform their job duties from their personal residence or shared or cooperative workspace are sometimes referred to as "remote workers." Workers who perform their duties both on-site and from their personal residence or shared or cooperative workspace are generally referred to as "teleworkers."

An example of a remote job opportunity is where the employer performs onboarding activities or orientation at the employer's location, but then, daily work is performed virtually at the worker's residence. The employee may relocate for reasons unrelated to projects or clients.

An example of telework is where the employer determines that a worker must report to the employer's office, or a third-party worksite, for three days per week and the worker can perform work virtually at the worker's residence two days per week, or some combination of virtual and in-person work. In telework cases, the employee may relocate when assigned to new projects or clients after the *Application for Permanent Employment Certification* is filed in order to commute to the new on-site location. In these scenarios the place where work is performed may be untethered from the employer's own office locations, including the employer's main or headquarters office, but is tethered to physical business address(es).

Prospective/Speculative Employment

While the NPRM proposes to update guidance for appropriately identifying and applying the place(s) of employment for the types of job opportunities discussed above to accommodate modern work scenarios and business advancements, the Department reminds employers that the job opportunity for which the employer seeks permanent labor certification must be a bona fide job. An *Application for Permanent Employment Certification* cannot be based on temporary employment, speculative employment, or a scenario where work does not yet exist.

The Department will question instances that appear to be contrived or abusive of the PERM program. Further, as is the case with the Department's H-1B program requirements, roving and peripatetic work must not be used as "strikebreaker" work (i.e., placing aliens at worksites where U.S. workers are striking) to disadvantage U.S. workers.

Solicitation of Public Comments

The Department solicits public comments on how the NPRM's approaches for identifying the known place(s) of employment on *Applications for Permanent Employment Certification* for roving, remote and telework job opportunities can be improved to better apprise U.S. workers and to protect the wages and working conditions of similarly employed U.S. workers to support the Department's statutory obligations.

The Department's proposed rule includes the current term ***Prevailing wage determination (PWD)*** with revisions to simplify the definition. The definition removes references to Schedule A and sheepherder petitions, as the Department proposes to eliminate Schedule A and alternative procedures for sheepherders under this rule. The proposed definition continues to indicate the PWD is issued by an OFLC NPC. It clarifies that the PWD issued provides the prevailing wage for the job opportunity that is the subject of the *Application for Permanent Employment Certification*.

The Department proposes to relocate the definition of the term ***Professional Athlete*** from its current location in section 656.40 to the definitions at section 656.3.

The proposed rule retains, with minor changes, the term ***Purchase***, defined as the transfer of ownership of a permanent labor certification application or certification from one person to another by voluntary act and agreement, based on valuable consideration, and term ***Sale***, defined as agreement between two parties, called, respectively, the seller (or vendor) and the buyer (or purchaser) by which the seller, in consideration of the

payment or promise of payment of a certain price in money terms, transfers ownership of a permanent labor certification application or certification to the buyer.

The proposed rule makes minor technical edits to the current definitions for ***Secretary of Homeland Security***, ***Secretary of Labor*****,** and ***Secretary of State***. It also proposes technical edits to the definition of ***State Workforce Agency (SWA)*** to be consistent with the Department's H-2A regulations at 655.103.

The Department proposes to remove ***Specific Vocational Preparation (SVP)*** as a defined term. SVP is a component of the occupational information O*NET provides to the general public, which OFLC uses to assess whether an employer's job opportunity reflects duties, qualifications, and requirements that are normal for the occupation. The current definition of O*NET, which the Department proposes to retain in section 656.3, provides a link where interested parties can find additional information about O*NET, including SVP. By removing SVP as a defined term and deferring to current O*NET information, the Department can ensure that part 656 will stay consistent and current with the meaning and usage of SVP in O*NET.

The proposed rule adds the term ***Strike*** to section 656.3, using the same definition as the Department uses at section 655.103. ***Strike*** would be defined as *"*[a] concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement)."

The proposed rule would add the term ***Substantially comparable***, as a defined term at 656.3. The Department's regulations currently address this term at section 656.17(i)(5)(ii) and state that a "substantially comparable" job or position is "a job or position requiring performance of the same job duties more than 50 percent of the time." In the definition added at section 656.3, the Department proposes changes to the definition for clarity and improved identification of substantially similar jobs or positions.

The definition would require a "substantially similar" job or position to share "more than a majority (i.e., 51 percent or more) of the same duties performed." In addition, the proposed definition would continue the CO's current practice of reviewing the duties disclosed in the *Application for Permanent Employment Certification* as the starting point for comparison. The proposed definition continues to notify the employer that additional documentation (e.g., organizational charts and position descriptions, the amount and percentage of time spent performing the duties, payroll records) may be required to justify a determination that two jobs or positions are substantially comparable or not. The additional documentation, if necessary to the CO's assessment, would be submitted to the CO upon request.

For clarity, the Department notes that "substantially comparable" and "substantially equivalent" are distinct terms, used for distinct assessments. "Substantially comparable," as discussed here, involves the CO's comparison of the duties of multiple jobs or positions to determine whether the jobs or positions are different, while "substantially equivalent"—addressed in current section 656.17(h)(4) and the proposed definition in section 656.19(d)(4)—involves the CO's assessment of an employer's stated primary and alternative minimum requirements for the job opportunity described in the *Application for Permanent Employment Certification*. The Department invites comments about how to further clarify these terms.

The proposed rule would revise the term ***United States*** and add the term ***Wages*** to align with definitions in sections 655.5 and 655.103. The Department also proposes to add ***U.S. Citizenship and Immigration Services (USCIS)***, an operational component of DHS, as a defined term.

For the term ***U.S. Worker***, the Department proposes to reorganize and modify the current definition. As proposed, a ***U.S. worker*** for purposes of the permanent labor certification program would be a U.S. citizen or national of the United States; an

individual who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158.

To provide greater clarity regarding how the Department will administer and enforce program integrity provisions (e.g., revocation, debarment) under this part, the proposed rule adds the terms ***Fraud***, ***Material***, ***Pattern or Practice***, ***Willful***, and ***Willful Misrepresentation***. The Department proposes to define the term ***Fraud*** as a false representation of a material fact, or the concealment of a material fact, made with knowledge of its falsity and with the intent to deceive the Department, DHS, DOS, or another Government entity, or to obtain a benefit under this part or the Act to which the person is not entitled. The proposed definition for the term ***Material*** refers to a fact, statement, representation, or omission that has a natural tendency to influence, or is capable of influencing, a decision of the Department under this part or a decision of DHS or DOS on an Immigrant Petition or visa application that relies on a permanent labor certification, regardless of whether it actually influenced the decision. In circumstances where the Department could have discovered the truth through its own independent inquiry, a misrepresentation will not be considered immaterial. This proposed definition is consistent with *Kungys v. United States*, 485 U.S. 759, 770 (1988) (a "misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body" (quoting *Weinstock v. U.S.*, 231 F.2d 699, 701 (D.C. Cir. 1956)). The same test governs 18 U.S.C. § 1001. *United States v. Gaudin*, 515 U.S. 506, 509 (1995). BALCA") uses a similar standard, holding that whether "misrepresentations were material is whether they had a natural tendency to influence the decision of the [agency]." *Bestkey Sols., Inc.*, 2014-PER-01248, slip op. at 4. (Apr. 6, 2018) (quotation omitted). However, reaching a conclusion that a material misrepresentation was made in the application does not require a change in the final adjudication of the case. Injeti v. U.S. Citizenship and Immigration Servs., 737 F.3d 311,

316 (4th Cir. 2013) ("finding that a misrepresentation is material does not require concluding that it necessarily would have changed the relevant decision"); *United States v. Stelmokas*, 100 F.3d 302, 317 (3d Cir. 1996) ("Materiality, after all, refers to the effect of a representation on a decision maker regardless of the nature of the decision. In other words, no matter what is being decided, the misrepresentation is material under Kungys if it has the natural tendency to affect the decision.").

With regard to potentially noncompliant conduct by an employer, attorney, or agent that could lead to debarment under 656.31, the Department is proposing to define ***pattern or practice*** as a course of conduct in which the act or omission in question is repeated, routine, or regular, rather than an isolated, sporadic, or accidental act. Such conduct may be established involving two or more *Applications for Permanent Employment Certification*, whether filed by or on behalf of the same employer or different employers, and, in the case of an attorney or agent, by conduct across the applications of different clients. This proposed definition is based on principles in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 388 n.16 (1977) (construing Title VII § 707, 42 U.S.C. 2000e-6) noting that a pattern or practice is conduct that is "the regular rather than the unusual practice," "more than the mere occurrence of isolated or 'accidental' or sporadic . . . acts."

In addition, the Department is proposing to define ***Willful*** as knowingly, deliberately, and voluntarily, or in reckless disregard of the requirements of this part or of the truth or falsity of a representation, as distinguished from an act or omission that is accidental, inadvertent, or merely negligent. In the Department's proposal, a person acts willfully with respect to a requirement of this part when the person knows of the requirement or shows reckless disregard for whether the person's conduct complies with it. The Department is proposing this definition for consistency with 20 CFR § 655.805(c), which states that a "'willful failure' means a knowing failure or a reckless disregard with

respect to whether the conduct was contrary to [the statute or regulations]." (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) ("willful" refers to conduct that is "voluntary," "deliberate," or "intentional," and not merely "negligent" and further confirms a willful violation occurs if an employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited"); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985) (defining willfulness under the Age Discrimination in Employment Act to mean the employer "either knew or showed reckless disregard" for whether its conduct was prohibited)).

A ***willful misrepresentation*** is proposed as constituting a false representation of a material fact, made willfully or with reckless disregard, in connection with an *Application for Permanent Employment Certification*, a prevailing wage determination, or any other document, form, or communication submitted under this part. The Department also proposes to clarify that the intent to deceive is not an element of willful misrepresentation. *Mwongera v. INS,* 187 F.3d 323, 330 (3d Cir. 1999) (stating that the government "does not need to show intent to deceive; rather, knowledge of the falsity of the representation will suffice")*; Forbes v. INS,* 48 F.3d 439, 442 (9th Cir. 1995) (same). It is sufficient that the person knew the representation was false or made it with reckless disregard for its truth or falsity, and made it voluntarily. The proposed definition is consistent with *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289–90 (BIA 1975) (a misrepresentation is willful if made deliberately and voluntarily with knowledge of its falsity). "[T]he intent to deceive is no longer required before the wilful [*sic*] misrepresentation charge comes into play." *Id.* at 290.

Overall, the terms and definitions included in this proposal will clarify program requirements to improve employer compliance, strengthen program integrity, and enhance consistency across programs.

4. Proposed 20 CFR 656.4, Persons and entities authorized to file.

The Department proposes adding a new section at 656.4 to address persons and entities authorized to file an *Application for Permanent Employment Certification* with OFLC and the employer's signature requirements, including when represented by an attorney or agent. The proposed new section would update and expand employer signature requirements in the PERM labor certification program, while providing consistency with the Department's H-2B program regulations at 20 CFR 655.7 and improving program integrity by requiring the employer to affirm its accountability for documentation submitted to the Department.

Proposed new paragraph (a) of section 656.4 clarifies that an employer may file the *Application for Permanent Employment Certification* or may authorize an agent or attorney, as defined at section 656.3, to do so on the employer's behalf. This paragraph would codify current program practices, as either the employer, or its agent or attorney, are allowed to file applications.

In paragraph (b), the Department proposes to require the employer to sign the *Application for Permanent Employment Certification* and all documentation submitted to the Department, regardless of whether the employer is represented by an attorney or agent. Requiring the employer to sign the *Application for Permanent Employment Certification* is a current practice under section 656.17(a)(1). Similarly, the employer's signature on the recruitment report is currently required under section 656.17(g)(1). Most employers would not experience a change in practice under this proposal, but those employers selected for audit or supervised recruitment, for example, would be required to sign all additional submissions to the CO.

Requiring employers to sign all documents submitted to the Department may expand signature requirements for some employers, but it does not expand program obligations. Under current section 656.10(b)(1), employers currently must attest to taking full responsibility for the accuracy of any representations made to the Department by an

attorney or agent when signing the application form. Continuing current practice, the Department will not permit an agent or attorney to sign for the employer, even if the employer seeks to delegate authority to the agent or attorney, such as through a Power of Attorney or similar document. It has been established by BALCA that the employer is responsible for ensuring the accuracy of the application and all other submissions.[40] The Department proposes to codify a signature requirement on all documents submitted as a means of ensuring employer accountability and, thereby, improving program integrity.

5. Proposed 20 CFR 656.5, Requirements for attorneys and agents.

As noted above, the Department proposes expanding subpart A to include sections 656.5, 656.6, and 656.7. In section 656.5, the Department proposes to repurpose the section that currently contains Schedule A, which is the only current provision in subpart B.[41]

The proposed section 656.5 addresses the requirements for agents and attorneys. Specifically, the Department proposes to address documentation requirements for agents and attorneys who file *Applications for Permanent Employment Certification* with OFLC on behalf of employers, as well as attorney and/or agent involvement in the consideration of U.S. workers during the PERM labor certification program's labor market test.

In paragraph (a), the Department proposes adding a new document retention requirement for agents and attorneys. Agents and attorneys would be required to retain documentation—an original agreement or other document—that demonstrates the employer authorized them to submit the *Application for Permanent Employment Certification* on the employer's behalf and otherwise represent the employer in connection with all aspects of that application. Adding this documentation requirement

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[40] *E.g.*, *Rubicon Global Holdings*, 2023-PER-00050, slip op. at 4 (Aug. 30, 2024) (holding employer responsible for error counsel made on Form ETA-9089); *see also Island Concrete Form LLC*, 2019-PER-00058 (July 28, 2022) (holding employer responsible for error counsel made submitting an incomplete draft NOF in an audit response).

[41] *See infra* Section B of this NPRM for further discussion on the current Schedule A provision at 20 CFR 656.5 and subpart B.

for agents is consistent with the Department's current document retention requirements for agents who participate in the H-2A and H-2B temporary labor certification programs, and expanding it to attorneys in the PERM program regulations would advance the Department's continued efforts to strengthen the integrity of the PERM program.[42] In recent years OFLC has experienced situations that have prompted the need to propose this requirement. For example, there have been PERM and/or PWD applications filed on behalf of employers that have not retained the professional services of attorneys or agents nor have authorized the filing of those applications. In addition, there have been other instances where OFLC has reviewed applications that fail to disclose information pertaining to attorneys and/or agents that have been retained by the employer or work for the employer for purposes of providing legal or professional services in connection with a PERM application.[43] These instances, along with other issues OFLC has experienced while processing applications, and the fact that requiring the retention of such agreements is an existing practice and requirement established for other programs, have prompted the need to propose the establishment of this requirement in this program. The Department proposes to require agents and attorneys to retain this documentation for the same proposed record retention period as would apply to employers who file *Applications for Permanent Employment Certification* under proposed section 656.10(h)—a period of 5 years from the date on which the Immigrant Petition is approved, denied or withdrawn. Or, if the employer does not proceed to file an Immigrant Petition, agents and attorneys would be required to retain all records associated with the *Application for Permanent Employment Certification* for a period of 5 years from the expiration of the labor certification or from the date of denial or withdrawal.

[42] *See* 20 CFR 655.8(a) (H-2B) and 20 CFR 655.133(a) (H-2A).
[43] *See generally Dwight M. Molina*, 2022-PED-00004 (May 29, 2025).

To be clear, the Department is proposing to require that any agreement the employer and its agents or attorneys might have entered into for purposes of filing a PERM application be retained to be provided to the Department, upon request, in order to substantiate the nature and scope of its relationship with the agent and/or attorney and the services to be rendered, as it relates to the entire PERM recruitment and application process. OFLC is not proposing to regulate the content of these representation agreements, as that is determined and controlled by the parties involved; OFLC is merely proposing that such agreements be retained and produced upon request, because it assumes that an agreement was entered into in order for the employer to authorize its attorney or agent to file a PERM application on its behalf. Moreover, the scope of the agreement must be specific enough to clearly delineate the role and responsibilities of the attorney and/or agent to ensure the agent or attorney does not act in a manner that goes beyond what was permitted or authorized, such as the consideration of U.S. workers who apply for the job opportunity unless they qualify as the employer's representative, as provided in proposed section 656.5(b). OFLC wants to further remind employers that legal representation or securing an agent for purposes of filing an *Application for Permanent Employment Certification* is not required, and participation in the PERM program is voluntary.

For the PERM labor certification program, the agent or attorney would not be required to submit evidence of their authority to represent the employer when submitting the *Application for Permanent Employment Certification* to OFLC at the time of filing. Rather, the agent or attorney would be required to retain the evidence and be prepared to provide it to OFLC upon request, for example, in the event of an audit or if the need to request proof of representation arises while the CO is processing the application.

In addition, the Department proposes to relocate the provision that addresses alien, attorney, or agent involvement in considering U.S. workers who apply or are

referred to the employer during the recruitment period, from current section 656.10(b)(2) to proposed section 656.5(b), without any substantive changes, apart from removing explanatory policy language from the proposed regulatory text to simplify the rule. The Department proposes to add a paragraph heading to 656.5(b), "Consideration of U.S. workers," for clarity. The Department would continue to put attorneys and agents on notice in proposed paragraph (b)(1) that the alien, and agents or attorneys of the employer or the alien, may not participate in interviewing or considering U.S. workers for the job offered to the alien, with one exception stated in proposed paragraph (b)(2). The Department proposes to change the regulatory content relocated from current section 656.10(b)(2)(i) to proposed section 656.5(b)(1) by removing the policy statement below from regulatory text:

> It is contrary to the best interests of U.S. workers to have the [foreign worker] and/or agents or attorneys for either the employer or [foreign worker] participate in interviewing or considering U.S. workers for the job offered the [foreign worker]. As the beneficiary of a labor certification application, the foreign worker cannot represent the best interests of U.S. workers in the job opportunity. The foreign worker's agent and/or attorney cannot represent the foreign worker effectively and at the same time truly be seeking U.S. workers for the job opportunity.

Although the Department's policy statement above remains in effect, removing it from regulatory text conforms with the Department's goal of simplifying the PERM labor certification regulations. As a result, proposed section 656.5(b)(1) continues to prohibit the alien and/or the alien's agent and/or attorney from interviewing or considering U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative, as described in paragraph (2) of this section, while the preamble explains the reason the Department is retaining the prohibition in the proposed rule.

The Department continues to recognize in paragraph (b)(2) that, in some cases, an employer may have an agent or attorney who acts as the employer's representative in recruitment, normally, for job opportunities such as the one

specified on the *Application for Permanent Employment Certification*. Only if the agent or attorney normally acts as the employer's representative in recruitment for such job opportunities when unconnected to labor certification may that agent or attorney be involved in interviewing or considering U.S. workers during permanent labor certification program recruitment.

6. Proposed 20 CFR 656.6, Successors in interest.

The Department proposes to add a new section to its PERM program regulations at 656.6 to address successors in interest to an employer, attorney, or agent who has violated PERM labor certification program requirements. The language proposed in this section mirrors the Department's current H-2A program regulations for successors in interest at 655.104. Specifically, this section proposes to define "successors in interest," clarify liability for successors in interest, and explain the effect of an employer, attorney, or agent's debarment on a successor in interest. The Department has determined that this proposal, similar to the H-2A program regulations, would improve program integrity by enabling the Department to hold entities accountable for their misconduct.

Proposed paragraph (b) provides a non-exhaustive list of factors the Department would use to identify a successor in interest. These factors would enable the Department to compare and contrast key information for a new employer, attorney, or agent who files an *Application for Permanent Employment Certification* against information for a previous filer who violated program requirements, during the violator's debarment period. Key information encompassed in this assessment includes: substantial continuity of the same business operations; use of the same facilities; continuity of the workforce; similarity of jobs and working conditions; similarity of supervisory personnel; whether former management or ownership retains a direct or indirect interest in the new enterprise; similarity in machinery, equipment, and production methods; and similarity of products and services. In addition, the Department would consider whether the

predecessor has the ability to provide relief for their violation(s). For purposes of debarment, the Department also would consider whether—and, if so, the extent to which—the employer, attorney, or agent's ownership, management, supervisors, and others associated with them were involved in the violation(s) at issue. If, after engaging in this assessment, the Department were to find substantial continuity or similarity between the two, the Department would deem the new employer, attorney, or agent to be a successor in interest to the predecessor. As proposed, no one factor would be dispositive. All the circumstances would be considered as a whole.

Proposed paragraph (a) clarifies that successors in interest could be liable for the duties and obligations of the predecessor employer, agent, or attorney, regardless of whether they have succeeded to all the rights and liabilities of the predecessor. The Department emphasizes that this liability and enforcement standard is tailored specifically to prevent the evasion of PERM program obligations and debarment. It does not alter, displace, or satisfy the distinct substantive standards applied by DHS when determining whether an entity qualifies as a valid successor in interest for purposes of immigrant visa petition adjudication under Title 8 of the Code of Federal Regulations. In addition, proposed paragraph (c) would permit the CO to deny an *Application for Permanent Employment Certification* filed by or on behalf of a successor in interest of a debarred entity during the period of debarment, without review beyond the successor in interest assessment. The CO would issue the denial solely on the basis that it was filed by a successor in interest to a debarred employer, agent, or attorney. Similarly, OFLC would revoke a PERM labor certification issued to a successor in interest to a debarred employer, agent, or attorney solely on that basis. The employer, agent, or attorney would have the option to appeal such a denial or revocation, pursuant to the procedures for appeals of CO determinations in proposed section 656.26.

This proposal would bolster the Department's ability to impose sanctions on program violators. It would prevent debarred employers, attorneys, and agents from circumventing debarment by obscuring their identity through reincorporation, restructuring, or other means. The Department could look behind the name or FEIN on a new filing to assess the employer, attorney, or agent as a successor in interest to a debarred entity. Adding this section would improve program integrity and promote greater compliance with program requirements.

7. Proposed 20 CFR 656.7, Transition procedures.

The Department proposes to add a new section 656.7 to clarify which set of regulations—the 2004 PERM Final Rule,[44] as amended, or this proposed rule, once finalized—an employer would be required to satisfy when filing an *Application for Permanent Employment Certification* or *Application for Permanent Prevailing Wage Determination* with OFLC. In this section, the Department proposes to use the date an employer submits an *Application for Permanent Employment Certification* to determine which set of rules govern that application, meaning that an *Application for Permanent Employment Certification* or *Application for Prevailing Wage Determination* must satisfy the regulations applicable on the date submitted and OFLC will process the application in accordance with those regulations. This proposed transition approach would ensure that each *Application for Permanent Employment Certification* or *Application for Prevailing Wage Determination* is subject to only one regulatory framework.

The Department recognizes that an employer's compliance with program requirements begins before filing an *Application for Permanent Employment Certification*, with pre-filing recruitment of U.S. workers and obtaining the required PWD. Under current pre-filing recruitment requirements, an employer's recruitment

[44] *See* Employment and Training Admin., Final Rule, *Labor Certification Process for the Permanent Employment of Aliens in the United States*, 69 FR 77326 (Dec. 27, 2004).

compliance efforts could begin as much as 180 calendar days before the employer intends to file an *Application for Permanent Employment Certification*.[45] Requesting a PWD could begin earlier than 180 calendar days before filing the *Application for Permanent Employment Certification* or it could be the employer's last action before filing.[46] To provide continuity for employers who were already engaged in pre-filing recruitment activities on the date the Department publishes the new rule and an opportunity for both employers and OFLC to adjust to the new requirements, the Department is considering a transition period.

The Department is proposing a 90-day transition period—consisting of a 60-day delayed effective date plus an additional 30 calendar days for transition. The Department used this approach when publishing the current PERM labor certification program regulations and proposes the same approach for this proposed rule, once finalized. Using a 90-day transition period would support a smooth transition between current and new requirements. It would enable employers who had already begun pre-filing recruitment for compliance with the current rule to complete all required recruitment activities—including placement of a job order with the SWA—at least 30 calendar days before filing an *Application for Permanent Employment Certification* under the current regulatory framework. In addition, it would provide opportunity for the Department to engage with stakeholders seeking to understand the new rule, to train staff, and to prepare and troubleshoot systems for processing under the new rule.

As proposed, the new rule would go into effect 60 calendar days after publication, the Department would be granting 30 additional calendar days for transition from the old rule to the new rule, and all *Applications for Permanent Employment Certification* or

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[45] Currently, employers following the basic pre-filing recruitment process at section 656.17 must conduct required recruitment activities within the 180-calendar-day period before filing; none of the required recruitment activities may have taken place more than 180 calendar days prior to filing the application.
[46] *See* 20 CFR 656.40(c). The proposed rule retains the requirement that the employer begin pre-filing recruitment or file the *Application for Permanent Employment Certification* within the validity period of the PWD.

Application for Prevailing Wage Determination filed on or after the 90th day after publication would be subject to the new rule. OFLC would review an *Application for Permanent Employment Certification o*r *Application for Prevailing Wage Determination* submitted no more than 29 days after the effective date of the new rule using current regulations at part 656. Beginning 30 days after the effective date of the new rule, any *Application for Permanent Employment Certification o*r *Application for Prevailing Wage Determination* filed with OFLC would be subject to the new rule.

The Department invites comments on the length of the proposed transition period, and ways to facilitate transition from the current regulations to the new rule, once finalized.

C. Discussion of Proposed Revisions to 20 CFR Part 656, Subpart B

The Department is proposing to eliminate the provisions for Schedule A in this subpart because it lacks the authority to establish an exception to the INA's labor market test; and, further, even if it possessed this authority the Department can no longer justify continuing to waive the labor market test for jobs that it has been unable to prove are subject to a national shortage of qualified U.S. workers using a reliable, objective, and transparent methodology or prove should otherwise be exempted from the statutory labor certification requirement, apart from a determination from the Secretary of Homeland Security that it is in the national interest to waive the permanent job offer requirement.

During the mid-1960s, in an effort to reduce administrative processing delays associated with the admission of aliens for permanent employment, the Department first established, by regulation, a mechanism for pre-certifying jobs for which U.S. workers were purportedly in short supply nationwide, which became known as Schedule A of the PERM labor certification program.[47] Currently, Schedule A is set forth in the

[47] *See* "Labor Certification for Permanent Employment of Foreign Workers in the United States; Modernizing Schedule A To Include Consideration of Additional Occupations in Science, Technology,

Department's PERM labor certification regulations at 20 CFR 656.5 and enumerates a list of occupations for which the Department predetermined that the statutory requirements have been met.[48] The occupations currently listed in Schedule A are divided into two groups. Group I consists of physical therapists and professional nurses; Group II consists of aliens who possess exceptional ability in the sciences, arts, or performing arts.[49] An employer seeking to hire an alien in an occupation listed in Schedule A is able to forego the labor market test for U.S. worker availability that is normally required for PERM labor certification. The employer bypasses filing an *Application for Permanent Employment Certification* with the Department and instead files an uncertified *Application for Permanent Employment Certification* directly with USCIS at the time the employer files its Form I-140 petition.[50]

Prior to 2004, the occupational listings in Schedule A were reviewed and modified multiple times to reflect changing economic and labor market conditions and to prevent adverse effects on the wages or working conditions of U.S. workers. Schedule A has been revised eight times, the last time in 2004.[51] The most recent revisions to Schedule A listings in 2004 only added aliens of exceptional ability in the performing arts to Group II; the other revision in 2004 was procedural and clarified the professional

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Engineering, and Mathematics (STEM) and Non-STEM Occupations," 88 FR 88290 (Dec. 21, 2023); *see also* 30 FR 14979 (Dec. 3, 1965) (publishing initial Schedule A).

[48] *See* INA section 212(a)(5)(A), 8 U.S.C. 1182(a)(5)(A) (stating, "Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that—(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.").

[49] *See* 20 CFR 656.5(b) and 656.15(d); *see also* "Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States," 42 FR 3440 (Jan. 18, 1977) (establishing the initial framework for Group II).

[50] *See* 8 CFR 204.5(k)(4)(i); 8 CFR 204.5(l)(3)(i); *see also* 20 CFR 656.15.

[51] *See, e.g.,* 31 FR 16412 (Dec. 23, 1966), 33 FR 12808 (Sept. 10, 1968), 36 FR 2462 (Feb. 4, 1971), 42 FR 3440 (Jan. 18, 1977), 45 FR 83933 (Dec. 19, 1980), 52 FR 20593 (June 2, 1987), 56 FR 54920 (Oct. 23, 1991), and 69 FR 77326 (Dec. 27, 2004).

qualifications for eligible nurses under Schedule A.[52] The two occupations listed in Group I of Schedule A have been unchanged for over 30 years.

In addition, the Department has determined that the existence of Schedule A—both Group I and Group II—is incompatible with the plain language of the INA. Regarding Schedule A, generally, and Group I, specifically, the INA requires that before "*any* alien" may be admitted into the United States to perform skilled or unskilled labor, the Secretary must certify that there are no qualified workers in the United States that are able and willing to perform the work. 8 U.S.C. 1182(a)(5)(A)(i)(I) (emphasis added). The INA does not exempt workers in a particular occupation from this requirement, nor does it provide the Department with the authority to exempt any occupations from this requirement. Had Congress wanted to empower the Department to establish an exemption from the labor certification requirement it would have clearly done so. Instead, the statute includes no such authority. To the extent that Group II implements the exception embedded in 1182(a)(5)(A)(i)(I) and defined in (A)(ii)—a slightly modified labor market test for members of the teaching profession and aliens with exceptional ability in the sciences or arts—such implementation is consistent with the statute.[53] The statute, however, does not exempt those occupations from the labor certification requirement.

Since Schedule A does not require the employer to file an *Application for Permanent Employment Certification* with OFLC, the Department does not have comprehensive data on how many employers utilize Schedule A and the types of work performed thereunder.[54] In response to growing stakeholder interest in modifying Schedule A and President Biden's October 2023 Executive Order 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, the Department

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[52] 69 FR 77326, 77333.
[53] *See* 8 U.S.C. 1182(a)(5)(A)(i)(I) and (A)(ii) (determination of the availability of U.S. workers rests on whether there are not U.S. workers equally qualified as the alien seeking to enter the United States.
[54] *See* 88 FR 88290, 88291 (Dec. 21, 2023). Nurses and physical therapists have been the sole occupations on Schedule A since the 1990s (56 FR 54920, 54922 (Oct. 23, 1991)) (removing other occupations from Schedule A but retaining nurses and physical therapists).

published an RFI,[55] seeking public comment on evaluating the utility of expanding Schedule A to include STEM or non-STEM occupations, input on the appropriate data sources and methods for determining whether labor shortages exist, and if so, how the Department could establish a reliable, objective, and transparent methodology for identifying STEM and non-STEM occupations that are experiencing labor shortages and use that methodology to make regular updates to Schedule A. As previously discussed, the Department received over 2,000 comments in response to the RFI, none of which in whole or in part provided the Department with information and evidence upon which the Department could rely to establish a consistent and reliable methodology for regularly reviewing and updating Schedule A occupations. In the absence of such a methodology, the Department can no longer confirm that a nationwide shortage of workers exists to reasonably justify keeping the existing occupations in Schedule A or expanding Schedule A to other occupations—even assuming it had the authority to exempt certain occupations from the required labor market test, the Department has no reasonable basis upon which to determine that a national shortage of workers exists in any occupation. The RFI process solidified the Department's growing belief that Schedule A, first established as an administrative measure to reduce processing delays, should be eliminated and all job opportunities subject to part 656 must undergo a labor market test for the reasons explained below. Consequently, the Department is unable to confidently conclude that Schedule A does not undermine INA section 212(a)(5)(A), 8 U.S.C. 1182(a)(5)(A), which requires a PERM labor certification from the Department confirming the Secretary's determination that there are insufficient U.S. workers who are able, willing, qualified and available for the job the alien seeks and employment of the alien will not adversely affect the wages and working conditions of U.S. workers in

[55] *See* "Labor Certification for Permanent Employment of Foreign Workers in the United States; Modernizing Schedule A to Include Consideration of Additional Occupations in Science, Technology, Engineering, and Mathematics (STEM) and Non-STEM Occupations," 88 FR 88290 (Dec. 21, 2023).

similar jobs.[56] Being unable to justify the continued presence of the current occupations on Schedule A, the Department likewise cannot justify continuing to waive recruitment for U.S. workers as it no longer possesses evidence that there is a nationwide shortage of U.S. workers able, willing, qualified, and available to work as physical therapists or professional nurses, as required for their placement on Schedule A. Further, the INA does not authorize the Department to make a finding of such a shortage or to use such a finding to exempt certain occupations from the requirements of the PERM program.

With regard to Schedule A, Group II, the Department further notes that even if a methodology could be identified to update Schedule A, the Department would still pursue elimination of Schedule A, Group II. Schedule A was intended for *occupations* for which the Department could identify a shortage of available U.S. workers, not individuals or classes of aliens.[57] Group II focuses on the aliens' qualifications and how the aliens possess exceptional ability. As written now, the regulation does not focus on the occupations, which as stated, was the primary concern for Schedule A.

It appears that the Department added Group II to Schedule A in connection with Congress' October 20, 1976 amendments to the INA at section 212(a)(5)(A)(ii), which required an "equally qualified" assessment for U.S. workers applying for positions requiring exceptional ability in the sciences or the arts, as a mechanism to route these applications to DHS, where DHS would then assess whether the alien possessed the exceptional ability claimed and compare the alien's qualifications to those of U.S.

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[56] *See* INA section 212(a)(5)(A), 8 U.S.C. 1182(a)(5)(A), which states, "Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that—(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed."

[57] *See* 69 FR 77335 (Dec. 27, 2004) (declining to expand Schedule A to include classes of workers that commenters suggested (*e.g.*, key employees with special or unique skills), noting that the core premise of Schedule A is pre-certification of occupations).

workers available for the job opportunity.[58] Continuing current practice, the Department will not assess the alien's "exceptional ability." DHS has the authority and experience to assess whether the alien possesses "exceptional ability." However, the Department has determined that it better serves and protects U.S. workers to first have employers seeking to employ aliens under current Schedule A Group II conduct a labor market test, with the CO assessing the employer's consideration of U.S. workers, and then allow DHS to make the "exceptional ability" determination, if the employer pursues an Immigrant Petition.

Even if the Department does not adopt its proposal to delete the content of section 656.15 in its entirety and reserve the section, some regulatory text would be deleted from 656.15, consistent with the Department's goal of eliminating regulatory text covering topics outside the scope of the Department's jurisdiction. For example, current sections 656.15(c) and 656.15(d) list documentation to be submitted to USCIS with the I-140 petition, for use in USCIS' assessment of whether the alien possesses the requisite exceptional ability. DHS addresses documentation requirements for USCIS' assessment of exceptional ability in its regulations at 8 CFR 204.5(k)(3)(ii). At best, sections 656.15(c) and (d) of the Department's regulations create confusion to the extent there are differences between those sections and DHS' regulations. At worst, they hamper USCIS' ability to assess exceptional ability claims. With the proposed elimination of section 656.15(c) and (d) content, USCIS' regulations at 8 CFR 204.5(k)(3)(ii) would clearly—and solely—govern.

While some employers may have relied on Schedule A to reduce burden when hiring aliens (i.e., avoiding time and cost burden associated with pre-filing recruitment and OFLC's *Application for Permanent Employment Certification* review process), the Department also has determined that this reliance interest does not outweigh the

[58] *See* "Labor Certification Process for the Permanent Employment of Aliens in the United States; Implementation of the Immigration Act of 1990; Final Rule," 56 FR 54920, 54922 (Oct. 23, 1991).

Department's interest in rigorous adherence to the requirements of the INA and Congress' mandate to protect the wages and working conditions of U.S. workers.

Therefore, the Department asserts that a labor market test should be conducted for these job opportunities to satisfy the Department's obligations under the INA. The Department has experience assessing U.S. worker availability using the "equally qualified" standard of current section 656.24(b)(2)(ii), which the Department applies to pre-filing recruitment for college and university teacher positions. In this rule, as discussed below, the Department proposes to expand section 656.24(b)(2)(ii) to encompass pre-filing recruitment for job opportunities offered to aliens claimed to have exceptional ability in the sciences or the arts and eliminate Schedule A, Group II. Under this proposed rule, the employer would identify the job opportunity on the *Application for Permanent Employment Certification* as offered to an alien of claimed exceptional ability. The employer would conduct pre-filing recruitment following the requirements of proposed section 656.17 and prepare a recruitment report and all other supporting documentation demonstrating compliance with the requirements of proposed section 656.17(f) for submission with its *Application for Permanent Employment Certification*. OFLC would review the employer's pre-filing recruitment activities conducted pursuant to 656.17 and those recruitment results to assess the availability of U.S. workers at least as qualified as the alien. However, OFLC would not assess whether the alien qualifies for the EB-2 immigrant visa classification as an alien of exceptional ability; that determination resides with USCIS. If the employer files a Form I-140 Petition asserting exceptional ability under the EB-2 immigrant visa classification, and USCIS denies it after determining the alien's qualifications do not rise to the level of exceptional ability pursuant to the requirements in the relevant DHS regulations at 8 CFR 204.5(k), the employer could file a new *Application for Permanent Employment Certification* without the assertion of exceptional ability.

As a result, the Department is proposing to eliminate Schedule A for Group I, both at the current section 656.5, in related provisions at section 656.15, and elsewhere as necessary. Employers seeking to permanently employ aliens currently covered in Group I of the current Schedule A would follow the standard PERM labor certification process, including the pre-filing recruitment requirements of proposed section 656.17, the filing instructions of proposed section 656.10, the processing requirements of proposed section 656.19, and all other PERM regulatory requirements that apply to all other occupations, without exception. As required by statute, a recruitment report and all other supporting documentation submitted for a job opportunity formerly classified under Schedule A, Group II, will be assessed under section 656.24(b)(2)(ii), using the same standard as that which applies to *Applications for Permanent Employment Certification* for college or university teachers, while a recruitment report for a job opportunity formerly classified under Schedule A, Group I, will be assessed under section 656.24(b)(2)(i), which applies to all other occupations.[59] The Department notes that aliens claiming to have exceptional ability in business are not currently listed in Schedule A, Group II, or in the statutory provision at 8 U.S.C. 1182(a)(5)(A)(ii), which establishes the alternative assessment for U.S. worker availability at section 656.24(b)(2)(ii); recruitment results for such job opportunities would continue to be subject to section 656.24(b)(2)(i).

In light of the foregoing, the Department proposes to eliminate the provision that classifies aliens of exceptional ability, defined in Group II of current section 656.5, under the umbrella definition of Schedule A. Employers seeking to permanently employ aliens currently covered in Group II of the current Schedule A would follow the standard PERM labor certification process (*i.e.*, proposed sections 656.10, 656.17, and 656.19, and all other PERM regulatory requirements that apply to all other occupations); however, the

[59] *See* 8 U.S.C. 1182(a)(5)(A)(i) and (ii). The statutory provisions governing assessment of U.S. worker availability for job opportunities are further discussed and explained in the preamble for proposed section 656.24.

recruitment report submitted for a case currently covered in Group II will be assessed under section 656.24(b)(2)(ii), as required by the INA, using the same standard that applies to *Applications for Permanent Employment Certification* for college or university teachers.[60]

As the Department has determined that there is no need to classify either Group I or Group II under Schedule A and is proposing to delete these provisions, the Department further proposes the deletion of the current section 656.5 of part 656, subpart B in its entirety. The Department's proposal would result in subpart B not containing any regulatory sections, so the Department proposes to reserve current part 656, subpart B in full for future rulemaking.

The elimination of Schedule A would enable the Department to better ensure that U.S. workers have an opportunity to apply for available job opportunities, and adhere to the statutory requirements to protect U.S. workers assigned to it, as intended by Congress under the INA.

D. Discussion of Proposed Revisions to 20 CFR Part 656, Subpart C

In subpart C, the Department proposes adding two new sections at 20 CFR 656.13 and 656.14. The Department is also proposing to delete the language currently contained in sections 656.15 and 656.16, so they can be reserved. Under this proposed rule, several sections of subpart C would be retained but repurposed and/or revised, as discussed below.

1. Proposed 20 CFR 656.10, Application filing requirements.

The Department proposes to clarify the process for filing an *Application for Permanent Employment Certification*, in part, by reorganizing the PERM labor certification program's regulatory framework to reflect program requirements by

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[60] *See* 8 U.S.C. 1182(a)(5)(A)(ii). The statutory provisions governing assessment of U.S. worker availability for job opportunities involving college or university teachers and persons of exceptional ability are further discussed and explained in the preamble for proposed section 656.24.

processing stage, rather than by occupation. This approach is consistent with the Department's existing H-2A and H-2B temporary labor certification program regulations and will help clarify and simplify the PERM labor certification program regulations.[61] In keeping with this reorganizational approach, the Department proposes to centralize the filing requirements for *Applications for Permanent Employment Certification* at section 656.10, as discussed below. In addition, the Department proposes certain changes to the information and documentation required at the time of filing and modifications to regulatory language in conformity with other proposals in this rulemaking. The filing requirements proposed in section 656.10 would apply to all employers seeking to permanently employ an alien in a job opportunity that requires a PERM labor certification, regardless of occupation. These proposed changes are explained below.

To accomplish the centralization of filing requirements in section 656.10, the Department proposes to move paragraphs both out of and into section 656.10. The proposed rule would move the current paragraphs (b) (representation), (c) (attestations), and (d) (notice) out of section 656.10, as they address topics other than filing requirements. The content of these paragraphs would be relocated and addressed in other sections of the proposed rule, including sections 656.3, 656.4(b), 656.5(b), 656.13, and 656.14. Under the proposed rule, regulatory content that would move into revised section 656.10 include language currently provided for under: sections 656.17(c) (filing date); 656.17(l) (documentation related to alien influence over the job opportunity); and 656.19(b) (documentation for live-in household domestic service workers). Following these organizational changes, proposed section 656.10 will focus only on filing requirements and will also address the related topics of filing date, submission of incomplete applications, and record retention.

[61] *See* 20 CFR 655.15 and 20 CFR 655.121.

Specifically, in proposed paragraphs (a) (What to file) and (d) (Original signature) of section 656.10, the Department addresses what all employers would be required to submit to OFLC. Consistent with current practice, proposed sections 656.10(a)(1) and 656.10(d) would require the employer to submit a complete *Application for Permanent Employment Certification* with original signature(s)[62] that includes a PWD obtained in advance pursuant to section 656.40[63] and information provided in all other required fields. Proposed section 656.10(a)(1) highlights certain key employer information that must be provided (*i.e.*, legal name(s), trade name(s), valid FEIN, valid place of business [physical location] in the United States, and a means by which prospective U.S. applicants may contact the employer for employment) on the *Application for Permanent Employment Certification*. In the current rule, the definition of ***Employer*** in section 656.3 requires the employer to have a FEIN and "a location within the United States to which U.S. workers may be referred for employment" and the Form ETA-9089 and instructions identify those, plus employer name, trade name (if applicable), and contact information for the employer, as required. To improve clarity that this key employer information is required at the time of filing—collected through required form fields—the Department proposes to include this content in proposed section 656.10(a)(1) and add legal name, trade name(s), and means by which prospective U.S. applicants may contact the employer for employment to proposed section 656.10(a)(1), consistent with required form fields

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[62] Employers and their attorneys or agents, if applicable, sign the *Application for Permanent Employment Certification*, and submit an electronic (scanned) copy of signed form (until the OFLC Administrator directs use of a verifiable electronic signature method). The form with the original signature(s) must be retained for compliance with the proposed section 656.10(h).

[63] Employers are only required to identify the tracking number for the PWD (Form ETA-9141) associated with the *Application for Permanent Employment Certification* when completing the Form ETA-9089 in the FLAG system. The FLAG system incorporates the PWD into the *Application for Permanent Employment Certification*, auto-filling certain required fields on the Form ETA-9089 for the employer and providing both Form ETA-9089 and Form ETA-9141 information for CO review in FLAG. *See Application for Permanent Employment Certification Form ETA-9089 – General Instructions*, Section E Job Opportunity and Wage Information, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/ETA-9089-General-Instructions-Expires%2002-28-29.pdf.

and H-2A program regulations.[64] If the employer does not use a trade name, "N/A" as an affirmative response is required, consistent with current form instructions.

In proposed sections 656.10(a)(2) through (4), the Department proposes additional records and documentation that employers must submit concurrently with the *Application for Permanent Employment Certification*. The proposal would change both the timing and frequency of employers' submission to OFLC of records and documentation demonstrating compliance with its notice to and consideration of U.S. workers.

For recruitment-related documentation, the current rule requires that employers retain copies of records and documentation to show compliance with pre-filing recruitment requirements (*e.g.*, copies of advertisements and resumes for U.S. workers who applied for the job opportunity) and a recruitment report describing the recruitment steps undertaken and the results achieved, including the lawful, job-related reason for not hiring any of the U.S. workers who applied. *See* current sections 656.10(f) and 656.17(g)(1). The current rule does not require employers to submit this documentation to the NPC, unless requested by the CO.

Similarly, employers prepare and retain evidence of the notice they provide to employees of the filing of the *Application for Permanent Employment Certification*—through bargaining representative(s) or posted notice to employees—and information about contacting DOL with information about the application, under the current rule. *See* current sections 656.10(d) and (f). For employers not subject to supervised recruitment, the employer provides or posts the NOF before filing the *Application for Permanent Employment Certification* and retains evidence of it for submission, upon request by the CO. If the CO imposes supervised recruitment during application processing, the CO may

[64] *See* 20 CFR 655.121(a)(1).

order the employer to update the NOF with revised information, consistent with the CO's ordered content for additional advertising.

For employers subject to supervised recruitment when filing future *Applications for Permanent Employment Certification* under the current rule, the CO instructs the employer not to provide or post the NOF until the CO has an opportunity to approve its content, along with advertising content, during the supervised recruitment process. While this practice ensures the NOF contains correct information, the Department has determined that delaying NOF posting until after filing the *Application for Permanent Employment Certification* is contrary to statute, which requires NOF at the time of filing.[65] Even if the initial NOF posted contains imperfect information, which the CO orders the employer to revise during supervised recruitment, the pre-filing NOF informs employees that the employer is filing an *Application for Permanent Employment Certification* and ensures that employees have an opportunity to provide information or concerns to DOL about the job opportunity described in the NOF. The proposed rule would require the notice to the bargaining representative(s) or NOF posting to begin within 10 business days before the employer files the *Application for Permanent Employment Certification* in all cases. *See* proposed sections 656.10(a)(2) and 656.14(f).

The Department also proposes to add clarifying language in proposed section 656.21(c)(7) to put employers subject to supervised recruitment on notice that the CO may require them to update the NOF during processing with revised content.

In addition, proposed section 656.10(a)(2) would require all employers to submit documentation demonstrating their compliance with NOF requirements concurrently with the *Application for Permanent Employment Certification*. Similarly, proposed sections 656.10(a)(3) and (4) would require employers to submit documents and records evidencing compliance with all pre-filing recruitment requirements, including resumes

[65] *See* Immigration Act of 1990, Pub. L. No. 101–649, title I, sec. 122, 104 Stat. 4994 (Nov. 29, 1990).

and applications for U.S. workers who applied for the job opportunity, concurrently with the *Application for Permanent Employment Certification.*[66]

Requiring submission of the NOF, documentation of recruitment activity and results, and the recruitment report prior to the issuance of a PERM labor certification decision will enhance transparency about the employer's efforts to conduct a good faith test of the domestic labor market and bolster program integrity efforts, with minor impact to burden. Further, the proposed change would strengthen the incentives for employers to comply with program requirements and ensure the Department's final determinations are more frequently based on actual evidence of a lack of qualified U.S. workers. While currently all employers must prepare and retain this documentation, only some employers are required to submit it to the NPC before the CO issues a final determination. Under the current rule, the CO certifies applications in the vast majority of circumstances without having reviewed the employer's consideration of U.S. workers; the CO relies on the employer's attestations alone. As proposed, the CO has discretion to review some or all recruitment reports prior to issuance of a final determination. In the event a recruitment report raised concerns regarding the employer's compliance with recruitment requirements or consideration of U.S. workers, the CO could review the supporting documentation (e.g., copies of advertisements, U.S. worker resumes and applications) to further assess the content, location, and timing of the employer's advertising of the job opportunity and its consideration of the U.S. workers who applied or were referred for the job opportunity, without unnecessary correspondence or subjecting the application for full audit examination. Thus, the Department expects that this additional review of readily-available documents will enable the CO to reach a final determination based on

[66] In the event the CO imposes supervised recruitment on an employer for future applications under proposed 656.21, recruitment for the employer's impacted *Applications for Permanent Employment Certification* would occur post-filing. As a result, the employer would not have a recruitment report to submit with an application subject to supervised recruitment.

evidence, as opposed to attestations, without additional processing. For example, if the employer's advertisements included a lower wage offer or higher qualifications than indicated on the *Application for Permanent Employment Certification*, the application could be denied on that basis without a lengthier audit examination process.

The Department also would like to emphasize that employers are already required to prepare the NOF and recruitment reports and maintain copies of them, along with supporting documentation, to be provided to the CO upon request, so no additional burden would result from the proposed change to the requirements beyond the burden associated with uploading that documentation in the FLAG system at the time the employer files the application, which, in the Department's opinion, constitutes a *de minimis* burden that results in a negligible burden increase.

In addition, this proposal would increase consistency across the Department's temporary and permanent labor certification programs, while accommodating program differences and supporting processing efficiency. For example, similar to the H-2B and CW-1 temporary labor certification programs, this proposal would require submission of the employer's recruitment report for CO review before the CO issues a final determination.[67] However, the timing of recruitment report submission before final determination would be different, based on when required recruitment activities are completed—pre-filing for the PERM labor certification program and during application review for the H-2B and CW-1 programs. Because recruitment—and a final recruitment report—must be completed pre-filing, requiring submission of the employer's recruitment report at the time of filing the *Application for Permanent Employment Certification* is an appropriate programmatic difference, which furthers the Department's processing efficiency goals. As proposed for the PERM labor certification program, the CO would be able to review employers' NOFs and recruitment reports—and related

[67] *See* 20 CFR 655.48 and 655.446.

supporting documentation—before reaching final determinations without additional, unnecessary correspondence.

Timeliness for filing

The Department is proposing a single filing timeframe requirement for submission of *Applications for Permanent Employment Certification* to OFLC in proposed section 656.10(b). An employer would be required to submit the complete *Application for Permanent Employment Certification*, with all documentation and information required at the time of filing, within 30 calendar days after the employer completes all pre-filing recruitment requirements. Together with proposed section 656.17(d), this would mean an employer must complete all recruitment activities between 30 to 60 calendar days before the employer expects to file the *Application for Permanent Employment Certification* and then file the application between 1 and 29 calendar days after the last recruitment activity ends. This 30-day timing requirement would apply to both employers who engage in the pre-filing recruitment procedures set forth in proposed section 656.17 and employers who engage in the optional pre-filing recruitment procedures for college and university teachers or professional athletes and professional sports team coaches set forth in proposed section 656.18. Currently, employers filing under section 656.17 must submit the application within 180 calendar days of beginning pre-filing recruitment activities and NOF posting, while employers filing under section 656.18 must do so within 18 months of the alien's selection, which is often many months before the actual filing of the application.[68]

The Department proposes this filing timeframe change to simplify part 656 and better provide the CO with more current information about the availability of U.S. workers for job opportunities that are the subject of an *Application for Permanent Employment Certification*. Under the current rule, an employer's recruitment and

[68] *See* 20 CFR 656.10(d)(3)(iv); 656.17(e)(1)(i) and (ii); 656.17(e)(2); and 656.18(c).

recruitment results can become stale before the employer submits its *Application for Permanent Employment Certification*. The Department considers the current timeframes—180 calendar days and 18 months in current sections 656.17 and 656.18, respectively—longer than necessary to enable employers to prepare their recruitment reports after completing pre-filing recruitment requirements. The Department considers the proposed 30-day timeframe after completion of pre-filing recruitment to be a reasonable period for preparation of recruitment reports for submission with the *Application for Permanent Employment Certification* and those recruitment reports would provide better information about the current availability of U.S. workers to the CO. In addition, as proposed, employers would file the *Application for Permanent Employment Certification* in closer proximity to the labor market test, which would ensure that U.S. workers who may have availability for the job opportunity are made aware of the job in closer proximity to the filing of the *Application for Permanent Employment Certification*, rather than many months ahead of time, and the recruitment report provided to the CO reflects current labor market results.

The Department invites comments on the proposed filing timeframe requirement that is consistent with the Department's goal of simplifying part 656 and ensuring recruitment activities and the report of recruitment results are not stale when submitted to the NPC. In particular, the Department invites comments about whether the 30-day timeliness requirement should be applied to *Applications for Permanent Employment Certification* filed using the proposed competitive recruitment and selection process of proposed section 656.18 based on the last advertisement date or the date of the organizational or administrative body's final report making the recommendation or selection of the alien. *See* proposed section 656.18(a)(2).

Location and method of filing

In paragraph (c), the Department proposes to require electronic filing for *Applications for Permanent Employment Certification* submitted to OFLC, except in limited circumstances. This proposal does not constitute a change for those employers who file *Applications for Permanent Employment Certification* using the Department's FLAG system, available at https://flag.dol.gov/. FLAG continues to be the OFLC Administrator's designated electronic filing method for *Applications for Permanent Employment Certification*. Consistent with the Department's approach when mandating electronic filing in temporary labor certification programs, the Department proposes similar procedures in the PERM labor certification program under paragraphs (c)(2) and (3), through which an employer may request authorization to file by mail by demonstrating to the OFLC Administrator that they are unable or limited in their ability to use or access electronic filing. An employer may contact the NPC in writing to the address designated in a notice published in the Federal Register, or for individuals with hearing or speech impairments, 1-877-889-5627 (this is the TTY toll-free Federal Information Relay Service number) for assistance in using, accessing, or filing any form or documentation required under this part, including the *Application for Permanent Employment Certification.* This proposal—and the parallel proposal in section 656.40(a)(2) to require electronic filing for *Applications for Prevailing Wage Determination*—would bring consistency across the foreign labor certification and labor condition application programs administered by the Department. If adopted, employers would submit all applications electronically to OFLC through the FLAG system, unless a limited exception applied.

Based on extensive experience administering permanent and temporary labor certification programs, the Department has determined that mandating electronic filing reduces costs (*e.g.*, mailing fees) and burdens for most employers and for the Department, reduces the frequency of delays related to filing applications, improves the

quality of information collected, promotes administrative efficiency and accountability, and increases consistency across labor certification programs. For employers and their authorized representatives, the Department's proposal to require electronic filing would improve customer experience by permitting more prompt processing of applications and reducing paperwork burdens and mailing costs. Electronic filing provides system prompts, which include warnings that an application is incomplete or obviously inaccurate and provides employers with an immediate opportunity to correct the errors or upload the missing documentation. Mandatory electronic filing furthers efficiency in communications between the Department and the employer and its representatives.

The Department anticipates that requiring e-filing will not require a change of practice for the vast majority of employers. Based on fiscal year (FY) 2021-FY 2025 data, approximately 99.61 percent of PERM labor certification applications were filed electronically.[69] Almost all of the remaining 0.39 percent of PERM labor certification applications filed by mail also disclosed valid email addresses on the application form, thereby suggesting that employers and, if applicable, their authorized attorneys and agents have access to the internet and are likely capable of filing electronically.

Additional documentation required for certain applications

After eliminating the content of current paragraph (e), as discussed below, the Department proposes to repurpose paragraph (e) to address additional documentation requirements for certain job opportunities. The Department proposes to relocate the content of current sections 656.19(b) (documentation for live-in household domestic service workers) and 656.17(l) (documentation related to alien influence over the job opportunity) to proposed sections 656.10(e)(1) and (e)(2), respectively, and add new regulatory content in proposed section 656.10(e)(3) to codify, with minor changes, the

[69] DOL OFLC Performance data for fiscal years 2021 through 2025 available at https://www.dol.gov/agencies/eta/foreign-labor/performance (last accessed May 6, 2026).

current practice for employers seeking to permanently employ professional athletes or professional sports team coaches, who meet the definition set forth in section 656.3.

After relocating the content of current section 656.19(b) to proposed section 656.10(e)(1), the Department proposes non-substantive changes for readability and changes to simplify documentation, while better ensuring the employment contract fully discloses all appropriate information about live-in household domestic service jobs offered. Under the current rule, the employer must prepare and retain both a statement describing the household living accommodations, which contains the information listed in current section 656.19(b)(1), and an employment contract, which contains information listed in current section 656.19(b)(2). The proposed rule would eliminate the separate statement describing household living accommodations and relocate its required content to the employment contract, resulting in one document that contains all required information about the job offered. This proposal simplifies documentation requirements, while better ensuring that the alien is apprised of the household living accommodations information. In addition, the proposed rule would reduce the number of copies of the employment contract the employer must retain. Currently, an employer seeking to permanently employ an alien in a live-in household domestic service job opportunity must retain two copies of the employment contract, but the proposed rule would only require retention of one.[70]

The Department's proposed section 656.10(e)(1)(i) eliminates two key pieces of information from the content required of employment contracts for live-in household domestic service job opportunity (i.e., the wage offer and description of duties required under current section 656.19(b)(2)(i) and (v), respectively). However, the two pieces of information are still required. The proposed language that introduces the enumerated list in proposed section 656.10(e)(1)(i) states that the employment contract must "contain[],

[70] *Compare* current section 656.19(b)(2) ("Two copies"), *with* proposed section 656.10(e)(1)(i) ("A copy").

at a minimum, the same material terms of employment specified on the *Application for Permanent Employment Certification* and the following information and employment guarantees." By requiring the employment contract to contain the same material terms of employment as the *Application for Permanent Employment Certification*, the Department ensures not only that the employment contract will continue to contain the wage offer and description of duties, but also any other material terms of employment the employer specified on the *Application for Permanent Employment Certification*, which could not be adequately captured in a static list. Moreover, through this approach, the Department would better ensure that the employment contract contains all essential information and is consistent with the *Application for Permanent Employment Certification* used to test the U.S. labor market.

Proposed section 656.10(e)(2) retains content of the additional documentation requirements found in current section 656.17(l) (Alien influence and control over job opportunity) with one change to simplify the rule by eliminating redundant language and, otherwise, only minor changes to conform with terminology used throughout this proposed rule. Proposed section 656.10(e)(2) eliminates the phrase "must be able to demonstrate the existence of a bona fide job opportunity, *i.e.*, the job is available to all U.S. workers," which appears in current section 656.17(l). This is not a requirement limited to job opportunities involving closely held corporations or partnerships in which the alien has an ownership interest; or familial relationships between the stockholders, corporate officers, incorporators, or partners, and the alien; or the alien as one of a small number of employees. It is a requirement applicable to all *Applications for Permanent Employment Certification* under both the current and proposed rules. The current rule addresses the requirement in section 656.10(c)(8) as well as section 656.17(l), while the proposed rule addresses this requirement in proposed section 656.13(a).

Under proposed section 656.10(e)(3), employers filing *Applications for Permanent Employment Certification* for professional athletes or professional sports team coaches would be required to prepare and maintain the following documentation, consistent with longstanding practice: (1) a copy of the executed written contract, signed and dated by the employer and alien, covering the entire year or period that indicates the specific payment(s) made to the alien; (2) an employment letter stating that the alien will work a minimum of ten (10) hours per week during the off-season period; and (3) for an alien being sponsored for permanent employment as a professional athlete, a copy of a letter or response, whether electronic or print, from the Players' Association (e.g., NBA, NHL, NFL, MLB) or applicable trade union(s) stating that it was provided notice from the employer, as required by section 656.14(a)(1), and has no objection to the filing of the *Application for Permanent Employment Certification*. The Department recognizes that Players' Association and trade union(s) may vary in their responsiveness to an employer's notice and request for confirmation of "no objection" to the filing of an *Application for Permanent Employment Certification.* The Department invites comments about whether and how an employer could document compliance with this notice and request requirement, in the absence of a response from the Players' Association or applicable trade union(s).

The Department does not propose to change the timing of submission for this additional documentation. Employers filing applications subject to the additional documentation requirements under proposed section 656.10(e) would continue to prepare and maintain the additional documentation required for the job opportunity in their record retention file and only submit it upon request. However, by locating the additional documentation requirements in proposed section 656.10, the Department clarifies that—both currently and under the proposed rule—preparation and retention of the additional documentation is a filing requirement, meaning it must be prepared and already saved in

the employer's record retention file at the time of *Application for Permanent Employment Certification* submission. No new burden would be incurred by employers as a result of this change.

Filing date

The Department proposes to relocate the filing date provision currently in section 656.17(c) to the centralized filing requirements in proposed section 656.10(f), with modifications to conform with other proposed regulatory changes herein. The proposed paragraph continues to deem the date OFLC accepts for processing a complete *Application for Permanent Employment Certification* to be the "filing date." For an electronically filed application, the "filing date" is the date the application is submitted and accepted in the electronic system based on the time of acceptance in the Eastern time zone of the United States. For an application submitted by mail under the procedures proposed at section 656.10(c)(2) and (3), the "filing date" would be the postmark date affixed to the employer's *Application for Permanent Employment Certification* submission, provided that the NPC determines the application is complete. This would be a change for applications submitted by mail. Currently, the filing date is the date the NPC accepts the application for processing and affixes a date stamp on the submission. However, the current approach is less straightforward than establishing the filing date using the postmark and delay between delivery and affixing a date stamp has resulted in denials for noncompliance with timing requirements (e.g., recruitment dates within the 180 days prior to the filing date) that BALCA has overturned.[71] In the interest of simplicity, efficiency, and certainty, the Department proposes to use the postmark date as the filing date for complete applications submitted by mail.

Completeness

[71] *E.g.*, *Dorbin Metal Strip Manufacturing Co., Inc.*, 2022-PER-00043 (Dec. 26, 2023) (remanding application for further processing when a delay in date stamping caused the application to be untimely).

Current section 656.17(a)(1) provides that incomplete applications will be denied. In the proposed section 656.10(g), the Department proposes, instead, to return incomplete applications to employers unprocessed.

Under the proposed rule, a complete application consists of a Form ETA-9089, *Application for Permanent Employment Certification*, with all required fields completed with valid information, a valid PWD, and the employer's recruitment report for the job opportunity offered on the *Application for Permanent Employment Certification*, as outlined in proposed section 656.10(a). Despite form instructions and FLAG system prompts designed to ensure employers submit complete *Applications for Permanent Employment Certification*, the Department receives applications missing required information. The Department has received applications where the employer overrode system prompts or entered nonsensical or placeholder information (e.g., the employer's point of contact as a movie or cartoon character or "TBD" (to be determined) or "Test Subject" as the alien's name) in order to circumvent system prompts meant to ensure only complete, valid applications are submitted. The Department anticipates that it will continue to receive such applications, which slow processing of legitimate, complete applications filed by employers with a genuine need for workers. With this rule's proposed addition of the employer's recruitment report and other recruitment related documentation as an application filing requirement, the Department also anticipates that an unscrupulous employer may try to circumvent these requirements by uploading into FLAG something other than their recruitment documentation to likewise evade system checks. Without, for example, a valid recruitment report or documentation demonstrating compliance with the advertising requirements or a signed Form ETA-9089, Appendix E, the application will be deemed incomplete.

Under the proposed rule, incomplete *Applications for Permanent Employment Certification* submitted to the NPC will not be processed. Rather, when an incomplete

Application for Permanent Employment Certification is discovered—which would occur when the application is assigned to an analyst for review, as provided in proposed section 656.19(a)—the NPC would return the application unprocessed. As the CO will not reach any substantive determinations before returning an incomplete application unprocessed, proposed section 656.10(g) clarifies that an employer cannot request reconsideration or review pursuant to section 656.26 after an application is returned by the NPC unprocessed due to incompleteness. In addition, the "filing date" of the incomplete application would not be retained and cannot be claimed for purposes of establishing a priority date. Rather, the employer may file a new *Application for Permanent Employment Certification* that is complete and satisfies all requirements of part 656 and the filing date would be the date the NPC accepts the new complete application for processing, in accordance with proposed section 656.10(f).

The Department recognizes that the proposed consequences for submission of an incomplete application are more strict than under the current rule. However, in light of the Administration's broad efforts to combat visa fraud and abuse and ensure the broadest pool of qualified U.S. workers have fair access to these job opportunities before a permanent labor certification is granted, the Department considers the consequences appropriate to safeguard limited resources and facilitate the processing of complete, genuinely filed applications.

Likewise, recognizing the consequence of returning an application unprocessed, the Department only intends to exercise this authority in situations where it is clear that the application is incomplete. For example, when a document other than the recruitment report is submitted, when the included PWD is invalid, when the employer is listed as a fictional entity, or when required fields include placeholders like "TBD." This provision is not intended to allow the Department to make substantive denials without permitting reconsideration or review by BALCA. The provision is intended to permit OFLC to

avoid spending time reviewing and drafting denials for applications which fail to meet the basic standards of a legitimate, complete application.

Record retention requirements

The Department proposes to retain the employer's record retention requirements, but it is seeking to relocate this provision from current section 656.10(f) to proposed section 656.10(h), with a change to the timeframe that would be required for employers to retain all documentation. Currently, employers are required to retain a copy of the *Application for Permanent Employment Certification* and all supporting documentation to demonstrate compliance with program requirements for a 5-year period, with the 5-year period beginning on the date the *Application for Permanent Employment Certification* was filed. The Department proposes to retain the 5-year period of retention, but to count the 5-year period of retention from the date on which the Immigrant Petition is approved, denied, or withdrawn. If the employer does not proceed to file an Immigrant Petition, it would be required to retain all records associated with the *Application for Permanent Employment Certification* for a period of 5 years from the expiration of the labor certification or the date of denial or withdrawal.

The current record retention timeframe overlaps with application processing timeframes and, in doing so, it fails to provide a full 5-year record retention period. By starting the record retention clock with the final determination for denied or withdrawn applications or the expiration of a certified application, or from the date on which the Immigrant Petition, if any, is approved, denied, or withdrawn, essential records will be available for the full period intended, which allows the Department, and other partner agencies, to request and obtain these records, if necessary, in order to conduct further review, investigations or any integrity actions.

Applicability of section 656.10

The Department reiterates for clarity that the filing procedures proposed in section 656.10 would apply to all employers required to obtain a PERM labor certification from OFLC for purposes of submitting an I-140 petition to USCIS. This would include job opportunities currently covered under Schedule A and certain sheepherders, consistent with the Department's proposals to eliminate current alternative regulatory procedures at sections 656.15 (Schedule A) and 656.16 (Sheepherders).

With this proposed change, employers seeking to permanently hire aliens to perform job opportunities currently defined as Schedule A or as qualifying sheepherders under part 656 would continue to obtain a PWD from OFLC but, going forward, also would be required to engage in pre-filing recruitment and submit their application to OFLC, rather than to USCIS, along with their recruitment report.

Similarly, the filing requirements in proposed section 656.10 would apply to employers seeking to permanently employ aliens as professional athletes or professional sports team coaches in job opportunities subject to the EB-2 or EB-3 visa classifications requirements, including those currently covered by Schedule A, which would require a PERM labor certification under this proposed rule.[72]

Eliminated provision

The Department proposes to eliminate section 656.10(e) of the current rule in its entirety. The proposed elimination of current section 656.10(e) is consistent with the Department's goal of simplifying its PERM program regulations.

Current section 656.10(e)(1) states that the public may submit evidence to the CO that may have bearing on an *Application for Permanent Employment Certification*. This provision duplicates the function of the NOF, which similarly invites any person to

[72] The proposed rule, including section 656.10, does not apply to all professional athletes. Some professional athletes may be eligible for the EB-1 visa classification based on extraordinary ability in athletics or a national interest waiver of the EB-2 permanent labor certification requirement. *See* 8 CFR 204.5(h)(1) Compliance with part 656 is not required for those job opportunities.

provide information or other documentation bearing on an *Application for Permanent Employment Certification* to OFLC for consideration in reaching the determinations required for PERM labor certification. *See* proposed section 656.14(d). The type of information or other documentation to be submitted to OFLC using the contact information provided in the NOF is the same as that described in current 656.10(e)(1)—information on available workers, information on wages and working conditions, and information on the employer's failure to meet the terms and conditions for the employment of aliens and similarly employed workers. In addition, as discussed below in connection with the Department's proposed expansion of NOF visibility, the proposed elimination of current section 656.10(e)(1) would simplify the regulation without impact to program integrity.

The Department also proposes to eliminate current section 656.10(e)(2), which discusses the submission of evidence to DHS. Although the Department is aware that DHS accepts and considers such information, the elimination of current section 656.10(e)(2) is consistent with the Department's intent to simplify part 656 by eliminating regulatory content that discusses another agency's processes.

2. Proposed 20 CFR 656.11, Substitutions and modifications to applications.

In this rulemaking, the Department proposes to retain current section 656.11's prohibitions on substituting aliens and modifying *Applications for Permanent Employment Certification*, with revisions to update terminology, eliminate outdated language, and improve clarity. For example, proposed revisions replace "application" with "*Application for Permanent Employment Certification*," among other minor revisions.

The Department also proposes removing references to July 16, 2007, which are no longer necessary. Prior to the establishment of current section 656.11, the Department

allowed employers to substitute an alien named on a permanent labor certification with another prospective alien. Labor certification substitution occurred either while the PERM labor certification application was pending with the Department or, by the Department's delegation to DHS, when a Form I-140 petition was submitted or was pending with DHS based on an approved PERM labor certification. This practice was permitted due to the length of time it took to obtain a PERM labor certification and Form I-140 petition approval.

On May 17, 2007, the Department issued the Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity* ("2007 Fraud Rule"), through which the Department eliminated the practice of allowing the substitution of aliens on PERM labor certifications through rulemaking.[73] In the 2007 Fraud Rule, the Department established that substitution or change to the identity of an alien was prohibited on any application filed with the Department for PERM labor certification and on any resulting certification.[74] *See* current 20 CFR 656.11(a). The 2007 rule also revised current section 656.30(c)(2) to state that a PERM labor certification is only valid for the alien named on the original PERM labor certification application.[75]

Further, the 2007 Fraud Rule clarified that requests for modifications to an application, where the application was filed after the final rule's effective date, would not be accepted. *See* current 20 CFR 656.11(b). The Department explained that it had implemented technological changes in the PERM program to alert applicants to technical grounds for deniability, thus eliminating the need for many modifications.[76]

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[73] *See* current 20 CFR 656.11.
[74] *See* 72 FR 27903, 27907 (May 17, 2007).
[75] *See* 72 FR 27903, 27907 (May 17, 2007).
[76] *See* 72 FR 27903, 27907 (May 17, 2007).

The Department has no intention of changing section 656.11(b) to permit substantive changes to an *Application for Permanent Employment Certification*, while in process or after certification, if certified. A substantive change is one that would correct an error that would lead to denial, if not corrected. The employer has the burden of proof to establish eligibility for a PERM labor certification and the responsibility to submit a complete and accurate *Application for Permanent Employment Certification*.

The Department has considered how it might appropriately permit minor modifications to an *Application for Permanent Employment Certification* while it is pending with the NPC. By minor modifications, the Department refers to errors that have no bearing on the CO's assessment of the employer's compliance with program requirements. An error is not minor—and its correction would not be a minor modification—if its correction would prevent denial. In addition, the Department has no interest in permitting correction of errors that clearly could have been prevented with closer attention, such as ridiculous errors (e.g., place holders or cartoon characters) or multiple errors—even if arguably clerical—in the same application. Rather, the Department would consider allowing correction of isolated instances of purely clerical errors for which correction could be appropriate to avoid wasted resources of withdrawing and refiling for both the employer and the NPC.

The Department invites comments about whether part 656 should be revised to permit any minor modifications and, if so, the conditions under which minor modifications could be permitted without impact to program integrity or program efficiency. Helpful comments will discuss time period limitations for requesting a minor modification (e.g., within the 30 calendar days after filing or prior to the issuance of a final determination by the CO); the scope of minor modifications with examples (e.g., correcting a birthdate, visa classification or phone number for the alien or replacing an agent or attorney information with a new representative's information) and identifying

form fields that do not contain substantive information, as substantive information could not be modified.

3. Proposed 20 CFR 656.12, Improper commerce and payment.

Through the 2007 Fraud Rule, the Department imposed clear limitations on the acquisition and use of a pending or approved permanent labor certification application to reduce the incentives and opportunities for fraud and abuse in the permanent labor certification program and to propose measures to enhance the integrity of the permanent labor certification program.[77] The 2007 Fraud Rule revised section 656.12(a) to create a complete ban on the sale, barter, and purchase of labor certification applications and certifications. The revisions applied to applications filed on or after the effective date of the 2007 Fraud Rule regardless of whether the labor certification application involved was filed under the regulations of 20 CFR part 656 in effect before March 28, 2005, or, on or after, March 28, 2005.[78]

Under this proposed rule, the Department proposes to eliminate the transition procedures in the introductory part of section 656.12 related to the 2004 PERM Final Rule[79] and the 2007 Fraud Rule because the transition procedures in this section are obsolete.

The current section 656.12 states that it applies to applications "under this part" and "certifications resulting from those applications," while stating in sections 656.12(a) and (c) that those provisions only apply to "*approved* permanent labor certifications." The Department's proposed introductory language serves to clarify that the provisions of section 656.12 apply to any *Application for Permanent Employment Certification* and any PERM labor certification. The proposed terminology changes serve to better frame the scope of various possible outcomes for *Applications for Permanent Employment*

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[77] *See* 72 FR 27903 (May 17, 2007).
[78] *See* 72 FR 27903, 27907 (May 17, 2007). This rule became effective on July 16, 2007.
[79] *See* 69 FR 77326 (Dec. 27, 2004).

Certification (*e.g.*, certification, withdrawal, invalidation, revocation) and continue to place employers on notice that their *Applications for Permanent Employment Certification* and PERM labor certifications under part 656 are subject to the provisions of section 656.12.

4. Proposed New 20 CFR 656.13, Assurances and obligations of employers.

The Department is proposing the creation of a new section at 656.13 to enumerate by topic the assurances and obligations under the PERM program to which an employer must attest compliance. Organizing all existing and newly proposed required attestations into one section will improve clarity and navigation within part 656 and part 656 with similar regulatory provisions the Department has in the H-1B, H-2A and H-2B programs.[80] By clearly stating the employer's legal obligations in one provision of the regulations, the Department has determined this approach will make it easier for employers to find, understand, and comply with the program requirements. Further, the proposed changes in section 656.13 would enhance protections for U.S. workers, including protection of U.S. worker wages, and promote consideration of U.S. workers for job opportunities, notably by expanding contact and consideration requirements in layoff situations and preventing employers from laying off U.S. workers to create the perception of available vacancies and filing an *Application for Permanent Employment Certification* with the intention of replacing laid off U.S. workers with aliens. *See* proposed 656.13(e) and (f).

For proposed section 656.13, employers will be required to read and agree to comply with essential program requirements and worker protections for both U.S. and aliens when submitting an application under part 656, which will improve program integrity. Under penalty of perjury, employers will attest that they have read and

[80] *See* 20 CFR 655.20 and 20 CFR 655.135.

reviewed every page of the *Application for Permanent Employment Certification*, including all applicable appendices and supporting documentation, and to the best of their knowledge the information contained therein is true and accurate. In addition, employers will assure they understand that knowingly and/or willfully furnishing materially false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by fines, imprisonment, or both under 18 U.S.C. §§ 2, 1001, 1546, 1621. The clearer requirements will also enhance the Department's program integrity efforts, as clearer requirements provide a more straightforward path for enforcement of program requirements.

Specifically, the Department is proposing to take existing required attestations, currently codified at section 656.10(c), and replace and relocate them to this new proposed section 656.13, while further replacing the language of the existing attestations to strengthen program integrity. The Department proposes to replace and relocate regulatory content explaining the nature and effect of attestations from current section 656.10(c) to the introductory language of proposed section 656.13. In addition, the Department is proposing to relocate other existing obligations from current sections 656.10, 656.12, 656.17, and 656.20 to proposed section 656.13, again further revising them to create clear employer attestations in efforts to clarify and/or update compliance requirements. Finally, the Department also proposes new attestations to reflect new requirements through this proposed rule. The proposals in this rule strengthen U.S. worker protections and bolster program integrity by holding employers who choose to participate in the PERM program accountable to the Department, and to their responsibilities to both U.S. workers and aliens, with regard to the employer's filing of the *Application for Permanent Employment Certification* and participation in the PERM program.

Proposed new section 656.13(a) continues to require an employer seeking to permanently employ an alien to attest that the job opportunity is a bona fide, full-time, permanent position and adds that the terms and conditions of employment must comply with all applicable laws and regulations, consistent with current sections 656.10(c)(7) and (1). This proposed revision continues current sections 656.10(c)(5), (8), and (9) attestations, requiring the employer to attest that the job opportunity has been and is open to any qualified U.S. worker, any U.S. worker who applied was rejected for lawful, job-related reasons, and the job opportunity does not involve unlawful discrimination. The Department proposes to expand this attestation so that the job opportunities that are the subject of *Applications for Permanent Employment Certification* remain open to the employer's laid off-employees in the place(s) of employment in the same or similar occupation throughout the period in which the employer is establishing its sponsorship of an alien for permanent employment in the United States—between filing the *Application for Permanent Employment Certification* and the date the Form I-140 petition is approved by USCIS or the date of determination, if the *Application for Permanent Employment Certification* or Form I-140 petition is denied or withdrawn, whichever is later, which would form the basis for the alien's application for a visa and admission to the United States as a permanent resident.[81] In addition, the provision adds language explicitly requiring employers to comply with Title VII of the Civil Rights Act of 1964, which prohibits workplace discrimination in the terms, conditions, or privileges of employment because of race, color, religion, sex, or national origin. Nothing in Title VII, "makes it illegal to discriminate on the basis of citizenship or alienage." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). The provision also adds language requiring compliance with the Antidiscrimination Provision of the Immigration and Nationality Act, 8 U.S.C.

[81] INA section 212(a)(5)(A)(i)(I) (stating that the Secretary certifies that there are not "sufficient workers . . . at the time of application for a visa and admission to the United States").

Section 1324b, which prohibits discrimination because of citizenship status against protected individuals and, for employers not covered by Title VII, because of national origin. That law states that it is an unfair immigration-related employment practice to discriminate against a citizen or national of the United States based on their citizenship status. 8 U.S.C. § 1324b(a)(1), (3).

Separately, and under the Department's own authority in 8 U.S.C. 1182(a)(5)(A)(i)(II), proposed section 656.13(a)(5) requires employers to offer U.S. workers terms, conditions, and privileges of employment no less favorable than those offered to the alien. Compliance with the PERM requirements is a floor; it does not establish compliance with Title VII or 8 U.S.C. 1324b, and a departure from the PERM requirements may be relevant evidence in an enforcement action or private suit under those laws. This provision will prohibit an employer from rejecting any qualified U.S. worker over a prospective alien based on any cost justifications or basis, including differences in any term, condition, or privilege of employment, and compensation and fringe benefits between any qualified U.S. worker and a prospective alien. This proposed provision is necessary to ensure the integrity of the PERM program by prohibiting situations where the job offer is designed to match the skills of a particular alien. Unduly restrictive job postings have a chilling effect on the number of qualified U.S. workers who respond to job vacancy postings, and the Department will prohibit this practice with this proposal. These proposals strengthen U.S. worker protections and bolster program integrity by holding U.S. employers who participate in the program accountable to the Department and U.S. workers beyond the processing of the *Application for Permanent Employment Certification*.

Under proposed section 656.13(b), the Department continues the attestation required under current section 656.10(c)(6) to require the employer to attest that the job opportunity is not vacant due to a strike or employees being locked out in the course of a

labor dispute involving a work stoppage. The proposal, however, expands the strike provision of the current regulation to clarify that it covers "all places of employment" included on the *Application for Permanent Employment Certification*, including third-party employers' locations. Through this proposed revised provision, the Department will improve program integrity and strengthen protections for U.S. workers.

To protect the integrity of the PERM labor certification program, deter fraud, and comply with the Department's statutory obligation to protect the wages of U.S. workers, the Department is proposing in section 656.13(c) to revise and clarify the already-required attestations in current sections 656.10(c)(1) through (4). For example, current section 656.10(c)(1) requires the employer to attest that it has offered, and will continue to offer, a wage that equals or exceeds the PWD. Proposed section 656.13(c) would more clearly state the employer's attestation that it has offered, and will continue to offer, a wage that equals or exceeds the highest of the Federal, State or local minimum wage or the PWD issued to the employer. The proposed paragraph clarifies that the offered wage requirement includes consideration of Federal, State, and local minimum wage rates, which is an existing requirement—for compliance with local, State, and Federal laws—under current section 656.10(c)(7). In addition, added content about the potential for an updated PWD reflects the potential for OFLC to obtain a new PWD, for example, during supervised recruitment. Further, this proposed provision adds new language stating that the offered wage cannot result in less favorable treatment of current or prospective U.S. workers in any terms, conditions, and privileges of employment, including compensation and fringe benefits, as compared with the alien (*i.e.*, must not be lower than the wage the employer pays, and the wage the employer advertises, for similarly situated positions). A violation of this certification is a serious matter that will result in denial and may result in revocation, debarment, and referral under 656.31 and 656.32. The Department solicits comments on this proposed provision, including how this attestation could be worded

more clearly to ensure that wage compensation and other benefits for U.S. workers similarly employed are not adversely affected by the prospective employment of the alien(s) in the job opportunity. The proposed attestation continues to specify that the offered wage cannot be based on commissions, bonuses or other incentives, unless the employer guarantees an offered wage earned on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage. The Department proposes expanding the attestation to accommodate the possibility of the Department issuing a new or revised PWD (*e.g.*, post-filing supervised recruitment) and, if so, the employer would be required to update its wage offer, unless notified otherwise by the Department.

The Department also proposes to continue to require the employer to attest that it has enough funds available to pay the offered wage for work performed in the job opportunity at the time of *Application for Permanent Employment Certification* submission. The Department proposes to revise this attestation for clarity and to include the citation to DHS's requirements regarding the employer's ability to pay at 8 CFR 204.5(g)(2), as USCIS will assess the employer's compliance during I-140 Petition review. These revisions would better apprise employers of this requirement, while avoiding duplicative regulatory provisions. In addition, citing to DHS's regulations would reduce the potential for confusion about the assessment to be performed when the employer files the I-140 Petition.

Under proposed section 656.13(d), the employer must attest that it has conducted, and will continue to conduct, recruitment of U.S. workers in good faith and in the same manner it normally recruits and considers U.S. workers in the same job opportunities that it does not request PERM labor certification, while also ensuring that its recruitment meets the standards set forth in proposed section 656.17. Through this proposed provision, the Department would require that the employer recruit U.S. workers in good faith and follow the same methods they would typically use for similar job opportunities

where they do not seek PERM labor certifications for aliens, including when those methods they typically use for similar job opportunities exceed the requirements in proposed section 656.17. Where, how, and for how long an employer advertises a job opportunity in connection with the PERM labor certification program must be at least equal to the employer's practices for similar job opportunities unrelated to a PERM labor certification. Similarly, the employer's application process for candidates who apply for the employer's job opportunity that is the subject of the PERM application, must not disadvantage U.S. workers or be less available to U.S. workers than the employer's standard for same job opportunities that are unrelated to a request for PERM labor certification. Additionally, if required, interviews must be conducted by phone or arranged through other means (e.g., virtual meetings, cloud calls, or other platforms or applications that facilitate communication without involving physical presence) to minimize costs for U.S. workers and facilitate the process should the applicant, for example, be unable to travel or be physically present at the employer's location for an interview. Further, the employer's representative who interviews or considers U.S. workers for the job offered to the alien must be a U.S. worker and one who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien which do not involve labor certifications. Lastly, employers are prohibited from giving preferential treatment to aliens over U.S. workers concerning any requirements for applications and interviews related to the PERM application process.

These attestations are necessary because there have been several reports of employers creating separate recruitment processes for PERM applications that deter U.S. workers from applying for job opportunities.[82] In one instance, the Department of Justice

[82] *See, e.g.,* "Civil Rights Division Sues Cloudera for Excluding U.S. Workers from Applying to High-Paying Technology Jobs," Dept. of Justice (Apr. 28, 2026), https://www.justice.gov/opa/pr/civil-rights-division-sues-cloudera-excluding-us-workers-applying-high-paying-technology (alleging Cloudera intentionally created a separate recruitment and hiring process to deter U.S. workers from applying); Gooding, Dan, "Tech Companies Accused of Bending H-1B Rules with Newspaper Job Listings,"

(DOJ) found that an employer did not advertise positions it sought to fill through the PERM program on its external job website, even though its standard practice was to post other job positions on this website.[83] The employer also required all applicants for PERM-related positions to mail paper applications, even though the company permitted electronic applications for other positions.[84] These provisions would clarify expectations for employer conduct during the PERM application recruitment process.

Currently, if the employer has a layoff in the AIE within six months of filing the *Application for Permanent Employment Certification,* the employer must document that it has notified and considered all of the employer's potentially qualified laid off U.S. workers for the job opportunity to be offered in an *Application for Permanent Employment Certification*. *See* current section 656.17(k). The proposed rule would convert the existing layoff obligation into an employer attestation and relocate the provision to the newly proposed section 656.13(e) with revisions. As proposed, section 656.13(e)(1) would address layoffs prior to the employer's filing of an *Application for Permanent Employment Certification*, while section 656.13(e)(2) would address post-filing layoffs.

Newsweek (Aug. 16, 2025), https://www.newsweek.com/h1b-job-ads-green-cards-targeted-immigrant-workers-2113714 (noting that newspaper ads were telling applicants to send resumes to immigration or "global mobility" departments); and MacGillis, Alec, "The Tech Recruitment Ruse That Has Avoided Trump's Crackdown on Immigration," ProPublica, (June 3, 2025), https://www.propublica.org/article/trump-immigration-h1b-visas-perm-tech-jobs-recruitment (reporting that PERM newspaper ads were not intended to find applicants, but to sponsor the current H-1B tech worker).

[83] *See* "Justice Department Secures $25 Million Landmark Agreement with Apple to Resolve Employment Discrimination Allegations Based on Citizenship Status," Dept. of Justice, (Nov. 9, 2023), https://www.justice.gov/archives/opa/pr/justice-department-secures-25-million-landmark-agreement-apple-resolve-employment (finding that Apple engaged in a pattern or practice of citizenship status discrimination in recruitment for positions it hired through PERM, and that these less effective recruitment practices deterred protected workers from applying to positions that Apple preferred to fill instead with PERM beneficiaries).

[84] *See* Id.; *see also* "Justice, Labor Departments Reach Settlements with Facebook Resolving Claims of Discrimination Against U.S. Workers and Potential Regulatory Recruitment Violations," Dept. of Justice (Oct. 19, 2021), https://www.justice.gov/archives/opa/pr/justice-labor-departments-reach-settlements-facebook-resolving-claims-discrimination-against (alleging that Facebook used recruiting methods designed to deter U.S. workers from applying to certain positions, such as requiring applications to be submitted by mail only).

The Department's proposals regarding layoffs and consideration of laid-off U.S. workers are intended to provide U.S. workers additional protections against improper hiring conduct by employers[85] and prevent employers from laying off U.S. worker(s) and creating vacancies which are then filled with aliens using the PERM process.[86]

As proposed, an employer would be required to attest that it has not laid off any U.S. worker(s) in the same or similar occupation that is the subject of the *Application for Permanent Employment Certification* in the area of intended employment of the place(s) of employment within 2 years prior to filing the application. The Department proposes to change the current term to describe similar occupations from "occupation for which certification is sought or in a related occupation" in current section 656.17(k) to "same or similar occupation" in proposed section 656.13(e), for readability. The Department does not intend for this proposed revision to change the employers' consideration of their laid-off employees post-filing of the *Application for Permanent Employment Certification* and reminds employers that their obligation is to consider all potentially qualified laid-off U.S. workers for job opportunities that are the subject of a pending or certified *Application for Permanent Employment Certification.* The Department invites comments on this proposed change and ways to improve clarity.

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[85] There are numerous reports of employers laying off U.S. workers and then hiring aliens to replace them. *See, e.g.,* Costa, Daniel and Hira, Ron, "Tech and outsourcing companies continue to exploit the H-1B visa program at a time of mass layoffs," Economic Policy Institute (Apr. 11, 2023), https://www.epi.org/blog/tech-and-outsourcing-companies-continue-to-exploit-the-h-1b-visa-program-at-a-time-of-mass-layoffs-the-top-30-h-1b-employers-hired-34000-new-h-1b-workers-in-2022-and-laid-off-at-least-85000-workers/ (finding that the top 30 H-1B employers hired 34,000 new H-1B workers in 2022 and laid off at least 85,000 workers in 2022 and early 2023); Belanger, Ashley, "Amazon blamed AI for layoffs, then hired cheap H1-B workers, senators allege," Ars Technica (Sept. 25, 2025), https://arstechnica.com/tech-policy/2025/09/amazon-blamed-ai-for-layoffs-then-hired-cheap-h1-b-workers-senators-allege/, (Amazon laid off tens of thousands of workers, then hired more than 10,000 foreign H-1B employees in 2025);Lambert, Fred, "Tesla must face lawsuit alleging it replaced laid-off US workers with H-1B Visa Holders," Electrek, (Feb. 25, 2026) https://electrek.co/2026/02/25/tesla-must-face-lawsuit-alleging-it-replaced-laid-off-us-workers-with-h-1b-visa-holders/, (Tesla laid off thousands of U.S. workers in 2024 while simultaneously requesting more than 2,000 H-1B visas).

[86] While the majority of these reports focus on H-1B workers, nearly 60% of PERM applications are filed on behalf of individuals currently in H-1B status and approximately 73% of all PERM applications are filed for workers currently employed on temporary, non-immigrant visas focused on highly skilled, professional workers, making such studies highly relevant to PERM. DOL OFLC Performance data for fiscal years 2021 through 2025 available at https://www.dol.gov/agencies/eta/foreign-labor/performance (accessed May 13, 2026) data.

If the employer could not make this attestation (i.e., if it had engaged in such a layoff), the employer would be prohibited from filing the *Application for Permanent Employment Certification*, under the proposed rule.

The proposed 2-year timeframe during which layoffs would be prohibited supports the Department's goals in this rulemaking. Specifically, this proposal would enhance safeguards for laid-off U.S. workers and increase protection against employment discrimination for an extended period of time, while preventing misuse of the PERM labor certification program.

The Department proposes a 2-year period because the current 180-day layoff timeframe prior to the employer filing an *Application for Permanent Employment Certification* may not adequately capture the relationship between an employer's layoffs and its subsequent efforts to obtain permanent labor certification. Workforce planning, recruitment, the PERM process, and related business decisions can unfold over an extended period, allowing a shorter restriction to be avoided simply by delaying the filing of an application. A 2-year period would provide a more meaningful safeguard against such circumvention while also allowing sufficient time for employers to rehire or retrain recently laid-off U.S. workers if demand for the same or similar occupations returns. This proposal seeks to ensure employers do not circumvent program requirements nor abuse the system for seeking to hire alien workers by conducting layoffs that are timed with respect to application or petition timeframes to avoid scrutiny or further having to justify the hiring of alien workers despite the employer experiencing layoffs. The Department seeks comment on whether 2 years is the appropriate period and whether a shorter or longer period would better accomplish these objectives.

The Department also believes the proposed period could encourage employers to invest in retraining existing workers as workforce needs change and could increase opportunities to rehire laid-off U.S. workers when demand for an affected occupation

returns. For example, without access to the PERM labor certification program for 2 years, employers would be more likely to invest in training their existing workforce in new technology or other changes, rather than replacing them with aliens who received that training elsewhere. For layoffs that occur due to changed market conditions, this proposal could result in increased re-hiring of laid-off U.S. workers, if an employer's need for the occupation that was affected by layoffs returns.

In addition, simultaneously laying off U.S. workers and recruiting in the same or similar occupation(s) of the PERM application (or doing so in close proximity) is inherently problematic for the statutorily required determinations the Department must make in order to issue a PERM labor certification. An employer's layoff of U.S. workers who are available and willing to work at the place(s) of employment and who, until the layoff, were performing work for the employer in the occupation, or a similar occupation, at the place(s) of employment would preclude the Department from making the statutorily required determinations necessary to issue a PERM labor certification. In addition to furthering U.S. worker protections and program integrity, the proposed 2-year pre-filing anti-layoff provision aligns with the Department's goal of streamlining processing by preventing the filing of an *Application for Permanent Employment Certification* where the employer's own actions have increased U.S. worker availability for the job opportunity that is the subject of the *Application for Permanent Employment Certification*.

Proposed section 656.13(e)(2) addresses layoff situations after an employer files their *Application for Permanent Employment Certification*. As proposed, this provision would apply to an employer's layoff of any U.S. workers in the same or similar occupation that is the subject of the *Application for Permanent Employment Certification* in the place(s) of employment—including the placement of the alien with another employer, subject to proposed section 656.13(f)—after the filing of the application

through the date on which the Form I-140 petition is approved by USCIS or the date of determination, if the *Application for Permanent Employment Certification* or Form I-140 petition is denied or withdrawn, whichever is later. If any such layoff occurs, the employer would be required to notify the NPC (and USCIS in the case of a pending Form I-140 petition) not later than 5 business days after such layoff(s) occurs. This new notification requirement after such layoff(s) occurs ensures program integrity by informing and allowing OFLC and USCIS, if applicable, to take appropriate action with the employer's *Application for Permanent Employment Certification*, and/or the employer's pending Form I-140 petition, respectively. The Department notes that the notification required by this provision will trigger the INA 204(b) consultation process whereby DOL will determine the adequacy of the employer's compliance with the post-certification obligation to consider laid off U.S. workers, and inform USCIS of the continued validity, or revocation of the underlying labor certification based on DOL's assessment of the employer's compliance.

In addition, the proposal would require the employer to offer the job opportunity that is the subject of the *Application for Permanent Employment Certification* to the laid-off U.S. worker(s) and document in an updated recruitment report whether the U.S. worker(s) refused the job opportunity, the employer rejected the U.S. worker(s) for the job opportunity for lawful, job-related reasons, or the employer hired the U.S. worker(s).

Under this proposed rule, the employer must seek to re-hire laid off U.S. worker(s) by offering the job opportunity to any potentially qualified laid off U.S. worker(s) before continuing with a PERM application. Failure to fill the job opportunity that is the subject of the *Application for Permanent Employment Certification* by re-hiring a laid-off U.S. worker who is qualified and available could raise an evidentiary inference of citizenship status discrimination, national origin discrimination or discrimination in any other class listed in anti-discrimination provision at proposed

section 656.13(a)(4). Through this proposed requirement, the Department would protect against U.S. worker displacement and ensure that an employer's laid off U.S. workers have access to the job opportunity while the *Application for Permanent Employment Certification* and Form I-140 petition are pending, before the employer uses the PERM labor certification to permanently employ an alien.

The Department seeks stakeholder comments regarding layoffs and what constitutes reasonable time periods and requirements for employers filing *Applications for Permanent Employment Certifications* before, during, and after layoffs.

This proposed provision would also protect against U.S. worker displacement and ensure that an employer's laid off U.S. workers have access to the job opportunity while the *Application for Permanent Employment Certification* and Form I-140 petition are pending, before the alien uses the PERM labor certification and I-140 petition to apply for permanent residence.

Further, the Department proposes to require an employer who has laid off any U.S. worker(s) in the same or similar occupation that is the subject of the *Application for Permanent Employment Certification* in the area of intended employment of the place(s) of employment during the period set forth in proposed section 656.13(e)—including the placement of the alien with another employer, subject to proposed section 656.13(f)—to notify OFLC (and USCIS in the case of a pending Form I-140 petition), in writing or by any other method the Department might specify in a FRN (or as specified by USCIS in the case of a pending Form I-140 petition), not later than five business days after such layoff(s) occurs. This new notification requirement after such layoff(s) occurred ensures program integrity by informing and allowing OFLC and USCIS, if applicable, to take appropriate action with the employer's *Application for Permanent Employment Certification*, and/or pending Form I-140 petition, respectively.

The Department also proposes a new attestation in proposed section 656.13(f) that would require the employer filing the *Application for Permanent Employment Certification* to attest that they have not and will not place the alien with another employer where there are indicia of an employment relationship between the alien and the other employer, and the other employer has laid off U.S. workers who are employed in the same or similar occupation within the 2 years prior to filing of the application through the date the Form I-140 petition is approved by USCIS or the date of determination, if the *Application for Permanent Employment Certification* or Form I-140 petition is denied or withdrawn, whichever is later. Although the Department recognizes that the alien's assignments may change after filing, the Department proposes to require the employer to identify on the application any third-party entities and sites to which the alien is assigned at the time of filing. This collection will improve the information available to the Department regarding third-party assignments and compliance with proposed section 656.13(f). This proposed provision would improve the integrity of the PERM program by ensuring U.S. workers will not be displaced by aliens, whether the aliens work directly for the employer or are employed by a secondary employer, such as a contractor.

For consistency across programs, the Department is proposing to use the criteria set forth in the Department's H-1B program regulations at 20 CFR 655.738(d)(2) to assess indicia of an employment relationship between the other employer and the alien. Under 20 CFR 655.738(d)(2), the relationship between the alien and the other employer need not constitute an "employment" relationship, but other relevant indicia of an employment relationship may be considered, including: which employer has the right to control when, where, and how the alien performs the job; who furnishes the tools, materials, and equipment; where the work is performed, who sets the hours of work and the duration of the job; and whether the work performed is part of the other employer's

regular business. The Department is considering whether to propose the implementation of a contract requirement between employers, which could align with the contract requirements in the H-1B program. Although the Department is not proposing a contract requirement in this rule, the Department welcomes comments on this consideration.

This proposed rule also codifies current requirements that employers and their agents, attorneys, and/or employees have not offered, and will not offer, for sale, barter or purchase *Applications for Permanent Employment Certification*, including applications certified by the Department, and have not sought or received, and will not seek to receive, payment of any kind from the worker(s) for any activity related to obtaining a PERM labor certification. The Department is proposing to relocate the language contained in current section 656.12, while also seeking to make some clarifying changes. *See* proposed section 656.13(g). This provision includes payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing an *Application for Permanent Employment Certification*, except when the work benefits the person or entity making the payment, based on an established business relationship with the employer. This provision serves to prevent fraud and abuse by those who unlawfully take advantage of the PERM labor certification program. The proposed rule, however, would continue to allow aliens to pay their own costs in connection with a PERM labor certification, including attorneys' fees, except where the same attorney represents both the alien and the employer, such costs must be paid by the employer. Under the proposed rule, payment includes, but is not limited to, monetary payments; wage concessions, including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor. Adding this provision to section 656.13 would serve as an additional guard rail to deter program abuse and bolster the integrity of the program. *See* proposed section 656.13(g).

The Department proposes to require employers to attest they will comply with applicable Federal, State, and local employment-related laws and regulations, including, but not limited to, employment-related health and safety laws, and all applicable provisions of the Fair Labor Standards Act, 29 U.S.C. 201, *et seq*. *See* proposed section 656.13(h). The Department proposes this attestation to put employers on notice that compliance with these laws is a condition of certification and to strengthen coordination of enforcement among Federal agencies with authority to ensure compliance with program requirements and combat fraud and abuse. The Department also requires employers to attest that they and their agents and attorneys are prohibited from holding or confiscating workers' passports, visas, or other immigration documents pursuant to 18 U.S.C. 1592(a). This proposal will provide protection for aliens' rights from unscrupulous employers, such as those who take away aliens' passports with the intent to trap and coerce the worker and undermine the integrity of the program by deterring those workers from coming forward to report labor and employment-related issues to the Department and the government at large.

Proposed section 656.13(i) would require employers to attest to compliance with record retention requirements. Employers would continue to be required to retain all documents and records demonstrating compliance with part 656 for a period of 5 years, which the Department proposes to count from the date on which the Immigrant Petition is approved or denied or withdrawn. If the employer does not proceed to file an Immigrant Petition, it would be required to retain all records associated with the Application for Permanent Employment Certification for a period of 5 years from the expiration of the certification or denial or withdrawal. *See* proposed section 656.10(h).

Proposed section 656.13(j) adds a new attestation, which would require employers to attest that they will fully cooperate with any audit, supervised recruitment, compliance review, evaluation, or inspection conducted by DOL related to compliance with part 656,

or by other government agencies investigating PERM practices. This proposal will deter fraud and abuse and improve the integrity of the PERM program because employers are put on notice of the Department's expectations and understand their obligations and responsibilities in the event of an audit examination or investigation.

Consistent with current practice, failure to attest to compliance with any of the required assurances and obligations would result in a denial of the *Application for Permanent Employment Certification* and a false certification would subject the employer to audit, supervised recruitment, debarment, referral, and criminal penalties under 18 U.S.C. 1001.

5. Proposed New 20 CFR 656.14, Notice of filing.

The NOF, required by the Act, is intended to make U.S. workers employed by the sponsoring employer aware that their employer is pursuing an *Application for Permanent Employment Certification* for a particular job opportunity, and enable them to provide information directly to the Department if any of the material terms or conditions of employment being offered to the alien are different from or adversely affect those offered or provided to U.S. workers in similar positions, or if they have any other evidence or information bearing on the prospective employment of an alien in the job opportunity at the place(s) of employment that the Department should consider. U.S. workers can also provide information to the Department of any qualified and available U.S. workers who have not been considered for the job opportunity, such as during a layoff that may occur at any time prior to the filing of the application through approval of the Form I-140 petition by USCIS.[87]

First, the Department proposes relocating the current regulatory text in section 656.10(d) to a new section at 656.14, with additional modifications to reorganize the section for clarity. The Department also proposes revising the standard for providing the

[87] *See* Immigration Act of 1990, Pub. L. No. 101–649, title I, sec. 122, 104 Stat. 4994 (Nov. 29, 1990).

NOF requirements to enhance transparency, strengthen program integrity, and acknowledge the widespread use of electronic tools by employers to disseminate other notices of employment-related guarantees or conditions (e.g., Fair Labor Standards Act minimum wage requirements, Equal Employment Opportunity protections), especially due to remote or other hybrid telework environments.

The Department is proposing that after the language currently contained in sections 656.10(d)(i) and (ii) is relocated to the newly added section 656.14's paragraphs (a)(1) and (2), conforming changes be made. Specifically, the Department is proposing revisions that would clarify employers' obligations for the NOF when the employer seeks to apply for a PERM labor certification to permanently employ an alien in the United States. Proposed new section 656.14(a) would still require, if requested by the CO, employers to submit documentation showing that the NOF was posted. The proposed revisions would eliminate regulatory text listing the sections to which the NOF requirement applies (*i.e.*, 656.15, 656.16, 656.17, 656.18, and 656.21), in favor of regulatory text that indicates that the NOF requirement applies to all applications under part 656, consistent with statute and other proposed regulatory changes. The proposed move to section 656.14 would streamline the current regulatory text by making it clear that the NOF is a general requirement; accordingly, the new regulatory text would eliminate the need for updates in the future should there be additional changes to the organization of part 656.

The Department makes minor revisions in proposed section 656.14(a)(1) to specify that the NOF, when given to a bargaining representative(s), must be in writing, either electronically or by mail. The employer must also provide a copy of the *Application for Permanent Employment Certification* to the bargaining representative. Proposed section 656.14(a)(1) clarifies that employers must maintain documentation of where and when the employer's NOF was sent to the bargaining representative(s). These

proposed revisions strengthen the NOF requirements to bolster the integrity of the PERM labor certification program and better align with similar notice requirements in the temporary labor certification programs.

In proposed 656.14(a)(1), the Department proposes to change the circumstances in which notification of bargaining representative(s) is required. Under the current rule, an employer must notify a bargaining representative, if there is a bargaining representative for the employer's employees in the occupational classification for which certification of the job opportunity is sought "in the employer's location(s) in the area of intended employment." As proposed an employer would be required to notify the bargaining representative(s) for the employer's employees located at the place(s) of employment" listed on the *Application for Permanent Employment Certification.* This change—to require notice to bargaining representative(s) at the place(s) of employment—would ensure the bargaining representative(s) of similarly employed U.S. workers at all place(s) of employment listed on the *Application for Permanent Employment Certification* must receive notice and resolves potential misinterpretation of the singular term "the area of intended employment" in the current provision. This approach better ensures the employer's employees receive notice of the filing of the *Application for Permanent Employment Certification*, even if those place(s) of employment are in more than one AIE. As discussed in relation to the definition of "place(s) of employment" in proposed section 656.3, workforce mobility has increased over the past two decades and the place(s) of employment listed on an *Application for Permanent Employment Certification* may encompass more than one AIE. The proposed change would ensure that all bargaining representatives representing employees in the occupational classification at the place(s) of employment receive direct notice of the filing of the *Application for Permanent Employment Certification* and can assess impact to U.S. workers. In addition, the proposed change would increase consistency of

notification to the employer's employees at the place(s) of employment, whether or not there is a bargaining representative, as both the current and proposed rules require physical or electronic posting of the NOF for employees at the location where work will be performed. The Department does not consider this proposed change to impact the employer's burden, as any increase in notice to bargaining representative(s) under proposed section 656.14(a)(1) would be offset by the corresponding decrease in posted notices under proposed section 656.14(a)(2). Even if some employers would experience some increased burden due to having to perform this notification and maintain applicable records of performance, the benefits maintaining the documentation for the notices the employer provides to any applicable bargaining representatives outweigh that increased burden. The Department also makes revisions in proposed section 656.14(a)(2) for situations where there is no bargaining representative(s) for any of the employer's employees located at the place(s) of employment. Currently, the employer must post the NOF physically at the place of employment, but the regulation does not specify the required number of posting locations required. Proposed section 656.14(a)(2) specifies that employers must post the NOF "in at least 2 conspicuous locations to all employees located at the place(s) of employment in which the work will be performed by the alien." Posting the NOF physically in at least two conspicuous locations at all places of employment involved, as defined in proposed section 656.3, would allow individuals who work or traverse through different locations more opportunity to see the posting and would enhance the visibility of the NOF to employees. Furthermore, requiring posting at *all* places of employment better executes the function of the notice—which is to inform people that the filing is taking place and solicit information bearing on the filing. Restricting it to one location would inherently deprive some of the employer's employees of notice.

In addition, current section 656.10(d)(1)(ii) requires the NOF to be posted physically and, if applicable, "…in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization." In contrast, proposed section 656.14(a)(2) would require electronic posting of the NOF as an alternative to physical posting—not as an additional requirement—under certain conditions. For employers who maintain internal or external website(s) that are "known and readily accessible to all employees, and customarily used by the employer for notices to employees about terms and conditions of employment," the Department proposes that prominently displaying the NOF on those websites, in lieu of physical postings, would satisfy the statutory notice requirement under proposed 656.14(a)(2). The Department asserts that posting the NOF electronically would be particularly effective for businesses with employees who frequently telework or travel, and who may not see the NOF if it is only posted physically in the workplace.

The Department also proposes, in new section 656.14(g), changing the timing and duration of the NOF posting. Currently, the NOF must be posted for at least 10 consecutive business days during the 30- to 180-day period before the employer files the *Application for Permanent Employment Certification.*[88] The Department proposes to eliminate the strict duration requirement from current section 656.10(d)(1)(ii) and timeframe requirement from current section 656.10(d)(3)(iv). Under proposed section 656.14(g), the NOF would be posted during the 10 business days before the employer files the *Application for Permanent Employment Certification* and continue to be displayed through the date on which the Form I-140 petition is approved by USCIS or the date of determination, if the *Application for Permanent Employment Certification* or Form I-140 petition is denied or withdrawn, whichever is later. The Department has

[88] 20 CFR 656.10(d)(1)(ii), 656.10(d)(3)(iv).

determined that increasing the duration of the NOF's display and requiring display contemporaneous with *Application for Permanent Employment Certification* filing and OFLC and USCIS processing would provide U.S. workers with different work schedules, who may be on leave, who may be impacted by layoffs, or may be hired during the *Application for Permanent Employment Certification* or Form I-140 petition process more opportunity to see the NOF and provide relevant information to OFLC and, if applicable, USCIS. This longer timeframe allows the Department to receive information it may not have previously received, which in turn, better informs the CO's decision-making and enhances program integrity. This improves transparency and protects U.S. workers by informing U.S. workers and other interested parties of the job opportunity offered in the *Application for Permanent Employment Certification* and the employer's obligations under part 656. In addition, although the statute is silent on the length of time that the NOF should be available to U.S. workers, these proposed changes better align with the statute's minimum standard that "no certification may be made [by the Secretary] unless the [employer applying] for certification has, at the time of filing the application, provided notice of the filing."[89]

Proposed section 656.14(a)(2) would also revise the description of how and where the NOF must be posted for clarity and to simplify regulatory language. For example, the Department adds "[t]he notice must be of sufficient size" to existing language that states the NOF must be "clearly visible, and unobstructed while posted and must be posted in conspicuous places." In addition, the Department proposes to update the description of appropriate locations to post a NOF from "locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a)" to "conspicuous places where the employees of the employer would normally expect to see such employment-related notices," while

[89] Immigration Act of 1990, Pub. L. No. 101–649, title I, sec. 122, 104 Stat. 4994 (Nov. 29, 1990).

retaining that employees should be able to "readily read the posted notice on their way to or from their place of employment." The Department also proposes to retain the current NOF documentation requirements and clarify that the documentation must identify when the notice was posted, in addition to where it was posted. These proposed revisions would ensure that NOFs are displayed appropriately, where and how employees will see them and the employer's documentation will better verify compliance with all NOF posting requirements, including timing and duration.

The Department also proposes adding a new provision at section 656.14(b), which extends the NOF requirements to third-party worksites, if applicable. For employers planning to place an alien under an *Application for Permanent Employment Certification* at a third-party worksite, regardless of whether the place(s) of employment is(are) owned or operated by the employer or by some other person or entity, NOF posting at the third-party worksite would be required. The Department asserts that this proposed provision would enhance transparency and conform with the Department's goal of modernizing the PERM labor certification program by recognizing common employment scenarios that involve third parties and contractors. Further, requiring posting of the NOF at the third-party worksite(s) would enhance program integrity, so that U.S. workers at the third-party worksite are also aware of the filing of an *Application for Permanent Employment Certification* and can provide both DOL and USCIS with any relevant information about the application. This could be particularly important in the event the other employer engages in layoffs where the alien has or will be placed. To enable the Department to verify compliance with this requirement, the Department proposes to require employers to disclose third-party worksites applicable to the *Application for Permanent Employment Certification* at the time of filing.

The Department proposes to relocate the language included in current section 656.10(d)(2) and (3) to proposed section 656.14(c), with minor technical revisions to

eliminate an unnecessary regulatory cross reference and to make a conforming change for consistency.

The Department is proposing to relocate current section 656.10(d)(3) to a proposed new section 656.14(d), and make further minor technical revisions, such as replacing "Certifying Officer" with "OFLC Administrator" to clarify responsibilities, as these terms are defined in section 656.3.

The Department is proposing to relocate the content of current section 656.10(d)(4), which lists required NOF content requirements, to proposed new section 656.14(e) with minor revisions to update the language and section references. In addition, the Department proposes to eliminate current sections 656.10(d)(5) and (d)(6), which separately address NOF content requirements for college or university teacher job opportunities and sheepherder job opportunities. The Department proposes to apply proposed section 656.14(e) to all NOFs, regardless of the job opportunity that is the subject of the *Application for Permanent Employment Certification*.

This proposed section would continue NOF content requirements for *Applications for Permanent Employment Certification* currently subject to processing under current section 656.17. Currently, employers filing *Applications for Permanent Employment Certification* in compliance with the requirements of section 656.17 must include the information required for advertisements in current section 656.17(f), the offered wage, and the notice and solicitation of evidence that effectuate the purpose of the NOF. Similarly, proposed section 656.14(e) would require the notice to contain the information required for advertisements in proposed section 656.17(e)—which, as proposed, would include a requirement to state the offered wage— and the notice and solicitation of evidence language of proposed 656.14(d).

The proposed NOF content provision, designed to implement a single standard for all NOFs, regardless of the occupation, would result in one change for employers filing

under section 656.18. Currently, such employers are not required to include the offered wage in their NOFs; neither current section 656.18(d)(3) (notice and solicitation of evidence bearing on the application) nor current section 656.18(b)(3) (advertising content requirements) require it. Under the proposed rule, reflecting the Department's efforts to simplify the regulations and processing, employers filing under proposed 656.18 would be subject to the same advertisement content requirements as other job opportunities at proposed 656.17(e) and, therefore, the same NOF content requirements in proposed 656.14(e).

Regarding current section 656.10(d)(6), the Department proposes to eliminate the regulatory text, consistent with the proposed elimination of Schedule A and sheepherder procedures at sections 656.15 and 656.16.[90]

The Department invites comments to inform how to appropriately ensure the broadest visibility possible of NOFs for job opportunities, such as remote or domestic service job opportunities, where the place of employment is the employer or employee's residence and other job opportunities where the employer's similarly employed employees may not see a physical posting of a NOF, unless the proposed expanded timeframe for NOF posting is adopted (e.g., long-haul trucking). As proposed, physical posting of the NOF at the place of employment would be permitted for an employer who does not maintain internal or external website(s) that are "known and readily accessible to all employees, and customarily used by the employer for notices to employees about terms and conditions of employment." For remote job opportunities physical posting of the NOF at the place of employment—a residence where no other employees work—would not provide the notice and solicitation of information from the employer's

[90] Further clarification on the procedures for handling *Applications for Permanent Employment Certification* for those positions currently identified under Schedule A and the sheepherder procedures under this part at 20 CFR 656.15 and 656.16 is provided at the discussion sections for those provisions, below.

employees that Congress intended. The Department has similar concerns with NOF postings for other job opportunities that involve residential places of employment (e.g., domestic service) or business places of employment that similarly employed employees may not visit regularly or often (e.g., long-haul trucking). Should electronic posting of the NOF be required for such job opportunities in all cases? If electronic NOF posting is required of an employer who does not use an electronic means for notices to employees about terms and conditions of employment, what electronic methods (e.g., websites, emails, text messages) and/or posting locations should be required for the NOF? For example, should the Department require an electronic posting on one or more of the employer's internal and external websites, consistent with the pre-filing recruitment requirements in proposed section 656.17(b)(2)? Based on feedback received, the Department will consider adding an additional requirement in the final rule to address this issue.

In addition, as discussed in connection with the proposed elimination of section 656.10(e)(1), the Department is considering ways to better solicit information bearing on an *Application for Permanent Employment Certification* from the public. For example, the Department could post a copy of the NOF, which contains information about the job offered and solicits information from interested parties, on a publicly accessible webpage that OFLC manages for broad visibility. Leveraging the NOF as a vehicle for soliciting information bearing on an *Application for Permanent Employment Certification* would not add burden for the employer, apart from a *de minimis* burden to upload an already-prepared document in FLAG, and would be more effective at reaching interested parties than retaining current section 656.10(e)(1).

The Department solicits comments about how NOF visibility—and solicitation of information beyond the place(s) of employment and related word-of-mouth dissemination—could be expanded, without additional burden to the employer or

significant impact to application processing efficiency, and will consider adding additional requirements in the final rule based on the feedback it receives from commenters.

6. 20 CFR 656.15, Reserved.

As explained in the preamble discussion for current section 656.5 of subpart B, the Department has determined not to retain Schedule A in this proposed rule. Therefore, the Department is proposing to remove the provisions discussing filing procedures, documentation, and determinations discussed in current sections 656.15(a) through (f) for Schedule A occupations and reserve this section.

7. 20 CFR 656.16, Reserved.

The current regulation designates section 656.16 for requirements for employers who seek to permanently employ sheepherders under part 656. Under this rule, the Department proposes to eliminate the alternative procedures for sheepherders. Under the proposed rule, all *Applications for Permanent Employment Certification* for sheepherders would be submitted to OFLC following the filing procedures in proposed section 656.10 after the employer completed pre-filing recruitment requirements in proposed 656.17 and satisfying all other normal PERM labor certification requirements.

Employers who seek to permanently employ an alien as a sheepherder have long been authorized to file an uncertified *Application for Permanent Employment Certification* directly with DHS, along with a PWD, provided that the alien could document legal employment as a nonimmigrant sheepherder in the United States for at least 33 of the preceding 36 months.[91] The Department's current approach to PERM labor

[91] *See* "Employment and Training Administration, Proposed Rule, *Implementation of New System, Labor Certification Process for the Permanent Employment of Aliens in the United States*, 67 FR 30465, 30470 (May 6, 2002), explaining that DOL will continue to handle all Sheepherder applications submitted to the Department in the same way and that Sheepherder applications will continue to be submitted to the Immigration and Naturalization Service. The Department adopted the proposed provision for Sheepherders in the resulting final rule. *See Labor Certification for the Permanent Employment of Aliens in the United States*; Implementation of New System, 69 FR 77326, 77340 (Dec. 27, 2004).

certification for sheepherder positions developed from Congressional legislation authorizing special handling of a certain number of skilled sheepherders for permanent employment during the early 1950s.[92] However, this legislation expired and Congress has not enacted further legislation providing an alternative path for employers seeking to permanently employ aliens as sheepherders.[93] As there is no statutory requirement that the Department continue to except certain sheepherders from the normal test of the U.S. labor market, consistent with the Department's proposal to eliminate exceptions to pre-filing recruitment requirements (*e.g.*, for job opportunities currently defined as Schedule A), the Department proposes to eliminate the alternative procedure section of the current rule for sheepherders at section 656.16. The Department proposes to review and process sheepherder applications under normal procedures (*e.g.*, proposed sections 656.10 and 656.17).

The Department proposes to delete this section in its entirety and to reserve this section for future use.

8. Proposed 20 CFR 656.17, Pre-filing recruitment requirements.

The Department is proposing to revise current section 656.17 and its section title (from "Basic Labor Certification Process" to "Pre-filing Recruitment Procedures"), in part, due to the proposed reorganization of part 656. The Department proposes to relocate the content of current paragraphs (a) and (c) of section 656.17 ("Filing applications" and "Filing date") to proposed section 656.10; the content of current paragraph (k) of section 656.17 ("Layoffs") to proposed section 656.13; and the content of current paragraphs (b),

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[92] Training and Employment Guidance Letter No. 32-10, *Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations under the H-2A Program* (June 14, 2011), *available at* https://www.dol.gov/sites/dolgov/files/ETA/advisories/TEGL/2011/TEGL32-10.pdf (summarizing Congress' engagement with temporary and permanent employment of aliens as sheepherders).

[93] Training and Employment Guidance Letter No. 32-10, *Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations under the H-2A Program* (June 14, 2011), *available at* https://www.dol.gov/sites/dolgov/files/ETA/advisories/TEGL/2011/TEGL32-10.pdf (summarizing Congress' engagement with temporary and permanent employment of aliens as sheepherders).

(h), (i), (j), and (l) of section 656.17 ("Processing," "Job duties and requirements," "Actual minimum requirements," "Conditions of employment," and "Alien influence and control over the job opportunity") to proposed section 656.19. The Department also proposes to revise section 656.17 to remove obsolete language (*e.g.,* current paragraph (d) "Refiling procedures") and to conform with other proposals contained in this proposed rule, such as the elimination of alternative procedures for sheepherders and occupations currently covered by Schedule A. The resulting proposed section 656.17 is designed to focus on pre-filing recruitment requirements. Moreover, under the proposed rule and as previously discussed, the pre-filing recruitment requirements proposed in section 656.17 would apply to all *Applications for Permanent Employment Certification*, unless the job opportunity was eligible for—and the employer opted to comply with—the optional pre-filing recruitment requirements of proposed section 656.18.

Consistent with the current regulation, proposed section 656.17 would continue to require employers seeking a PERM labor certification to engage in pre-filing recruitment activities, conduct a good faith test of the labor market for qualified U.S. workers, and retain documentation to demonstrate compliance with program requirements. However, the Department proposes to eliminate the current distinction between pre-filing recruitment requirements for professional and non-professional occupations in section 656.17; the requirements of proposed section 656.17 would apply equally to professional and non-professional occupations. As discussed below, the Department proposes significant revisions to modernize the pre-filing recruitment steps required under section 656.17 that better reflect the widespread use of online or digital recruitment practices, ensure that recruitment efforts reach the broadest pool of qualified and available U.S. workers, and ensure the employers' labor market tests are conducted in good faith and consistent with their current hiring practices to reach prospective applicants for similar job opportunities outside the PERM labor certification process. The proposed approach

will support recruitment of both professional and non-professional occupations, enabling the Department to further its goal of simplifying part 656.

Employer Obligations

Consistent with current section 656.17(e), proposed section 656.17(a) requires employers to attest, under penalty of perjury, that they conducted the pre-filing recruitment outlined in section 656.17, including compliance with all advertising requirements contained in proposed sections 656.17(b) through (e). Under the proposed rule, only employers filing *Applications for Permanent Employment Certification* for college or university teachers, professional athletes, or professional sports team coaches may opt not to conduct pre-filing recruitment under section 656.17; however, if they do not comply with pre-filing recruitment requirements of proposed section 656.17, they must comply with the pre-filing recruitment requirements of proposed section 656.18.

Both currently and under the proposed rule, the employer must maintain documentation, including copies of all advertisements and resumes or applications from prospective U.S. applicants considered for the job opportunity, to support the attestations made in the *Application for Permanent Employment Certification* and recruitment report. Under this proposed rule, the employer would be required to submit the recruitment report (including resumes and applications of all U.S. workers who applied for the job opportunity) and documentation to prove compliance with recruitment requirements at the time of filing the *Application for Permanent Employment Certification*. *See* proposed sections 656.10(a)(3) and (4).

Required recruitment

Under the current rule, employers are generally required to recruit during the 30-day to 180-day period before filing the *Application for Permanent Employment Certification*. Recruitment for nonprofessional occupations consists of placing a job order with the SWA for a period of 30 days and print advertisements on two different Sundays

in a newspaper of general circulation in the AIE most appropriate to the occupation and the workers likely to apply for the job opportunity. Recruitment for professional occupations similarly consists of placing a SWA job order and two print advertisements—one of which may be a professional journal that is normally used for job opportunities requiring an advanced degree and experience—but also requires three additional steps. Employers self-select the three additional steps to take from a menu of ten (10) recruitment options. The list of recruitment options for professional occupations are intended to provide employers flexibility to select methods appropriate to the job opportunity that is the subject of the *Application for Permanent Employment Certification.* The menu of options includes: job fairs; the employer's website; job search websites other than the employer's; on-campus recruiting; trade or professional organization newsletters or journals; private employment firms; employee referral programs with incentives; campus placement offices; local and ethnic newspapers; and radio and television advertisements.

The Department recognizes that print advertisements are no longer a meaningful method for recruitment, which impacts the informational value of the two print advertisements currently required for the PERM labor market test for both nonprofessional and professional job opportunities.[94] As some newspapers are shutting down and others are replaced by digital sources, the avenues for recruiting through news sources also migrate from print to online.[95] Online newspapers and social media sites are

[94] The Department has previously recognized in the H-2 programs that print newspaper advertisements are not an effective method of recruiting prospective U.S. workers. See Modernizing Recruitment Requirements for the Temporary Employment of H-2A Foreign Workers in the United States, 83 FR 55985, 55987 (Nov. 9, 2018); *Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States*, 83 FR 55977, 55979 (Nov. 9, 2018).

[95] *See* David Buader, "Local news sources are still drying up, but there's growth in digital sites in metro areas", Associated Press, (Oct. 23, 2024), https://apnews.com/article/newspapers-closing-jobs-lost-digital-fa82ebfdefdde058a1cbfaea1a59fb69 (discussing migration away from print newspapers toward digital sites).

surpassing print newspapers for news and information,[96] including for job seekers, with job seekers using online or digital platforms over traditional print media.[97] In addition, many newspapers have reduced or eliminated print circulation.[98] This trend has continued, for example, with the Atlanta Journal-Constitution issuing its final print edition on December 30, 2025.[99] According to news reports, in recent years, print newspapers declined at rapid rates,[100] including local and ethnic print news sources,[101] resulting in news deserts throughout the country and the increased prevalence of areas without local newspapers.[102]

The loss of print editions directly affects employers' abilities to place advertisements for job opportunities in print newspapers to comply with current part 656 requirements for both professional and nonprofessional occupations, and ultimately impacts the numbers of U.S. workers exposed to job opportunities advertised in print news sources.

Based on information, stakeholder feedback, and anecdotal data from previous rulemakings for the H-2A and H-2B programs, print ads in newspapers have yielded very

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[96] *See* Shearer, Elisa, "Social media outpaces print newspapers in the U.S. as a news source," Pew Research Center, (Dec. 10, 2018), https://www.pewresearch.org/short-reads/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/ (discussing print newspapers being surpassed by social media sites).

[97] *See* Smith, Aaron*,* "Job seeking in the era of smartphones and social media," Pew Research Center, (Nov. 19, 2015), https://www.pewresearch.org/internet/2015/11/19/2-job-seeking-in-the-era-of-smartphones-and-social-media/ (discussing the increased use of the internet for job searches since 2015).

[98] *See* Lipka, Michael and Shearer, Elisa, "Audiences are declining for traditional news media in the U.S. – with some exceptions," Pew Research Center, (Nov. 28, 2023), https://www.pewresearch.org/internet/2015/11/19/2-job-seeking-in-the-era-of-smartphones-and-social-media/ (discussing decline in daily newspaper circulation).

[99] *See* Chapman, Jr., Leroy, "After 157 years, AJC says goodbye to print and embraces its digital future (Dec. 31, 2025), https://www.ajc.com/business/2025/12/as-the-final-ajc-editions-are-printed-an-era-of-local-news-ends/.

[100] *See* Streitfeld, David, "How the media industry keeps losing the future," New York Times, (Feb. 28, 2024), https://www.nytimes.com/2024/02/28/technology/news-media-industry-dying.html (discussing the decline of newspapers and traditional media).

[101] *See* Hagey Keach, Alpert, Lukas I., and Serkez, Yaryna, "In News Industry, a Stark Divide Between Haves and Have-Nots," The Wall Street Journal, (May 4, 2019), https://www.wsj.com/graphics/local-newspapers-stark-divide/ (discussing sharper declines in circulation for local print newspapers even beyond declines national print newspapers have experienced).

[102] *See* Adgate, Brad, "This year the Loss in the Number of Newspapers Published Accelerated," Forbes, (Nov. 21, 2023), https://www.forbes.com/sites/bradadgate/2023/11/21/this-year-the-loss-in-the-number-of-newspapers-published-accelerated/ (discussing the rapid disappearance of newspapers and the resulting news deserts in localities throughout the nation).

few, if any, applications from able, willing, and qualified U.S. workers. Further, the Department's experience in conducting audit examinations, has shown that very few U.S. workers have applied to job opportunities in response to print advertisements that employers have placed.[103]

To modernize compliance requirements and to attract more U.S. workers to available job opportunities, this proposed rule seeks to replace mandatory print newspaper advertising with updated electronic methods for both nonprofessional and professional job opportunities. The modern methods of recruitment proposed in this rule ensure that recruitment for job opportunities that are the subject of *Applications for Permanent Employment Certification* is conducted in the manner that is at least the same as the employer's recruitment practices for job opportunities in the same or substantially comparable occupations that it does not seek PERM labor certification and most likely to reach the broadest pool of qualified U.S. workers in the current labor market.

In addition, the Department proposes to replace the current menu of options for additional recruitment for professional occupations with a standardized list of modern methods of recruitment, which would be applicable to both professional and nonprofessional occupations. As discussed below, the flexibility of the menu approach has not had the intended effect of ensuring appropriate recruitment for professional occupations. In addition, nonprofessional recruitment currently uses similar approaches to professional recruitment, including online advertising on job search websites and social media and recruitment through trade schools.[104]

The Department has reviewed the additional recruitment options employers have disclosed on *Applications for Permanent Employment Certification* for professional

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[103] *See* Modernizing Recruitment Requirements for the Temporary Employment of H-2A Foreign Workers in the United States, 83 FR 55985, 55987 (Nov. 9, 2018); *Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States*, 83 FR 55977, 55979 (Nov. 9, 2018).

[104] *See* Lobell, Kylie Ora, "How to Recruit for Hard-to-Fill Blue-Collar Positions" (Apr. 17, 2023); https://www.shrm.org/topics-tools/news/talent-acquisition/how-to-recruit-hard-to-fill-blue-collar-positions.

occupations and how employers have actually recruited using those options. In promulgating the current menu of additional recruitment options under the 2004 PERM Final Rule, the Department reasoned, at that time, that the methods selected were based on what program experience had shown to be real-world methods normally used by businesses to recruit workers, and that employers should be afforded flexibility to select the recruitment steps that were consistent with the employer's standard recruiting procedures.[105]

Based on a review of employer applications granted PERM labor certification for professional occupations (*i.e.*, requiring a degree) during FY 2021-FY 2025, the Department is proposing that the current approach—a menu of additional recruitment options for professional occupations—be eliminated because it is not serving its intended purpose.[106] Out of 409,368 PERM labor certifications granted during the most recent 5-year period, 94.2 percent of PERM applications for professional occupations were certified for positions within just the following 5 SOC major groups: SOC 15 (Computer and Mathematical) accounted for 65.4 percent of labor demand; SOC 17 (Architectural and Engineering) accounted for 10.1 percent of labor demand; SOC 13 (Business and Finance Operations) accounted for 8.9 percent of labor demand; SOC 11 (Management) accounted for 6.7 percent of labor demand; and SOC 29 (Healthcare Practitioners and Technicians) accounted for 3.2 percent of labor demand.[107]

First, the data reviewed shows that across all these professional occupations, the majority of employers selected online advertising through a job search website (95.4 percent) and half selected a website maintained by the employer (49.5 percent) as two of their three additional recruitment options. These recruitment options, along with the

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[105] DOL OFLC Performance data for fiscal years 2021 through 2025 available at https://www.dol.gov/agencies/eta/foreign-labor/performance (last accessed May 6, 2026).
[106] DOL OFLC Performance data for fiscal years 2021 through 2025 available at https://www.dol.gov/agencies/eta/foreign-labor/performance (last accessed May 6, 2026).
[107] DOL OFLC Performance data for fiscal years 2021 through 2025 available at https://www.dol.gov/agencies/eta/foreign-labor/performance (last accessed May 6, 2026).

rapidly increasing use of social media platforms (*e.g.*, Instagram, LinkedIn, and others),[108] are considered among the top trends in recruiting young professionals seeking initial employment and career advancement.

Second, the data indicate that, in most instances, the ability for employers to self-select which additional recruitment options they want to conduct may lead to choices that do not necessarily serve to reach the broadest possible pool of potentially qualified U.S. workers. For example, despite requiring at least a post-secondary degree, more than 18.5 percent of employers across these occupational groups chose radio and television advertisements at a far higher rate as compared to using job fairs (0.2 percent), on-campus recruiting (0.5 percent), or a campus placement office (9.6 percent), which are more common methods of building talent pipelines and recruiting qualified professionals by allowing direct interaction with recruiters, industry peers, and hiring managers. In addition, with approximately 40 percent of college and university students participating in formal internships before graduation, the value of on-campus recruitment is not limited to entry-level job opportunities.[109] Additionally, approximately 76 percent of employers chose local and ethnic newspapers to advertise their professional job opportunities, which the Department noted in the 2004 Final Rule should be used "to the extent they are appropriate for the job opportunity."[110] As noted above, job fairs, on-campus recruiting or a campus placement office would appear to be more appropriate for these professional job opportunities, yet employers overwhelmingly used local and ethnic newspapers

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[108] *See* Nick Ferrara, *How Social Media is Redefining Job Hunting for Gen Z Professionals,* Society for Human Resource Professionals (Feb. 26, 2025), available at https://www.shrm.org/topics-tools/news/how-social-media-is-redefining-job-hunting-gen-z (citing Zety's 2025 Gen Z Career Trends Report, which conducted a survey of 896 Generation (Gen) Z employees and is available at https://zety.com/blog/genz-career-trends-report, more than 95% of Gen Z employees said that a company's social media presence impacts their decision to apply with 76% using Instagram, 52% using TikTok, and 34% using LinkedIn for career advice and content. In addition, Gen Z employees were reportedly more likely to connect with peers, mentors, or industry professionals on Instagram (66%), compared to LinkedIn (35%), and more than 64% have secured a job or internship via Instagram and 56% have done so on Twitter or X).

[109] *See* "Building A New Path: The 2026 Graduate Report," ZipRecruiter https://www.ziprecruiter-research.org/annual-grad-report (last accessed May 7, 2026).

[110] *See* Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 FR 77345 (Dec. 27, 2004).

instead. Program data suggest that employers are not using the flexibility afforded through the menu approach to engage in recruitment activities most appropriate to the job opportunities offered, contrary to the Department's intent.

In the proposed rule, the Department would eliminate mandatory print advertisements for both professional and nonprofessional job opportunities and the current menu of additional recruitment options for professional occupations. Instead, for both professional and nonprofessional job opportunities, the proposed rule would require employers to comply with a standardized, mandatory list of modernized recruitment activities, which leverage online recruitment and the employer's own approach to recruit for similar job opportunities that are not the subject of an *Application for Permanent Employment Certification*.

The proposed rule seeks to improve and modernize the PERM labor certification labor market test by replacing outdated and ineffective means of recruitment with modern and more effective forms of recruitment, while also retaining some forms of recruitment that remain standard and productive, to advertise job opportunities as broadly as possible in order to attract as many U.S. workers as possible. In addition, the proposed rule aims at leveraging employers' current approaches to recruitment outside the PERM labor certification program. The proposed rule would require employers to recruit U.S. workers for PERM labor certification job opportunities using the same methods they use when seeking to fill a vacancy in a non-PERM labor certification recruitment setting. The recruitment steps proposed in this paragraph would ensure that U.S. workers are informed of the job opportunity and are provided the opportunity to apply and be considered for the job opportunity prior to an alien being offered permanent employment through a PERM labor certification, which would allow the Department to make the certification required by the INA. The mandatory pre-filing recruitment activities required of all employers under proposed section 656.17 are outlined below.

Placement of the Job Order – Proposed section 656.17(b)(1) would require the employer to place a job order with the SWA serving the place(s) of employment, consistent with the current rule. The Department proposes a revision to clarify that if the job opportunity covers more than one place of employment and the SWAs serving the places of employment are distinct, the employer would be required to place a job order with more than one SWA. Further, the proposed rule uses the term "place of employment" rather than "area of intended employment" to add specificity for the location(s) that determine placement of the job order with the particular SWA(s).

Placement of Advertisement on Employer's Website(s) – As proposed in section 656.17(b)(2), if an employer maintains one or more websites for its business operations, it must place an advertisement for the job opportunity that is the subject of the *Application for Permanent Employment Certification* on those websites. If the employer customarily uses its website(s) for its business operations to recruit for job opportunities that are not the subject of an *Application for Permanent Employment Certification*, the advertisement for the job opportunity that is the subject of the *Application for Permanent Employment Certification* must be placed in the same manner (e.g., same webpage) the employer customarily uses to recruit for job opportunities. If the employer does not customarily use its website(s) for its business operations to recruit for job opportunities, the employer must post the job opportunity that is the subject of the *Application for Permanent Employment Certification* on all such website(s) in a conspicuous location (e.g., the employer's contact page). The objective of the advertisement is to apprise as many U.S. workers of the job opportunity as possible and, therefore, the advertisement must be placed in a conspicuous location on each website the employer maintains for its business operations. Under the proposed rule, the employer is required to use all websites it maintains for business purposes to ensure the broadest dissemination of the job opportunity.

This proposal is intended to better apprise U.S. workers of the job opportunity and also make it more difficult for employers who are not recruiting in good faith to conceal job opportunities from U.S. workers, including those who are employed by the employer but might be interested in applying for the offered position, or U.S. workers who have been laid off, for example.

Placement of Advertisement on Job Search Website(s) – Proposed section 656.17(b)(3) would require the employer to place an advertisement for the job opportunity on at least one job search website. This proposal specifies that compliance with paragraph (b)(3) requires placement of the advertisement on a job search website that is not the employer's own website (*i.e.*, the employer's business website in proposed paragraph (b)(2)) or the SWA's website (*i.e.*, job order posting in proposed paragraph (b)(1)).

The proposed rule requires employers to post advertisements on one or more job search website(s) using the same methods and website locations as the employer customarily uses for recruitment of its other job opportunities that are unrelated to requests for PERM labor certification. The intent is to ensure that while recruiting for a PERM labor certification job opportunity, the employer, at a minimum, uses all of the job search website methods it typically uses, and in the same manner that it typically uses, when recruiting outside of the PERM labor certification context to make jobs known to U.S. workers. In the event an employer does not customarily post advertisements on job search websites for job opportunities that are the same as the job offered in the *Application for Permanent Employment Certification*, compliance with proposed 656.17(b)(3) would require the employer to post an advertisement on one job search website that is appropriate for recruitment of the job opportunity.

For an employer whose business is job postings, providing job searches, or job matching (*e.g.*, an employer whose business includes a job search engine, job website,

job board, job portal, or job aggregator, etc.; and/or an employer whose businesses performs tasks such as headhunting, staffing, or connecting employers and job seekers through job platforms, etc.) or, otherwise, the employer specializes in advertisement of job opportunities, compliance with proposed section 656.17 would require the employer to advertise on its own job search website(s) for proposed paragraph (b)(2) and, in addition, to advertise using a third-party commercial job search website for the proposed paragraph (b)(3).

Social Media Platform(s) – Proposed section 656.17(b)(4) would require an employer who customarily uses one or more social media platforms to advertise job opportunities in the same occupational classification to similarly do so during pre-filing recruitment for PERM labor certification. Under the proposed rule, the employer must use the same method(s) and location(s) and post this advertisement in a similar manner as it would for job opportunities unrelated to requests for PERM labor certification. The intent of this requirement is to ensure that while recruiting for a PERM labor certification, the employer, at a minimum, uses all of the methods it commonly uses when recruiting outside of the PERM labor certification context to make jobs known to U.S. workers.

If an employer does not customarily use a social media platform to advertise job opportunities in the same occupational classification, proposed paragraph (b)(4) does not require an advertisement on a social media platform. In this way, proposed paragraph (b)(4) contrasts with proposed paragraphs (b)(3) and (b)(5), which would require an employer who does not normally advertise job opportunities in the same occupational classification using the method described to do so during PERM labor certification pre-filing recruitment.

Job Fairs or On-Campus Recruitment – Proposed section 656.17(b)(5) would require employers to advertise the job opportunity through at least one job fair, on-

campus recruitment event, or college, university, or trade school placement office while the job order placed with the SWA, under proposed paragraph (b)(1), is actively circulating. Even if the employer does not normally recruit for the same or similar job opportunities through any one of these methods, compliance with proposed paragraph (b)(5) would require the employer to do so at least once, through one of the listed methods.

For employers whose recruitment methods for the same or similar job opportunity outside the PERM labor certification context includes recruitment through job fairs, on-campus recruitment events, and/or college, university, or trade school placement office, the employer would be required to recruit for the PERM-related job opportunity in the same way it recruits for non-PERM job opportunities. The Department recognizes that employers may customarily recruit through job fairs, on-campus recruiting events, and/or college, university, or trade school placement offices that may not be geographically close to the place(s) of employment because those job fairs are expected to attract qualified candidates or those colleges, universities, or trade schools offer programs of study that align with the job opportunity offered and whose students or alumni are likely to be good candidates for the employer's job opportunities. The Department does not intend for employers to artificially limit their recruitment under proposed paragraph (b)(5) based on geography. Rather, employers who customarily recruit through job fairs, on-campus recruitment events, and/or campus placement offices would use the same location(s) and manner for job opportunities that are the subject of *Applications for Permanent Employment Certification*.

The Department welcomes comments on the proposed pre-filing recruitment methods listed above, as well as additional ideas or methods of recruitment that could be used in the PERM program. Specifically, the Department requests comments on whether to include a requirement to contact all U.S. workers currently employed at the place(s) of

employment, similar to the requirement in the H-2B program under temporary final rules (TFRs) for fiscal years 2023, 2024, and 2025.[111] For this requirement, employers would be required to contact U.S. workers currently employed at the place(s) of employment to inform them of the job opportunity and request their assistance in recruiting qualified U.S. workers who may be seeking employment. As explained in the H-2B TFR and relevant for recruiting U.S. workers for permanent employment under this NPRM, the Department believes this method of positive recruitment is a reasonable and cost-effective way of broadening dissemination of available job opportunities and increasing the likelihood that qualified U.S. workers will apply.[112] Moreover, encouraging existing employees to provide referrals is generally recognized as an effective means for an employer to identify prospective applicants who would be well matched to the available job opportunity.[113] The Department also invites comments on how innovations in technology will impact the relevant forms of recruitment and whether there are alternative or additional methods of broadly disseminating job opportunities that could more effectively test the U.S. labor market while reducing unnecessary employer burden, including approaches that would facilitate and consolidate the publication of job opportunities. Commenters are encouraged to identify mechanisms that could increase the visibility and accessibility of PERM job opportunities to U.S. workers, improve the

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[111] *See* "Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2025 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers," 89 FR 95626, 95656 (Dec. 2, 2024); "Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers," 88 FR 80394, 80428 (Nov. 17, 2023); and "Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers," 87 FR 76816, 76845 (Dec. 15, 2022).

[112] *See* "Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2025 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers," 89 FR 95626, 95656, (Dec. 2, 2024).

[113] *See* Ceniza-Levine, Caroline, "Does An Employee Referral Make A Difference?," Forbes, (Oct. 6, 2023), https://www.forbes.com/sites/carolinecenizalevine/2023/10/06/does-an-employee-referral-make-a-difference/ (discussing the value of employee referrals for both the employer and job seeker); *see also* Lobell, Kylie Ora, "How to Recruit for Hard-to-Fill Blue-Collar Positions" (Apr. 17, 2023); https://www.shrm.org/topics-tools/news/talent-acquisition/how-to-recruit-hard-to-fill-blue-collar-positions.

Department's ability to ensure compliance and/or assess the effectiveness of recruitment, or reduce reliance on multiple employer-directed recruitment activities.

Length of active recruitment

Section 656.17(c) of the proposed rule requires active recruitment for each method in proposed paragraphs (b)(1) through (b)(4) of this section to be performed for at least 90 calendar days. However, if during the prior 12 months, the employer has routinely advertised for the same or similar job opportunities unrelated to requests for PERM labor certification for more than 90 calendar days, then the employer must advertise for the PERM labor certification job opportunity for the longer period of time it routinely used in the prior 12 months. To comply with this paragraph, the employer must use whichever period of time is longer—90 calendar days or the employer's customary length of recruitment for the same or similar job opportunities in the prior 12-month period.

For example, where the employer normally posts a job opportunity for 120 calendar days, the employer must similarly post the job opportunity that is the subject of the *Application for Permanent Employment Certification* for 120 calendar days. The intent is for the employer to allow as much active recruitment time in connection with PERM labor certification recruitment as the employer allows on active recruitment for non-PERM labor certification recruitment. The proposed text requires that the job opportunity for which the employer seeks a PERM labor certification is as broadly and widely advertised as possible and in accordance with the employer's own customary business recruitment standards, in order to reach as many potentially qualified U.S. applicants as possible. The Department thinks that the proposed 90-day period for active recruitment of U.S. workers is both reasonable and appropriate because this proposed minimum timeframe is consistent with the amount of time unemployed American workers are actively searching for work and therefore a sufficient period of time to test

the U.S. labor market. According to the October 2026 Employment Situation Summary Report, the BLS estimated that the average number of weeks unemployed persons were actively looking for work in September 2026 was 25.4 weeks (i.e., approximately 6 months), while the median duration was 12.1 weeks (i.e., approximately 3 months) and, when excluding the long-term unemployed (i.e., persons actively seeking work 27 weeks or longer), nearly 1.1 million unemployed persons were actively looking for work for 15 to 26 weeks.[114] When examining the most recent estimates of unemployed American workers actively searching for work within the prime working-ages of 25 to 54 years, this proposed timeframe is likewise reasonable and appropriate. For October 2026, BLS also estimated that the median number of weeks unemployed persons were actively looking for work was 13.2 weeks for those 25 to 34 years old; 15.4 weeks for those 35 to 44 years old; and 14.6 weeks for those 45 to 54 years old.[115]

Additionally, the proposed 90-day advertising standard would provide a minimum level of consistency in recruitment efforts and ensure qualified U.S. workers have ample opportunity to apply and be considered for employment in the job opportunity. Because current regulations do not require any minimum timeframe, the amount of time employers make online advertisements available through their own website and other job search websites varies significantly, and often times these announcements are available for less time than the current 30-day job order placed with the SWA. For example, among the 200,124 applications granted PERM labor certification for professional occupations during FY 2021-FY 2025 that chose to advertise job opportunities through a website maintained by the employer, approximately 25 percent (50,361 applications) advertised for less than 15 calendar days, 34 percent (67,825 applications) advertised for

[114] *See* BLS, *The Employment Situation*, Oct. 2026, Table A-12 Unemployed people by duration of unemployment, https://www.bls.gov/news.release/empsit.t12.htm.
[115] *See* BLS, *The Employment Situation*, Oct. 2026, Table A-36 Unemployed people by age, sex, race, Hispanic or Latino ethnicity, marital status, and duration of unemployment, https://www.bls.gov/web/empsit/cpseea36.htm.

15 to 30 calendar days, and 41 percent (81,938 applications) advertised for 30 calendar days or more. Among the 387,518 applications where the employer chose to use an online job search website, approximately 62 percent (241,880 applications) advertised for less than 15 calendar days, 29 percent (113,165 applications) advertised for 15 to 30 calendar days, and 8 percent (32,464 applications) advertised for 30 calendar days or more.[116] Thus, the Department's most recent program experience demonstrates a clear need to propose a minimum regulatory standard that can achieve greater consistency in the length of time prospective qualified U.S. workers have to apply and be considered for employment in these job opportunities.

As discussed in detail below under section 656.17(f), the employer must document the length of its recruitment efforts for the *Application for Permanent Employment Certification* and, as directed by the CO, provide documentation of the length of the employer's recruitment efforts for *Application for Permanent Employment Certification* with proof of the length of the employer's normal or typical recruitment standard for the same or similar job opportunities.

Completion of Active Recruitment

Section 656.17(d) of the proposed rule would require the employer to complete the recruitment activities of proposed paragraphs (b)(1) through (b)(4), between 30 to 60 calendar days before the employer files the *Application for Permanent Employment Certification.* This provision protects U.S. workers by ensuring the recruitment for the job opportunity does not become stale prior to the *Application for Permanent Employment Certification* filing, and ensures that U.S. workers who may have availability for the job opportunity are made aware of the job in proximity to the filing of the *Application for Permanent Employment Certification*, rather than many months ahead

[116] DOL OFLC Performance data for fiscal years 2021 through 2025 available at https://www.dol.gov/agencies/eta/foreign-labor/performance (accessed May 6, 2026).

of time, potentially prior to when currently available U.S. workers have begun their job search. In contrast, the current rule permits employers to complete recruitment as much as 5 months in advance of filing.

Advertising Content Requirements

Proposed section 656.17(e) largely continues current advertising content requirements, with revisions to ensure that U.S. workers are better apprised of the job opportunities offered. In addition, under this proposed rule, the Department would expand the scope of the advertising content requirements. The current rule has been interpreted as limiting advertising content requirements to the mandatory print advertisements.[117] In contrast, proposed 656.17(e) would apply the advertising content requirements to all recruitment conducted for compliance with 656.17.

Through the years after the implementation of the current rule, employers began to include technical jargon and shortened terms in PERM-related newspaper advertisements. More often than not, advertisements used in recruitment for PERM labor certification have confused potential job applicants, rather than sufficiently apprising U.S. workers about the actual job duties, qualifications, and skills required. In addition, over time, the advertisements placed for compliance with the current rule have been recognized by applicants as PERM-specific advertisements and in many cases, U.S. workers no longer apply because they believe such ads signify the lack of a bona fide job opportunity.[118] This perspective from U.S. workers suggests that some employers are not making PERM-related job opportunities truly open to qualified U.S. workers, a problem this proposed rule addresses. Further, the proposed rule would require consistency throughout the recruitment process by requiring employers to solicit and recruit for U.S.

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[117] *See Symantec Corporation*, 2011-PER-01856 (July 30, 2014).

[118] *See* Gooding, Dan, "The Job Listing Site Highlighting H-1B Positions So Americans Can Apply," Newsweek (Mar. 7, 2025), *https://www.newsweek.com/h1b-jobs-now-american-workers-green-cards-2041404* (accessed June 15, 2026) (discussing skepticism concerning whether employers try to seek U.S. workers, as they are required to do, when seeking approval through the PERM process).

workers using specific content intended to apprise U.S. workers of the job requirements, wages, locations and other pertinent details of the available job opportunities.

While proposed section 656.17(e)(1) would continue to prohibit advertising from containing terms and conditions that are less favorable to U.S. workers than those offered to the alien, it adds that the terms and conditions offered in the advertising also, at a minimum, must comply with assurances set forth in proposed section 656.13. The proposed rule would ensure that U.S. workers are not disfavored in the recruitment process or dissuaded from applying for job opportunities that are subject to *Applications for Permanent Employment Certification* due to misleading or inaccurate information or prohibited terms.

The list of required advertising content in proposed section 656.17(e)(2), again, largely continues current requirements. However, the proposed list includes intentional revisions to better ensure that U.S. workers are apprised of the pertinent details of the available job opportunities and available U.S. workers can apply for the position. For example, rather than continuing to require advertisements to "[n]ame the employer" and "[d]irect applicants to report or send resumes, as appropriate for the occupation, to the employer," the proposed rule requires advertisements to contain "[t]he employer's name and contact information." The revised advertising content requirements proposed in section 656.17(e) are intended to both provide the necessary information for U.S. workers to determine whether they are interested in and qualified for the job opportunity and better match non-PERM recruitment situations.

Finally, proposed section 656.17(e)(3) would permit employers to recruit for multiple positions simultaneously using the same advertisement as long as that single advertisement complies with all the pre-filing recruitment time, placement, and duration requirements for each job opportunity; and includes sufficient information to inform U.S. workers of each job opportunity.

As proposed, all of the employer's advertisements for recruitment under this proposed section must include the following: the employer's name and contact information; a description of the job opportunity sufficient to apprise U.S. workers of the services or labor to be performed and the actual minimum qualifications or requirements to perform the services or labor sought; the place(s) of employment or geographic area of employment, including a statement as to whether the position offers remote work, full-time telework, or a hybrid combination of telework and on-site work, with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor; the wage offer, or if there are multiple wage offers, the range of applicable wage offers (each of which must equal or exceed the highest of the prevailing wage or the Federal, State, or local minimum wage); a statement that overtime is available to the worker and the wage offer(s) for working any overtime hours (as applicable); and a statement that the job is a full-time position and, if the employer has more than one job opening, the total number of job openings the employer intends to fill.

The Department also proposes a new provision at section 656.17(e)(3) to provide some flexibility for employers who may be able to combine multiple positions in a single advertisement, while complying with the content requirements in proposed section 656.17(e). Permitting this flexibility would be financially efficient for employers, while ensuring the employer's advertisements contain content necessary to appropriately apprise U.S. workers of the job opportunities offered.

Recruitment Report

Section 656.17(f) of the proposed rule discusses the recruitment report the employer must prepare and maintain to document its recruitment efforts under part 656 and the results. A notable change from the current regulation is that under the proposed rule, the employer would submit the recruitment report (including the resumes and

applications of all U.S. workers who applied for the job opportunity) concurrently with the *Application for Permanent Employment Certification*. The employer's submission of the recruitment report with the *Application for Permanent Employment Certification* will allow the Department's review of the recruitment report for each *Application for Permanent Employment Certification*, rather than solely reviewing recruitment reports during audit examinations or when submitted in connection with supervised recruitment, as is the case under the current regulation. In other words, under the proposed regulation, employers will be required to submit a recruitment report for each application and the Department will be able to review the report for every single application to assess employers' pre-filing recruitment activities and consideration of U.S. workers. As discussed for proposed sections 656.10(a)(3) and (4), the Department would also require the employer to submit the supporting evidence for the recruitment report—copies of all advertising and U.S. worker applicants' resumes or applications for the job opportunity. While the CO may review only the recruitment report in all cases, the employer's full documentation of compliance with recruitment and consideration of U.S. workers would be available for the CO to review, without additional correspondence. Also, as noted in connection with proposed sections 656.10(a)(3) and (4), employers would not incur additional new burdens as a result of this requirement because they are already required to prepare and maintain recruitment reports for each *Application for Permanent Employment Certification* and to provide the recruitment report and supporting documentation to the CO, upon request (*e.g.*, audit examination).

The Department proposes to require more specific content in the recruitment report under the proposed rule than the current rule mandates. Current section 656.17(g)(1) includes general language that requires the recruitment report to "describe[e] the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful

job-related reasons for such rejections." This approach provides recruitment results to the CO in the form of data, which does not adequately reflect the success—or failure—of specific recruitment activities and does not adequately reflect the employer's consideration of U.S. workers who apply for the job opportunity that is the subject of the *Application for Permanent Employment Certification*. The Department has determined that the current recruitment report content does not provide sufficient information for the CO to form a clear picture of the labor market test (e.g., which recruitment activities successfully reach U.S. workers, how the employer considered U.S. applicants, why the employer did not offer the job opportunity to each U.S. worker who applied, or that the employer did offer the job opportunity to U.S. workers who applied, but they declined) or to verify information in recruitment reports, as appropriate, for program integrity.

The recruitment report under proposed 656.17(f)(1) would include specific factual information to provide a fuller picture of the employer's recruitment activities and results. As proposed, the recruitment report submitted with the *Application for Permanent Employment Certification* would identify the name of each recruitment activity and the date(s) of advertisement; identify the uniform resource locator (URL) or other location of each advertisement, and, for each advertisement placed with a website, platform, publisher, or the SWA, the platform or publisher generated confirmation number, receipt, or order identifier and the posting and expiration dates it generated; state the name and contact information and date of application of each U.S. worker (including any the employer laid off) who applied for or was referred for the job opportunity up to the date the employer finalizes its recruitment report for submission with the *Application for Permanent Employment Certification*, categorized by the advertising method through which the U.S. worker applied, indicating whether the U.S. worker met the actual minimum requirements, with the disposition of each U.S. worker specified, including whether the U.S. worker received a job offer and, if so, whether they accepted or

declined; and, if applicable, for each U.S. worker who applied but was not hired, explain the lawful job-related reason(s) for not hiring that U.S. worker. The recruitment report would also identify the name and title of each employee of the employer who reviewed, screened, or interviewed each of the applicants listed.

As provided by the INA in section 212(a)(5)(A)(i) and (ii) and both the current and proposed rule in section 656.24(b)(2), the Department will not issue a PERM labor certification to an employer if able, willing, and qualified U.S. worker(s) are available for the job opportunity that is—or would be—the subject of the *Application for Permanent Employment Certification*. To demonstrate eligibility for a PERM labor certification, the employer must document its reasons for not hiring each U.S. applicant who applied for the job opportunity in a recruitment report. In the event U.S. workers apply for the job opportunity and satisfy the minimum qualifications, as described on the *Application for Permanent Employment Certification*, or for a college or university teacher position or positions offered to aliens who have exceptional ability in the sciences or the arts, who are at least as qualified as the alien, the employer must consider each of those U.S. worker applicants. Unless the employer identifies lawful, job-related reason(s) for not hiring each qualified U.S. worker, the Department considers the U.S. worker(s) available and will not issue a PERM certification. The employer may offer the job opportunity to such U.S. workers to determine whether the U.S. worker(s) are willing and available and if no qualified U.S. workers accept the job offer, the employer could continue to pursue issuance of a PERM labor certification. However, if a qualified U.S. worker accepts the job offer, the Department would not issue a PERM labor certification, as the job opportunity can be filled by a U.S. worker; permanent employment of an alien is not necessary. In addition, the proposed recruitment report content would provide the CO with information necessary to assess whether the employer has satisfied its burden of proof with respect to this statutory and regulatory requirement.

Adding the proposed specificity to recruitment report content requirements would improve clarity for employers and the consistency of recruitment information submitted to the NPC. It will also allow the Department to make a more informed determination about the availability of U.S. workers when carrying out its statutory obligation to determine that there are not sufficient able, willing, and qualified U.S. workers available for the job opportunity. In addition, the proposal to require recruitment reports to identify which U.S. workers applied for the job opportunity through which recruitment activities would better enable the Department to update recruitment requirements to balance burden against the effectiveness of advertising activities in the future.

Duty to Update Recruitment Report – Proposed section 656.17(f)(2), consistent with the proposed layoff attestation in section 656.13(e), would require the employer to update its recruitment report after initially submitting it with the *Application for Permanent Employment Certification* in the event of a layoff. A recruitment report update would be required whenever the employer experiences a layoff of any U.S. worker(s) in the same or similar occupation as the *Application for Permanent Employment Certification* in the place(s) of intended employment, until the employer withdraws the *Application for Permanent Employment Certification* or related Form I-140 petition, the CO denies PERM labor certification or USCIS denies the related Form I-140 petition, or USCIS approves the related Form I-140 petition. The employer would prepare an updated recruitment report each time it experiences a layoff. Each time, the employer would sign and date the updated recruitment report. The recruitment report updates would not be submitted to the CO, unless requested. This proposal supports program integrity and protects U.S. worker access to job opportunities before they are permanently filed with an alien by enabling the CO to confirm compliance with required consideration of laid off U.S. workers while the *Application for Permanent Employment Certification* and Form I-140 petition are pending.

Similar to proposed section 656.17(f)(1), proposed section 656.17(f)(2) specifies the content to be required for recruitment report updates. The employer would be required to update their recruitment report with (i) a detailed explanation of the method(s) used and date(s) on which the employer notified all potentially qualified laid off U.S. workers for the job opportunity, who had been employed in the same or similar occupation that is the subject of the *Application for Permanent Employment Certification* in the place(s) of intended employment, and (ii) the name and contact information of each U.S. worker notified, identifying each one who applied to the job opportunity up to the date of the preparation of the recruitment report, categorized by the notification method through which they applied for the job opportunity, and specifying the disposition of each U.S. worker and whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined.

Duty to Maintain Recruitment Documentation – The Department is proposing to relocate the requirement to retain documentation to prove compliance with section 656.17 recruitment requirements from current section 656.17(e)(1) to proposed revised section 656.17(g). The proposed rule would continue to require employers to retain documentation associated with their pre-filing recruitment for the *Application for Permanent Employment Certifications* and add the required retention of documentation associated with their ongoing, post-filing consideration of any laid off workers, if applicable.

As is current practice, the CO may request the employer's documentation to verify compliance with timing, content, and activity requirements, as well as recruitment results. To demonstrate compliance, the employer must document each advertisement's date(s), content (*e.g.*, proof of publication or screen shot of the ad placed on a website), and location(s) (*e.g.*, physical location and/or website address) and each notification to laid off U.S. workers.

Finally, the Department proposes a new section 656.17(h) that would provide some flexibility for the OFLC Administrator to provide further clarifying guidance regarding recruitment requirements, methods, and practices that do not rise to the level of requiring rulemaking. The Department considers this to be an important option for the OFLC Administrator to address questions or resolve confusion that may arise as recruitment methods continue to evolve.

9. 20 CFR 656.18, Optional pre-filing recruitment requirements for college and university teachers and professional athletes and professional sports team coaches.

The Department proposes to retain the optional competitive recruitment and selection procedures currently available to an employer seeking to permanently hire a college or university teacher at section 656.18, with revisions. Consistent with the current regulation, the employer would be permitted to conduct recruitment for a job opportunity involving a college or university teacher using the normal pre-filing recruitment procedures set forth in section 656.17. Alternatively, if the employer selected the alien using a competitive recruitment process, the employer would have the option of following the optional pre-filing recruitment procedures set forth in section 656.18.

The Department proposes expanding the optional pre-filing recruitment alternative available in proposed section 656.18 to include professional athlete or professional sports team coach job opportunities and rename proposed section 656.18 to reflect the changed content. The current regulations do not address pre-filing recruitment or documentation requirements for such job opportunities. As a result, while employers seeking to permanently employ professional athletes and professional sports team coaches must engage in pre-filing recruitment, they have not been required to comply with the standard pre-filing recruitment requirements of current section 656.17. Consistent with the Department's goals of clarifying program requirements and

maintaining program integrity, the Department proposes to specify recruitment and documentation requirements for *Applications for Permanent Employment Certification* involving professional athletes and professional sports team coaches in this proposed rule, while maintaining the current flexibility for alternative recruitment practices appropriate to these job opportunities. The Department proposes to permit an employer seeking to permanently employ an alien as a professional athlete or professional sports team coach to either comply with the normal pre-filing recruitment procedures set forth in proposed section 656.17, or the alternative process in proposed section 656.18. The Department invites comments regarding the proposal to permit such employers to demonstrate a competitive recruitment and selection process under proposed section 656.18, rather than requiring compliance with proposed section 656.17. In addition, the Department invites comments that provide information about the means and methods of recruitment used for professional athletes and professional sports team coaches (e.g., private executive recruiters, talent scouts, multi-session tryouts or interview panels), which may not be captured in the standard pre-filing recruitment requirements of 656.17. The Department invites the public to provide input that can better inform the pre-filing recruitment standards and documentation requirements to ensure potentially qualified and available U.S. workers are afforded a fair chance to apply for professional athlete and professional sports team coaching positions.

To use the optional recruitment and documentation procedures at section 656.18, both currently and under the proposed rule, the employer must be able to document that the alien was selected for the job opportunity using a competitive recruitment and selection process. Also consistent with the current regulation, this proposed rule would require the employer to prepare and retain documentation showing compliance with the requirements of the optional pre-filing recruitment procedures for submission to the CO, upon request. However, under the proposed rule, such employers also would submit the

recruitment report and all evidence of compliance with the advertising requirements and consideration of U.S. workers (including resumes and applications of all U.S. workers who applied for the job opportunity) proposed in section 656.18 when filing their *Application for Permanent Employment Certification*—a change for all employers, as discussed in proposed section 656.10.

The documentation necessary to show compliance using a competitive recruitment and selection process for a college or university teacher job opportunity under proposed 656.18 would include the following list, which the Department retains from the current rule with minor conforming modifications: (1) a written statement, signed and dated by an official who has actual hiring authority from the employer, providing a detailed description of the recruitment procedures undertaken; (2) a final report or other documentation from the organizational or administrative body making the recommendation or selection of the alien at the completion of the competitive recruitment and selection process; (3) evidence of all other recruitment sources utilized; (4) a copy of at least one print or electronic advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements; and (5) a written statement attesting to the degree(s) of the alien's educational or professional qualifications and academic achievements. For a professional athlete or professional sports team coach job opportunity, the Department would require an employer using the optional recruitment procedures in proposed section 656.18 to document that the alien was selected for the job opportunity using a competitive recruitment and selection process and retain, at minimum, the first three documentation requirements listed above. The Department invites comments on additional documentation requirements that would be appropriate to require for professional athletes or professional sports team coaches akin to the additional requirements for college and university teachers, listed as (4) and (5) above.

In paragraph (b), the Department proposes to require employers who use the competitive recruitment and selection option under proposed section 656.18 to both retain the documentation listed in paragraph (a) and submit it to the CO when filing the *Application for Permanent Employment Certification*. The Department notes that attestations regarding the competitive recruitment and selection process are collected in Appendix D of the *Application for Permanent Employment Certification.*

While the recruitment and documentation requirements for employers who use these optional pre-filing recruitment procedures are consistent with current regulations, the proposed rule would change the timing and content of recruitment report submissions required of employers using the optional pre-filing recruitment requirements of proposed section 656.18. As addressed in proposed section 656.10, the Department proposes a consistent filing requirements and consistent recruitment report content requirements for all *Applications for Permanent Employment Certification.* The Department proposes to eliminate current section 656.18(c), which requires an employer to submit the *Application for Permanent Employment Certification* for a college or university teacher within 18 months of the alien's selection through a competitive recruitment and selection process. Instead, these applications would be subject to the same filing requirements as all other *Applications for Permanent Employment Certification*, including proposed section 656.10(b), which requires application submission within 30 calendar days after completion of pre-filing recruitment requirements. This proposed change is discussed in section 656.10.

In addition, employers who engage in pre-filing recruitment under proposed section 656.18 would be required to prepare a recruitment report in compliance with proposed 656.17(f). As discussed in proposed section 656.17, the Department proposes to require additional specificity in employers' recruitment reports to better enable the CO to assess the employer's test of the U.S. labor market and, as appropriate, verify

information. For employers preparing a recruitment report following optional pre-filing recruitment under proposed section 656.18, the Department proposes to expand recruitment report content requirements from only the "total number" of applicants for the job opportunity and the specific lawful job-related reasons why the alien is more qualified than each U.S. worker who applied to the additional specificity that would be required under proposed section 656.17(f)— the name of each recruitment activity and date(s) of advertisement and the name and contact information of each U.S. worker who applied, categorized by the advertising method through which they applied, and specifying each applicant's disposition and whether the job opportunity was offered to them and whether they accepted or declined.

The Department highlights that, consistent with the Department's efforts to modernize recruitment requirements, proposed section 656.18(a)(4) would permit either print or electronic advertisements. The Department invites comments about whether to retain the option for employers to place the one required advertisement in a national professional journal in print.

In addition, consistent with organizational changes proposed throughout this rule, the Department proposes to consolidate current sections 656.18(a)(1)(i) and 656.18(a)(1)(ii), which correspond to recruitment report content, with similar language in proposed section 656.17(f). Finally, the Department proposes deleting current section 656.18(d) to avoid redundancy with similar language in proposed section 656.18(a). These minor revisions are consistent with the Department's overall goal of simplifying and clarifying part 656.

10. Proposed 20 CFR 656.19, Processing of an application.

As previously discussed in connection with proposed section 656.10, the Department proposes to move the current content of section 656.19 ("Live-in household domestic service workers") to proposed section 656.10(e), so that all filing requirements

are located in section 656.10 of this proposed rule. Then, the Department proposes to repurpose current section 656.19 to address the processing of *Applications for Permanent Employment Certification* submitted to OFLC and retitle section 656.19 as "Processing of an application."

Consistent with the Department's proposed reorganization of part 656, the Department proposes to relocate provisions from other areas of the current regulation that address the review and processing of *Applications for Permanent Employment Certification* submitted to OFLC to proposed section 656.19. Specifically, the Department proposes to move content about the CO's assessment of the job opportunity described in the *Application for Permanent Employment Certification* from current sections 656.17(h) ("Job duties and requirements") and 656.17(j)(2) ("Conditions of employment") to proposed section 656.19(d). Similarly, text currently found at section 656.17(i) ("Actual minimum requirements") would be relocated to proposed section 656.19(e). These proposals would streamline the regulations, while improving clarity for employers regarding how applications are assigned for review and promoting more effective and fair processing by OFLC.

Proposed section 656.19 would address the CO's assignment of *Applications for Permanent Employment Certification* for review, rules for correspondence between the NPC and employers during processing, including requirements for responding, and the CO's assessment of the job opportunity offered in the *Application for Permanent Employment Certification*. The provisions proposed in this section would apply to all employers who must obtain a PERM labor certification before filing a Form I-140 petition with USCIS, including sheepherders, professional athletes and professional sports team coaches, and job opportunities currently designated as Schedule A (including aliens with exceptional ability).

In proposed paragraph (a), the Department considered codifying its application assignment process but decided against including these details in the proposed regulatory text. The NPC currently processes applications by assigning *Applications for Permanent Employment Certification* for staff review in the order received, using application filing dates. Specifically, the CO or other designated staff assigns for review all of the *Applications for Permanent Employment Certification* received in a certain month and year, before moving to assign applications filed in the next month and year. After being assigned, each designated staff organizes their monthly workload and initiates review of each application for compliance with PERM labor certification program requirements. After initial review, the CO or designated staff may initiate other processing steps, such as an audit examination under section 656.20 or supervised recruitment under section 656.21, or issue a final determination, approving or denying the application, pursuant to section 656.24. Processing times for any particular *Application for Permanent Employment Certification* received and assigned for review within that processing month may vary, depending on the unique circumstances of each application, contents of each application, and the applicable processing steps. While the Department intends to continue this practice for the foreseeable future, new technology or program enhancements may create necessary modifications. Any future changes, including minor tweaks to processing or order, would require the Department to propose another rule to codify its revised practices. Accordingly, the Department does not find it efficient or necessary to codify its internal review process.

Proposed paragraph (b) contains the correspondence rules that would apply to both the CO and the employer while an *Application for Permanent Employment Certification* is in process. For any notice or request the CO sends to an employer that requires a response from the employer, the CO will use electronic delivery, unless the employer was permitted to file by mail, as set forth in proposed section 656.10(c). For

employers permitted to file by mail, the CO will send any notice or request via traditional methods to assure next-day delivery. Similarly, employers would be required to submit their responses electronically by the due date, except that an employer permitted to file by mail under proposed section 656.10(c), may use traditional methods to assure next-day delivery. This proposed section would implement the current practice regarding due dates in the H-2A program, under which if a response due date falls on a Sunday or Federal holiday, the employer's deadline would be the next business day, rather than the current practice regarding due dates in the H-2B and CW-1 programs, under which if a response due date falls on a Saturday, Sunday, or Federal holiday, the employer's deadline would be the next business day. *See* 20 CFR 655.140(b), 655.11(f), and 655.430(b), respectively. Mandatory electronic filing, with limited exceptions, and for those permitted to file by mail, access to delivery services on Saturday to postmark a response on the due date, the Department proposes to adopt the H-2A program's approach to due dates. This paragraph provides clarity for employers and supports the Department's efforts to process *Applications for Permanent Employment Certification* efficiently. These rules apply to all correspondence between the CO and the employer during processing, including any CO-issued RFIs outside audit procedures or supervised recruitment procedures. However, the proposed rule reiterates these correspondence rules in proposed section 656.20 (Audit) (*see* proposed § 656.20(e)) and proposed section 656.21 (Supervised Recruitment) to provide further clarity to employers subject to audit or supervised recruitment. *See* proposed sections 656.20(e) and 656.21(e). The Department invites comments about whether proposed section 656.19(b) provides sufficient notice of correspondence rules or if those rules should also be included in part 656 in sections 656.20 and 656.21. Providing sufficient notice of correspondence is important because failure to respond to an RFI, audit notice, supervised recruitment

notice, or any other notice or request that requires a response, or responding after the due date may result in a denial.

Proposed paragraph (c) discusses response dates for correspondence between the CO and employer. For *Applications for Permanent Employment Certification* received electronically, the date that the response is submitted is considered the response date. For the time of submission, the Department will use the Eastern time zone of the United States. For *Applications for Permanent Employment Certification* received by mail in accordance with section 656.10(c)(2) or (3), the date that the response is submitted is the postmark date of the employer's response. This approach is consistent with the Department's filing date proposal, as discussed in proposed section 656.10(f)(2), and current practice in the Department's temporary labor certification program regulations for response submission to the NPC.[119] This applies to any notice or request sent to the employer during *Application for Permanent Employment Certification* processing.

Proposed paragraph (d) contains content relocated from current sections 656.17(h) ("Job duties and requirements") and 656.17(j)(2) ("Conditions of employment"), while proposed paragraph (e) contains the content relocated from current section 656.17(i) ("Actual minimum requirements"). The Department intends to retain the CO's current standard of review and documentation requirements for assessing the job duties and requirements specified on the *Application for Permanent Employment Certification*. Modifications to the current regulatory text in proposed sections 656.19(d) and 656.19(e) are intended to improve clarity, not to change the existing standard of review. For example, the proposed section 656.19(d)(1) retains the requirement that the job requirements specified in the *Application for Permanent Employment Certification* 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, unless adequately

[119] *See* 20 CFR 655.140(b), 655.11(f), and 655.430(b).

documented as arising from business necessity. The Department proposes to revise the provision to identify the application as "*Application for Permanent Employment Certification*" and add "(SVP)" and "Occupational Network" for clarity. Similarly, in proposed sections 656.19(d)(2)(ii)(A) and (B), the Department proposes to add "effectively" to modify "communicate in English" to better convey the standard applied to foreign language requirements carried over from current section 656.17(h)(2)(ii). Further, the Department proposes to add "executed contracts or agreements" in proposed section 656.19(d)(2)(ii)(A) to clarify the type of documentation that may be required to show plans to market products or deliver services in a foreign country. The Department also proposes to add "clients, contractors, or employees" in proposed section 656.19(d)(2)(ii)(B) to replace "customers" and clarify with whom an alien may need to communicate. Lastly, the Department proposes to require an additional explanation as to why the responsibilities of the position for which permanent labor certification is sought necessitates regular contact and communication with these individuals.

Again, the Department proposes these modifications for clarity and better organizational flow, not to change the existing standard of review.

11. Proposed 20 CFR 656.20, Audit.

The PERM labor certification audit process is a pre-decisional integrity measure that enables the CO to request and review documentation the employer is required to maintain, currently under section 656.10(f), to verify compliance with program requirements and form attestations before issuing a PERM labor certification. This proposed rule seeks to modify and clarify the audit examination process for employers under part 656.

Discretion

Consistent with the current regulation, the proposed rule allows the CO to select an *Application for Permanent Employment Certification* for audit review prior to the

issuance of a final determination. The current rule lists two reasons in section 656.20(a) why the CO might select an application for audit—random selection or for quality control purposes. These examples could be misunderstood as limiting the CO's discretion, which was not the Department's intent. The proposed rule revises this language to clarify that the CO has the discretion to choose an *Application for Permanent Employment Certification* for audit for any reason(s) the CO might deem necessary to ensure compliance with the laws and regulations governing the PERM labor certification process. This discretion is necessary so that the CO can effectively use the audit tool to verify compliance and to bolster the integrity of the program. The CO may—or may not—select an application for audit based on any variety of internal and/or external factors, such as filing trends, specific industries or types of employers, complaints received from members of the public or referrals from other government agencies, program needs, etc., but ultimately the proposed rule clarifies that the CO has the necessary discretion to choose an *Application for Permanent Employment Certification* at any time prior to the issuance of a final determination. Under the proposed rule, the Department seeks to ensure the CO's ability to select applications for audit is clear, as the CO's discretion with this integrity tool strengthens the overall integrity of the program.

Audit Notice

Proposed 656.20(b) continues current practice of requiring the CO to issue a written notice to the employer (*i.e.*, Notice of Audit Examination), after selecting an *Application for Permanent Employment Certification* for audit examination. In addition, proposed paragraph (b) codifies the CO's current practice of sending a copy of the audit notice to the employer's agent or attorney, if applicable, to ensure proper notice. The proposed audit notice will contain similar content to current audit notices, such as informing the employer of the selection of its application for audit review, identifying the documentation the employer is required to provide in response to the audit, specifying a

due date by which the employer must respond to the CO for the audit, and advising the employer of the consequences of noncompliance with the audit notice.

The Department proposes revising the audit response due date in section 656.20(b)(2) to support processing efficiency. Currently, section 656.20(a)(2) requires the CO to specify the same due date in all audit notices—30 calendar days from the audit notice issuance date. Proposed section 656.20(b)(2) would permit the CO to specify a date "no more than 30 calendar days" from the audit notice issuance date as the due date for the employer's response. The Department notes that employers attest at the time of filing the *Application for Permanent Employment Certification* that they have prepared documentation demonstrating program compliance. Compliant employers will therefore be ready to submit a response to the audit notice quickly. This proposal permits the CO to require a faster audit response than 30 days without harm to the employer, particularly as the Department proposes to retain the option for an employer to request a one-time extension of up to 30 calendar days, if needed, in proposed section 656.20(c).

In addition, the Department proposes revising the audit notice's content to better advise employers of the potential consequences for failure to comply with the audit process. Current section 656.20(a)(3) has been relocated to proposed section 656.20(b)(3), and continues to require that the audit notice advise the employer that failure to respond by the due date will result in denial and ineligibility for review by BALCA under section 656.26. Separately—and not included in required audit notice content subparagraphs—current 656.20(b) addresses substantial failure to respond to the audit notice, stating that it may result in denial or supervised recruitment. The current provision fails to ensure that the employer is notified of all potential consequences of noncompliance with audit examination (*e.g.*, debarment) in the audit notice. The Department proposes to relocate the content of current section 656.20(b) to proposed section 656.20(b)(4), with revisions for readability and to include all potential

consequences of failure to fully comply with the audit process. Proposed section 656.20(b)(4) improves notice to employers by ensuring the audit notice advises of all potential consequences of noncompliance with the CO's audit examination: denial of the *Application for Permanent Employment Certification* under section 656.24; imposition of supervised recruitment under section 656.21 for the current application or future application filings for up to two years; or debarment under section 656.31(f) from filing any labor certification applications or labor condition applications or receiving any approvals from OFLC for up to three years. These consequences are not new. The Department is proposing to both simplify the language in the audit notice and make it more complete.

One-time Extension Request

In proposed section 656.20(c), the Department proposes to continue to permit an employer to request an extension of a response deadline once during audit examination. The Department proposes one change to the current one-time extension request provision. Currently, the one-time extension request provision in paragraph (c) refers only to the initial Notice of Audit Examination due date (current subparagraph 656.20(a)(2)). It does not reference requests for supplemental information and/or documentation the CO may make under current paragraph 656.20(d). The Department proposes to remove this limitation and permit an employer to request an extension of any one response deadline during audit examination. This proposed change is consistent with a similar provision in section 656.21 for supervised recruitment processing, which permits one extension request to any one response deadline during supervised recruitment. In addition, this proposed change acknowledges that a response to a supplemental audit information and/or documentation request may require more time to prepare and submit to the CO than the employer's initial response, which would largely encompass information and/or

documents the employer attested to having prepared before filing the *Application for Permanent Employment Certification*.

Continuing current procedure, the employer must request an extension in writing, before the due date of the response, and the CO at their discretion, may grant one extension of up to 30 additional calendar days for the employer to respond. Where granted, the CO issues a written notice to the employer that specifies the new date by which the employer must respond with the requested information and/or documentation. This proposal clarifies in section 656.20(c) that this is a "one-time extension," and the extension will not automatically be granted but rather will be granted at the CO's discretion. Only one extension request during audit examination will be approved by the CO.

Actions during processing

The Department proposes to revise current section 656.20(d) by adding a heading ("Actions during processing"), updating content in paragraph (d)(1) for clarity and to reflect the proposed response deadline of up to 30 days, and retaining paragraph (d)(2) without change. Existing section 656.20 paragraphs (d) and (d)(1) state that before making a final determination the CO may "request supplemental information and/or documentation," while current paragraph (d)(2) states that the CO "may require the employer to conduct supervised recruitment under 656.21." In proposed paragraph (d), the Department continues its current practice, where, if the CO determines further information is needed to verify program compliance, the CO may request supplemental information from the employer and/or impose supervised recruitment requirements. The CO may request supplemental information more than once during audit examination, each time providing up to 30 calendar days for response. This provision is intended to ensure that employers are aware the CO may request supplemental information to have full information before rendering a final determination on the *Application for Permanent*

Employment Certification. The Department also clarifies that the CO will not consider any information the employer submits that is beyond the approved deadline(s) for the audit response(s), that is not in response to a CO's request, or that is not provided in the manner specified by the CO's request for supplemental information.

These proposed regulatory changes will add more clarity to the process by clearly specifying when and how supplemental information must be provided to the CO to ensure employers submit the necessary information when requested by the CO and that requesting and submitting supplemental information is done as efficiently as possible to avoid unnecessary delays in the audit examination.

Correspondence in Audit

Furthering technological efficiency measures and updates, and modernization efforts developed and implemented over time for OFLC's programs, the Department is now proposing to codify in section 656.20(e) that the CO will issue all notices or requests electronically to the employer—and the employer's agent or attorney, if applicable—during audit using the electronic mail (email) address the employer designates in the *Application for Permanent Employment Certification*. There is an exception for employers permitted to file by mail, as set forth in § 656.10(c). For these employers, the CO will send any notice or request via traditional methods to assure next day delivery. This proposal increases transparency and supports the Department's modernization goals.

The Department proposes in paragraph (e) to also require employers to communicate electronically, except where the employer has been granted permission to file by mail in section 656.10(c), in which case the employer must send responses to the CO using a method that assures next-day delivery. As discussed above, the Department is proposing to adopt the current practice regarding response due dates in the H-2A program—employer responses must be sent by the due date specified by the CO, or by the next business day if the due date falls on a Sunday or Federal holiday. This proposal

furthers the Department's goals to modernize and streamline processes to support processing efficiency.

Failure to Comply with Audit

In proposed section 656.20(f), the Department proposes to clarify the actions the CO may take as the result of an audit examination, and address the potential for debarment based on noncompliance with audit examination requirements. Under the current and proposed rules, the CO may: order the employer to conduct supervised recruitment under 656.21 before the CO issues a final determination on the current *Application for Permanent Employment Certification*; deny the *Application for Permanent Employment Certification* under section 656.24; deny the *Application for Permanent Employment Certification* under section 656.24 and order supervised recruitment under 656.21 for the employer's future filings for up to 2 years; and/or deny the *Application for Permanent Employment Certification* under section 656.24 and pursue debarment against the employer, agent, and/or attorney for up to 3 years under 656.31(f). Although debarment is not a new possible consequence of noncompliance with audit examination, it is not mentioned in current section 656.20 of the current rule; rather, it appears in current section 656.31(f)(1)(iv). Moreover, proposed paragraph (f) better clarifies that failure to comply with audit requirements will lead to denial under section 656.24 and potential debarment under section 656.31, while an inadequate audit response will be denied under section 656.24. The CO may also determine it is appropriate to impose supervised recruitment for future applications for up to two years, in addition to denial. The Department proposes to change language referring to "a substantial failure" to provide required documents to "failed to comply with audit requirements ordered by the CO" in the audit examination. This proposed change simplifies the standard of review with a more objective test.

During audit examination, the employer must fully respond to the audit, including any supplemental RFI issued to the employer, and must return the response to the CO in the manner specified by the audit notice. Failure to provide the information requested will result in a denial because the CO will lack the information it requires to properly assess the application for compliance. The proposed changes ensure that employers are fully aware of the consequences of not complying with audit examinations.

Potential Referrals

The Department proposes a new section 656.20(g) to inform employers that the CO will refer information provided in response to an audit to other enforcement agencies where the findings indicate a possible violation of law within an agency's jurisdiction, and will provide such information upon an agency's request. Such referrals are in addition to internal referrals provided for elsewhere in part 656 and serve as an additional means of deterring fraud and suspicious activity. Under this proposed rule, the CO will refer audit findings and underlying documentation for an employer, or an attorney or agent, to any enforcement agency, including the DOL-OIG, DHS, DOS, EEOC, and DOJ. This includes referring any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged or otherwise discriminated against an eligible U.S. worker to DOJ, Civil Rights Division, Immigrant and Employee Rights Section and/or the U.S. Equal Employment Opportunity Commission. Proposed section 656.20(g) serves as an additional means of deterring fraud and suspicious activity and notifies the public fully of the Department's intention to cooperate with fellow agencies to the maximum extent possible to protect the integrity of the permanent labor certification program.

12. Proposed 20 CFR 656.21, Supervised recruitment.

The Department proposes clarifications to the supervised recruitment provisions in section 656.21. OFLC uses supervised recruitment as a means of enhancing program

integrity by directing the employer through specific recruitment steps under part 656. Through this integrity measure, OFLC ensures the adequacy of the employer's test of the labor market for U.S. workers and ensures the employer's consideration of U.S. applicants for the available job opportunity.

When the CO places an employer into supervised recruitment, the CO guides the employer through an additional recruitment process. Consistent with the current rule, under the proposed rule, the CO may impose supervised recruitment on an employer for a single *Application for Permanent Employment Certification* or for all of the employer's future-filed *Application(s) for Permanent Employment Certification* for a period of up to 2 years if the CO determines the employer failed to fully comply with audit examination requirements. Once in supervised recruitment, the employer must demonstrate its compliance with the additional recruitment requirements specified by the CO, in addition to compliance with all other requirements of part 656, in order to receive a PERM labor certification.

Discretion

The proposed rule revises language in section 656.21(a) to more clearly state the CO's discretion to place an employer in supervised recruitment. Proposed section 656.21(a) replaces "[w]here the Certifying Officer determines it appropriate" with "[t]he CO may, at their discretion, require supervised recruitment." Under both the current and proposed rule, the CO has discretion to place an employer in supervised recruitment; however, the proposed rule more clearly states this discretion. In addition, proposed section 656.21(a) replaces "for the pending application or future applications pursuant to § 656.20(b)," which could be interpreted as requiring the pending application to undergo audit before supervised recruitment, with "on any *Application for Permanent Employment Certification* pending a final determination or for all of an employer's future *Applications for Permanent Employment Certification* for up to two years pursuant to §

656.20(f).” By more clearly providing the CO maximum discretion to induct an employer into supervised recruitment at any phase of processing an *Application for Permanent Employment Certification*, the Department provides employers with clearer notice regarding the potential for supervised recruitment and supports the CO’s efforts to quickly and efficiently address trends and concerns regarding program integrity. Furthermore, the proposed revision in paragraph (a) adds the specific period during which the CO may order supervised recruitment for an employer’s future filings to add clarity to proposed section 656.21(a). The period stated in proposed 656.21(a) is not new. Current section 656.20(f) specifies the potential period for which the CO may order supervised recruitment for an employer’s future *Applications for Permanent Employment Certification* as up to two years. This proposal would provide important information relating to supervised recruitment in one place.

By clarifying the CO’s discretion regarding supervised recruitment, the Department seeks to both streamline processing and safeguard U.S. workers by ensuring a robust test of the labor market.

Supervised Recruitment Notice

The Department proposes to repurpose section 656.21(b) to formalize the “Notice of Supervised Recruitment” procedure, with revisions. To increase the consistency of the audit and supervised recruitment procedures and improve clarity for employers subject to supervised recruitment procedures, the Department proposes to repurpose section 656.21(b) so that it codifies current practice, through which the CO issues a written notice to the employer, currently called “Notice of Supervised Recruitment,” with a copy to the employer’s attorney or agent, if the employer has such a representative.

In proposed section 656.21(b)(1), the Department proposes new content outlining the type of information and instructions to be provided to the employer in the Notice of Supervised Recruitment. As proposed, the notice will specify the procedures the

employer must follow to conduct supervised recruitment, including "the required method(s) and content for advertising the job opportunity to prospective U.S. applicants (*e.g.*, whether to have applicants respond directly to the NPC), timeframes for compliance with the supervised recruitment process, and state that supervised recruitment will be incorporated as bona fide conditions and terms of the *Application(s) for Permanent Employment Certification*." To simplify proposed section 656.21 and acknowledge that advertising methods and contents are assessed by the CO on case-by-case basis, the Department does not propose to retain the list of required advertisement content in current section 656.21(b)(2) that currently applies to newspaper advertisements. Further, this approach provides the CO with flexibility to customize instructions for each job opportunity to the employer in the Notice of Supervised Recruitment, including advertisement content, to ensure the supervised recruitment efforts are appropriately guided to solicit referrals from the broadest pool of potentially qualified and available U.S. workers. Among the greater flexibilities afforded the CO under the proposed rule to customize recruitment and advertising content, as appropriate, during supervised recruitment, proposed section 656.21(b) would permit—but not require—the CO to require the employer's advertisements to direct applicants to send resumes or applications for the job opportunity to the NPC, rather than the employer.[120] The current rule requires applicants to apply only to the CO and the CO to refer those applicants to the employer. With this proposed change, the Department intends to balance the competing goals of supervising labor market testing and using advertisements to test U.S. worker availability for PERM job opportunities that blend in with non-PERM advertisements.

In addition, the Department proposes to add new content in proposed section 656.21(b)(2) that would implement the same consequences for failure to provide required

[120] *See* current section 656.21(b)(2)(i).

documents by the due date(s) as currently applies during audit examination. While in audit examination processing, if the employer fails to provide required documentation by the due date, the CO will deny the application, with the denial ineligible for review by BALCA under section 656.26. *See* current section 656.20(a)(3) and proposed section 656.20(b)(3). If adopted in the final rule, proposed section 656.21(b)(2) would implement this consequence in Supervised Recruitment processing and would require that the Notice of Supervised Recruitment include notification of the consequence.

Requirements

To accommodate the new content in paragraph (b), which discusses the Notice of Supervised Recruitment, current section 656.21(b) has been redesignated in the proposed rule as section 656.21(c), with additional substantive changes. Currently, supervised recruitment requires placement of print advertisements in all cases, as well as any other measures the CO may add. *See* current sections 656.21(b) and (d). In addition, the current rule specifies advertisement content, requires the employer to submit a draft advertisement for CO review within 30 calendar days of the supervised recruitment notice date, and requires communication between the CO and employer regarding the timing of advertisements in paragraphs (b) and (c).

Consistent with Department's proposed modernization of pre-filing recruitment requirements in this rule, proposed section 656.21(c) eliminates print advertisements as mandatory for all supervised recruitment, while retaining flexibility for the CO to order appropriate recruitment activity under the CO's guidance, which could include print advertisements, when appropriate. Because supervised recruitment may require the employer to repeat a pre-filing recruitment activity under supervision—for example, reposting an advertisement on the employer's website for a longer period of time or changing the location of the posting on the website, or the CO can require an additional advertisement on a website other than the employer's or the SWA's during supervised

recruitment—the Department proposes language in paragraph (c) to clarify that the supervised recruitment process is in addition to the pre-filing recruitment requirements in section 656.17 or 656.18.

Proposed paragraph (c) further discusses the various potential additional requirements that could constitute supervised recruitment; however, the CO would not be limited to the list in proposed paragraph (c). The Department intends for the CO to use discretion to determine the appropriate supervised recruitment steps to ensure the proper recruitment of U.S. workers.

Paragraph (c) continues to allow the CO to control the supervised recruitment process, for example, by: requiring submission of a draft advertisement for review and approval prior to placement; identifying source(s) and specifying timeframe(s) for advertisements, including an extended period for advertisements or job orders; and requiring the employer to notify the CO when advertisement(s) are placed. In addition, the proposal continues to permit the CO to require the employer to retain proof of publication for submission to the CO, upon request, and to require the employer to submit a recruitment report to the CO after completing supervised recruitment.

As discussed above, the Department proposes to eliminate advertisement content requirements in regulatory text. Instead, under this proposed rule, the CO will specify required advertisement content in the Notice of Supervised Recruitment to maintain flexibility to require the content necessary to apprise U.S. workers of the job opportunity. Moreover, the CO may require the employer to submit a draft advertisement so that the CO can review and approve the content before placement.

Similarly, the Department proposes to eliminate the separate recruitment report content provision currently in section 656.21(e). Rather, proposed 656.21(c)(6), leverages the recruitment report provision at proposed section 656.17(f). Applying the proposed recruitment report content in section 656.17(f) to recruitment reports submitted in

supervised recruitment would simplify part 656 and bring consistency to recruitment report content requirements.

The Department also proposes to add clarifying language in proposed section 656.21(c)(7), as discussed in connection with proposed section 656.10(a)(2), to put employers subject to supervised recruitment on notice that the CO may require them to update the NOF they provided or posted before filing the *Application for Permanent Employment Certification* with revised content, consistent with content ordered for supervised recruitment advertisements.

Supplemental Information Request

The Department proposes to relocate content from current section 656.21(f) to proposed section 656.21(d), with revisions, to address requests for documentation or information during supervised recruitment. Proposed section 656.21(d) has been revised for consistency with current practice in supervised recruitment and the similar provision for audit examination in proposed section 656.20(d). Proposed section 656.21(d) specifies that the CO may issue one or more requests to the employer for supplemental information and/or documentation during the supervised recruitment process. The CO will continue to issue requests for supplemental information to the employer in writing and will specify the date(s), of up to 30 calendar days, by which information is due to the CO. The employer must respond to the Notice of Supervised Recruitment and any request(s) from the CO during supervised recruitment, by the date(s) specified, in the manner specified, and with the documentation and information requested of the employer.

Correspondence During Supervised Recruitment

Consistent with proposals for correspondence during processing, the Department proposes in section 656.21(e) to require the CO to send notices and requests to the employer with a copy to the employer's attorney or agent, if the employer has such a

representative, and the employer to respond electronically, unless the employer was permitted to file by mail as set forth in § 656.10(c). For employers permitted to file by mail, the CO would be required to send any notice or request and the employer to respond via traditional methods to assure next day delivery. Consistent with other proposals in this rule and current practice in the H-2A program, the proposed rule would require employer responses during supervised recruitment to be sent by the due date specified by the CO, or by the next business day if the due date falls on a Sunday or Federal holiday. This proposal improves transparency about the CO's correspondence during supervised recruitment, in addition to furthering the Department's goals to modernize and streamline processes to support processing efficiency.

Failure to Comply with Supervised Recruitment

The Department proposes revising section 656.21(f) to clarify the consequences of failure to comply with the supervised recruitment process or requirements. Current section 656.21(f) simply states that the CO will deny the application if the employer fails to "supply the CO with the required documentation or information within 30 days of the date of the request." However, the CO also must deny certification if the employer submits the required documentation or information, but the substance of that documentation or information does not support certification. For example, the CO will deny the application if the employer submitted its recruitment report, but the recruitment report does not contain required content, such as lawful, job-related reasons for rejecting the U.S. workers who applied. The additional recruitment during supervised recruitment, when ordered, is part of the CO's assessment of U.S. worker availability and prevention of adverse impact to U.S. workers similarly employed. An employer's failure to perform the additional recruitment required, in compliance with the CO's instructions, precludes certification. Proposed section 656.21(f) clarifies that failure to comply with any

requirements ordered by the CO during supervised recruitment—including, but not limited to, due dates—will result in denial.

In addition, the Department proposes revising section 656.21(f) to add that debarment of the employer and/or its attorney or agent is a possible consequence of noncompliance with supervised recruitment orders. This is not a new possible consequence. Both the current rule and proposed rule include a pattern or practice of failure to comply in the supervised recruitment process as a basis for debarment in section 656.31(f). Adding the proposed language in section 656.21(f) is consistent with changes proposed in section 656.20 (Audit) and improves notice of the consequences of noncompliance, which include taking appropriate measures to ensure the integrity of the PERM labor certification program under section 656.31(f).

Potential Referrals

The Department proposes to redesignate the provision for the one-time extension request option from current section 656.21(g) to proposed section 656.21(h) and repurpose section 656.21(g) to notify the public that the CO will provide supervised recruitment findings or underlying documentation to any enforcement agency, including the DOL-OIG, DHS, DOS, EEOC, and DOJ. Additionally, the CO will refer findings that an employer, attorney, or agent, "discouraged an eligible U.S. worker from applying, or failed to hire, discharged or otherwise discriminated against an eligible U.S. worker" to DOJ, Civil Rights Division, Immigrant and Employee Rights Section and/or the U.S. Equal Employment Opportunity Commission. The text in proposed section 656.21(g) aligns with a similar provision in proposed section 656.20 (Audit). These proposed provisions serve as an additional means of deterring fraud and suspicious activity and notify the public of the Department's intention to cooperate with fellow agencies to the maximum extent possible to protect the integrity of the PERM labor certification program.

One-time Extension Request

The Department proposes to relocate current section 656.21(g) to proposed section 656.21(h), with revisions for clarity and consistency with a similar provision in proposed section 656.20(c) for audit examination. The proposed rule continues to permit an employer to request one extension to any one response deadline during the supervised recruitment process. Consistent with current practice, where an employer requests an extension, it must do so in writing, before the due date of the supervised recruitment response, and the CO at his or her discretion, may grant one extension of up to 30 additional calendar days for the employer to respond. Where granted, the CO will issue a written notice to the employer that specifies the new date by which the employer must respond with the requested documentation. This proposal clarifies in paragraph (h) that this is a "one-time extension" and the extension is at the CO's discretion. Only one extension request during the supervised recruitment process will be approved by the CO.

13. Proposed 20 CFR 656.24, Labor certification determinations.

Consistent with the Department's proposals throughout this rulemaking to reorganize part 656 and simplify language to clarify program requirements and procedures, the Department proposes revisions to the section addressing PERM labor certification determinations at section 656.24. The proposed changes in this section are largely organizational and for conformity with the overall proposed rule. For example, proposed section 656.24 contains paragraph headings to more clearly identify topics and simplifies procedural matters related to issuing final determinations to certify or deny an *Application for Permanent Employment Certification*. The Department also proposes relocating the content of current section 656.24(f), which discusses supervised recruitment, to proposed section 656.21(f) and the content of current section 656.24(g), which discusses reconsideration, to proposed section 656.24(d)(2). Below, the Department summarizes proposed section 656.24 and highlights proposed changes.

The Department retains its explanation of the OFLC Administrator's role and delegation of authority to COs to issue determinations for *Applications for Permanent Employment Certification* in proposed section 656.24(a) (Determinations), with conforming changes. The Department is proposing to revise the current language in section 656.24(a), to clarify that the OFLC Administrator's authority to review and issue determinations for *Applications for Permanent Employment Certification* is not limited to "special or unique problems." The proposed language clarifies that authority resides with the OFLC Administrator, who may, in their discretion, delegate that authority to COs. The proposed provision states that, "the OFLC Administrator has sole discretion to certify, deny, or suspend processing of *Applications for Permanent Employment Certification* under 656.31(b) or for other appropriate reasons or to delegate authority to the CO to do so." *See* proposed section 656.24(a). The Department emphasizes that the proposed language is not intended to change current practice. While the OFLC Administrator has the authority to review applications and issue final determinations, the COs at NPCs will continue to issue final determinations in most cases. The Department is revising this provision to add clarity, as well as align this language with several other provisions which discuss authority and delegation.

Proposed section 656.24(b) continues to address the three criteria for certification of an *Application for Permanent Employment Certification*. In addition to conforming modifications, the Department proposes revisions intended to increase clarity and consistency within part 656 and across the Department's regulations. With only minor clarifying changes, proposed subparagraph (b)(1) continues to require the employer to have met all the requirements of part 656 as a condition of certification. Proposed subparagraphs (b)(2) and (b)(3) continue to address the statutorily required determinations—that there are insufficient U.S. workers able, willing, qualified, and available to fill the employer's job opportunity and that the employment of the alien will

not have an adverse effect upon the wages and working conditions of U.S. workers similarly employed—with revisions.

In proposed subparagraph (b)(2), the Department adds language regarding the CO's assessment of U.S. worker availability using information gathered from the U.S. labor market test, as provided in the employer's recruitment report. As modified, proposed subparagraph (b)(2) is consistent with similar provisions in the H-2A and H-2B programs at sections 20 CFR 655.51(b) and 20 CFR 655.161(b), respectively. It is the employer's responsibility to ensure that it submits a recruitment report that clearly articulates lawful, job-related reason(s) for not hiring any U.S. worker who applies for the job opportunity that is the subject of the *Application for Permanent Employment Certification.* Proposed section 656.24(b)(2) would better notify employers how the CO will assess U.S. worker availability in the event the employer's recruitment report fails to clearly state reason(s) that are lawful, job-related reasons for not hiring a U.S. worker. The CO will "count as able and qualified" any U.S. worker who was referred or applied for the job opportunity and for whom the employer does not identify a lawful, job-related reason for rejection in the recruitment report. This language supports efficient and faster processing, as the CO can reach a determination based on the information stated in the recruitment report, without additional requests and delays.

For most *Applications for Permanent Employment Certification*, current section 656.24(b)(2)(i) governs the CO's assessment of an employer's recruitment results. The Department proposes no substantive change to the standard of review for recruitment reports subject to assessment under section 656.24(b)(2)(i). Consistent with current practice, a U.S. worker is considered able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform the duties involved in the normally accepted manner, as customarily performed by other U.S. workers similarly employed, or can acquire the skills necessary to perform the duties

involved during a reasonable period of on-the-job training. This assessment may be referred to as a "minimally qualified" assessment. The Department proposes to retain this subparagraph with one minor revision to identify the CO as the decisionmaker.

For *Applications for Permanent Employment Certification* involving a college or university teacher job opportunity, the CO currently applies the alternative assessment of U.S. worker availability found at current section 656.24(b)(2)(ii), which is a limited exception to the "minimally qualified" assessment. This alternative assessment reflects Congress' October 20, 1976 amendments to the INA at section 212(a)(5)(A)(ii), which implemented an "equally qualified" assessment for these job opportunities.[121] Under this proposed rule, the CO would continue to apply this alternative assessment to count as available, any U.S. worker who applies or is referred to a college or university teacher job opportunity and who is "at least as qualified" (*i.e.*, "equally qualified") as the alien selected.

The Department proposes to expand current section 656.24(b)(2)(ii) to include job opportunities involving aliens who have exceptional ability in the sciences or the arts. This proposal further implements Congress' October 20, 1976 amendments to the INA at section 212(a)(5)(A)(ii), which also excepted aliens who have exceptional ability in the sciences and arts from the generally applicable "minimally qualified" assessment of U.S. worker availability and, instead, required application of the "equally qualified" assessment.[122] Although Congress extended the "equally qualified" assessment standard to PERM labor certifications for aliens who have exceptional ability in the sciences or the arts at the same time as college and university teachers, it was not necessary to address it in part 656 as long as job opportunities involving aliens who have exceptional ability in the sciences or the arts were included in Schedule A, Group II, and exempt from

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[121] *See* 69 FR 77326, 77357-7738 (Dec. 27, 2004) (discussing legislative history and intent related to its amendments to INA section 212(a)(5)(A)(ii)).
[122] *See* 69 FR 77326, 77357-7738 (Dec. 27, 2004) (discussing legislative history and intent).

engaging in a labor market test.[123] With the proposed elimination of Schedule A, the Department expects to receive *Applications for Permanent Employment Certification* from employers seeking to permanently employ aliens who have exceptional ability in the sciences or the arts and will be required to assess U.S. worker availability using the statutory standard at INA section 212(a)(5)(A)(ii).[124] Such employers would be required to engage in the pre-filing recruitment activities proposed in section 656.17(a), and submit a recruitment report to OFLC when filing the *Application for Permanent Employment Certification*, as provided in proposed section 656.10(a)(1). Accordingly, proposed section 656.24(b)(2)(ii) clarifies that any U.S. worker who is "at least as qualified" (*i.e.*, "equally qualified") as the alien who has exceptional ability in the sciences or the arts would be considered available.

The Department proposes minor conforming changes in proposed subparagraph (b)(3). In addition, the Department proposes a modification to state that, in reaching the determination regarding adverse effect, the CO will consider information about working conditions that are "normal to the occupation and industry," rather than "prevailing…in the occupation." The Department notes that current subparagraph (b)(3) contains the only instance in part 656 where the current rule suggests a "prevailing" standard for assessing a job opportunity or occupation. The proposal to use a "normal" standard for the occupation and industry, here, is consistent with the CO's assessment of the information the employer provides about the job opportunity and related occupation on the *Application for Permanent Employment Certification* and during processing.[125] In addition, using a "normal" standard better aligns with publicly available resources and

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[123] *See* 20 CFR 656.5(b) and 656.15(d).

[124] The Department's proposal extends to employers who intend to file an Immigrant Petition under INA section 203(b)(2) for an alien who has exceptional ability in the sciences or arts and are currently covered by the Department's regulations at 20 CFR 656.24(b)(2)(ii) (*i.e.*, Schedule A, Group II). It does not extend to Immigrant Petitions filed by individual aliens who submit a petition directly to DHS with a request for a waiver of the job offer requirement under INA section 203(b)(2)(B).

[125] *See*, *e.g.*, section 656.19(d) of this proposed rule, and sections 656.17(h)(1) and 656.17(j)(1) of the current rule.

information, which facilitates efficient review of *Applications for Permanent Employment Certification.*

Finally, the Department proposes to reorganize the content of current sections 656.24(c), (d), and (e) to focus final determination issuance procedures in proposed sections 656.24(c) (Approved certification) and 656.24(d) (Denied Certification). Proposed sections 656.24(c) and 656.24(d) reflect changes to conform with electronic filing and communication proposals throughout this rule and OFLC's current practice of electronically sending the certified *Application for Permanent Employment Certification* directly to USCIS upon approval. For employers permitted to file by mail under proposed section 656.10(c), the CO would continue to send certifications by mail and denials by means normally assuring next-day delivery, to ensure full access to reconsideration and administrative review options. In addition, paragraph (d) identifies "Notice of Denial" as the name of the notice issued when the CO denies certification, a proposal to add clarity, as discussed in section 656.26 below.

To add clarity for employers, the Department further proposes to revise the content relocated from current 656.24(e) to proposed section 656.24(d) for Notice of Denial content. Currently, section 656.24(g) provides the option for an employer to request reconsideration by the CO after receiving a denial, but this option is not listed in the denial notice content requirements. To ensure employers who receive a Notice of Denial are apprised of their full set of options after denial, proposed subparagraphs (d)(2) and (d)(4) ensure that the employer is informed that it has three options—it may request reconsideration by the CO under proposed 656.26(a), review by BALCA under proposed 656.26(b), or may not appeal and, instead, file a new *Application for Permanent Employment Certification*. Proposed subparagraph (d)(3) continues to apprise employers that if they wish to request reconsideration or review of the denial, they must do so within 30 calendar days of the denial date; after 30 calendar days have passed, the window to

appeal the denial closes and the denial becomes final. These are not new options, but in the proposed rule they are more clearly stated. Further, the proposed rule would require these options to be explained in the Notice of Denial.

14. Proposed 20 CFR 656.26, Review of denied permanent labor certifications.

Consistent with the Department's general proposal to reorganize part 656 to follow the ordinate flow of processing an *Application for Permanent Employment Certification*, the Department proposes to rename section 656.26's heading to read "Review of denied permanent labor certification" (currently "Board of Alien Labor Certification review of denials of labor certification") and transfer the language currently contained in section 656.24(g), which addresses requests for reconsideration by the CO of an application's denial, under the proposed revised section 656.26(a). With this proposed change, section 656.26 would cover the options available to an employer who receives an application denial—requests for reconsideration by the CO and requests for review by BALCA. In addition, the Department proposes to redesignate current sections 656.26(a) through (c) as proposed sections 656.26(b) through (d) and to revise the existing regulatory language in section 656.26 to codify existing practices and provide clarity to employers, attorneys, agents, and BALCA regarding the reconsideration and appellate processes.

Requests for CO Reconsideration vs. Requests for BALCA Review

Currently, when the CO denies an *Application for Permanent Employment Certification*, the CO must include certain language in the notice to the employer. Current section 656.24(e) requires the CO to "quote the request for review procedures at § 656.26(a) and (b)." The request for review procedures articulates how an employer may request review of the denial by BALCA. In the 2002 NPRM, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*

("2002 NPRM"),[126] the Department noted that the regulations at that time were silent on the possibility of motions for reconsideration by the CO after a final determination and that while, historically, COs "sometimes honored such motions" for reconsideration, they "generally treated them as requests for review and transmitted the matter to the" BALCA.[127] The 2002 NPRM proposed to preserve the ability for employers to submit motions for reconsideration, and the Department then amended the regulations to "specifically provide that while motions for reconsideration before the [CO] may be filed, [the CO] may, in his/her complete discretion, choose to treat the motion as a request for review."[128] Thus, the Department adopted two avenues of review of a final determination in the current rule—either the employer requests review by BALCA, or it requests reconsideration by the CO.[129]

In practice, most employers, after an initial denial, choose to submit a request for reconsideration by the CO rather than submitting a request for review by BALCA. It became the general practice of OFLC to deem requests that did not specifically ask for BALCA review to be requests for reconsideration. After the denial of the request for reconsideration, the CO would automatically transmit the *Application for Permanent Employment Certification* to BALCA for review. This was done regardless of whether the employer requested review by BALCA after the request for reconsideration was denied. Those cases were then docketed at BALCA. This practice continued for many years. As a result, BALCA was inundated with cases—at one point reaching over 3,760 docketed cases in a fiscal year.[130]

There were a number of issues with this process as it evolved. First, many employers did not want their cases to be sent to BALCA for review after their requests

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[126] *See* 67 FR 30466 (May 6, 2002).
[127] *See* 67 FR at 30476.
[128] *See* 67 FR at 30476.
[129] *See* 69 FR 77326 (Dec. 27, 2004).
[130] *See, e.g.,* 2012-PER-03768 (the last 5 digits show the sequential case docketing beginning with 00001 at the start of a fiscal year, then 00002, then 00003, etc.).

for reconsideration were denied. OFLC automatically sending the applications for review by BALCA meant that not only was the case docketing an extra administrative burden to BALCA and to the CO, who created the administrative file for review, but it was also a burden to the employer who then had to wait for the case to be docketed only to then file a motion for it to be dismissed. Second, this waiting period could jeopardize an employer's attempts to file future PERM labor certification applications because, pursuant to current section 656.24(e)(6), an employer may not file a "new application in the same occupation for the same [alien] . . . while a request for review is pending with the [BALCA]." If an employer intended to file a new PERM labor certification application, it would again have to wait for the matter to be docketed, then file a dismissal and wait for the order to be issued.

For example, in *Lindsborg Community Hospital Association*, on April 10, 2012, the CO denied a request for reconsideration and forwarded the case to BALCA.[131] The employer attempted to withdraw the case on May 7, 2012, and the CO—because the case had already been sent to BALCA—sent the letter to BALCA as well.[132] Due to a docketing error of some kind, BALCA had not received the employer's withdrawal request as of September 17, 2012.[133] The employer explained that the pending appeal meant that it could not file a new *Application for Permanent Employment Certification* "and that this may have implications for the timing of the new application and the supporting prevailing wage determination."[134] Had the employer been required to specifically request an appeal in the first instance, this lengthy delay between the denial on reconsideration (Apr. 10, 2012) and eventual dismissal from BALCA (Sept. 19, 2012) would have been eliminated. Also, BALCA noted in a footnote that the employer's

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[131] *See* 2023-PER-03395, slip op. at 1 (Sept. 19, 2012).
[132] *See Id.* at slip op. at 1-2.
[133] *See Id.* at slip op at 1.
[134] *See Id.* at slip op. at 1.

motion for reconsideration had "said nothing about requesting BALCA Review" and that the regulation "does not state that the CO must automatically forward an Appeal File to BALCA if the CO denies reconsideration. Thus, the fact that the matter was treated as an appeal may not have been procedurally correct."[135] The high number of appeals was extremely burdensome to BALCA and the CO—an unnecessary burden, especially in light of the fact that employers were not actively requesting such appeals. In addition, the Department's approach resulted in delays that could cause harm to employers seeking to file for permanent labor certifications.

The delays and administrative burdens on COs and BALCA led to an internal processing change that has been in effect since October 27, 2014.[136] As before, an employer may submit either a request for review by BALCA or a request for reconsideration by the CO, and the CO may still deem the request for BALCA review as a request for reconsideration.[137] Now, after the CO has determined to deny the request for reconsideration, the CO no longer automatically transmits that *Application for Permanent Employment Certification* to BALCA for review. Instead, the CO includes language in the reconsideration decision notice affirming the earlier denial that explains to the employer that the employer has the ability to request review by BALCA and has 30 calendar days from the date of the reconsideration decision notice to do so. This process significantly cut down the administrative burdens for the CO, BALCA, and employers because now only those decisions that employers wish to pursue are sent to BALCA. The table below shows the difference between the years when the CO was automatically sending cases to BALCA for review without employer's request as compared to when

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[135] *See Id. at* 1, n.1.
[136] *See* OFLC Announcements, stating, "As of October 27, 2014, the Atlanta National Processing Center has changed its process and will no longer automatically forward to BALCA all PERM case Requests for Reconsideration where the original case decision was upheld. Rather, a Notice of Decision will be issued when the case is upheld, and the employer must affirmatively request review before BALCA no later than 30 calendar days after the date the Notice of Decision is issued." (Oct. 23, 2014) *available at* https://www.dol.gov/agencies/eta/foreign-labor/news/archive#14.
[137] *See* 20 CFR 656.24(g)(4).

employers had to specifically request BALCA review after the CO denied request for reconsideration. The decrease in the number of cases docketed was significantly lower when employers had to request for BALCA review.

Fiscal Years	Cases CO Automatically Referred to BALCA	Fiscal Years	Cases Employers Requested BALCA Review
2011	2,989	**2014**	1,729
2012	3,766	**2015**	757
2013	3,471	**2016**	852
		2017	326
Total Number of Cases Docketed	10,226		3,664

Source: Office of Administrative Law Judges

It is likely that there are additional reasons for the declining docketed appeals; however, the data show a pattern of significant decrease of cases docketed when the CO no longer automatically sent cases to BALCA after denial on reconsideration. Currently, the CO only sends cases for BALCA review if an employer actively submits the request. The proposed section 656.26 would codify this current practice.

Although this processing change is not contradictory to the regulations in any way, it was not fully captured by the text of the current regulations. Notably, the older process by which the CO would transmit *Applications for Permanent Employment Certification* to BALCA immediately after denying the request for reconsideration was also not fully captured by the plain text of the current regulations. Regardless of which process would ultimately have been the chosen and lasting path by the Department, a change in regulatory text is needed to codify the current practice to provide clarity and transparency regarding this part of the permanent labor certification process.

Also, the fact that the processes are not actually encompassed in the regulations leads to procedural postures that are difficult to navigate. For example, if an employer requested reconsideration and the denial was affirmed, the employer was told that they could request review by BALCA within 30 calendar days; however as noted, there is no regulatory provision granting 30 calendar days to further appeal to BALCA—which itself

is troublesome—but also, if the employer failed to appeal within that 30 calendar day timeframe, there was no regulatory provision to which either the CO or ALJs could cite that would allow for the dismissal or closure of an untimely filing.

With this NPRM, the Department proposes to amend sections 656.26 and 656.27 of the current regulations to codify the current practice that has been in place for over a decade and to articulate the full appellate process and provide transparency and clarity on program requirements and procedures of part 656.

Final Determinations

Currently, the term "Final Determination" is used for the initial denial of the PERM labor certification as well as for the notice sent after reconsideration is denied. This fact leads to, in many cases, having two "Final Determinations," which is confusing to the regulated community. The Department proposes to call the notice after a PERM labor certification is denied the "Notice of Denial," and call the notice issued after a request for reconsideration is denied a NORD. This proposed change in terminology clarifies the meaning of each of the CO's decisions and helps to distinguish which document the CO, an agent/attorney, employer, or even BALCA may be referring.

Section 656.26(a), Request for Reconsideration by the CO

In addition to proposing to relocate current section 656.24(g) to the proposed new section 656.26(a), the Department is seeking to change the reconsideration language in the provision at section 656.26(a). Most significantly, the Department proposes to include a subparagraph (5) in the proposed new section 656.26(a). Proposed subparagraph (a)(5) would explain that if reconsideration is requested, the CO will reconsider the application's denial, and then if the CO determines that the request for reconsideration should be denied, the CO will issue a NORD informing the employer of the determination. Proposed subparagraphs (a)(5)(i) through (vi) outline required NORD content. The proposed language states the notice will: state the reasons for the denial;

quote the procedures for review by BALCA; advise that an employer has 30 calendar days from the date of the reconsideration determination to request review or the denial will become the final determination of the Secretary and the employer will have failed to exhaust administrative remedies; and advise that an employer may file a new application after the reconsideration is denied if a request for review is not filed with the Board, but otherwise a new application in the same occupation for the same alien cannot be pending while a request for review is pending with BALCA. The intent of this proposed subsection is to clarify, via both the regulatory text and the Notice of Reconsideration Denial, that an employer may, after the reconsideration is denied, make a formal appeal to BALCA within 30 calendar days, and to articulate the consequences for not doing so. As stated above, this proposed rule codifies this current practice and provides transparency and clarity in part 656.

The Department also proposes edits to the existing reconsideration regulatory language that would be relocated and contained in the new proposed section 656.26's paragraphs (a)(1) through (4). The new proposed paragraph (a)(1) states clearly that the employer may request reconsideration by the CO after the Notice of Denial is issued. The Department proposes to remove "For applications submitted after July 16, 2007" that would be included in proposed paragraph (a)(2), as the phrase is no longer necessary. Proposed paragraph (a)(4) asserts that an employer "must clearly state" with its request whether it is seeking review by BALCA or is making a request for reconsideration by the CO, and, if it does not do so, the CO will construe the request as a request for reconsideration by the CO.

In proposed paragraph (a)(4) the Department is proposing to remove the discretion for the CO to determine whether to treat the request as a reconsideration request or not and makes it very clear to employers that if they themselves are not clear as to their desired review process their request will be construed, by default, as requests

for reconsideration. The Department believes its proposal to construe unclear requests as requests for reconsideration by the CO is largely more beneficial to the employer. Under this approach, the CO can review additional information submitted with the request for reconsideration (assuming it meets the documentary requirement of section 656.26's paragraphs (a)(2)(i) and (ii)). A case sent straight to BALCA—a procedure that does not allow for the introduction of new evidence on appeal—must be persuasive using a more limited pool of information. In fact, BALCA has objected to the CO's decision in previous cases to send to BALCA "requests" that were not entirely clear, or consistent internally, as to what was being requested—reconsideration and/or review—precisely because doing so precluded the introduction of new evidence.[138]

Finally, an employer may also receive a faster answer if the CO is given the opportunity to review a denial on reconsideration rather than sending the denial to BALCA and waiting for a decision and, potentially, an order remanding the case. Should an employer wish to move straight to BALCA review, it must clearly state as such.

Section 656.26(b), Request for Review by BALCA

In light of the proposed explicit incorporation of the "request for reconsideration" into the regulations, corresponding edits would also be needed to section 656.26, including redesignating existing paragraph (a) to (b), (b) to (c), and (c) to (d) following the addition of the reconsideration provision at paragraph (a). In redesignated paragraph (b)(1), the Department proposes new regulatory text to explain that a request for review by BALCA may be filed if a request for reconsideration is denied. The Department

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[138] *See, e.g., Denzil Gunnels,* 2010-PER-00627, slip op. at 10 (Nov. 16, 2010) (holding "that the CO will be found to have abused his or her discretion when treating what is substantively a request for reconsideration as a request for BALCA review where doing so would have the unsolicited effect of precluding the employer from developing the necessary factual record upon which the denial of certification is properly based under the amended regulations"); *see also Mary Scott Russell*, 2010-PER-00550, slip op at 4 (Aug. 31, 2011) ("Because the Employer's first opportunity to submit evidence documenting its intent to sponsor the Alien occurred when it requested reconsideration, we find that pursuant to our holdings in *Denzil Gunnels* and *CVS Rx Services* [2010-PER-1108 and 1275 (Nov. 16, 2010)], the CO abused his discretion by forwarding this matter to BALCA.").

proposes including cross citations to other parts of the regulations for clarity and symmetry. As such, this section now proposes that BALCA may review a PERM labor certification denial pursuant to proposed section 656.24(d), a request for reconsideration denial under proposed new section 656.26(a), as well as a PERM labor certification revocation, or debarment under section 656.32 or section 656.31(f).

The Department proposes edits to the language that would be contained in redesignated paragraph (b)(2) to incorporate the provision for "denial on reconsideration" and again provide a 30-calendar-day timeline to employers for filing appeals to BALCA for denials on reconsideration and the way they should do so. Paragraph (b)(2)(iv) still refers to a "final determination," but this reference is not a defined term and instead refers to the last or final determination of the reviewing official before the appeal.

The Department is also proposing non-substantive edits to subparagraph (b)(4) to clarify that with respect to the review of a PERM labor certification denial or a denial of a reconsideration motion, only items that were before the CO when the CO made the decision may be considered, even if other documents are in the physical appeal file sent to BALCA. Because the CO will include the appeal request in the administrative file transmitted to BALCA, the file will contain paperwork submitted on appeal. However, pursuant to the regulations, BALCA is not permitted to consider this additional submitted evidence.

The Department also proposes amending the regulations at (c)(2) and (3) to remove the physical address of BALCA from the regulatory text primarily because that physical address is no longer accurate—but also because as the Department streamlines and modernizes its processes, it is best to leave out specific physical addresses from regulatory texts as those might change from time to time and the Department is able to provide easier and faster updates to the public about the physical addresses or locations, as well as general information regarding its offices, services and procedures,

electronically, via its website or when requested by the methods it specifies for requesting information. Corresponding edits were also made to (d)(2) and (3) removing the physical address from the text. Finally, it should be noted that electronic submission to BALCA, as well as to the Associate Solicitor for Employment and Training Legal Services is highly encouraged.

15. Proposed 20 CFR 656.27 Consideration by and decisions of BALCA.

The Department proposes to revise existing section 656.27 by adding new provisions, repurposing and redesignating paragraphs, and changing regulatory language for clarity and conformity with other proposed revisions introduced through this proposed rule. The Department proposes to repurpose section 656.27(c) to add a new standard of review provision. This proposal would result in the redesignation of current paragraphs (c), (d), and (e) as proposed paragraphs (d), (e), and (f). Similarly, the Department proposes adding a new provision to provide BALCA with the authority to remand cases to the CO when the merits of the *Application for Permanent Employment Certification* have not yet been fully assessed, resulting in the redesignation of current paragraph (c)(3) as proposed paragraph (d)(4). Also, in proposed section 656.27(d) (current section 656.27(c)), the Department proposes to add review of denials on reconsideration to the list of adverse decisions BALCA may review and to clarify that such review will be limited to an on-the-record review. In proposed paragraphs (e) and (f) (current paragraphs (d) and (e)), the Department proposes to codify its existing practice of including the employer's attorney or agent, if applicable, in communication during appeal. Throughout proposed section 656.27, the Department also proposes minor conforming changes for consistency throughout the proposed rule. In addition, the Department is proposing to remove language from current section 656.27(e)(1) that requires "good cause" to be shown for hearing rescheduling requests. This proposed change is intended to provide

BALCA with more control and flexibility in hearing scheduling and requests for rescheduling.

Standard of Review

In proposed paragraph (c), the Department seeks to incorporate the arbitrary and capricious standard of review into requests for review of denials of PERM labor certifications under proposed section 656.24(d), denials of requests for reconsideration under proposed section 656.26(a), or affirmations of PWDs under section 656.41. As the regulation is currently silent on the standard of review, this proposed change clarifies and ensures BALCA is conducting review under part 656 in a consistent manner. Other employment-based visa programs administered by OFLC require use of the arbitrary and capricious standard of review on appeal to BALCA.[139] This change further aligns the PERM program with the other employment-based visa programs administered by OFLC.

Presently, BALCA explains that it uses a form of de novo review, "limited in scope by 20 CFR 656.27(c)" or in other words, as limited by the record.[140] However, BALCA has also said that "[t]he Board will not decide an appeal on grounds for denial not raised while the case was before the CO."[141] It also stated that "our review of the preliminary decisions entrusted by regulation to the discretion of the CO is typically more limited, and we examine those decisions with an eye toward whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[142]

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[139] *See* 20 CFR 655.171(d)(3) (H-2A program requires that "[t]he ALJ must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."); 20 CFR 655.462(d)(2) (CW-1 program requires that "[t]he ALJ must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.").

[140] *See PA Employment Services, Inc.,* 2012-PER-00093, slip op. at 2 (Jan. 27, 2015) (citation omitted). It has done so for many years. *Albert Einstein Medical Center*, 2009-PER-00379, slip op at 14 (Nov. 21, 2011) (en banc) ("BALCA engages in de novo review of the record upon which the CO denied permanent alien labor certification.").

[141] *See PA Employment Services, Inc.*, 2012-PER-00093 at 2 (citations omitted).

[142] *See Fresh Cleaners at Elk Grove, Inc.*, 2014-PER-00604, slip op at 3, n.5 (Jan. 23, 2019) (citation omitted).

The fact that BALCA seems to have combined different scopes of review—arbitrary and capricious for "preliminary decisions," yet it conducts a modified "de novo" review that does not consider issues not already before the CO—demonstrates why clearly articulating one consistent standard of review in the regulations will help provide clarity to the regulated community, attorneys/agents and judges themselves. The Department proposes to adopt the standard of review "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law" to make it consistent with the other employment-based visa programs. The Department does not believe that this will result in significant changes in adjudication because BALCA is limited in their review to the administrative record pursuant to current section 656.27(c) (proposed section 656.27(d)), and BALCA already does not decide an appeal based on new denial grounds or on new arguments not made before the CO.[143]

The Department proposes minor edits to section 656.27 paragraph (d) to account for the addition of review of denials on reconsideration by the CO as well as to note that on-the-record review is conducted on the basis of the record upon which the "CO's final determination" was made. Here "final determination" refers to the last determination by the reviewing official before it moves to BALCA—for example, the denial of the PERM labor certification, the denial of the reconsideration request, or the affirmation on the PWD.

Section 656.27(d)(2) – (3) Directing Certification and Remands

In the 2004 PERM Final Rule, the Department eliminated the possibility of remands from BALCA to the CO in the PERM program.[144] At that time, the Department believed that the cases that would have made it to BALCA would have been sufficiently

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[143] *See Albert Einstein Medical Center*, 2009-PER-00379, slip op. at 14; *PA Employment Services, Inc.*, 2012-PER-00093 at 2 (the Board "will not consider wholly new arguments not made before the CO") (citations omitted)).

[144] *See* 69 FR at 77363.

developed such that remand would be unnecessary.[145] Furthermore, the Department, at the time, explained that the processing model for applications requesting PERM labor certification did "not contemplate the type of interchange between the employer and the [CO]" and "it is not apparent what the [CO] would do if a case were 'remanded."[146]

Through years of actual administrative practice, however, the Department has discovered that there have been cases—though not frequent—with a record sufficient enough to determine that the CO was arbitrary and capricious in the denial, but still not enough to determine that certification is warranted. The purpose of the PERM labor certification program is to allow the Secretary to determine and certify that "there are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; . . . and the employment of the alien will not adversely affect the wage and working conditions of United States workers similarly employed."[147] For certification to be issued in circumstances where the CO has not yet fully evaluated the merits of the case would violate the regulations and statute.[148]

A remand, rather than an order directing certification, in a situation where the CO has not fully reviewed an *Application for Permanent Employment Certification* and all supporting documentation would allow the CO to examine the merits of the application and to determine whether the application truly establishes that there are not sufficient U.S. workers able, willing, qualified and available for the position, and also that the alien's employment will not adversely affect the wages and working conditions of U.S. workers similarly employed.[149] BALCA has recognized this principle before and has actually remanded cases for further processing, even though remands are not currently

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[145] *See* 67 FR at 30477.
[146] *See* 69 FR at 77363.
[147] *See* 20 CFR 656.1.
[148] See 8 U.S.C. § 1182(a)(5); 20 CFR 656.1.
[149] *See* 8 U.S.C. § 1182(5); 20 CFR 656.1.

provided for in the regulations. BALCA has stated, "[w]hile the Board generally eschews remands to allow further processing of an application, such remands are appropriate where an application was denied on preliminary grounds, and the merits of the application have not been addressed."[150]

The Department agrees with BALCA and believes that remand may be the most appropriate way forward in certain cases; and therefore, is proposing to add a new provision, subparagraph (d)(3), to codify remands from BALCA for clarity and transparency purposes. The intent is for remands to be used sparingly and only in situations where, based on the facts and posture of the case, as well as the underlying reasons for denial, the CO had been unable to evaluate the underlying merits of the decision. If a case is sufficiently developed, then affirmance of the denial or reversal of the denial and an order directing certification would be appropriate. However, for example, if an employer failed to respond to an audit and did not submit appropriate documentation, a remand to allow for resubmission and further analysis for the CO would be inappropriate. In contrast, if the CO has listed all the legal reasons for denial after a thorough evaluation, but BALCA determines that the CO was arbitrary and capricious in their denial, certification rather than remand may be more appropriate as the CO already evaluated the merits of the application.

In addition, remand is an essential component of the Department's proposal in this NPRM regarding section 656.6 to better hold program violators accountable for their misconduct by preventing successors in interest to debarred persons or entities from participating in the program during the debarment period, without unnecessarily disrupting processing for proper filings. As discussed in proposed section 656.6, once the CO discovers an *Application for Permanent Employment Certification* has been filed by a successor in interest to a debarred person or entity, the CO would deny the application

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[150] *See Lenora Systems, Inc.,* 2018-PER-00059, slip op. at 2 (Jan. 31, 2022) (citations omitted).

solely on that basis and without review. The Notice of Denial would offer the person or entity the option to appeal the CO's determination of their successor in interest status under section 656.26. However, as the CO would not have reviewed the merits of the *Application for Permanent Employment Certification* or reached any determination apart from successor in interest status, if BALCA overturns the CO's determination regarding the successor in interest status, remand would be the appropriate procedural order to allow the application to move forward.

To that end, the Department is proposing to allow for remands in subparagraph (d)(3), and to correspondingly revise proposed subparagraph (d)(2) to make clear that a grant of certification may only be directed when the CO had the opportunity to review the merits of the application.

16. Proposed 20 CFR 656.30, Validity of labor certifications.

The Department proposes revisions to current section 656.30 to further its reorganizational efforts of part 656, to remove language outside the Department's jurisdiction, and to clarify requirements concerning the granting of PERM labor certifications. Specifically, the Department proposes to eliminate the content of current paragraph (a)—"priority date" is a DHS, not DOL, topic—and, then, redesignate current paragraphs (b) and (c) as proposed paragraphs (a) and (b), with revisions discussed below. In addition, the Department proposes relocating current paragraph (d), regarding the standards for invalidating PERM labor certifications by DHS or DOS, to 656.32(c), with revisions discussed in the preamble for that section. Relocating current paragraph (d) and redesignating existing paragraph (c) as (b) in Section 656.30 would subsequently result in the removal of paragraphs (c) and (d) from Section 656.30.

In addition, the Department proposes to eliminate outdated language—including current section 656.30(e) in its entirety—to simplify the regulatory provision. This proposed change would result in the deletion of paragraph (e), which provides a no-

longer-necessary process for requesting a duplicate paper permanent labor certification, as discussed below.

Finally, the Department proposes to change the title of proposed section 656.30 from "Validity of and invalidation of labor certifications" to "Validity of labor certifications," consistent with the proposed content changes.

The current regulation at section 656.30(a) addresses filing dates in the context of how priority dates are established for Immigrant Petition purposes. However, the authority to designate priority dates for Immigrant Petitions resides with DHS, as USCIS is the agency that processes Immigrant Petitions, not DOL.[151] Although priority dates may be based on *Application for Permanent Employment Certification* filing dates, they are a concept outside the Department's statutory authority and bear no impact on the administration of the PERM program. DHS has long codified how priority dates are assigned in its regulations.[152] As part of its deregulatory initiatives, the Department is proposing to eliminate from its regulations language that is duplicative or outside its statutory or regulatory authorities. Removing language about priority dates from the Department's regulations will streamline PERM labor certification program regulations and ensure the scope of each department's authority remains focused on each agency's role, as determined by statute.[153] The Department proposes to retain content from current paragraph (a) about the *Application for Permanent Employment Certification* filing date, and seeks to relocate that content to proposed section 656.10(f), with clarifying revisions.

After relocating current paragraph (a) of section 656.30, the Department proposes to redesignate current paragraph (b) as proposed paragraph (a), with revisions. In turn, the proposed new paragraph (a) would continue to include the current 180-calendar day validity period for a PERM labor certification. Consistent with the current rule, this

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[151] *See* INA section 203(b); 8 U.S.C. 1153(b) (Nov. 29, 1990).
[152] *See* 8 CFR 204.5(d).
[153] *See* INA section 212(a)(5)(A); 8 U.S.C. 1182(a)(5)(A).

NPRM would require the employer to submit a PERM labor certification to USCIS with its Immigrant Petition (*i.e.*, Form I-140 petition) for the alien within 180 calendar days of the date the CO approves the *Application for Permanent Employment Certification*. If the employer does not submit an Immigrant Petition to USCIS using the approved *Application for Permanent Employment Certification* for the alien within 180 calendar days of approval, the PERM labor certification, as it is the case under the current rule, expires and cannot be used. However, the Department has become aware of the practice of PERM labor certifications being reused to subsequent Form I-140 petitions filed with USCIS for the same alien in violation of this prescribed validity period of 180 days, based on a mistaken interpretation of the provision. Therefore, the Department proposes a revision to the current regulatory language to explicitly prevent reuse of a PERM labor certification once it is used in support of the first or initial Form I-140 petition filing for the alien.

Specifically, some employers have been using their PERM labor certifications more than once, including filing after the 180-calendar day validity period has expired. For example, after receiving an Immigrant Petition denial from USCIS and unsuccessfully pursuing an appeal, some employers have filed, and USCIS has accepted, a subsequent Immigrant Petition using the same approved PERM labor certification. These employers assert to USCIS that current section 656.30(b) allows the approved PERM labor certification to remain valid indefinitely, so long as the employer first used it during the 180-calendar day validity period to file an Immigrant Petition with USCIS. Under this interpretation, a PERM labor certification could be several years out-of-date by the time an employer attempts to use it in support of a subsequent Immigrant Petition, which undermines the original PWD and labor market test.

The Department strongly disagrees with this interpretation of its PERM labor certification validity rule. The Department did not intend to permit use of the same

PERM labor certification more than 180 calendar days after approval or in connection with subsequent Form I-140 petition filings for the alien. The Department asserts that the statutorily required determinations underlying a PERM labor certification are based on an assessment of the labor market for a certain job opportunity at a certain point in time and a new, updated assessment is necessary for each subsequent Immigrant Petition. The ability to use a PERM labor certification in perpetuity, so long as it was timely filed with a first Immigrant Petition is a fundamentally inconsistent interpretation of the Secretary's determinations, and contradicts statutory intent, and must be clarified to ensure the integrity of the PERM labor certification process. In addition, issuing this clarification and closing this perceived loophole will significantly reduce the continued costs of adjudicating and litigating subsequent filings with USCIS. Although the Department anticipates that this clarifying change would likely result in a marginal increase in filings in its PERM labor certification program, the Department has determined that this cost is necessary to serve its statutory duty and preserve, above all, the integrity of the program.

Accordingly, the Department proposes to resolve this misinterpretation by revising the language that under the proposed reorganization of section 656.30 would be included in proposed new paragraph (a) to explicitly limit the validity of a PERM labor certification to the "initial Immigrant Petition." With this proposed revision, the Department clarifies that a PERM labor certification may be used in connection with one Immigrant Petition, which must be submitted to USCIS within 180 days of the *Application for Permanent Employment Certification*'s approval. If USCIS adjudicates the initial Immigrant Petition and denies it—and after any appeals with USCIS have been exhausted and other due process rights afforded—the PERM labor certification is no longer valid for use when filing a new Immigrant Petition.

As explained in the beginning of this section, the Department also proposes redesignating this section 656.30's current paragraph (c) as paragraph (b). In addition to

redesignating paragraph (c) as new paragraph (b), the Department proposes revising the regulatory language to clarify the scope of a PERM labor certification's validity that already exists, in large part, on the Office of Management and Budget (OMB)-approved form– *Final Determination: Permanent Employment Certification Approval*, and to conform with other proposals in this proposed rule. First, the Department proposes to remove language that has become outdated and language discussing Schedule A and sheepherder *Applications for Permanent Employment Certification*, which this NPRM proposes to eliminate. Second, the Department is proposing revised language to clarify that a PERM labor certification is valid only for the employer to whom the CO issued the approval, or its successors in interest. Proposed section 656.30(b) further clarifies that a PERM labor certification is only valid for the job opportunity, the alien, the place(s) of intended employment, and the employer named on the approved *Application for Permanent Employment Certification*, while recognizing that the employer may change its corporate form and should not lose access to the PERM labor certification due to a legitimate business transaction related to a change to its corporate structure.

Finally, the Department is proposing to eliminate current section 656.30(e), which outlines an outdated process for requesting duplicate PERM labor certifications from the OFLC CO. Through past information technology initiatives, the Department has eliminated the issuance of PERM labor certifications in paper form; now that PERM labor certifications are issued electronically through the OFLC FLAG system, employers, aliens, and their authorized attorneys or agents, as applicable, no longer need to request duplicate PERM labor certifications to submit to USCIS or DOS. Through a combination of existing data sharing agreements with USCIS and DOS and direct customer access to their authorized FLAG system accounts, OFLC makes all approved PERM labor certifications, as well as information related to any application, available real-time to USCIS and DOS. Once this change is implemented, the government agencies that

collaborate with OFLC to administer the temporary and permanent labor certification programs will continue to have access to OFLC's FLAG system to obtain PERM labor certification records and verify data and information related to *Applications for Permanent Employment Certification*. Therefore, there is no longer a need to issue duplicate approved PERM labor certifications, when this process occurs electronically. Eliminating these paper government records serves to safeguard government resources, reduce burden on employers, and reduce costs to the public, the filing community, and the federal agencies processing these cases. This proposal also seeks to strengthen integrity measures by minimizing the number of original PERM labor certifications that are issued in paper-format. By eliminating this provision, the Department is not prohibiting the issuance of paper-based PERM labor certification records or duplicates to USCIS or other federal agencies, if and when necessary, but no longer needs to issue them directly to employers, aliens, or their authorized attorneys or agents, as applicable.

17. Proposed 20 CFR 656.31, Applications involving fraud, willful misrepresentation, or violations of this part.

The Department is proposing to revise current section 656.31 to make non-substantive, clarifying changes that conform to other changes the Department is proposing in this NPRM to bring consistency regarding the terms widely used across part 656 regulations. In addition, the Department proposes to strengthen program integrity by expanding the scope under which debarment of the employer, attorney, or agent, or any combination thereof, will be applied.

First, the Department is proposing to shorten the section heading by deleting the term "Labor Certifications" and just simply having the heading read "Applications involving fraud, willful misrepresentation, or violations of this part." This is a conforming, non-substantive change that would align with other changes the Department is making to ensure uniform use of terms throughout part 656 regulations.

The Department is further proposing clarifying changes throughout section 656.31 to uniformly indicate that the provisions of this section apply to "any," meaning any single, *Application for Permanent Employment Certification.* This change would clarify previous instances where singular and plural references were used interchangeably. The Department is also proposing some clarifying changes such as the elimination of the term "National Processing Center" and shortening agency titles by including acronyms instead (*e.g.*, DHS, DOL, EEOC). The Department asserts that these changes will provide consistency and clarity across part 656 regulations, as more up-to-date and easier to identify terms will be used. In addition, references to other provisions that are relevant to the scope of this section would now be included, which could be beneficial in navigating part 656 regulations.

The Department is also seeking to codify OFLC's current practice regarding notification by proposing to update current sections 656.31(b)(1) and 656.31(c) to add language that would specify that a copy of any notice to suspend processing of applications for possible fraud or willful misrepresentation reasons, involving the employer who filed the *Application for Permanent Employment Certification*, would also be provided to the employer's agent or attorney, if appropriate. This proposed change would codify a practice that has allowed OFLC through the years to provide simultaneous notifications of this nature to not only employers, but also their agents and attorneys, when appropriate, for expediency, transparency and accountability purposes.

The Department is further codifying another existing OFLC practice as it proposes to revise section 656.31(d) to specify that it will resume processing of *Application(s) for Permanent Employment Certification* if the employer or their representative is acquitted of fraud or willful misrepresentation charges, or if criminal charges are withdrawn or otherwise did not result in a finding of fraud or willful misrepresentation. The existing regulatory language states that "the Certifying Officer

shall decide each pending PERM labor certification application related to that employer, attorney, or agent on the merits of the application." Specifically, the proposed change would make it clear that the CO will resume processing the application at the stage where the suspension began, before reaching a determination on the merits of the application. The proposed change to section 656.31(d) reflects the Department's current processing procedures for handling cases involving potential fraud or willful misrepresentation in the PERM labor certification process.

In addition, the Department is proposing changes to section 656.31(f) to strengthen debarment. The Department proposes to expand the list of bases for debarment in current section 656.31(f)(1) to include two new proposed grounds for debarment. Proposed section 656.31(f)(1)(vii) would add a pattern or practice, by an attorney or agent, of preparing or submitting *Applications for Permanent Employment Certification* on behalf of unrelated employers that "contain materially the same job duties, requirements, or recruitment procedures where the CO has determined that those requirements were not the employers' actual minimum requirements or that the recruitment was not conducted in good faith" as a basis for debarment, while proposed section 656.31(f)(1)(viii) would establish "failure to pay the alien or a U.S. worker hired for the job opportunity the offered wage stated in the certified *Application for Permanent Employment Certification*" as a basis for debarment. The Department also proposes to add a new section 656.31(f)(3) that would more clearly establish the OFLC Administrator's independent authority to a finding of fraud or material misrepresentation and that such a finding does not preclude a related referral under proposed section 656.31(b).

Finally, the Department is proposing under section 656.31(f) that an employer, agent, or attorney, or any combination thereof, who is debarred by OFLC from the permanent labor certification program will also be debarred from all other foreign labor

certification and labor condition application programs administered by the Department for the time period in the Notice of Debarment issued under section 656.31(f)(2), consistent with H-2B program regulations.[154] As the Department has noted in prior rulemaking in temporary labor certification programs, many employers, agents and attorneys participate in more than one foreign labor certification or labor condition application program administered by the Department.[155] However, under the current regulation, an employer, attorney, or agent that is debarred under the permanent labor certification program may continue to file applications and receive certifications or approvals under the Department's other foreign labor programs. By empowering OFLC to reject applications filed by, or on behalf of, a debarred employer, attorney, or agent, to refuse to issue certifications under the permanent labor certification program during the term of debarment, and to prevent filings or approvals during the debarment period in any of the Department's foreign labor certification or labor condition application programs, the Department would not only foster regulatory uniformity but would also enhance employer accountability and strengthen program integrity.

The Department invites comments about whether parties other than "employer, attorney, or agent" should be named in proposed sections 656.31(b) and (c). For example, an employer representative or point of contact may engage in fraud, willful

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[154] *See* 20 CFR 655.73(i).

[155] The Department has repeatedly recognized its inherent suspension and debarment authority in the foreign labor certification context. As the Second Circuit found in *Janik Paving & Construction, Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987), the Department possesses an inherent authority to refuse to provide a benefit or lift a restriction for an employer that has acted contrary to the welfare of U.S. workers. In assessing the Department's authority to debar violators, the court found that "[t]he Secretary may . . . make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions . . . as he may find necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Government business." *Id.* at 89 n.6. In that case, the implied authority to debar existed even though the statute in question "specifically provided civil and criminal sanctions for violations of overtime work requirements but failed to mention debarment." *Id.* at 89. The court held that debarment may be necessary to "effective enforcement of a statute." *Id.* at 91; *see also Temporary Non-Agricultural Employment of H-2B Aliens in the United States,* 80 FR 24083 (Apr. 29, 2015) (discussing debarment under 20 CFR 655.73(i)), and *Labor Certification Process for Temporary Employment in the Commonwealth of the Northen Mariana Islands (CW-1 Workers),* 84 FR 12412-12414 (Apr. 1, 2019) (discussing debarment under 20 CFR 655.473(b)).

misrepresentation, or violations while acting on the employer's behalf, but without the employer's knowledge. Thus, the Department seeks public input on whether "employer representative," "employer point of contact," or other parties be identified in sections 656.13(b) and (c) to ensure maximum integrity of the program from visa fraud or abuse.

The Department also is interested in receiving comments on additional reforms to the PERM debarment process including making the PERM debarment operative during the pendency of the administrative review process. The Department is also requesting comments on whether the maximum debarment period under 20 CFR 656.31(f) should be increased from 3 years to, for example, 5 years consistent with the debarment parameter at 20 CFR 655.73 for the H-2B program, or longer, such as to 10 years.

18. Proposed 20 CFR 656.32, Revocation and invalidation of permanent labor certifications.

The Department is proposing various changes to section 656.32. One of the changes to proposed to section 656.32 involves adding a new paragraph (c) to contain content about "invalidation" that the Department proposes to relocate from current 656.30(d). This proposed change would also result in revision of the title of proposed section 656.32.

In proposed section 656.32(a), the Department is proposing to replace the phrase "Certifying Officer, in consultation with the Chief, Division of Foreign Labor Certification" with "OFLC Administrator" to establish the OFLC Administrator's role as adjudicator in revocation matters, while also updating terminology. In addition, the Department proposes to remove a sentence acknowledging DHS and DOS's authority to invalidate an approved PERM labor certification, as invalidation would now be addressed under the new paragraph (c) of this section and "revocation" and "invalidation" are

different program integrity measures, performed by different agencies (i.e., DOL vs DHS or DOS), based on each agency's own authority, as further discussed below.

Similarly, the Department proposes changes to section 656.32(b) to identify the OFLC Administrator as the adjudicator in revocation matters. In addition, the Department proposes to codify its current practice in section 656.32(b)(1) by stating that when the OFLC Administrator issues a *Notice of Intent to Revoke* (NOIR) in connection with an approved *Application for Permanent Employment Certification*, it will be sent to the employer and a copy, if appropriate, to the employer's agent or attorney. As a matter of longstanding practice, OFLC provides a copy of any notice during revocation proceedings to the employers' agents or attorneys, if applicable; codifying this practice merely captures a process that has been well established.

Although the Department is not modifying section 656.32(b)(2), the Department is reiterating that if the employer or its representative does not submit rebuttal evidence within the 30-calendar-day period provided in the NOIR, the NOIR becomes the final decision of the Secretary. As a result, the Department would not issue a subsequent declaration or letter notifying the employer, if applicable, its attorney or agent, that the PERM labor certification has been, in fact, revoked; rather, the NOIR serves that purpose.

After relocating the content of current section 656.30(d) to proposed section 656.32(c), the Department proposes revisions for clarity and to simplify the regulation. The Department proposes revisions to remove a sentence about "revocation" from proposed paragraph (c). As noted above, "revocation" and "invalidation" are different program integrity measures performed by different agencies (i.e., DOL vs DHS or DOS). DOL continues to have authority to revoke a PERM labor certification issued under part 656, if the certification was not justified, following the procedures outlined in proposed 656.32(b). DHS and DOS continue to have authority to invalidate a PERM labor

certification, exercising their own authority to make "a determination[ ] in accordance with those agencies' procedures or by a court" of fraud or willful misrepresentation of a material fact involving the PERM labor certification application, as acknowledged in proposed section 656.32(c). As continued in proposed section 656.32(c), the Department's only role related to "invalidation" is to send written notice to DHS or DOS—and, as appropriate, a copy to the regional or national office of the DOL-OIG—if evidence of fraud or willful misrepresentation becomes known to the OFLC Administrator.

In proposed section 656.32, the Department is also proposing conforming changes to ensure uniform use of terms and language throughout part 656 regulations and to identify the OFLC Administrator as responsible for revocation and for sending notice to DHS or DOS, in the event of fraud or willful misrepresentation becoming known to the OFLC Administrator.

E. Discussion of Proposed Revisions to 20 CFR Part 656, Subpart D

The Department is proposing to amend subpart D by revising section 656.40; however, section 656.41 would remain unchanged.

1. Proposed 20 CFR 656.40, Determination of prevailing wage for labor certification purposes.

Employers who intend to file an *Application for Permanent Employment Certification* must obtain a PWD, as defined in proposed section 656.3, before filing that application, and before beginning to engage in pre-filing recruitment, unless the employer's application is subject to supervised recruitment under section 656.21. Current section 656.40 provides the standards and procedures for the PWD an employer must obtain from the Department before filing an *Application for Permanent Employment Certification*. However, at the time the current rule went into effect, PWDs were

processed at State Workforce Agencies.[156] On January 1, 2010, PWD processing shifted to OFLC.[157] OFLC established internal procedures for processing *Applications for Prevailing Wage Determination* under section 656.40 and has updated its internal procedures in the years since, as appropriate, to support processing efficiency, allow for submission and consideration of additional information during processing, and adapt to an electronic processing environment. The Department has kept stakeholders apprised of these internal procedures through public guidance, including in Frequently Asked Questions posted on the Department's website.[158] The Department is taking this opportunity to codify its existing procedures to increase transparency and to ensure stakeholders are fully aware of these procedures and the requirements with which employers must comply to obtain the required PWD.[159] The Department also proposes to revise current section 656.40, consistent with its modernization and streamlining goals and to further improve efficiency in PWD processing.

Filing an Application for Prevailing Wage Determination

The Department proposes to eliminate the content of current section 656.40(a) and add new content in proposed section 656.40(a), using a framework similar to proposed section 656.10 ("Application filing requirements"). In proposed section 656.40(a)(1), the Department proposes to add specific details on what to file to request a PWD. Similarly, the Department proposes adding the location and method of filing in proposed section 656.40(a)(2).

Consistent with current practice, proposed paragraph (a)(1)(i) would require that an employer submit a completed *Application for Prevailing Wage Determination*, including its appendix and supporting documentation, if applicable, to the NPC. Proposed

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[156] *See* 74 FR 63795, 63796 (Dec. 4, 2010).
[157] *See* 74 FR 63795, 63796 (Dec. 4, 2010).
[158] *See* Frequently Asked Questions (FAQs), National Prevailing Wage and Helpdesk Center (Mar. 2010), *available at* https://www.dol.gov/agencies/eta/foreign-labor/faqs/print (last visited Mar. 6, 2026).
[159] *See* FAQs, DOL, https://www.dol.gov/agencies/eta/foreign-labor/faqs/print (last visited Mar. 6, 2026).

section 656.40(a)(1)(ii) codifies the current practice in which employers provide their legal name, trade name(s), valid FEIN, and valid business address with a physical location in the United States as part of their *Application for Prevailing Wage Determination.* Codifying these practices would provide additional clarification to employers about what information they must provide when submitting an *Application for Prevailing Wage Determination* to the NPC.

Proposed paragraphs (a)(1)(iii) to (v) address additional documentation requirements in the event an employer seeks a PWD based on a wage source other than the Occupational Employment and Wage Statistics (OEWS) program.[160] The proposed rule continues to require employers to request a PWD based on a collective bargaining agreement (CBA) or professional sports league rules or regulations, when the job opportunity is subject to those wage sources. In the event the job opportunity is not subject to a CBA or professional sports league rules or regulations, the proposed rule continues to permit the employer to use Service Contract Act or Davis Bacon Act as the wage source, when applicable, or to request consideration of an employer-provided survey as an alternative to a PWD determined using the BLS OEWS program. Although the current rule does not state that documentation of the requested wage source must be submitted with the *Application for Prevailing Wage Determination*, the electronic filing system currently will not permit submission of an *Application for Prevailing Wage Determination* without additional documentation uploaded, if a source other than OEWS is requested. The Department proposes to codify its existing practice of requiring employers to provide documentation of their selected wage source, if applicable, for the CO's review concurrent with their filing of the *Application for Prevailing Wage Determination*. This practice supports efficient processing by reducing unnecessary requests for documentation necessary to issue a PWD.

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[160] See generally BLS, Occupational Employment and Wage Statistics,https://www.bls.gov/oes/.

The current rule also does not specify what documentation is necessary to enable the CO to assess whether the employer's suggested wage source may be used to establish the prevailing wage, which the Department proposes to add in proposed subparagraphs (a)(1)(iii) to (v), based on current practice. This proposal to codify what documents to submit for the CO's review will increase transparency and better inform employers how to request an alternative wage source, if appropriate. In addition, it will avoid unnecessary requests for documentation, which slow processing.

For example, proposed subparagraphs (a)(1)(iii)(A) through (C), clarify that to request CO consideration of a CBA, employers must provide a: (1) copy of the relevant sections of the CBA, which must include the validity dates of the agreement; the position(s) and description of the job(s) covered; the wage section, including tables and explanations; and the signature page with effective dates of the agreement; (2) letter on letterhead from the employer or employer's representative that states the relevant portions of the agreement with effective dates; the title of the position in the agreement appropriate to the job duties, requirements, and location; and wage value appropriate to the job duties, requirements, and location; and (3) letter on letterhead from the CBA authorized representative that states the relevant portions of the agreement with effective dates; the title of the position in the agreement appropriate to the job duties, requirements, and location; and wage value appropriate to the job duties, requirements, and location. As is current practice, if the NPC determines the CBA is valid and covers the job opportunity for which the employer seeks a PWD, the NPC will use the CBA wage as the prevailing wage, even where the OEWS wage for the occupation in the AIE is higher. When the NPC determines, based on the documentation provided, that the CBA does not meet all the requirements, the NPC will continue its current practice of issuing an OEWS wage for the employer's job opportunity. As discussed in proposed section 656.18, in connection with documentation requirements for *Applications for Permanent*

Employment Certification for professional athlete or professional sports team coach job opportunities, the Department recognizes that unions may vary in their responsiveness to an employer's request for the letter to be submitted to the NPC. The Department invites comments about whether and how an employer could provide alternative documentation that would not compromise program integrity, in the absence of a response from union.

The Department also proposes to add language in proposed subparagraph (a)(1)(iv) to address the documentation necessary to issue PWDs for professional athletes and professional sports team coaches whose wages are set by professional sports league rules or regulations, which is necessary due to the proposed elimination of current section 656.40(f). Proposed section 656.40(a)(1)(iv) clarifies that if an employer is requesting a PWD for a job opportunity for a professional athlete or professional sports team coach covered by professional sports league rules or regulations with wage provisions, the employer must concurrently submit with its *Application for Prevailing Wage Determination* a copy of the applicable league rules or regulations. Similar to the current regulation, this proposed language comports with section 212(p)(2) of the INA.[161] Further, as noted above, requiring a copy of the applicable league rules or regulations at the time of filing allows the Department to review the league rules or regulations when determining the prevailing wage, likely reducing the number of RFIs and further streamlining the PWD process.

Similarly, the Department proposes to relocate the content of current section 656.40(g)(2) to proposed section 656.40(a)(1)(v), with minor revisions to the existing language to codify its current practice for the CO's consideration of a survey other than OEWS. This proposed provision continues to require the employer to concurrently

[161] INA section 212(p)(2) states, "With respect to a professional athlete (as defined in subsection (a)(5)(A)(iii)(II)) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations shall be considered as not adversely affecting the wages of United States workers similarly employed and be considered the prevailing wage."

submit the actual wage survey with its *Application for Prevailing Wage Determination*. The current regulation lists requirements for a survey but does not explicitly state that copies of the actual survey pages are required. Currently, the NPC frequently contacts the employer to request the actual survey instrument through an RFI so that the NPC can determine if the survey meets the methodological requirements before issuing a PWD. To better streamline the process, improve efficiency, and align the regulation with the NPC's practice of reviewing the actual survey instrument alongside the submitted *Application for Prevailing Wage Determination*, the Department proposes to specify in its regulations that employers must concurrently submit a copy of the survey at the time of filing the application. Consistent with current policy and practice, the survey must contain specific information about the survey methodology, including sample size and source, sample selection procedures, survey job descriptions, job and wage leveling chart, and list of participants surveyed to allow a determination of whether the survey meets all the requirements of this section.[162] In situations where the survey instrument is incomplete, the Department will continue to send an RFI before issuing a PWD. Although the proposal does not change current practice nor create new burdens on the regulated community, by codifying this information in the regulation, the Department anticipates a reduction in the number of RFIs needed before issuing a PWD, thereby maintaining processing efficiency.

Proposed section 656.40(a)(2)(i) would mandate electronic filing for *Applications for Prevailing Wage Determination*, which is consistent with the Department's proposal to mandate electronic filing for *Applications for Permanent Employment Certification* in section 656.10(c). The Department also would provide the same limited exceptions, as are available under 656.10(c), to mandatory electronic filing for employers who are

[162] *See* 20 CFR 656.40(g)(2); Frequently Asked Questions, National Prevailing Wage Center (Mar. 2010), *available at* https://www.dol.gov/agencies/eta/foreign-labor/faqs/print.

unable or limited in their ability to use or access electronic forms to submit an *Application for Prevailing Wage Determination*. This proposed provision is intended to maximize end-to-end electronic processing of *Applications for Prevailing Wage Determination*, which is an important technological objective of the Department.

Although electronic filing of applications using the FLAG System is not currently mandated, in the Department's experience, employers prefer to use electronic filing to request a PWD. Based on data for *Applications for Prevailing Wage Determination* processed during fiscal years 2023, 2024, and 2025, more than 99 percent of employer's *Applications for Prevailing Wage Determination* were submitted electronically to the NPC for processing using the FLAG System. Therefore, requiring electronic filing of *Applications for Prevailing Wage Determination* continues the current practice for nearly all employers.

NPC processing

The Department proposes to relocate current section 656.40(b) ("Determinations") to proposed section 656.40(d) and add new language in proposed section 656.40(b) to discuss the NPC review process for *Applications for Prevailing Wage Determination.* The processes described in this proposed section are consistent with the NPC's current practices and the Department is merely proposing to codify them for transparency and clarification. Proposed section 656.40(b)(1) explains that when NPC receives an employer's *Application for Prevailing Wage Determination*, the CO reviews it to ensure it complies with all applicable program requirements, including that all the necessary information pertaining to the employer's job opportunity is included in the *Application for Prevailing Wage Determination*. After reviewing the employer's application, the CO will decide whether to issue a RFI under proposed section 656.40(c) or issue a PWD under proposed section 656.40(d).

Proposed section 656.40(b)(2) would require the CO to electronically send notice(s) or request(s) that require a response to employers, unless the employer was permitted to file by mail as set forth in § 656.10(c). For employers permitted to file by mail, the CO would send the notice or request via traditional methods to assure next day delivery. Similarly, the employer's response to such a notice or request must be filed electronically, except that an employer permitted to file by mail as set forth in § 656.10(c) may use traditional methods to assure next day delivery. The proposed rule would require the employer to send the response by the due date or the next business day, if the due date falls on a Sunday or Federal holiday. Consistent with current practice, if the CO does not timely receive the employer's response by the due date, the CO will return the employer's application unprocessed. While the Department encourages electronic communication, this proposed paragraph would retain the option to issue and respond to notices and requests using traditional methods that ensure next-day delivery, which may be necessary in some cases.

Proposed section 656.40(b)(3) provides that an employer may file only one *Application for Prevailing Wage Determination* for the same job opportunity and AIE. This proposal promotes efficiency and is consistent with similar provisions in the temporary labor certification programs the Department administers.[163] This provision would prevent the Department from receiving and processing duplicate applications that result in a general unnecessary delay in processing. Submitting multiple *Applications for Prevailing Wage Determination* for the same job opportunity for a PWD in the same wage year is unnecessary, as a single PWD can be used for multiple *Applications for Permanent Employment Certification* that offer the same job opportunity in the same AIE(s). This provision also would reduce duplicative processing by preventing an employer from filing a new *Application for Prevailing Wage Determination* for the same

[163] See 20 CFR 655.120(e)(2).

job opportunity in the same AIE when the employer's appeal of a PWD for that job opportunity in the same AIE is pending. Preventing an employer from filing a subsequent *Application for Prevailing Wage Determination* also serves to enhance program integrity by deterring an employer that is seeking to manipulate the prevailing wage process from submitting numerous filings in the hope that one of the PWDs might be adjudicated in a manner more favorable to the employer. As proposed, the CO will return duplicative applications unprocessed. The Department does not intend for this proposal to prevent employers from submitting a new *Application for Prevailing Wage Determination* for the same job opportunity near the expiration of their current PWD in order to obtain an updated PWD for the new wage year with a new validity period.

Requests for Information

The Department proposes to relocate the content of current section 656.40(c) ("Validity period") to proposed section 656.40(h), with revisions, as discussed below. The Department is proposing to add new language in proposed section 656.40(c) to codify the NPC's current RFI practice. Currently, the CO may issue one or more RFIs when the employer's *Application for Prevailing Wage Determination* is incomplete, contains errors or inaccuracies, or otherwise contains information that is not sufficient to issue a PWD. Consistent with current practice, under proposed section 656.40(c), the CO would send RFIs to the employer with a copy to the employer's attorney or agent, if applicable. As proposed, the CO could issue multiple RFIs to allow employers every opportunity to provide necessary information to ensure the employer's application is complete. This approach enables the CO to process the application based on the most accurate information possible to issue a prevailing wage that does not adversely affect the wages of U.S. workers.

In proposed section 656.40(c)(2), the Department outlines the content of an RFI, which largely continues current practice but introduces a change involving amendment of

an employer's *Application for Permanent Employment Certification* to enable the NPC to issue a PWD. As proposed, the RFI would continue to state the reason the CO could not issue a PWD and offer the employer the opportunity to submit a response within 7 calendar days. In addition, the RFI would explain that if the employer submits a response, the CO will review the response, determine whether to issue a PWD, and, as necessary, make amendments to the *Application for Prevailing Wage Determination* so that the CO can issue a PWD. Currently, the CO does not treat the employer's response as authorizing amendments to the employer's *Application for Prevailing Wage Determination* that would enable the CO to issue a PWD. This change in practice would save both the Department and the employer's time, eliminating additional back-and-forth communication between the CO and the employer for the purpose of acquiring explicit permission to amend the employer's application so that a PWD can be issued. The Department intends this provision to enable the CO to identify information that would need to be corrected for the CO to issue a PWD (e.g., conflicting information regarding travel). This provision would not permit employers to request modification of an *Application for Prevailing Wage Determination*. To correct information, the employer may request withdrawal of the *Application for Prevailing Wage Determination* under proposed section 656.40(i) and then file a new, corrected application. Furthermore, once a PWD is submitted in connection with, and becomes a part of an *Application for Permanent Employment Certification*, it will be subject to the "no modification" provision in 20 CFR § 656.11(b).

As proposed, the RFI also would explain what will happen if the employer does not respond by the due date. If the employer does not send their response by the due date (i.e., within 7 calendar days from the date the RFI was issued by the CO), the application will be deemed abandoned, the CO will return the application unprocessed to the employer without issuing a PWD, and the employer may file a new *Application for*

Prevailing Wage Determination with the NPC. This proposal improves transparency, supports processing efficiency, and is also consistent with other programs and regulations.[164] The Department seeks public comment regarding the number of days employers have to respond to RFI before the PWD is deemed abandoned.

Determinations

Consistent with the Department's proposed reorganization of section 656.40—to address what, when, and how to submit to the NPC to request a PWD in proposed paragraph (a) and processing information in proposed paragraphs (b) and (c), before addressing the CO's issuance of a PWD—the Department proposes to address determinations in proposed paragraph (d).

After relocating the content from current section 656.40(b), titled "Determinations" to proposed section 656.40(d), the Department proposes technical changes for consistency and conformity with other sections of this proposed rule, to improve clarity, and to update internal references. In addition, the Department proposes to update the term "DOL Occupational Employment Statistics Survey" to "Occupational Employment and Wage Statistics survey," to reflect the current name.[165]

The Department proposes one substantive change in proposed section 656.40(d). In proposed paragraph (d)(3), the Department proposes to eliminate the exception in the current rule that allows a survey to provide the median wage if the arithmetic mean wage

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[164] *See* 20 CFR 655.121(e)(2), which states that the employer has 12 calendar days to respond to a SWA concerning deficiencies in a job order and that if the employer does not respond within 12 calendar days the job order will be deemed abandoned.

[165] DOL's BLS changed the name of this program in 2021. *See* Bureau of Labor Statistics, History: Handbook of Methods: U.S. Bureau of Labor Statistics," *available at* https://www.bls.gov/opub/hom/oews/history.htm (last accessed Mar. 3, 2026). The Department will continue to issue PWDs based on "occupational categories based on the Office of Management and Budget's 2018 Standard Occupational Classification (SOC) system." *Occupational Employment and Wage Statistics*, *Technical Notes for May 2025 OEWS Estimates* (last updated May 15, 2026), https://www.bls.gov/oes/2025/may/oes_tec.htm. The SOC system is the authoritative resource for occupational definitions within the United States. Of note, the O*NET OnLine, an oft used tool by stakeholders in prevailing wage determination applications, is an application for the "general public" based on the SOC system but is not the authoritative source for defining occupations. National Center for O*NET Development, *O*NET OnLine Help, OnLine Overview*, O*NET OnLine (last updated May 19, 2026), https://www.onetonline.org/help/online/.

is not provided; as a result, all surveys must provide the arithmetic mean of wages of workers similarly employed in the AIE. Under this proposed rule, if an employer submits a survey that provides only the median wage, the survey would not meet the criteria to issue a PWD. Because the requested survey could not be used to issue a PWD, the CO would issue the PWD using an OEWS wage. The Department proposes this change to be consistent with the methodology of the OEWS survey. Also, based on the Department's experience, employers have generally submitted surveys with the arithmetic mean of the wages of all workers similarly employed in the AIE. As a result, the Department asserts that elimination of the option to provide a survey using a median wage will not have a significant practical effect because the NPC rarely receives surveys that only include a median wage. Moreover, the Department continues to think that setting the wage below the mean would have a depressive effect on wages, and therefore this proposed change is consistent with the Department's obligation to ensure that U.S. workers' wages are not adversely affected when setting a prevailing wage for workers employed in the PERM program.

PWD validity period

The Department proposes to relocate current section 656.40(c), entitled "Validity period" to proposed section 656.40(h), with revisions. Proposed section 656.40(h)(1) continues to require each PWD to have a specific validity period. The Department proposes a technical revision to clarify that the CO will specify the validity period of the PWD as 90 to 365 calendar days from the date of issuance, rather than 90 days to 1 year. In addition, added language clarifies that an employer cannot use a PWD for PERM labor certification purposes, while simultaneously requesting review of that PWD under section 656.41. As stated in proposed section 656.40(h)(1), "[a] request for review under section 656.41 renders the PWD invalid until the CO issues an affirmed or modified PWD." After the review under section 656.41 is complete, the CO will issue an affirmed or

modified PWD, which will specify the validity period for the PWD. Then, the PWD can be used to support an *Application for Permanent Employment Certification* during the validity period. A new proposed section 656.40(h)(3) would clarify the option available for an employer to use the same PWD for multiple, consistent *Applications for Permanent Employment Certification*. These proposed revisions clarify the Department's existing prevailing wage process and bring certainty to employers and stakeholders of the prevailing wage program.

In proposed section 656.40(h)(2), the Department proposes a substantive change to employers' use of a PWD for an *Application for Permanent Employment Certification.* Currently, if an employer either begins pre-filing recruitment or files the *Application for Permanent Employment Certification* within the PWD's validity period, they may use that PWD when filing the *Application for Permanent Employment Certification*. The Department proposes to eliminate the option for an employer to begin pre-filing recruitment before receiving a PWD for the job opportunity to be offered to U.S. workers during the labor market test. As proposed in subparagraph (h)(2), the employer must obtain a PWD before beginning pre-filing recruitment for the *Application for Permanent Employment Certification* and must begin pre-filing recruitment—whether in accordance with section 656.17, section 656.18, or section 656.21—within the validity period OFLC specified on the *Application for Prevailing Wage Determination*. This change would improve program integrity by ensuring pre-filing recruitment offers at least the prevailing wage rate the CO determines applies to the employer's job offer.

Similarly employed

The Department proposes to relocate current section 656.40(d), titled "Similarly employed" to proposed section 656.40(g), without any revisions.

PWDs for institutions of higher education, affiliated or related nonprofit entities, nonprofit research organizations, or Governmental research organizations

Section 656.40(e) implements Congress' prevailing wage computation requirements for job opportunities at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)(2000)), or an affiliated or related nonprofit entity, a nonprofit research organization, or a Governmental research organization.[166] In computing the prevailing wage for such job opportunities, the CO takes into account the wage levels of employees only at such institutions and organizations in the AIE. The Department defines affiliated or related nonprofit entity in current section 656.40(e)(1)(ii) using DHS' definition at 8 CFR 214.1(h)(19)(iii)(C), which DHS has updated since the current rule was published.[167] The Department proposes to update section 656.40(e)(1)(ii) in the proposed rule to reflect DHS' current regulatory language. In addition, the Department proposes to include the DHS regulatory citation in proposed 656.40(e)(1) (i.e., 8 CFR 214.2(h)(19)(iii)) for employers to use for reference. Also, the Department proposes one technical edit in this section by adding a hyphen in the word "pre-accreditation" in section 656.40(e)(1)(i)(E). Otherwise, the Department retains this section in the proposed rule without any other changes.

Professional athletes and professional sports team coaches

The Department proposes to eliminate the content of current paragraph (f), titled "Professional athletes," from section 656.40. As discussed in proposed section 656.3, the Department proposes to relocate the content of current section 656.40(f) that is definitional to proposed section 656.3. In addition, the Department's revisions throughout proposed section 656.40 appropriately address PWDs for professional athletes and professional sports team coaches, without retaining the content of paragraph (f) in section 656.40.

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[166] INA section 212(p)(1); 8 U.S.C. 1182(p)(1).

[167] *See* final rule titled "*Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers*." 89 FR 103054, 103199 (December 18, 2024).

Surveys other than OEWS

The Department proposes to relocate current section 656.40(g), titled "Employer-provided wage information" to proposed section 656.40(f), with revisions. The revisions, which eliminate some content of subparagraph (1) and all of subparagraphs (4) and (5), are necessary to conform with the Department's proposals to require wage survey information to be submitted concurrently with the *Application for Prevailing Wage Determination* and to streamline the PWD process by eliminating unnecessary correspondence. In addition, the Department proposes to eliminate current subparagraph (2), as its content is now addressed in proposed section 656.40(a)(1)(v), and redesignate subparagraph (3) as subparagraph (2), without any substantive changes.

Withdrawal

The Department proposes to delete the content of current section 656.40(i) and repurpose section 656.40(i) to codify how an employer may request withdrawal of an *Application for Prevailing Wage Determination.* Proposed section 656.40(i) explains the NPC's current practice of allowing employers to withdraw a pending *Application for Prevailing Wage Determination*.[168] That is, if the CO has not issued a PWD for the job opportunity for which the employer submitted the *Application for Prevailing Wage Determination*, the employer may withdraw their application by submitting a request in writing, either electronically or via mail, to the NPC. The request must identify the unique application number and state the reason(s) for the withdrawal. This provision clarifies the existing prevailing wage process and practice with no substantive or procedural changes.

Other eliminated provisions

The Department proposes to eliminate the content of current section 656.40(h), titled "Submittal of supplemental information by employer." Currently, employers must

[168] This practice has been in place since January 1, 2010. *See* 73 FR 78068 (Dec. 19, 2008).

go through two stages of reviews when they disagree with a PWD. They must first submit a request for redetermination under current section 656.40(h) before they are permitted to submit a request for Center Director Review (CDR) under current section 656.41. The Department proposes to eliminate the first step of review so employers may directly submit a request for (CDR) under section 656.41. Deleting this section would reduce the regulatory burden on employers from having multiple review processes. In addition, it would streamline the process by which the Department receives and reviews employers' *Applications for Prevailing Wage Determination* by eliminating submission of additional information outside the RFI process proposed in section 656.40(c).

The Department also proposes to eliminate current content section 656.40(i), titled "Frequent users," because the Department believes it is no longer relevant or necessary. The proposed removal of this paragraph is consistent with the Department's goal of simplifying its regulations. In addition, the proposed language added in section 656.40(h)(3) codifies current practice whereby an employer may use just one PWD for multiple job opportunities if the positions have the same job duties and requirements and are in the same AIE.

Similarly, the Department proposes to eliminate current section 656.40(j), titled "Fee prohibited." This section is no longer relevant, as the responsibility to issue PWDs was transferred from the SWAs to OFLC on January 1, 2010.[169]

F. Discussion of Proposed New to 20 CFR Part 656, Subpart E

The Department is proposing to amend part 656 by adding a new subpart E, which would include one new provision in a new section 656.50, to add a severability clause to part 656.

1. Proposed 20 CFR 656.50, Severability.

[169] *See* 73 FR 78068 (Dec. 19, 2008).

Proposed section 656.50 would add a severability provision to part 656. This new content would provide that if any provision of the Department's part 656 regulations is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law. As proposed, section 656.50 further provides that where such holding is one of total invalidity or unenforceability, the provision would be severable from the corresponding part and will not affect the remainder thereof.

Consistent with its reasoning when proposing to add such a provision within the H-2A regulations, the Department believes that adding a severability clause to part 656 is appropriate because each provision within part 656 is capable of operating independently from the others and to enhance the Department's capabilities to monitor compliance and conduct enforcement.[170] It is also important to the Department and the regulated community that the PERM and PWD regulations continue to operate consistent with the expectations of employers and workers, even if a portion of those regulations is held to be invalid or unenforceable.

The Department invites comments about the substance and scope of proposed section 656.39 and requests the public's views on other issues related to severability, such as whether the rule in general includes provisions that would not be amenable to severability; whether specific parts of the rule could operate independently; whether the benefits of the rule would continue to justify the costs should particular provisions be severed; or whether individual provisions are essential to the entire rule's workability.

[170] *See* NPRM, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 88 FR 63750 (Sept. 15, 2023).

IV. Administrative Information

A. Executive Order 12866: Regulatory Planning and Review, Executive Order 13563: Improving Regulation and Regulatory Review, and Executive Order 14192: Unleashing Prosperity Through Deregulation

Under E.O. 12866, the Office of Information and Regulatory Affairs (OIRA) in OMB determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and review by OMB. Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OIRA has reviewed this rule and designated it a significant action under E.O. 12866.

E.O. 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Improving Regulation and Regulatory Review, 76 FR 3821, 3821 (Jan. 21, 2011), E.O. 13563 recognizes that some costs and benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult

or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. *Id.*

Executive Order 14192, titled "Unleashing Prosperity Through Deregulation," was issued on January 31, 2025. This executive order directs agencies to significantly reduce the private expenditures required to comply with Federal regulations and provides that "any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least 10 prior regulations." This proposed rule is not an Executive Order 14192 regulatory action because it is being issued with respect to an immigration-related function of the United States. The rule's primary direct purpose is to implement or interpret the immigration laws of the United States (as described in INA § 101(a)(17), 8 U.S.C. 1101(a)(17)) or any other function performed by the U.S. Federal Government with respect to aliens. *See* OMB Memorandum M-25-20, "Guidance Implementing Section 3 of Executive Order 14192, titled 'Unleashing Prosperity Through Deregulation'" (Mar. 26, 2025).

1. Need for Regulation

The Department has determined that this rulemaking is necessary to modernize the permanent labor certification (PERM) program so that it continues to fulfill the Secretary's statutory responsibilities under section 212(a)(5)(A) of the INA. The current regulatory framework has remained largely unchanged since 2005, despite significant changes in labor market conditions, recruitment practices, technology, and the manner in which employers recruit and hire workers.

Modernizing the PERM program is a regulatory action the Department must undertake to be able to adapt existing regulations governing the statutory permanent labor certification requirement to the current characteristics and demands of the labor market in the United States, address challenges encountered by the Department to more effectively administer the program while addressing employers' bona fide workforce needs who rely

on the program to employ aliens in permanent positions that cannot be filled by qualified and available U.S. workers. For example, over the past two decades, employers have increasingly shifted away from print advertising toward electronic recruitment platforms, remote work has become commonplace across many industries, and workforce mobility and employer hiring practices have evolved considerably. At the same time, the Department has gained substantial operational experience administering the PERM program and identified areas where existing regulations no longer adequately reflect current labor market realities or provide sufficient clarity regarding employer obligations, as well as program administration, integrity and enforcement. These developments demonstrate the need to update the Department's regulations to ensure that the statutory PERM labor certification requirement remains an effective mechanism for determining whether qualified U.S. workers are available for permanent job opportunities and whether the employment of aliens would adversely affect the wages and working conditions of similarly employed U.S. workers.

The Department has also determined that rulemaking is necessary to strengthen protections for U.S. workers and improve integrity of the labor market test required by the INA. Decades of experience administering the PERM program has revealed opportunities to better ensure that employers recruit U.S. workers in good faith using recruitment methods that better reflect contemporary hiring practices and provide the broadest exposure possible of available job opportunities to prospective U.S. applicants. Moreover, the Department has identified the need to strengthen safeguards related to layoffs, clarify employer obligations during the recruitment and adjudication process, improve notice requirements, enhance oversight of third-party employment arrangements, and increase accountability for employers, attorneys, and agents participating in the program. In addition, following its review of public comments received in response to the Department's 2023 RFI concerning Schedule A, the Department concluded that it lacks a

reliable, objective, and transparent methodology for maintaining or expanding Schedule A in a manner consistent with its statutory responsibilities. Accordingly, the Department has determined that regulatory changes are necessary to ensure that labor market testing more accurately reflects current labor market conditions and that all employers seeking permanent labor certification are subject to standards that are consistent, transparent, and aligned with the INA.

This rulemaking is also intended to modernize and streamline administration of the PERM program by codifying electronic filing and communication practices, clarifying regulatory standards, simplifying procedures, and eliminating outdated requirements that no longer provide meaningful regulatory value. The Department proposes to consolidate and reorganize regulatory provisions, modernize and streamline prevailing wage and application processing procedures, clarify integrity actions, as well as the appeals and review processes, and remove obsolete requirements associated with paper processing and duplicative regulatory provisions. These changes are expected to improve administrative efficiency, reduce unnecessary burdens on employers and the Department, facilitate coordination with DHS, and improve the consistency and predictability of program administration.

Accordingly, the Department is proposing comprehensive revisions to 20 CFR part 656 that modernize recruitment requirements, strengthen protections for U.S. workers, enhance program integrity, improve processing efficiency, and update the regulatory framework governing permanent labor certifications to better reflect current labor market conditions and the Department's statutory responsibilities. Collectively, the proposed revisions are intended to preserve employers' ability to access employment-based immigration pathways when qualified U.S. workers are unavailable, while ensuring that the PERM labor certification process continues to provide meaningful protections for

the U.S. workforce and supports the fair and effective administration of the Nation's employment-based immigration system.

2. Analysis Considerations

The Department estimated the costs and cost savings of this proposed rule relative to the existing baseline (i.e., the current practices for complying, at a minimum, with the PERM program as currently codified at 20 CFR part 656, subparts A, B, C, and D).

In accordance with the regulatory analysis guidance articulated in OMB's Circular A-4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the proposed rule (i.e., costs, cost-savings, and benefits that accrue to entities affected). The analysis covers 10 years to ensure it captures measurable costs and transfer payments that accrue over time. The Department expresses all quantifiable impacts in 2025 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A-4[171] published on October 9, 2003.

3. Subject-by-Subject Analysis

In this section, the Department describes all anticipated benefits, costs, and cost-savings of the proposed rule, including both quantified and unquantified impacts. Each impact is described, and quantifiable impacts are estimated while nonquantifiable impacts are discussed qualitatively.

i. Benefits Discussion

The Department expects the proposed rule to generate substantial benefits by modernizing the PERM labor certification process, strengthening protections for U.S. workers, improving the integrity and efficiency of the employment-based immigrant visa system, and reducing administrative inefficiencies for employers and the Federal Government. Collectively, the proposed changes would better align the PERM program

[171] OMB, Circular A-4, https://www.whitehouse.gov/wp-content/uploads/2025/08/CircularA-4.pdf, Sept. 17, 2003.

with current labor market conditions, modern recruitment practices, and the Department's statutory obligations under INA section 212(a)(5)(A), and modernize the program so that it becomes more efficient and transparent.

A principal benefit of the proposed rule is the modernization of existing recruitment methods used to test the U.S. labor market for purposes of filing a PERM application. The current PERM framework relies heavily on print newspaper advertisements and recruitment methods established nearly two decades ago, which no longer reflect how employers recruit workers or how workers search for employment opportunities. The proposed rule replaces outdated print-focused recruitment requirements with modern electronic recruitment methods, including advertisements on employer websites, commercial job search websites, social media platforms, and SWA job orders, as well as job fairs or campus recruiting events. These proposed changes are expected to improve dissemination of job opportunities to U.S. workers and increase the likelihood of qualified and available U.S. workers becoming aware of and applying for PERM-related positions before employers seek to permanently employ aliens.

The proposal also would require employers to recruit U.S. workers using the same recruitment methods and timeframes they customarily use for comparable non-PERM positions. This approach is expected to improve the equality of employment opportunities by disincentivizing employers from departing from their ordinary PERM recruitment methods or efforts they normally employ, in ways that may discourage U.S. worker participation. By requiring recruitment practices that more closely resemble real-world hiring practices, the rule would strengthen the integrity of the labor market test and improve confidence that PERM recruitment is conducted in good faith.

The Department also expects significant benefits from the proposed extension of recruitment duration requirements. Under the proposed rule, most advertisements would remain active for at least 90 calendar days, or longer if the employer normally recruits for

similar positions for a longer period. Longer recruitment periods are expected to improve labor market exposure for job opportunities and provide workers additional time to find out about the job offer, become familiar with the job requirements and apply for available positions. The Department believes this longer recruitment timeframe would better reflect actual labor market conditions and would align more closely with the amount of time unemployed workers spend searching for employment.

Another major benefit the Department believes would derive from the proposed rule is enhanced protection for U.S. workers impacted by layoffs not only throughout the PERM process but also while the employer pursues the visa petition before DHS. Specifically, the proposal would expand current layoff-related protections by prohibiting the filing of a PERM application within the 2 years after a relevant layoff and, in the event a relevant layoff occurs after filing a PERM application, requiring employers to consider laid-off U.S. workers during a significantly broader timeframe extending through adjudication of the associated Form I-140 petition or final case resolution. The Department expects these changes to reduce the risk of employers seeking permanent foreign labor while simultaneously displacing U.S. workers in the same or similar occupations. These provisions are also expected to improve employment opportunities for laid-off workers and better align labor certification determinations with actual labor market conditions at the time of adjudication of PERM applications and visa petitions.

The proposed rule also seeks to prohibit the placement of aliens at third-party worksites experiencing layoffs where indicia of an employment relationship exist between the alien and the third-party employer. This provision is expected to reduce the risk of indirect displacement of U.S. workers through staffing arrangements or contractor relationships and improve accountability and transparency in third-party employment arrangements.

The Department further expects benefits from increased transparency requirements related to layoffs and notice obligations. Employers would be required to notify DOL and, where applicable, USCIS, of layoffs occurring during the relevant period and update recruitment reports accordingly. Expanded NOF requirements, including electronic notice procedures and notice obligations for third-party worksites, are expected to improve U.S. workers' awareness of pending labor certification applications and facilitate the reporting of fraud, misrepresentation, or the existence of qualified U.S. workers to the Department and USCIS.

The proposed elimination of Schedule A is also expected to produce important benefits. The Department determined that it currently lacks a reliable, objective, and transparent methodology to justify continuing categorical labor market test exemptions for occupations listed on Schedule A. Eliminating Schedule A would ensure that all occupations subject to PERM labor certification requirements undergo a labor market test unless exempted by statute. The Department expects this change to improve consistency with the INA's labor certification requirements and provide U.S. workers an opportunity to apply for all PERM-covered positions.

The proposed rule also contains substantial program integrity improvements. These changes include enhanced employer attestations, expanded audit and supervised recruitment authority, stronger debarment provisions, successor-in-interest liability standards, and independent accountability for attorneys and agents. The Department expects these changes to deter fraud and abuse, improve compliance with program requirements, and strengthen public confidence in the PERM labor certification process. Expanded authority to hold attorneys, agents, and successor entities accountable for misconduct is expected to reduce opportunities for program circumvention and abusive filing practices.

The proposal would also modernize and streamline the administration of the PERM program through mandatory electronic filing and expanded electronic communications. These changes are expected to reduce paperwork burdens, lower mailing and administrative costs, improve application completeness and data quality, reduce processing delays associated with deficient applications, and facilitate faster communication between OFLC and stakeholders. The vast majority of employers already use electronic filing systems, based on FY 2021-FY 2025 data, approximately 99.61 percent of PERM labor certification applications were filed electronically. Department expects the transition costs associated with mandatory electronic filing to be minimal for most employers.

In addition, the Department estimates that the proposed centralized electronic processing and electronic transmission of determinations to USCIS will improve interagency coordination, facilitate data sharing, reduce duplicative submissions, and improve fraud detection capabilities. The Department also expects operational efficiencies and better public experience with the program from codifying existing adjudicative practices, clarifying audit and appeal procedures, and reducing unnecessary BALCA docketing.

The proposed rule would further improve regulatory clarity and predictability by modernizing existing terminology, consolidating procedures, and clarifying definitions and standards throughout part 656. These changes are expected to improve the regulated community understanding of program requirements, reduce ambiguity and inadvertent noncompliance, improve adjudicative consistency, and reduce litigation risk.

Overall, the Department expects the proposed rule to generate substantial benefits by improving labor market testing, strengthening protections for U.S. workers, increasing transparency and accountability by all program participants, modernizing program administration, reducing inefficiencies, and enhancing the integrity of the PERM labor

certification process. The proposals are expected to create a more effective, transparent, and administratively efficient system that better reflects contemporary labor market conditions while preserving access to employment-based immigration pathways for employers with legitimate workforce needs.

ii. Costs

In the following sections, the Department presents the costs estimated to be incurred by relevant stakeholders.

a. Quantifiable Costs

Rule Familiarization

To quantify rule familiarization costs, the Department employs a methodology that reflects the structure of the PERM filing market. PERM applications are primarily filed either by outside immigration law firms on behalf of employers or directly by employers themselves, although agents also may file PERM applications on behalf of employers. Accordingly, the Department estimates familiarization costs separately for two groups: (1) unique law firms that submitted PERM applications on behalf of employers, and (2) unique employers that filed PERM applications directly without outside legal counsel.

For law firms, the Department assumes that one attorney per firm is responsible for reviewing and understanding the regulatory changes associated with the rule. The Department values this time using the fully-loaded hourly compensation rate for Attorneys. For employers filing without outside counsel, the Department assumes that one Human Resources (HR) specialist per employer is responsible for rule familiarization and values this time using the fully loaded hourly compensation rate for HR Specialists.

The Department used the hourly compensation rates presented in Exhibit 1 to estimate rule familiarization costs. BLS's OEWS data show that the mean hourly wage of HR Specialists (SOC 13-1071) is $39.42 and the hourly rate of an Attorney is $89.35

(SOC 23-1011).[172] The Department applied a 42-percent benefits rate[173] and a 17-percent overhead rate,[174] resulting in a fully loaded hourly wage of $62.68 for HR Specialists and $142.07 for Attorneys.

Based on FY 2023–FY 2025 PERM certification data, the Department identified 5,433 unique law firms and 41,747 unique employers. Assuming one hour of familiarization time per attorney and per HR specialist, the law firm familiarization cost is estimated at $0.77 million, and the employer familiarization cost is estimated at $2.62 million for a combined first-year total of $3.38 million, once the rule is implemented. The annualized cost over a ten-year period is projected at $0.39 million at (3% discount rate) and $0.48 million (7% discount rate).

Exhibit 1: Compensation Rate

Occupation	Base hourly wage rate	Loaded wage factor	Overhead costs	Hourly compensation rate
	(a)	(b)	(c)	(d)
HR Specialist	39.42	$16.56 = ($39.42 × 0.42)	$6.7 = (39.42 x 0.17)	62.68
Attorney	89.35	$37.53 = ($89.35 × 0.42)	$15.19 = (89.35 x 0.17)	142.07

Employer Signature on All Supporting Documents (§ 656.4)

The primary cost associated with the employer signature requirement is the incremental time and coordination burden imposed on employers who are represented by

[172] See BLS, Occupational Employment and Wage Statistics, Period: May 2025, https://data.bls.gov/oes/#/area/0000000/2025.
[173] BLS, "National Compensation Survey, Employer Costs for Employee Compensation," https://www.bls.gov/ecec/data.htm (last visited June 3, 2026). For private sector workers, wages averaged $32.36 per hour worked in 2025, while benefit costs averaged $13.79, which is a benefits rate of 42 percent.
[174] Cody Rice, U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002, https://www.regulations.gov/document/EPA-HQ-OPPT-2014-0650-0005 (last visited May 8, 2025).

attorneys or agents and who are not currently in the practice of signing all documentation submitted to OFLC beyond the Application for Permanent Employment Certification and recruitment report. For these employers, the proposed rule adds a workflow step to the filing and processing cycle. Specifically, the need to obtain the employer's signature on audit responses, supplemental information submissions, and other materials before transmitting them to OFLC.

The Department notes that the additional signature burden is not uniform across the population of employers filing Applications for Permanent Employment Certification, it is concentrated among those whose applications are selected for audit examination or placed into supervised recruitment, as those are the principal processing stages at which employers would be required to sign and submit additional documentation beyond the application and recruitment report. For applications that proceed through standard adjudication without audit or supervised recruitment, the proposed signature requirement would apply only to the *Application for Permanent Employment Certification* and the recruitment report, both of which are already subject to employer signature requirements under current regulations and thus would impose no incremental burden on those employers.

The Department calculates this cost by multiplying the total number of employers (including Schedule A and Sheepherders) by 1 hour (on average) and the wage rate for an HR Specialist. Based on FY 2023–FY 2025 PERM certification data, there were approximately 26,277 unique employers that filed PERM applications per year, an average of 1,417 unique Schedule A employers per year,[175] and an average of 4 Sheepherder applications per year.[176] The annual cost is calculated as follows:

(26,277 + 1,417 + 4) × $62.68 × 1 hour = **$**1,736,046. Over the ten-year period of analysis, the total undiscounted cost would be approximately $17.36 million.

The annualized cost over the ten-year span is projected at approximately $1.79 million (3% discount rate) and $1.86 million (7% discount rate).

Extended NOF Duration and Locations (§ 656.14)

The primary cost associated with the expanded NOF requirements is the additional administrative burden of maintaining the posting, whether physical or electronic, for a significantly longer duration than currently required. Under the proposed rule, the NOF must remain available throughout the entirety of OFLC's adjudication of the *Application for Permanent Employment Certification* and USCIS's adjudication of the associated Form I-140 petition, which can span months or, in some cases, years. For employers who post the NOF physically, this may require periodic monitoring to ensure the posting remains visible and unobstructed throughout the extended period, consistent with the proposed requirement that the notice be of sufficient size, clearly visible, and unobstructed while posted. For employers who post electronically through their existing internal or external websites, the incremental burden of maintaining the NOF through the

[175] This is calculated from the PERM petition data for FY 2023–FY 2025 provided by USCIS.
[176] The average of 4 Sheepherder applications per year is derived from the PERM petition data for FY 2023–FY 2025 provided by USCIS, which recorded 1, 2, and 9 Sheepherder applications respectively, for a three-year total of 12 applications (12 ÷ 3 = 4). FY 2023–FY 2025 figures are used for Sheepherder applications as they represent the most recent complete fiscal years available at the time of this analysis.

conclusion of adjudication is expected to be minimal, as sustaining a webpage posting requires little ongoing effort once the notice is initially published.

The Department assumes an average of 15 minutes of additional time per application to manage the extended posting requirements. The average number of certification applications for FY 2023–FY 2025 was approximately 108,786, and the average number of Schedule A applications filed with USCIS for FY 2023–FY 2025 was 23,835, for a total of 132,621. This yields an estimated annual incremental cost of approximately $2.08 million (132,621 × $62.68 × 0.25). Over the ten-year period of analysis, the total undiscounted cost would be approximately $20.78 million. The annualized cost over the ten-year span is projected at $2.14 million at a 3-percent discount rate and $2.23 million at a 7-percent discount rate.

New Attestations (§ 656.13)

The primary cost associated with the new and expanded attestations is the incremental time required for employers and their authorized attorneys or agents to review, understand, and execute the expanded set of attestations at the time of filing. To estimate the cost of the new and expanded attestation requirements, the Department multiplies the number of certification applications and Schedule A applications (132,621)[177] by an average of 30 minutes of additional time per application for employers to review and execute the expanded attestations at the wage rate of $62.68 for a HR specialist. This yields an estimated annual incremental cost of approximately $4.16 million (132,621× 62.68 × 0.5). Over the ten-year period of analysis, the undiscounted total cost would be approximately $41.56 million. The annualized cost over the ten-year span is projected at $4.28 million at a 3-percent discount rate and $4.44 million at a 7-percent discount rate.

[177] The total of 132,621 reflects the average number of certified PERM applications for FY 2023–FY 2025 (108,786) and the average number of Schedule A applications for FY 2023–FY 2025 (23,835).

Schedule A Occupations Now Subject to Full PERM Recruitment (§ 656.5 & § 656.15)

The proposed elimination of Schedule A requires employers seeking to permanently employ aliens in occupations previously listed under Schedule A, including physical therapists, professional nurses, and workers who possess exceptional ability in the sciences or the arts, to conduct full pre-filing recruitment under proposed section 656.17 and submit an Application for Permanent Employment Certification to OFLC before filing a Form I-140 petition with USCIS. Under the current rule, employers sponsoring aliens in Schedule A occupations obtain a PWD from OFLC but bypass the PERM labor certification process entirely, submitting an uncertified *Application for Permanent Employment Certification* directly to USCIS without conducting any pre-filing recruitment. The proposed rule imposes entirely new recruitment costs on these employers that they have not previously incurred.

To estimate the population of certification applications affected by this provision, the Department relied on USCIS administrative data on Form I-140 petitions filed under Schedule A occupations for fiscal years 2023 through 2025. The number of Schedule A petitions filed annually is 20,557 in FY 2023, 27,428 in FY 2024, and 23,521 in FY 2025, with an average of approximately 23,835 petitions per year over the three-year sample.[178]

To estimate the incremental labor cost imposed on Schedule A employers by the full PERM pre-filing recruitment requirement, the Department estimates 60 minutes per application for pre-filing recruitment activities to the average annual volume of Schedule A petitions (23,835) and the loaded hourly compensation rate for HR specialists of $62.68, as presented in Exhibit 2. This yields an estimated annual incremental labor cost of approximately $1,493,978, calculated as 23,835 applications multiplied by 1 hour multiplied by $62.68 per hour. Over the ten-year period of analysis, the total

[178] Because Schedule A employers currently file directly with USCIS, the Department does not have independent program data on the volume of Schedule A filings and relies on USCIS administrative records as the best available source for this estimate.

undiscounted cost would be approximately $14.94 million. The annualized cost over the ten-year span is projected at $1.54 million at a 3-percent discount rate and $1.32 million at a 7-percent discount rate.

Notify OFLC of Pending Form I-140 Petition (§ 656.13(f))

The primary cost associated with the proposed notification requirement is the time employers would spend preparing and submitting the required notification. Under the proposed rule, employers would be required to notify the NPC, and USCIS in the case of a pending Form I-140 petition, no later than 5 business days after engaging in a qualifying layoff, including the placement of an alien with another employer that is engaging in layoffs.

To estimate the cost of this requirement, the Department estimates that employers would spend approximately 10 minutes (0.167 hours) preparing and submitting each notification. Consistent with the methodology used elsewhere in this analysis, the Department uses the average annual number of Form I-140 petitions for FY 2023 through FY 2025, 23,835 petitions, to estimate the number of notifications. Applying a loaded hourly compensation rate of $62.68 for human resources specialists, the Department estimates an annual cost to employers of approximately $248,991 (23,835 petitions × 0.167 hours × $62.68 per hour).

The Department estimates that this requirement would result in a recurring annual cost of approximately $248,991. Over the ten-year period of analysis, the total undiscounted cost would be approximately $2.49 million. The annualized cost over the ten-year span is projected at $0.26 million (at the 3-percent discount rate) and $0.27 million (at the 7-percent discount rate).

b. Nonquantifiable Costs

In this section, the Department describes various non-quantifiable costs of the proposed rule.

Record Retention Period Restarted 5 years from Date of Certification Expiration or Denial/Withdrawal of the Application for Permanent Employment Certification, or 5 years from the date on which the Immigrant Petition is Approved or Denied (§ 656.10)

The principal cost associated with the extended record retention period is the incremental cost of storing documentation for a longer period than currently required for applications with extended processing timelines.

The Department was unable to quantify the incremental storage costs associated with the extended retention period with sufficient precision to report a point estimate, for several reasons, and accordingly treats the costs of this provision as a nonquantifiable cost.

First, the additional retention burden is not uniform across the population of employers filing Applications for Permanent Employment Certification, it varies significantly depending on the processing trajectory of each individual application. Employers whose applications proceed through standard adjudication and result in a timely filed and approved Form I-140 petition would experience little or no meaningful extension of their retention obligations relative to the current rule, as the practical difference between a retention period measured from the date of filing and one measured from the date of certification expiration would be modest in the absence of prolonged processing. By contrast, employers whose applications are subject to audit examination, supervised recruitment, BALCA review, or extended USCIS adjudication of the associated Form I-140 petition could face a substantially longer retention period under the proposed rule than under current regulations. Because the Department cannot predict with confidence which applications will follow each processing path at the time of filing, it cannot reliably estimate the average incremental retention duration across the full population of filers.

Additionally, the incremental cost per unit of additional retention time varies significantly across employers depending on whether they maintain physical or electronic

records, the volume of documentation associated with each application, and the nature of each employer's existing document management infrastructure. For the substantial majority of employers who already use electronic filing and document management systems, as evidenced by the near-universal rate of electronic filing in the PERM program, with approximately 99.61 percent of Applications for Permanent Employment Certification filed electronically during FY 2021–FY 2025, the marginal cost of retaining records for an extended period is expected to be negligible, consisting primarily of incremental electronic storage costs that are difficult to isolate and are likely to be minimal relative to overall compliance costs. For the small subset of employers who maintain physical records, the incremental cost would depend on local storage rates and individual document volumes that the Department does not have sufficient data to estimate reliably across the regulated community.

The Department notes that the proposed change does not require employers to collect or create any new documentation; it requires only that documentation already required to be prepared and retained under existing program regulations be preserved for a period that more reliably ensures its availability for program oversight purposes throughout the full adjudication lifecycle of the application and associated petition. For these reasons, the Department concludes qualitatively that the incremental retention costs associated with this provision are minimal relative to the significant program integrity benefits of ensuring that complete documentation remains accessible for the full period during which OFLC and partner agencies may have occasion to request and review it.

The Department requests comment and data that could inform its assessment of the incremental costs associated with the proposed record retention requirements. Specifically, the Department requests comment and data on, the proportion of applications that proceed to audit or BALCA review, the time elapsed between PERM approval or denial and I-140 adjudication, the number of employees potentially affected,

the extent of any additional recruitment, hiring, delay, or administrative burdens, and costs associated with those impacts. The Department also requests data on how these costs might vary depending on employer size, industry, and other circumstances.

Permanent Labor Certification Validity Limited to One Use and One Employe r (§ 656.30)

The primary costs associated with this clarification fall on employers who have previously relied on the interpretation that an approved permanent labor certification remains available for use in connection with subsequent Form I-140 petitions for the same alien, provided it was timely filed with an initial petition. For employers in this situation whose initial petitions are denied, and whose appeals before USCIS or the federal courts are ultimately unsuccessful, the proposed clarification would require them to obtain a new permanent labor certification, including full compliance with the pre-filing recruitment requirements of proposed section 656.17, before filing a subsequent petition with USCIS. This would involve conducting a new labor market test, obtaining a new PWD from OFLC, and preparing and submitting a new *Application for Permanent Employment Certification*, all of which impose meaningful time and cost on affected employers and their authorized representatives.

The magnitude of this cost is difficult to estimate reliably for several reasons. First, the Department does not have comprehensive data on the number of employers who have reused approved permanent labor certifications in connection with subsequent Form I-140 petitions, as this practice occurs in the context of USCIS adjudication rather than OFLC processing and is therefore not fully captured in the Department's program data. Second, the costs imposed on any individual employer will depend on the circumstances of the underlying denial, the duration of any appellate proceedings before USCIS or the federal courts, and the extent to which labor market conditions and prevailing wage rates

have changed in the intervening period, all of which will vary considerably across affected employers.

Because the proposed clarification forecloses a practice that the Department has determined is inconsistent with the intent of the current rule and with the Secretary's statutory obligations under INA section 212(a)(5)(A), the population of employers who would incur these costs going forward is expected to consist primarily of those who have been relying on an interpretation of the regulation that the Department considers erroneous, rather than those engaging in conduct the Department intended to permit.

The Department concludes qualitatively that the costs of this clarification are real, and in some cases may be significant for individual employers affected by it.

Those costs are a necessary consequence of the Department's obligation to administer the permanent labor certification program in a manner consistent with the Secretary's statutory mandate and are proportionate to the program integrity benefits the clarification is designed to achieve.

Recruitment Report Required at Time of Filing (§ 656.10, § 656.17)

The Department acknowledges that requiring submission of the recruitment report at the time of filing will impose an incremental upfront documentation burden on employers and their authorized attorneys or agents. Under the current rule, employers whose applications are not selected for audit are not required to submit the recruitment report at any point during processing. Under the proposed rule, all employers would be required to upload or otherwise submit the recruitment report at the time of filing. Because this change applies to the full universe of applications, rather than only to those selected for audit, it represents a broader expansion of the submission requirement than any prior change in program administration.

Nonetheless, the Department expects the incremental burden of this requirement to be modest for most employers and their representatives and accordingly treats the costs of this provision as a non-quantifiable cost.

Because employers are required to prepare and maintain the recruitment report before filing the *Application for Permanent Employment Certification*, the substantive work of compiling the report is already required under current regulations. The proposed change imposes only the additional step of transmitting the completed report to OFLC at the time of filing rather than retaining it solely in the employer's records. For approximately 99.61 percent of employers who already file electronically using the FLAG System, this additional step consists primarily of uploading the recruitment report into the electronic filing system as part of the standard submission process, a task the Department considers de minimis in isolation. The incremental time associated with this step will vary depending on the format and organization of the employer's existing recruitment documentation, the complexity of the employer's pre-filing recruitment activities, and the capabilities of the employer's document management systems, making it difficult to estimate reliably across the full population of filers.

Furthermore, the incremental burden of this requirement will also vary depending on the degree to which employers and their authorized attorneys or agents have already integrated recruitment report preparation into their standard pre-filing workflows. For immigration law firms that handle large volumes of PERM filings and have established document management practices, the additional step of uploading the recruitment report concurrently with the application is expected to impose little marginal burden beyond what is already incurred in preparing and organizing the report for retention. For employers who file without outside legal counsel and who may have less standardized pre-filing documentation practices, the incremental burden of ensuring the recruitment report is in a form suitable for submission at the time of filing may be somewhat greater,

though the Department expects this cost to decrease over time as employers adapt their pre-filing workflows to the new requirement.

The Department notes that this provision is expected to generate offsetting administrative efficiencies for both employers and OFLC. By enabling OFLC to review the recruitment report for every application as a standard part of adjudication, rather than only upon audit selection, the proposed rule is expected to reduce the frequency of post-filing requests for documentation, support faster adjudication of compliant applications, and reduce the uncertainty and administrative burden associated with responding to audit notices for employers whose applications might otherwise have been selected for that purpose. For these reasons, the Department concludes qualitatively that the incremental costs associated with the universal recruitment report submission requirement are modest and proportionate to the significant program integrity and adjudicative efficiency benefits expected from this change.

Mandatory Electronic Filing

The Department assumes there is a modest cost associated with mandatory electronic filing falls on the small subset of employers who currently file by mail and who may need to establish access to the FLAG System or otherwise adapt their filing practices to comply with the electronic filing requirement. These costs may include the time necessary to establish or access a FLAG System account, convert or upload supporting documentation in an appropriate electronic format, and modify existing administrative procedures used to prepare and submit applications.

The Department expects this transition cost to be minimal for most affected employers, given that the FLAG System is publicly accessible and that the Department proposes to retain a limited exception to mandatory electronic filing for employers who can demonstrate to the OFLC Administrator that they are unable or limited in their ability to use or access electronic filing. This exception ensures that mandatory electronic filing

does not impose an unreasonable burden on employers with genuine technological constraints. The Department concludes qualitatively that the transition costs associated with mandatory electronic filing are minimal relative to the cost savings the requirement is expected to generate for the employer community and OFLC.

Antidiscrimination Provision of the INA

This provision will prohibit an employer from rejecting any qualified U.S. worker over a prospective alien based on any cost justifications or basis, including differences in any term, condition, or privilege of employment, and compensation and fringe benefits between any qualified U.S. worker and a prospective alien.

The Department does not expect this provision to impose additional costs on employers because it requires conduct that is already required under existing Federal anti-discrimination laws. Because employers are already required to comply with these legal obligations, the proposed provision does not impose an incremental compliance burden relative to the regulatory baseline; rather, it reinforces and clarifies the application of existing requirements in the PERM context.

2-Year Pre-Filing Anti-Layoff Provision

The Department expects that the proposed expansion of the layoff period from 180 days to 2 years could generate costs that cannot be reliably quantified. The proposed provision could also impose costs on employers by reducing their flexibility to use the permanent labor certification program following a relevant layoff. Employers whose legitimate workforce needs change during the 2-year period may be unable to pursue permanent labor certification for workers in the same or occupations even when subsequent business conditions create a need for additional workers. These employers could incur costs associated with delaying hiring, conducting additional recruitment, retraining or redeploying existing workers, modifying business operations, or using alternative sources of labor. To the extent that relevant visas are thus freed for use by

other employers—those with PERM certifications but facing a visa backlog due to statutory caps—there would be partially-offsetting cost savings associated with their accelerated hiring.

Because the Department lacks sufficient information regarding the extent of relevant layoffs, and subsequent employer hiring needs, the effects of this provision are discussed qualitatively. The Department requests public comments and data linking employers' layoff histories to their standing within relevant visa backlogs and invites interested individuals, organizations, and stakeholders to share their feedback and suggestions.

iii. Cost-Savings

In the following sections, the Department presents the cost-savings of this proposed rule.

a. Quantifiable Cost-savings

Elimination of Mandatory Print Newspaper Advertisements and Expanded Recruitment Method Requirements (§ 656.17, § 656.21)

One of the largest quantifiable cost savings is the Elimination of Mandatory Print Newspaper Advertisements (§ 656.17 / § 656.21). The cost savings of not requiring employers to post their job ads in print newspapers are twofold. Firstly, they save money by not having to pay newspapers money to post their job ad. Secondly, the cost savings also extend to the labor and time spent that companies used to get the ad online.

The average cost of a job posting in a printed newspaper varies. The average print newspaper advertisement cost for a one-inch column, black-and-white ad in a major publication is $681.[179] Assuming this cost is per insertion, the average cost of a job posting in a printed newspaper will be $1,362 to cover two Sundays. The Department will

[179] Fit Small Business, "How Much Does a Newspaper Ad Cost? (+ Factors & Alternatives)," https://fitsmallbusiness.com/newspaper-advertising-costs/, published June 23, 2025.

use this figure but is open to public comments on whether it overstates or understates the true average cost of a newspaper job posting.

To estimate the annual cost savings by eliminating mandatory print newspaper advertisements, the Department multiplies the number of certification applications (108,786) by the average cost of a Newspaper job posting ($1,362). This yields an estimated annual cost-savings of approximately $174,465,390 (108,786 × $1,362). Over the ten-year period of analysis, the total undiscounted cost would be approximately $1.74 billion. The annualized cost over the ten-year span is projected at $179.69 million (at a 3 percent discount rate) and $153.71 (at a 7-percent discount rate).

The proposed rule also expands the recruitment method requirements for nonprofessional jobs by requiring advertising on the employer's own website(s), at least one job search engine, social media (if applicable), and at a job fair (or campus recruitment) and for professional occupations from three additional methods selected from a menu of options similar to the options proposed in this rule to four or more, consistent with their customary recruitment methods for job opportunities that are not the subject of a PERM application. The Department assumes that there are no additional costs to employers to place a job advertisement on job search engines and at a job fair (or -campus recruitment). There are several ways to post job advertisements online for free, making it easier for employers and small businesses to find qualified candidates without spending money on advertising. Many job boards, social media platforms, and community websites allow users to publish job vacancies at no cost. Employers can also share job openings in professional networking groups, local community forums, and university career portals to reach a wider audience. Using these free online platforms helps organizations attract potential applicants efficiently while reducing recruitment costs. By choosing the right combination of free resources, employers can successfully promote their job opportunities to a large and diverse audience. We are seeking public

comments on this matter and invite interested individuals, organizations, and stakeholders to share their feedback and suggestions

b. Nonquantifiable Cost-savings

Permanent Labor Certification Validity Limited to One Use and One Employer (§ 656.30)

The Department expects the clarification of permanent labor certification validity to generate meaningful cost savings for USCIS and, indirectly, for the broader employer community, by reducing the volume of Form I-140 petitions filed in reliance on stale or improperly reused permanent labor certifications.

Under the current rule, as interpreted by some employers, and current USCIS procedures, an approved permanent labor certification may be reused in connection with successive Form I-140 petitions for the same alien, potentially years after the underlying labor market test was conducted, so long as it was timely filed with an initial petition. Each such petition requires USCIS to expend adjudicative resources to review and process a filing that the Department has determined is inconsistent with the intent of the permanent labor certification program and with the Secretary's statutory obligations under INA section 212(a)(5)(A). Where USCIS denies such petitions, additional costs are incurred through the appellate process, including administrative appeals before the USCIS Administrative Appeals Office and, in some cases, litigation in the federal courts. By clarifying that a permanent labor certification is valid for use in connection with one initial Form I-140 petition only, the proposed rule is expected to reduce the frequency of such filings going forward, generating cost savings for USCIS in the form of reduced adjudicative and administrative costs associated with processing petitions based on stale certifications.

To the extent that the clarification also reduces the frequency of federal court litigation arising from USCIS denials of petitions based on reused certifications, the

proposed rule is expected to generate additional cost savings for both USCIS and DOJ in the form of reduced litigation costs. The Department is unable to quantify these savings with precision, as it does not have comprehensive data on the volume of petitions currently filed in reliance on reused certifications or the rate at which such petitions are denied and subsequently litigated. However, the Department concludes qualitatively that these cost savings are real and contribute meaningfully to the overall net benefits of the proposed clarification.

Mandatory Electronic Filing (§ 656.10 & § 656.40)

The Department expects the requirement to file *Applications for Permanent Employment Certification* and *Applications for Prevailing Wage Determination* electronically through the FLAG System to generate meaningful cost savings for both employers and OFLC. Because approximately 99.61 percent of *Applications for Permanent Employment Certification* and more than 99 percent of *Applications for Prevailing Wage Determination* were already submitted electronically during FY 2021–FY 2025, mandatory electronic filing does not represent a change in practice for the substantial majority of employers and their authorized representatives. Rather, it codifies and extends to the full population of filers the efficiencies that the Department and most employers have already realized through voluntary adoption of electronic filing.

For employers who currently file electronically, the cost savings associated with mandatory electronic filing are already being realized and are not incremental to the proposed rule. For the small subset of employers who currently file by mail (approximately 0.39 percent of PERM filers based on recent program data) mandatory electronic filing is expected to eliminate the costs associated with paper-based submission, including printing, postage, and private courier or expedited mailing fees. The Department notes that nearly all employers who currently file by mail disclosed valid email addresses on their applications, suggesting that these filers have access to the

internet and are likely capable of transitioning to electronic filing without significant investment in new technology or infrastructure.

For OFLC, mandatory electronic filing is expected to generate operational cost savings by reducing the administrative burden associated with receiving, sorting, scanning, and manually processing paper applications. Electronic filing also reduces the frequency of processing delays attributable to illegible, incomplete, or misdirected paper submissions, and supports more efficient interagency data sharing with USCIS and DOS by enabling direct electronic transmission of certified applications and PWDs. The Department considers these savings to be genuine reductions in Federal administrative costs that contribute to the overall net benefits of the proposed rule.

Elimination of Duplicate Labor Certifications (§ 656.30)

The Department expects the elimination of the process for requesting duplicate paper permanent labor certifications under current section 656.30(e) to generate cost savings for employers (potentially), their authorized representatives (potentially), and OFLC (more certainly) by removing an administrative procedure that is no longer necessary given the Department's transition to fully electronic processing and direct electronic transmission of approved certifications to USCIS and DOS.

Under the current rule, employers, aliens, and their authorized attorneys or agents may request duplicate paper copies of approved permanent labor certifications from the CO for submission to USCIS or DOS. This process requires employers or their representatives to identify the need for a duplicate, submit a request to OFLC, and await issuance of the duplicate certification before proceeding with downstream immigration filings. For OFLC, processing duplicate certification requests requires staff time to locate, verify, and issue the requested documentation. These costs, derived by both employers and the Federal Government, are entirely avoidable given that OFLC now transmits approved permanent labor certifications directly to USCIS electronically through existing

data sharing agreements, and that employers, aliens, and their authorized representatives have real-time access to approved certification records through their FLAG System accounts.

By eliminating the duplicate certification process, the proposed rule removes a procedural step that generates administrative costs without producing program benefits that are meaningful under current operating conditions as they might have been under other conditions. The Department expects that, for employers and authorized representatives who did not use the duplicate certification process, this elimination will have no effect on their burden. For those who voluntarily used the process, its elimination represents a loss of flexibility and a potential cost, as these entities will need to rely on FLAG System access or other means to provide certification documentation to USCIS or DOS, rather than a straightforward savings. For OFLC, cost savings would be in the form of reduced staff time spent processing requests that are no longer necessary for the downstream submission process. The Department also expects this change to strengthen program integrity by reducing the number of original paper permanent labor certifications in circulation, thereby reducing the risk of fraud associated with the possession and potential misuse of paper certification documents. The Department concludes qualitatively that eliminating the duplicate certification process would generate administrative cost savings for the Federal Government and potentially for employers and their representatives who did not rely on the duplicate process, there would be no change in burden. For those who did rely on it, they may incur costs from the loss of flexibility to request duplicate certifications. Such costs could include additional time and resources needed to obtain or verify certification records through alternative procedures. The Department is unable to reliably quantify these costs and seeks public comment on their potential magnitude, including the time and resources needed to obtain or verify

certification records through alternative means. The Department requests comment and data that could inform its assessment of this provision.

Elimination of Post-PWD Supplemental Information Submission (§ 656.40)

The Department expects the elimination of the supplemental information submission step currently available under section 656.40(h), which requires employers to submit a request for redetermination before they may seek Center Director Review (CDR) of a PWD under section 656.41, to generate cost savings for employers and their authorized representatives by streamlining the prevailing wage review process and eliminating a procedural step that imposes compliance costs without commensurate program integrity benefits.

Under the current rule, employers who disagree with a PWD issued by OFLC must first submit supplemental information to the NPC under section 656.40(h) before they are eligible to request review by the Center Director under section 656.41. This two-stage review process requires employers and their authorized representatives to prepare and submit supplemental information at the redetermination stage, await a response from the NPC, and then, if the redetermination is unfavorable, prepare and submit a separate request for Center Director Review (CDR). Each stage of this process imposes incremental costs on employers in the form of attorney or agent time spent preparing submissions, coordinating with the NPC, and managing the administrative timeline associated with a multi-stage review process.

By eliminating the redetermination step and permitting employers to proceed directly to Center Director Review (CDR) under section 656.41 when they disagree with a PWD, the proposed rule reduces the number of procedural steps employers must navigate to obtain review of an unfavorable determination. The Department expects this change to generate cost savings for employers by reducing the total time and professional fees associated with challenging a PWD, and to generate operational efficiencies for

OFLC by reducing the volume of supplemental submissions the NPC must review and adjudicate outside of the standard RFI process established in proposed section 656.40(c). The Department concludes qualitatively that the elimination of the post-PWD supplemental information submission step generates meaningful cost savings for the regulated community and contributes to the Department's broader goal of streamlining and modernizing the administration of the PWD process.

4. Summary of the Analysis

Exhibit 2 summarizes the estimated total costs, cost savings, and net cost-savings of the proposed rule over the 10-year analysis period. The Department estimates the total net cost-savings of the proposed rule at $164.30 million at a discount rate of 7 percent and $164.37 million at a discount rate of 3 percent.

Exhibit 2: Estimated Monetized Costs, Cost Savings, and Net Costs,

	Costs	Cost Savings	Net Costs
Rule Familiarization (1st Year only)	$3,388,457	$0.00	$3,388,457.00
Employer Signature on All Supporting Documents	$17,360,455	$0.00	$17,360,455
Extended NOF Duration and Locations	$20,781,034	$0.00	$20,781,034
New Attestations	$41,562,067	$0.00	$41,562,067
Schedule A Occupations Subject to Full PERM Recruitment	$14,939,254	$0.00	$14,939,254
Notify OFLC of Pending Layoffs	$2,489,910	$0.00	$2,489,910
Elimination of Mandatory Print Newspaper Advertisements and Expanded Recruitment Method Requirements	$0.00	$1,744,653,900	($1,744,653,900)
Total (Year 1)	$13,101,729	$174,465,390	($161,576,420)
Total (Years 2 through 10)	$87,419,448	$1,570,188,510	($1,482,769,062)

Annualized with a Discount Rate of 3%	($164,366,457)
Annualized with a Discount Rate of 7%	($164,301,239)

5. Regulatory Alternatives

OMB Circular A-4, which outlines best practices in regulatory analysis, directs agencies to analyze alternatives if such alternatives best satisfy the philosophy and principles of E.O. 12866. The Department considered two primary alternatives:

Alternative 1: Mandating additional recruitment methods and longer recruitment periods

As an alternative to the proposed rule, the Department considered mandating additional recruitment methods and longer recruitment periods. Under this alternative, the Department could have required employers to conduct a more extensive labor market test by mandating additional recruitment methods and longer recruitment periods beyond those proposed in this NPRM. For example, the Department could have required all employers to conduct recruitment through multiple commercial job search websites, mandatory social media advertising regardless of customary practice, and mandatory employee referral programs. Similarly, the Department could have required all recruitment advertisements to remain active for periods exceeding 90 calendar days, such as 120 or 180 calendar days, to maximize labor market exposure and increase opportunities for U.S. workers to apply. Although the Department recognizes that these more stringent requirements could potentially provide additional protections for U.S. workers and further strengthen program integrity, the Department determined that such approaches would likely impose substantially greater administrative and compliance burdens on employers, increase processing complexity, and reduce operational flexibility for employers with legitimate workforce needs. The Department also determined that these approaches could significantly increase application preparation costs and prolong recruitment timelines without proportionate additional benefits in many cases. Accordingly, the Department determined that the proposed rule appropriately balances

the need to strengthen labor market protections and program integrity while avoiding unnecessary burdens on employers and the administration of the PERM program.

Alternative 2: Elimination of print newspaper advertisement requirements

As an alternative to the proposed rule, the Department considered a narrower regulatory approach that would have focused solely on eliminating the mandatory print newspaper advertisement requirements currently applicable to the PERM labor certification process, while otherwise retaining the existing recruitment framework and procedural requirements under 20 CFR part 656. Under this alternative, employers would continue to comply with the existing PERM labor certification structure, including the distinction between professional and nonprofessional occupations, the current menu-based recruitment system for professional occupations, and existing recruitment timing and notice requirements. However, the Department would eliminate the requirement that employers place print advertisements in newspapers of general circulation on two different Sundays or in professional journals, as currently required under section 656.17.

In place of mandatory print advertisements, the Department considered allowing employers to satisfy the recruitment requirement through alternative electronic recruitment methods, such as commercial job search websites or employer websites, while preserving the remainder of the current regulatory framework. This alternative would have recognized significant changes in labor market recruitment practices and the declining utility of print newspapers as a meaningful recruitment tool for many occupations.

The Department considered this alternative because current labor market practices increasingly rely on electronic recruitment methods rather than traditional print media. Online job platforms, employer career websites, and social media platforms have become the primary means through which employers advertise vacancies and workers search for employment opportunities. In contrast, print newspaper circulation has significantly

declined in recent years, including among local and ethnic newspapers traditionally relied upon for recruitment. As a result, the Department recognized that retaining mandatory print newspaper advertisements may impose costs on employers while producing diminishing recruitment value for U.S. workers.

However, after consideration, the Department determined that this limited alternative would not adequately address broader structural and integrity concerns within the PERM labor certification process. Although eliminating print newspaper advertisements would modernize one component of the labor market test, the Department concluded that retaining the remainder of the current recruitment framework would fail to sufficiently align PERM recruitment requirements with contemporary labor market conditions and employer hiring practices. In particular, the Department determined that simply removing print newspaper advertisements without adopting broader modernization measures would not adequately address inconsistencies in recruitment quality, insufficient labor market exposure, or concerns regarding employer recruitment practices that may deter participation by qualified U.S. workers. The Department also determined that this alternative would not sufficiently strengthen protections for U.S. workers impacted by layoffs, improve transparency during adjudication, or address integrity concerns involving third-party placements, inadequate notice procedures, or inconsistent employer recruitment practices.

The Department invites public comments on these or other possible alternatives with the goal of ensuring a thorough consideration and discussion at the final rule stage.

B. Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act of 1996, and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121

(Mar. 29, 1996), hereafter jointly referred to as the RFA, requires agencies to prepare an initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities. The Department conducted the IRFA below of the effect on small entities from the proposed rule.

1. Why the Department Is Considering Action

The Department is considering this rulemaking to modernize and streamline the permanent labor certification (PERM) program and ensure that its regulations continue to fulfill the Department's statutory responsibilities under section 212(a)(5)(A) of the INA. Under the INA, before certain employment-based immigrants may be admitted to the United States for permanent employment, the Secretary must determine and certify that there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the work and that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

The Department's current PERM regulations were largely established in 2004 and have not undergone comprehensive modernization in approximately two decades. During that time, substantial changes have occurred in labor market conditions, recruitment practices, workforce mobility, and the use of technology in hiring. Employers increasingly rely on electronic recruitment methods, including online job boards, employer websites, social media platforms, and virtual recruitment events, while the use and effectiveness of traditional print newspaper advertising have declined significantly. The Department has determined that the current regulatory framework does not fully reflect these developments and may not consistently ensure that available job opportunities are advertised to the broadest possible pool of qualified U.S. workers.

The Department is also considering this action to strengthen protections for U.S. workers and improve program integrity. Through its administration of the PERM

program, the Department has identified areas where existing regulations could be clarified or updated to better address issues involving layoffs, third-party worksite arrangements, notice requirements, recruitment practices, employer accountability, and compliance oversight. The Department believes that updating these requirements would improve transparency, enhance the effectiveness of labor market testing, and provide greater assurance that employers seeking permanent labor certification are conducting recruitment in good faith and providing qualified U.S. workers a meaningful opportunity to compete for available positions.

In addition, the Department seeks to modernize and streamline program administration by codifying electronic filing and communication practices, clarifying regulatory standards, reducing reliance on outdated procedures, and improving operational efficiency. These changes are intended to support timely processing, reduce administrative burdens associated with obsolete requirements, and improve consistency and integrity across the Department's foreign labor certification programs while continuing to provide employers with access to lawful employment-based immigration pathways when qualified U.S. workers are unavailable.

2. Objectives of and Legal Basis for the NPRM

The objective of this NPRM is to modernize the permanent labor certification (PERM) program, improve protections for U.S. workers, strengthen program integrity, and increase the efficiency and transparency of the Department's administration of employment-based permanent labor certifications. Through this rulemaking, the Department seeks to update regulatory standards and procedures that have remained largely unchanged since implementation of the current PERM framework in 2005, while continuing to provide employers with access to permanent employment-based immigration pathways when qualified and available U.S. workers cannot be found.

The proposed rule would update labor market test requirements to better reflect contemporary recruitment practices and labor market conditions. Among other changes, the Department proposes to replace outdated print-focused recruitment requirements with modern electronic recruitment methods, establish a more uniform recruitment framework applicable to most occupations, clarify recruitment content and timing requirements, and require employers to recruit U.S. workers in a manner that is comparable to recruitment conducted for similar positions outside the PERM process. The Department also proposes to strengthen worker protections by expanding requirements related to layoffs, NOF obligations, and consideration of qualified U.S. workers throughout the labor certification process.

In addition, the NPRM proposes measures intended to enhance program integrity and improve compliance with statutory and regulatory requirements. These measures include revised employer attestations, expanded audit and supervised recruitment authorities, strengthened debarment provisions, successor-in-interest accountability standards, and additional requirements governing attorneys and agents participating in the PERM process. The Department also proposes to modernize program administration through mandatory electronic filing and communications, clarification of PWD procedures, and codification of existing electronic processing practices.

The legal basis for this NPRM is found principally in section 212(a)(5)(A) of the INA, 8 U.S.C. 1182(a)(5)(A), which requires the Secretary to determine and certify, before certain employment-based immigrants may be admitted to the United States, that there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the labor or services involved in the employment opportunity and that employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Additional authority is provided by section 212(p) of the INA, 8 U.S.C. 1182(p), governing PWDs, and other statutory authorities delegated to

the Secretary for administration of the permanent labor certification program. The Department is issuing this NPRM pursuant to these statutory authorities and its responsibility to establish procedures necessary to carry out the labor certification requirements of the INA.

3. Estimating the Number of Small Entities Affected by the Rulemaking

Based on FY 2021–FY 2025 DOL Certification data, there were 95,656 unique PERM employers. To clarify which industries are impacted by this regulation, Exhibit 3 shows the number of unique PERM employers in the 10 most prevalent industries at the 6- and 4-digit North American Industry Classification System (NAICS) levels. The Department, however, lacks the data needed to identify small employers among the 95,656 unique PERM employers.

Exhibit 3 – Number of PERM Unique Employers by NAICS Code

6-Digit NAICS	Description	Number of PERM Unique Employers	Percentage of Employers
541511	Custom Computer Programming Services	7,488	8%
722511	Full-Service Restaurants	3,995	4%
541330	Engineering Services	2,457	3%
541512	Computer Systems Design Services	1,609	2%
511210	Software Publishers	1,466	2%
814110	Private Households	1,411	1%
611310	Colleges, Universities, and Professional Schools	1,143	1%
541519	Other Computer Related Services	1,065	1%
722513	Limited-Service Restaurants	1,006	1%
541110	Office of Lawyers	972	1%
All Others		73,044	76%

Total	95,656	100%

4. Compliance Requirements of the NPRM, Including Reporting and Recordkeeping

The Department has considered the incremental costs (and cost-savings) for small entities from the baseline (i.e., the current practices for complying, at the minimum, with the regulations governing permanent labor certifications at 20 CFR part 656 and labor condition applications at 20 CFR part 655, subpart H) to this NPRM. We estimated the cost (cost-savings) of (1) the time to read and review the NPRM; (2) elimination of mandatory print newspaper advertisements and expanded recruitment method requirements; (3) employer's signature required on all supporting documents; (4) expanded NOF duration and locations; and (5) new attestations. These estimates are consistent with those presented in the E.O. 12866 section.

5. Calculating the Impact of the NPRM on Small Entities

The Department estimates that small entities using the PERM program would incur a one-time cost of $62.68 to familiarize themselves with the rule. In addition to the rule familiarization, each small entity using the PERM program would incur $62.68 for providing employer's signature on all supporting documents. $15.67 for expanded NOF locations. Cost-savings of eliminating mandatory print newspaper advertisements for a job posting is $1,362 per year. The cost of the new and expanded attestation requirements is $31.34 annually per small entities. In total, typical small entities affected will have an annualized cost-savings of $1,190. with 7% discounting.

Exhibit 4 through 13 provide breakdowns of small employers by the proportion of revenue affected by the costs of the NPRM for the top ten most prevalent industries at the

six-digit NAICS code level.[180] Based on FY 2023–FY 2025 DOL certification data, approximately 90 percent of unique PERM employers had no more than five certifications over the five-year period. Therefore, the Department assumes that, on average, small employers have one certification per year.

Exhibit 4 – Cost Impacts as a Proportion of Total Revenue for Small Entities under NAICS 5415111

Custom Computer Programming Services (NAICS 541511)					
Small Business Size Standard: $34.0 million					
Enterprises with Receipts	**Number of Firms**	**Number of Firms as Percent of Small Firms in Industry**	**Average Receipts per Firm**	**Annualized Cost-Savings per Firm with 7% Discounting**	**Annualized Cost-Savings per Firm as Percent of Receipts**
below $100,000	12,194	19.9%	$48,437	$1,190	2.5%
$100,000 to $499,999	25,636	41.9%	$243,535	$1,190	0.5%
$500,000 to $999,999	7,355	12.0%	$712,014	$1,190	0.2%
$1,000,000 to $2,499,999	7,291	11.9%	$1,591,418	$1,190	0.1%
$2,500,000 to $4,999,999	3,772	6.2%	$3,535,956	$1,190	0.0%
$5,000,000 to $7,499,999	1,590	2.6%	$6,043,962	$1,190	0.0%
$7,500,000 to $9,999,999	902	1.5%	$8,487,348	$1,190	0.0%
$10,000,000 to $14,999,999	1,015	1.7%	$11,844,915	$1,190	0.0%
$15,000,000 to $19,999,999	616	1.0%	$16,569,023	$1,190	0.0%
$20,000,000 to $24,999,999	343	0.6%	$21,202,379	$1,190	0.0%
$25,000,000 to $29,999,999	228	0.4%	$25,815,320	$1,190	0.0%
$30,000,000 to $34,999,999	197	0.3%	$30,409,198	$1,190	0.0%

Exhibit 5 – Cost Impacts as a Proportion of Total Revenue for Small Entities under NAICS 541512

[180] The Department uses the United States Census Bureau's 2022 Statistics of U.S. Businesses that includes annual receipts for most U.S. business firms (https://www.census.gov/data/tables/2022/econ/susb/2022-susb-annual.html).

Computer Systems Design Services (NAICS 541512)					
Small Business Size Standard: $34.0 million					
Enterprises with Receipts	**Number of Firms**	**Number of Firms as Percent of Small Firms in Industry**	**Average Receipts per Firm**	**Annualized Cost-Savings per Firm with 7% Discounting**	**Annualized Cost-Savings per Firm as Percent of Receipts**
below $100,000	9,400	19.5%	$48,269	$1,190	2.5%
$100,000 to $499,999	21,775	45.1%	$244,193	$1,190	0.5%
$500,000 to $999,999	5,913	12.2%	$702,622	$1,190	0.2%
$1,000,000 to $2,499,999	5,310	11.0%	$1,577,051	$1,190	0.1%
$2,500,000 to $4,999,999	2,596	5.4%	$3,492,912	$1,190	0.0%
$5,000,000 to $7,499,999	1,100	2.3%	$5,957,183	$1,190	0.0%
$7,500,000 to $9,999,999	620	1.3%	$8,519,268	$1,190	0.0%
$10,000,000 to $14,999,999	654	1.4%	$11,921,459	$1,190	0.0%
$15,000,000 to $19,999,999	352	0.7%	$16,099,790	$1,190	0.0%
$20,000,000 to $24,999,999	219	0.5%	$20,170,521	$1,190	0.0%
$25,000,000 to $29,999,999	157	0.3%	$25,471,121	$1,190	0.0%
$30,000,000 to $34,999,999	92	0.2%	$29,790,902	$1,190	0.0%
$35,000,000 to $39,999,999	85	0.2%	$34,315,153	$1,190	0.0%

Exhibit 6 – Cost Impacts as a Proportion of Total Revenue for Small Entities under NAICS 454111

Electronic Shopping and Mail-Order Houses (NAICS 454111)					
Small Business Size Standard for Retail Trade Industry: $9.0 million – $47.0 million					
Enterprises with Receipts	**Number of Firms**	**Number of Firms as Percent of Small Firms in Industry**	**Average Receipts per Firm**	**Annualized Cost-Savings per Firm with 7% Discounting**	**Annualized Cost-Savings per Firm as Percent of Receipts**
below $100,000	9,615	18.3%	$46,644	$1,190	2.6%
$100,000 to $499,999	16,997	32.4%	$259,774	$1,190	0.5%
$500,000 to $999,999	7,847	15.0%	$714,538	$1,190	0.2%
$1,000,000 to $2,499,999	8,483	16.2%	$1,581,124	$1,190	0.1%
$2,500,000 to $4,999,999	4,173	8.0%	$3,490,440	$1,190	0.0%
$5,000,000 to $7,499,999	1,791	3.4%	$5,968,086	$1,190	0.0%
$7,500,000 to $9,999,999	937	1.8%	$8,347,625	$1,190	0.0%
$10,000,000 to $14,999,999	996	1.9%	$11,658,443	$1,190	0.0%
$15,000,000 to $19,999,999	544	1.0%	$16,101,985	$1,190	0.0%
$20,000,000 to $24,999,999	340	0.6%	$20,511,574	$1,190	0.0%
$25,000,000 to $29,999,999	218	0.4%	$25,222,537	$1,190	0.0%
$30,000,000 to $34,999,999	166	0.3%	$28,776,867	$1,190	0.0%
$35,000,000 to $39,999,999	143	0.3%	$33,579,308	$1,190	0.0%
$40,000,000 to $49,999,999	170	0.3%	$38,348,212	$1,190	0.0%

Exhibit 7 – Cost Impacts as a Proportion of Total Revenue for Small Entities under NAICS 511210

Software Publishers (NAICS 511210)					
Small Business Size Standard for Information Industry: $11.0 million – $47.0 million					
	Number of Firms	**Number of Firms as Percent of Small Firms in Industry**	**Average Receipts per Firm**	**Annualized Cost-Savings per Firm with 7% Discounting**	**Annualized Cost-Savings per Firm as Percent of Receipts**
below $100,000	1,826	14.2%	$46,457	$1,190	2.6%
$100,000 to $499,999	3,738	29.1%	$259,281	$1,190	0.5%
$500,000 to $999,999	1,821	14.2%	$709,754	$1,190	0.2%
$1,000,000 to $2,499,999	2,179	17.0%	$1,574,610	$1,190	0.1%
$2,500,000 to $4,999,999	1,256	9.8%	$3,506,799	$1,190	0.0%
$5,000,000 to $7,499,999	567	4.4%	$6,000,767	$1,190	0.0%
$7,500,000 to $9,999,999	318	2.5%	$8,311,094	$1,190	0.0%
$10,000,000 to $14,999,999	360	2.8%	$11,887,753	$1,190	0.0%
$15,000,000 to $19,999,999	220	1.7%	$15,858,295	$1,190	0.0%
$20,000,000 to $24,999,999	147	1.1%	$21,420,422	$1,190	0.0%
$25,000,000 to $29,999,999	130	1.0%	$26,131,908	$1,190	0.0%
$30,000,000 to $34,999,999	70	0.5%	$29,558,443	$1,190	0.0%
$35,000,000 to $39,999,999	72	0.6%	$34,198,708	$1,190	0.0%
$40,000,000 to $49,999,999	126	1.0%	$41,008,397	$1,190	0.0%

Exhibit 8 – Cost Impacts as a Proportion of Total Revenue for Small Entities under NAICS 311615

Poultry Processing (NAICS 311615)					
Small Business Size Standard: 1,250 employees					
Employer with	**Number of Firms**	**Number of Firms as Percent of Small Firms in Industry**	**Average Receipts per Firm**	**Annualized Cost-Savings per Firm with 7% Discounting**	**Annualized Cost-Savings per Firm as Percent of Receipts**
0-4 employees	71	27.3%	$1,099,507	$1,190	0.1%
5-9 employees	37	14.2%	$2,508,270	$1,190	0.0%
10-19 employees	27	10.4%	$8,034,556	$1,190	0.0%
20-99 employees	60	23.1%	$22,382,233	$1,190	0.0%
100-499 employees	35	13.5%	$100,976,800	$1,190	0.0%
500-749 employees	10	3.8%	$235,111,200	$1,190	0.0%
50-999 employees	10	3.8%	$243,939,000	$1,190	0.0%
1,000-1,499 employees	10	3.8%	$436,221,500	$1,190	0.0%

Exhibit 9 – Cost Impacts as a Proportion of Total Revenue for Small Entities under NAICS 334111

Electronic Computer Manufacturing (NAICS 334111)					
Small Business Size Standard: 1,250 employees					
Employer with	**Number of Firms**	**Number of Firms as Percent of Small Firms in Industry**	**Average Receipts per Firm**	**Annualized Cost-Savings per Firm with 7% Discounting**	**Annualized Cost-Savings per Firm as Percent of Receipts**
0-4 employees	79	40.5%	$791,873	$1,190	0.2%
5-9 employees	37	19.0%	$3,374,568	$1,190	0.0%
10-19 employees	25	12.8%	$5,710,360	$1,190	0.0%
20-99 employees	36	18.5%	$19,231,194	$1,190	0.0%
100-499 employees	18	9.2%	$154,260,444	$1,190	0.0%
500-749 employees	0	0.0%	NA	NA	NA
750-999 employees	0	0.0%	NA	NA	NA
1,000-1,499 employees	0	0.0%	NA	NA	NA

Exhibit 10 – Cost Impacts as a Proportion of Total Revenue for Small Entities under NAICS 611310

Colleges, Universities, and Professional Schools (NAICS 611310)					
Small Business Size Standard: $34.5 million					
Enterprises with receipts	**Number of Firms**	**Number of Firms as Percent of Small Firms in Industry**	**Average Receipts per Firm**	**Annualized Cost-Savings per Firm with 7% Discounting**	**Annualized Cost-Savings per Firm as Percent of Receipts**
below $100,000	157	10.3%	$49,675	$1,190	2.4%
$100,000 to $499,999	341	22.4%	$264,692	$1,190	0.4%
$500,000 to $999,999	154	10.1%	$738,506	$1,190	0.2%
$1,000,000 to $2,499,999	228	15.0%	$1,631,763	$1,190	0.1%
$2,500,000 to $4,999,999	165	10.9%	$3,538,188	$1,190	0.0%
$5,000,000 to $7,499,999	104	6.8%	$6,064,519	$1,190	0.0%
$7,500,000 to $9,999,999	75	4.9%	$8,644,800	$1,190	0.0%
$10,000,000 to $14,999,999	81	5.3%	$11,615,383	$1,190	0.0%
$15,000,000 to $19,999,999	69	4.5%	$17,032,768	$1,190	0.0%
$20,000,000 to $24,999,999	56	3.7%	$22,171,768	$1,190	0.0%
$25,000,000 to $29,999,999	44	2.9%	$26,563,500	$1,190	0.0%
$30,000,000 to $34,999,999	46	3.0%	$31,368,761	$1,190	0.0%

Exhibit 11 – Cost Impacts as a Proportion of Total Revenue for Small Entities under NAICS 541519

Other Computer Related Services (NAICS 541519)					
Small Business Size Standard: $34.0 million					
Enterprises with Receipts	**Number of Firms**	**Number of Firms as Percent of Small Firms in Industry**	**Average Receipts per Firm**	**Annualized Cost-Savings per Firm with 7% Discounting**	**Annualized Cost-Savings per Firm as Percent of Receipts**
below $100,000	2,433	23.4%	$48,118	$1,190	2.5%
$100,000 to $499,999	4,704	45.2%	$239,342	$1,190	0.5%
$500,000 to $999,999	1,185	11.4%	$708,056	$1,190	0.2%
$1,000,000 to $2,499,999	1,002	9.6%	$1,562,830	$1,190	0.1%
$2,500,000 to $4,999,999	472	4.5%	$3,478,585	$1,190	0.0%
$5,000,000 to $7,499,999	178	1.7%	$5,945,230	$1,190	0.0%
$7,500,000 to $9,999,999	111	1.1%	$8,449,153	$1,190	0.0%
$10,000,000 to $14,999,999	133	1.3%	$11,714,707	$1,190	0.0%
$15,000,000 to $19,999,999	68	0.7%	$16,270,147	$1,190	0.0%
$20,000,000 to $24,999,999	55	0.5%	$20,341,618	$1,190	0.0%
$25,000,000 to $29,999,999	31	0.3%	$25,029,194	$1,190	0.0%
$30,000,000 to $34,999,999	23	0.2%	$27,239,087	$1,190	0.0%
$35,000,000 to $39,999,999	18	0.2%	$33,093,556	$1,190	0.0%

Exhibit 12 – Cost Impacts as a Proportion of Total Revenue for Small Entities under NAICS 722513

Limited-Service Restaurants (NAICS 722513)					
Small Business Size Standard: $13.5 million					
Enterprises with Receipts	**Number of Firms**	**Number of Firms as Percent of Small Firms in Industry**	**Average Receipts per Firm**	**Annualized Cost-Savings per Firm with 7% Discounting**	**Annualized Cost-Savings per Firm as Percent of Receipts**
below $100000	13,597	8.5%	$50,945	$1,190	2.3%
$100,000 to $499,999	56,720	35.5%	$288,968	$1,190	0.4%
$500,000 to $999,999	40,506	25.4%	$711,219	$1,190	0.2%
$1,000,000 to $2,499,999	34,412	21.5%	$1,489,168	$1,190	0.1%
$2,500,000 to $4,999,999	8,825	5.5%	$3,318,664	$1,190	0.0%
$5,000,000 to $7,499,999	2,515	1.6%	$5,891,812	$1,190	0.0%
$7,500,000 to $9,999,999	1,536	1.0%	$8,174,289	$1,190	0.0%
$10,000,000 to $14,999,999	1,604	1.0%	$11,316,902	$1,190	0.0%

Exhibit 13 – Cost Impacts as a Proportion of Total Revenue for Small Entities under NAICS 518210

Data Processing, Hosting, and Related Services (NAICS 518210)					
Small Business Size Standard: $40.0 million					
Enterprises with Receipts	**Number of Firms**	**Number of Firms as Percent of Small Firms in Industry**	**Average Receipts per Firm**	**Annualized Cost-Savings per Firm with 7% Discounting**	**Annualized Cost-Savings per Firm as Percent of Receipts**
below $100,000	1,740	16.7%	$46,422	$1,190	2.6%
$100,000 to $499,999	3,183	30.5%	$251,294	$1,190	0.5%
$500,000 to $999,999	1,393	13.4%	$710,749	$1,190	0.2%
$1,000,000 to $2,499,999	1,643	15.8%	$1,589,093	$1,190	0.1%
$2,500,000 to $4,999,999	922	8.8%	$3,498,157	$1,190	0.0%
$5,000,000 to $7,499,999	440	4.2%	$5,918,555	$1,190	0.0%
$7,500,000 to $9,999,999	256	2.5%	$8,153,965	$1,190	0.0%
$10,000,000 to $14,999,999	303	2.9%	$11,453,026	$1,190	0.0%
$15,000,000 to $19,999,999	200	1.9%	$15,758,765	$1,190	0.0%
$20,000,000 to $24,999,999	129	1.2%	$19,035,791	$1,190	0.0%
$25,000,000 to $29,999,999	77	0.7%	$22,959,442	$1,190	0.0%
$30,000,000 to $34,999,999	69	0.7%	$26,595,087	$1,190	0.0%
f $35,000,000 to $39,999,999	64	0.6%	$28,350,719	$1,190	0.0%

6. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the NPRM

The proposed rule concerns the administration of the permanent labor certification process under section 212(a)(5)(A) of the INA, an area of authority specifically delegated to DOL. The regulations in 20 CFR part 656 govern the standards and procedures by which the Department determines whether there are sufficient qualified and available U.S. workers for a job opportunity and whether the employment of an alien would adversely affect the wages and working conditions of similarly employed U.S. workers.

Although other Federal agencies, including DHS and DOS, administer related aspects of the employment-based immigration system, their regulations address separate statutory responsibilities, such as immigrant visa petition adjudication, visa issuance, and admission of aliens. The proposed revisions in this NPRM are intended to complement,

rather than duplicate or conflict with those requirements. However, as USCIS administers the immigrant petition process after DOL grants permanent labor certification, the proposed revisions may require DHS to make technical revisions to 8 C.F.R. 204.5 in the event the Department eliminates Schedule A and other minor changes regarding USCIS requests to OFLC for duplicate Applications for Permanent Employment Certification and outdate references to discontinued DOL Form ETA-750.

7. Alternatives to the Proposed Rule

The RFA requires agencies to consider significant alternatives that accomplish the objectives of the proposed rule while minimizing impacts on small entities. The Department considered the following alternatives.

Alternative 1: Reduced Recruitment Duration for Small Employers

As an alternative to the proposed requirement that most recruitment activities remain active for at least 90 calendar days, the Department considered allowing small employers to satisfy the recruitment requirement through a shorter advertising period, such as 30 or 60 calendar days. This approach would reduce recruitment costs and administrative burdens for small businesses by shortening the duration of required job advertisements and reducing the time needed to complete the labor market test. However, the Department determined that a uniform recruitment period better promotes consistency across employers and provides U.S. workers with a meaningful opportunity to learn about and apply for available job opportunities. Accordingly, the Department is proposing a single recruitment standard applicable to all employers.

Alternative 2: Retention of Current Recruitment Framework with Limited Modernization

The Department considered retaining the existing PERM recruitment framework while eliminating only the mandatory newspaper advertisement requirements and permitting electronic recruitment methods as substitutes. Under this alternative, employers would continue to follow the current distinction between professional and

nonprofessional occupations and the existing recruitment timelines. This approach would reduce compliance costs for small businesses by avoiding many of the new recruitment, notice, and reporting requirements proposed in this NPRM. However, the Department concluded that this narrower approach would not sufficiently address concerns regarding the effectiveness of the labor market test, evolving recruitment practices, program integrity, and protections for U.S. workers. Therefore, the Department determined that the proposed rule more effectively advances its statutory objectives.

The Department welcomes commenter feedback on these regulatory alternatives and invites suggestions for any other regulatory alternatives that commenters believe would be feasible and appropriate.

C. Review Under the Paperwork Reduction Act

In order to meet its statutory responsibilities under the INA, the Department collects information necessary to render determinations on requests for permanent labor certification, which allow employers to bring foreign labor into the United States on a permanent basis under the PERM program. This information collection is authorized by INA sections 203(b)(2) and (b)(3) and 212(a)(5)(A) and 8 U.S.C. 1153(b)(2) and (b)(3) and 1182(a)(5)(A), DOL and DHS have promulgated regulations to implement provisions of the INA at 20 CFR part 656 and 8 CFR 204.5. This information is subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB control number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid control number. See 5 CFR 1320.5(a) and 1320.6. The Department obtained OMB approval for this information collection under Control Number 1205-0451. The PRA helps ensure that

requested data is provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

The NPRM, *Modernizing the Labor Market Test and Improving Protections for U.S. Workers in the PERM Immigrant Visa Program,* proposes to update the PERM program by modernizing recruitment to attract high-quality American talent, improving the safeguards for U. S. workers impacted by layoffs, strengthening employer compliance and program integrity, and modernizing the prevailing wage and PERM application process. The Department now proposes revisions to the information collection tools covered under OMB Control Number 1205-0451, to reflect the regulatory changes proposed in this proposed rule. The revisions to Form ETA-9089 and General Instructions the Department is proposing through this proposed rule will align information collection requirements with the proposed regulatory framework and the Department's continued ongoing efforts to provide greater clarity to employers on regulatory requirements, standardize and streamline information collection to reduce employer time and burden preparing applications, minimize processing delays associated with deficient applications, and promote greater efficiency and transparency in the review and issuance of decisions under the PERM program.

Specifically, the Department is proposing conforming changes to the Form ETA-9089, and the General Instructions which include, for example, updating language based on proposed revised regulatory language, eliminating fields that have and will become obsolete due to the Department's proposed changes to eliminate certain steps of the process, and adding new fields to reflect the proposed regulatory changes that will result in new or revised requirements to be implemented. In addition, DOL seeks to extend, without changes, the validity of Form ETA-9089, *Application for Permanent Employment Certification*; Form ETA-9089, *Final Determination: Permanent*

Employment Certification Approval; Form ETA-9089, *Appendix A, Foreign Worker Information*; Form ETA-9089, *Appendix B, Additional Worksite Information*; Form ETA-9089, *Appendix C, Supplemental Information*; Form ETA-9089, *Appendix D, Optional Pre-filing Recruitment for College and University Teachers and Professional Athletes and Professional Sports Team Coaches*, and Form ETA-9089, *General Instructions*. The Department is, however, proposing the creation and implementation of a new Form ETA-9089*, Appendix E, Assurances and Obligations* to comply with the proposed revised provisions at 656.13 and to enumerate by topic the assurances and obligations under the PERM labor certification program to which an employer must attest compliance. This form will include existing obligations contained in current sections 656.10, 656.12, 656.17, and 656.20 that are being relocated to proposed section 656.13, which also further revises them to create clear employer attestations in efforts to clarify and/or update compliance requirements. The proposals in this rule strengthen U.S. worker protections and bolster program integrity by holding employers who choose to participate in the PERM program accountable to the Department, and to their responsibilities to both U.S. workers and aliens, with regard to the employer's filing of the of the *Application for Permanent Employment Certification* and participation in the PERM labor certification program.

The rule also proposes that employers seeking to sponsor workers under DHS' National Interest Waiver program must continue to file Form ETA-9089 directly with DHS. This will continue to eliminate the intake of this information by the Department and will transfer the burden imposed by the requirement to another agency so it is not accounted for in the reporting burden disclosure the Department submits to OMB.

In addition, the Department is proposing to revise its regulations covering Schedule A occupations to eliminate the exception to pre-filing recruitment requirements. This change, if approved, would result in employers who utilize Schedule A having to

conduct pre-filing requirements and submitting the Form ETA-9089 to the Department, instead of being submitted with DHS, which is the current process.

DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

The Department is also considering which questions or instructions could be removed to reduce public burden without impacting the general collection of information to assess and process Applications for Permanent Employment Certification or revised to better collect the information needed to fulfill the Department's statutory obligations regarding the requests for permanent employment certification. For example, questions confirming whether a required appendix has been attached could potentially be removed if the electronic platform would not permit submission without the required appendix. Similarly, redundant questions about the employer's acceptance of foreign diploma/degree equivalency could be removed from Form ETA-9089 because the information is already collected through the current Form ETA-9141. The Department is also interested in feedback regarding ways to improve the information collected to ensure

consistency across the forms and appendices the Department relies on to collect information in order to process *Applications for Permanent Employment Certification* or requesting more information that would assist employers establish or clarify any successor in interest scenario or travel requirements (e.g., frequency of travel). As discussed above, the Department seeks to improve the collection of worksite information to better reflect modern concepts of remote work and telework, without adding burden to employers. The Department is therefore seeking comments on how to best approach these changes and may consider adding, eliminating or revising questions, as necessary to accomplish the goals of this proposed rule. Lastly, the Department is seeking comments on how an employer's future filings of the ETA Form 9089 under Supervised Recruitment are clearly identifiable.

Agency: DOL-ETA.

Type of Review: Notice of Proposed Rulemaking.

Title of Collection: Application for Permanent Employment Certification.

Forms: Form ETA-9089, *Application for Permanent Employment Certification*; Form ETA-9089, *Final Determination: Permanent Employment Certification Approval*; Form ETA-9089, *Appendix A, Foreign Worker Information*; Form ETA-9089, *Appendix B, Additional Worksite Information*; Form ETA-9089, *Appendix C, Supplemental Information*; Form ETA-9089, *Appendix D, Optional Pre-filing Recruitment for College and University Teachers, and Professional Athletes and Professional Sports Team Coaches;* New Form ETA-9089, *Appendix E, Assurances and Obligations;* and Form ETA-9089, *General Instructions*.

OMB Control Number: 1205-0451.

Affected Public: Individuals or Households; Private Sector (businesses or other for profits); Not-for-profit Institutions; Government, State, Local and Tribal Governments.

Total Estimated Number of Annual Respondents: 42,073.

Annual Frequency: Varies by form.

Total Estimated Number of Annual Responses: 1,032,321.

Estimated Time per Response: Varies by form.

Total Estimated Annual Burden Hours: 29,691 hours.

Total Estimated Annual Other Costs: $104,905,296.20.

D. Review Under Executive Order 13132

E.O. 13132, *Federalism*, 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The E.O. requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The E.O. also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.

The Department has examined this proposed rule and has determined that it would 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.

E. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

The Department has reviewed this proposed rule in accordance with E.O. 13175 and has determined that it does not have tribal implications. This proposed rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and tribal governments.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, "Civil Justice Reform," imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General.

Section 3(c) of E.O. 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of E.O. 12988.

G. Review Under the Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4, codified at 2 U.S.C. 1501 *et seq.*) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on state, local, and tribal governments. UMRA requires Federal agencies to assess a regulation's effects on state, local, and tribal governments, as well as on the private sector, except to the extent the regulation incorporates requirements specifically set forth in law. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any regulation that includes any

Federal mandate in a proposed or final agency rule that may result in $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or upon the private sector, except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.

The Department examined this proposed rule according to UMRA and its statement of policy and determined that this rule does not contain a Federal intergovernmental mandate, nor is it expected to require expenditures of $100 million or more in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.

H. Review Under Executive Order 12630

Pursuant to E.O. 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights*, 53 FR 8859 (Mar. 18, 1988), the Department has determined that this proposed rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, the Department has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002). The Department has reviewed this proposed rule under the OMB guidelines and has concluded that it is consistent with applicable policies in those guidelines.

List of Subjects and Regulatory Amendments

20 CFR Part 656

Administrative practice and procedure, Aliens, Employment, Fraud, Labor, Passports and visas, Reporting and recordkeeping requirements, Wages.

Department of Labor

For the reasons stated in the preamble, the Department of Labor proposes to amend part 656 of Chapter V, Title 20, Code of Federal Regulations, 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), 1182(p)(1); sec. 122, Public Law 101-649, 109 Stat. 4978; and Title IV, Public Law 105-277, 112 Stat. 2681.

2. Revise subpart A to read as follows:

Subpart A—General Provisions

Sec.
656.1 Purpose and scope.
656.2 Statutory authority and burden of proof.
656.3 Definition of terms.
656.4 Persons and entities authorized to file and sign.
656.5 Requirements for agents and attorneys.
656.6 Successors in interest.
656.7 Transition procedures.

§ 656.1 Purpose and scope.

(a) *Purpose.* This part establishes the requirements and the procedures by which the Department of Labor (Department or DOL) makes a determination in connection with *Applications for Permanent Employment Certification* and certifies its determination to the Department of Homeland Security (DHS) and Department of State (DOS). A permanent labor certification issued under this part reflects a determination by the Secretary of Labor (Secretary), pursuant to 8 U.S.C. 1182(a)(5)(A), that:

(1) There are not sufficient workers who are able, willing, and qualified United States (U.S.) workers available at the time of application for a visa and admission to the United States and at the place where the alien is to perform the skilled or unskilled services; and

(2) The employment of the alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(b) *Scope.* This part sets forth the procedures governing the labor certification process for the permanent employment of aliens in the United States. It also establishes standards and obligations with respect to the terms and conditions of the permanent labor certification with which employers must comply and sets forth integrity measures for ensuring employers' good faith recruitment of U.S. workers and continued compliance with the terms and conditions of the permanent labor certification.

§ 656.2 Statutory authority and burden of proof.

(a) The Secretary has delegated the authority to issue permanent labor certifications and execute other statutory responsibilities required by 8 U.S.C. 1182(a)(5)(A) to the Office of Foreign Labor Certification (OFLC). Determinations on an *Application for Permanent Employment Certification* are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff (e.g., a Certifying Officer (CO)).

(b) The employer has the burden of proof to establish eligibility to receive certification of an *Application for Permanent Employment Certification*.

§ 656.3 Definition of terms.

For purposes of this part, the following definitions apply:

Act. The Immigration and Nationality Act, as amended (INA), 8 U.S.C. 1101 *et seq*.

Actual minimum requirements. The minimum requirements for education, experience, training, skills, licenses, or other requirements that are necessary for prospective applicants to perform the employer's job opportunity in a normally acceptable manner. The employer's actual minimum requirements must be normal for the occupation and must not exceed the Specific Vocational Preparation (SVP) required in the Standard Occupational Classification (SOC) code, as indicated by the Occupational Network (O*NET) Job Zones, or must not be materially different from the requirements stated in the employer's recruitment for job opportunities that were not subject to PERM labor certification in the same or substantially comparable occupational classifications during the 12 months preceding the date on which recruitment began for the job opportunity stated in the *Application for Permanent Employment Certification*, unless the employer is able to establish a business necessity for any requirements that are not normal to the occupation or exceed the SVP.

Administrative Law Judge (ALJ). A person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

Agent. A legal entity or person that:

(i) Is authorized to act on behalf of the employer for permanent labor certification purposes;

(ii) Is not itself an employer as defined in this subpart with respect to a specific application; and

(iii) Is not under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, or the Executive Office for Immigration Review or DHS under 8 CFR 292.3 or 1003.101.

Applicant. A U.S. worker who is applying for a job opportunity for which an employer anticipates an *Application for Permanent Employment Certification*.

Application for Permanent Employment Certification. The Office of Management and Budget (OMB)-approved Form ETA-9089, including the PWD (Form ETA-9141) and appropriate appendices, or any successor forms submitted by an employer to secure a permanent labor certification determination from DOL.

Area of intended employment (AIE). The geographic area within normal commuting distance of the place(s) of employment for which permanent labor certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the place of employment, or quality of the regional transportation network). If a place of employment is within an MSA, including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a place of employment outside of an MSA may be within normal commuting distance of a place of employment that is inside (e.g., near the border of) the MSA.

Attorney. Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, or the District of Columbia (DC). Such a person is also permitted to act as an agent under this subpart. No attorney who is under suspension, debarment, expulsion, or disbarment from

practice before any court, the Department, or the Executive Office for Immigration Review or DHS under 8 CFR 292.3 or 1003.101 may represent an employer under this part.

Barter. The transfer of ownership of a permanent labor certification or application from one person to another by voluntary act or agreement in exchange for a commodity, service, property or other valuable consideration.

Board of Alien Labor Certification Appeals (BALCA or Board). The permanent Board established by this part, chaired by the Chief Administrative Law Judge (Chief ALJ), and consisting of Administrative Law Judges (ALJs) appointed pursuant to 5 U.S.C. 3105 and designated by the Chief ALJ to be members of the Board.

Business day. Any day other than a Saturday, Sunday, or Federal holiday. The terms "business day" and "working day," wherever used in this part, have the same meaning.

Business Necessity. An employer's demonstration that the job duties and requirements of the job opportunity 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.

Certifying Officer (CO). The person who makes a determination on an *Application for Permanent Employment Certification* filed under this part. The OFLC Administrator is the national CO. Other COs may be designated by the OFLC Administrator to also make the determinations required under this part.

Chief Administrative Law Judge (Chief ALJ). The chief official of the Department's Office of Administrative Law Judges or the Chief ALJ's designee.

Closely held corporation. A corporation that typically has relatively few shareholders and whose shares are not generally traded in the securities market.

Department of Homeland Security (DHS). The Department of Homeland Security, as established by 6 U.S.C. 111.

Employee. A person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

Employer. An individual or entity (e.g., partnership, association, corporation, cooperative, firm, joint stock company, trust, public institution, or other organization with legal rights and duties) that seeks to permanently employ a full-time alien at a place within the United States and:

(1)(i) Has or will have an employment relationship (such as the ability to hire, pay, fire, supervise, or otherwise control the work performed by the employee) with respect to a worker;

(ii) Possesses a valid Federal Employer Identification Number (FEIN);

(iii) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment The employer must employ at least one individual full-time at the place of business;

(iv) Files an *Application for Permanent Employment Certification* other than as an agent or attorney; and

(v) Is an individual or entity on whose behalf an *Application for Permanent Employment Certification* is filed.

(2) Persons who are temporarily in the United States, including but not limited to, individuals with temporary employment visas, adjustment applicants whose underlying work authorization was based on a temporary employment visa, foreign diplomats, intra-company transferees, students, and exchange visitors, visitors for business or pleasure, and representatives of foreign information media cannot be employers for the purpose of obtaining a labor certification for permanent employment in the United States.

(3) A foreign mission, determined applicable by the Secretary of State, e.g. 22 U.S.C. 4302(a)(3) inter alia, cannot be an employer for purposes of obtaining a permanent labor certification.

Equal Employment Opportunity Commission (EEOC). The Equal Employment Opportunity Commission, an independent Federal agency established by Title VII of the Civil Rights Act of 1964.

Familial relationship. A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, cousins of all degrees, aunts, uncles, grandparents and grandchildren are included. It also includes any relationship established through marriage (including domestic partnerships, common-law marriages or civil unions), such as in-laws and step families.

Federal holiday. Legal public holiday as defined at 5 U.S.C. 6103.

Fraud. A false representation of a material fact, or the concealment of a material fact, made with knowledge of its falsity and with the intent to deceive the Department, DHS, the Department of State, or another Government entity, or to obtain a benefit under this part or the Act to which the person is not entitled. Reliance by the Department on the false representation or concealment is not required.

Immigrant Petition. The U.S. Citizenship and Immigration Services (USCIS) Form I-140, *Immigrant Petition for Alien Workers*, or successor form, and accompanying

documentation required by DHS for employers seeking to employ foreign persons under an employment-based immigrant visa.

Job opportunity. Full-time employment at a place in the United States to which U.S. workers can be referred. In the event of an audit, the employer must be prepared to document the permanent and full-time nature of the position by furnishing position descriptions and payroll records for the job opportunity involved in the *Application for Permanent Employment Certification*.

Job offer. The offer made by an employer or potential employer of an alien(s) to both U.S. and aliens describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits for the job opportunity.

Job order. The document containing the material terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its interstate and intrastate job clearance systems to recruit prospective U.S. applicants for the employer's job offer.

Layoff. An involuntary separation of one or more workers by the employer without cause or prejudice, such as a personnel action characterized by the employer as a reduction in force, restructuring, or downsizing.

Material. A fact, statement, representation, or omission is material if it has a natural tendency to influence, or is capable of influencing, a decision of the Department under this part or a decision of DHS or the Department of State on an Immigrant Petition or visa application that relies on a permanent labor certification, regardless of whether it actually influenced the decision. A misrepresentation is not immaterial merely because the Department could have discovered the truth through its own inquiry.

Metropolitan Statistical Area (MSA). A geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. An MSA contains a core urban area of 50,000 or more population, and a Micropolitan Statistical Area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metropolitan or micropolitan area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

National Processing Center (NPC). The offices within OFLC in which the COs operate and which are charged with the adjudication of *Applications for Permanent Employment Certification*.

Non-profit or tax-exempt organization. An organization that:

(1) Is defined as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6) (26 U.S.C. 501(c)(3), (c)(4) or (c)(6)); and

(2) Has been approved as a tax-exempt organization for research or educational purposes by the Internal Revenue Service.

Offered wage. The salary or wage, or salary or wage range offered by the employer for the job opportunity. The offered wage must be included in the employer's *Application for Permanent Employment Certification* and advertisements and must equal or exceed the highest of the prevailing wage or Federal, State, or local minimum wage.

Office of Foreign Labor Certification (OFLC). The organizational component within DOL that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA, as amended, concerning aliens seeking admission to the United States in order to work under section 212(a)(5)(A) of the INA, as amended.

OFLC Administrator. The primary official of OFLC, or the OFLC Administrator's designee.

*Occupational Network (O*NET).* The system developed by DOL, Employment and Training Administration, to provide to the general public information on skills, abilities, knowledge, work activities, interests and SVP levels associated with occupations. O*NET is based on the SOC system. Further information about O*NET can be found at *http://www.onetcenter.org.*

Pattern or practice. A course of conduct in which the act or omission in question is repeated, routine, or the regular rather than conduct in which the act or omission in question represents an isolated, sporadic, or accidental act. A pattern or practice may be established by conduct on two or more *Applications for Permanent Employment Certification*, whether filed by or on behalf of the same employer or different employers, and, in the case of an attorney or agent, by conduct across the applications of different clients.

Permanent employment. Employment in a job opportunity of indefinite duration in which an employee will ordinarily have an expectation of continued employment. To establish that a job opportunity is "permanent," an employer must establish, at a minimum, that it: (1) has a bona fide need for a worker to fill a job opportunity whose services or labor are needed year-round, except for job opportunities such as members of the teaching profession and professional athletes; and (2) the employer will not require breaks or periods of inactivity, except where such periods stem from an established employer policy for leave that applies to other employees similarly employed by the employer; and (3) will not enter into a temporary staffing agreement to place the alien with one or more third-party clients.

Permanent labor certification. Certification made by the OFLC Administrator, based on the *Application for Permanent Employment Certification* and all supporting

documentation, with respect to an employer seeking to file an Immigrant Petition with DHS to employ an alien under an immigrant visa, pursuant to section 212(a)(5)(A) of the Act, 8 U.S.C. 1182(a)(5)(A), and this part.

Place of employment. A worksite or physical location where work under the *Application for Permanent Employment Certification* is actually performed.

Prevailing wage determination (PWD). The prevailing wage for the job opportunity that is the subject of the *Application for Permanent Employment Certification*. The PWD is issued by an NPC on the Form ETA-9141, *Application for Prevailing Wage Determination*, or successor form.

Professional athlete. An individual who is employed as an athlete by (1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or (2) Any minor league team that is affiliated with such an association, as defined by 8 U.S.C. 1182(a)(5)(A)(iii)(II)**.**

Purchase. The transfer of ownership of a permanent labor certification application or certification from one person to another by voluntary act and agreement, based on a valuable consideration.

Sale. An agreement between two parties, called, respectively, the seller (or vendor) and the buyer (or purchaser) by which the seller, in consideration of the payment or promise of payment of a certain price in money terms, transfers ownership of a permanent labor certification application or certification to the buyer.

Secretary of Labor (Secretary). The chief official of the Department or the Secretary's designee.

Secretary of Homeland Security. The chief official of DHS or the Secretary of Homeland Security's designee.

Secretary of State. The chief official of the U.S. Department of State or the Secretary of State's designee.

State Workforce Agency (SWA). A State government agency that receives funds pursuant to the Wagner-Peyser Act, 29 U.S.C. 49 et seq., to administer the State's public labor exchange activities.

Strike. A concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement (CBA)).

Substantially comparable. A job or position where more than a majority (i.e., 51 percent or more) of the duties performed are the same as those disclosed in the *Application for Permanent Employment Certification* and justified based on organizational charts and position descriptions, the amount and percentage of time spent performing the duties, and payroll records.

United States. The continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

U.S. Citizenship and Immigration Services (USCIS). An operational component of DHS.

U.S. worker. A worker who is:

(i) A U.S. citizen or national of the United States;

(ii) An individual who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under 8 U.S.C. 1157 or is granted asylum under 8 U.S.C. 1158.

Wages. All forms of cash remuneration to a worker by an employer in payment for labor or services.

Willful. Done knowingly, deliberately, and voluntarily, or in reckless disregard of the requirements of this part or of the truth or falsity of a representation, as distinguished from an act or omission that is accidental, inadvertent, or merely negligent. A person acts willfully with respect to a requirement of this part when the person knows of the requirement or shows reckless disregard for whether the person's conduct complies with it.

Willful misrepresentation. A false representation of a material fact, made willfully, in connection with an *Application for Permanent Employment Certification*, a prevailing wage determination, or any other document, form, or communication submitted under this part. Intent to deceive is not an element of willful misrepresentation; it is sufficient that the person knew the representation was false, or made it with reckless disregard for its truth or falsity, and made it voluntarily.

§ 656.4 Persons and entities authorized to file and sign.

(a) *Persons authorized to file.* In addition to the employer, an *Application for Permanent Employment Certification* may be filed by an attorney or agent, as defined in § 656.3.

(b) *Employer's signature required.* Regardless of whether the employer is represented by an attorney or agent, the employer is required to sign the *Application for Permanent Employment Certification* and all documentation submitted to DOL.

§ 656.5 Requirements for agents and attorneys.

(a) *Representation agreement required.* An agent or attorney filing an *Application for Permanent Employment Certification* on behalf of an employer must retain an original executed agreement or other document demonstrating their authority to represent the employer and make this documentation available upon request by the CO. Documentation to prove compliance with this requirement must be retained by the agent or attorney for a period of 5 years from the date on which the certified *Application for Permanent Employment Certification* expires or from the date of determination if the *Application for Permanent Employment Certification* or Immigrant Petition is denied or withdrawn.

(b) *Consideration of U.S. workers.*

(1) The alien and/or the alien's agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative, as described in paragraph (b)(2) of this section.

(2) The employer's representative who interviews or considers U.S. workers for the job offered to the alien must be a U.S. worker and one who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien which do not involve labor certifications.

§ 656.6 Successors in interest.

(a) *Liability of successors in interest.* Where an employer, agent, or attorney has violated the requirements of this part, a successor in interest to that employer, agent, or attorney may be held liable for the duties and obligations of the violating employer, agent, or attorney in certain circumstances, regardless of whether such successor in interest has succeeded to all the rights and liabilities of the predecessor employer, agent, or attorney.

(b) *Definition of successors in interest.* The following factors, including those as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment

Assistance Act, may be considered in determining whether an employer, agent, or attorney is a successor in interest; however, these factors are not exhaustive, and no one factor is dispositive, but all of the circumstances will be considered as a whole:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the workforce;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(7) Similarity in machinery, equipment, and production methods;

(8) Similarity of products and services;

(9) The ability of the predecessor to provide relief; and

(10) For purposes of debarment, the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

(c) *Effect of debarment on successors in interest.* When an employer, agent, or attorney is debarred under § 656.31(f), any successor in interest to the debarred employer, agent, or attorney is also debarred. No *Application for Permanent Employment Certification* may be filed by or on behalf of or approved for a successor in interest to a debarred employer, agent, or attorney, subject to the term limits set forth in § 656.31(f). If the CO determines that an *Application for Permanent Employment Certification* was filed by or on behalf of a successor in interest to a debarred employer, agent, or attorney during the period of debarment as set forth in § 656.31(f), the CO will deny the application pursuant to § 656.24(d) solely on the basis that the entity is a successor in interest to a debarred employer, agent, or attorney. If the OFLC Administrator determines

that a permanent labor certification was issued to a successor in interest to a debarred employer, the OFLC Administrator may revoke the certification pursuant to § 656.32. The employer, agent, or attorney may appeal its status as a successor in interest to the debarred entity, pursuant to the procedures for appeals of CO determinations at § 656.26.

§ 656.7 Transition procedures.

(a) *Processing of cases under prior regulations*. The NPC will continue to process an *Application for Permanent Employment Certification* or an *Application for Prevailing Wage Determination* submitted prior to [INSERT 90 DAYS FROM DATE OF PUBLICATION], in accordance with the requirements of this part that were in effect prior to [INSERT 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(b) *Processing of cases under new regulations*. The NPC will process an *Application for Permanent Employment Certification* or an *Application for Prevailing Wage Determination* submitted on or after [INSERT 90 DAYS FROM DATE OF PUBLICATION], in accordance with the requirements of this part that went into effect on [INSERT 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Subpart B—[Removed and Reserved]

3. Remove and reserve subpart B, consisting of §§ 656.8 and 656.9.

4. Revise subpart C to read as follows:

Subpart C—Labor Certification Process

Sec.
656.10 Application filing requirements.
656.11 Substitutions and modifications to applications.
656.12 Improper commerce and payment.
656.13 Assurances and obligations of employers.
656.14 Notice of filing.
656.15 [Reserved]

656.16 [Reserved]
656.17 Pre-filing recruitment requirements.
656.18 Optional pre-filing recruitment requirements for college and university teachers and professional athletes and professional sports team coaches.
656.19 Processing of an application.
656.20 Audit.
656.21 Supervised recruitment.
656.24 Labor certification determinations.
656.26 Review of denials of permanent labor certification.
656.27 Consideration by and decisions of the Board of Alien Labor Certification Appeals.
656.30 Validity of labor certifications.
656.31 Applications involving fraud, willful misrepresentation, or violations of this part.
656.32 Revocation and invalidation of permanent labor certifications.

§ 656.10 Application filing requirements.

Except as otherwise permitted by statute or this subpart, an employer who desires to hire an alien for permanent employment in the United States must apply and obtain a labor certification from the Secretary by filing an *Application for Permanent Employment Certification* with the NPC designated by the OFLC Administrator. This section provides the procedures employers must follow when filing.

(a) *What to file.*

(1) An employer that desires to apply for permanent labor certification of an immigrant worker must file a complete *Application for Permanent Employment Certification*, including a valid PWD as required by § 656.40, the employer's legal name, trade name(s), and valid FEIN as well as a valid place of business (physical location) in the United States and a means by which it may be contacted by prospective U.S. applicants for employment;

(2) A copy of the NOF providing notice to employees located at the place(s) of employment, as set forth in § 656.14, must be submitted with the *Application for Permanent Employment Certification*;

(3) A copy of all records and documentation demonstrating compliance with pre-filing recruitment requirements set forth in § 656.17 or § 656.18, must be submitted with

the *Application for Permanent Employment Certification*, unless the *Application for Permanent Employment Certification* is subject to supervised recruitment procedures as set forth in § 656.21; and

(4) A recruitment report meeting the requirements set forth in § 656.17(f), and copies of all resumes and/or applications for each U.S. worker who applied for the job opportunity, must be submitted with the *Application for Permanent Employment Certification*, unless the *Application for Permanent Employment Certification* is subject to supervised recruitment procedures as set forth in § 656.21.

(b) *Timeliness*. A complete *Application for Permanent Employment Certification,* including all supporting documentation and information required at the time of filing under this subpart, must be filed within 30 calendar days after the completion of the recruitment procedures set forth in § 656.17 or the optional pre-filing recruitment procedures set forth in § 656.18.

(c) *Location and method of filing*.

(1) *Electronic filing.* The employer must file the *Application for Permanent Employment Certification* and all required supporting documentation with the NPC using the electronic method(s) designated by the OFLC Administrator. The NPC will return without review any application submitted using a method other than the designated electronic method(s), unless the employer submits the application in accordance with paragraph (c)(2) or (3) of this section.

(2) *Filing by mail.* Employers that lack adequate access to electronic filing may file the application by mail. The employer must indicate that it is filing by mail due to lack of adequate access to electronic filing. The OFLC Administrator will identify the address to which such filing must be mailed by public notice(s) and by instructions on DOL's website.

(3) *Reasonable accommodation.* Employers who are unable or limited in their ability to use and/or access the electronic *Application for Permanent Employment Certification,* or any other form or documentation required under this part, as a result of a disability may request a reasonable accommodation to enable them to participate in the permanent labor certification program. An employer in need of such an accommodation may contact the NPC in writing to the address designated in a notice published in the Federal Register, or for individuals with hearing or speech impairments, 1-877-889-5627 (this is the TTY toll-free Federal Information Relay Service number) for assistance in using, accessing, or filing any form or documentation required under this part, including the *Application for Permanent Employment Certification.* All requests for an accommodation must include the employer's name, a detailed description of the accommodation needed, and the preferred method of contact. The NPC will respond to the request for a reasonable accommodation within 10 business days of the date of receipt.

(d) *Original signature.* The *Application for Permanent Employment Certification* must contain an electronic (scanned) copy of the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent) or a verifiable electronic signature method, as directed by the OFLC Administrator. If submitted by mail, the *Application for Permanent Employment Certification* must bear the original signature of the employer and, if applicable, the employer's authorized attorney or agent.

(e) *Additional documentation for certain job opportunities.* An employer who desires to hire an alien for permanent employment in the United States in one of the following job opportunities must maintain, at the time of filing, the additional documentation required by this section and be prepared to submit such documentation in the event of an audit or in response to a request from the CO:

(1) For a live-in household domestic service worker job opportunity, an employer must maintain the following documentation:

(i) A copy of the executed contract signed and dated by the employer and alien containing, at a minimum, the same material terms of employment specified on the *Application for Permanent Employment Certification* and the following information and employment guarantees:

(A) A description of the household living accommodations, including the type of residence (e.g., house or apartment), number of rooms inside the residence, and number of adults and children, with ages of the children, residing in the residence;

(B) The total hours of employment per week and the expected hours of employment per day;

(C) The total amount of any money that the employer will advance to the alien, including a detailed description of each specific item and amount of advance, and the terms of repayment by the alien of any such advance;

(D) A statement that a private room on the employer’s premises and board will be provided, at no cost, to the alien;

(E) A statement that the alien is free to leave the employer's premises during all non-work hours, except the alien may work overtime if paid for the overtime at no less than the legally required hourly rate;

(F) A statement that the alien will not be required to give more than two weeks’ notice of intent to leave the employment contracted for and the employer must give the alien at least two weeks' notice before terminating employment; and

(G) Any other agreement or material term or condition of employment not specified on the *Application for Permanent Employment Certification*.

(ii) Documentation that the alien possesses at least one year of full-time paid work experience, exclusive of any training, in the form of written statements, signed and dated

from past or present employers, providing a detailed statement of the duties performed and equipment used, identifying the dates (month and year) employment started and ended, hours of work per day, number of days worked per week, place(s) where the alien was employed and the amount of wages paid per week or month.

(2) For a job opportunity with an employer that is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer must maintain the following documentation:

(i) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;

(ii) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien;

(iii) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien; and

(iv) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which permanent labor certification is sought.

(v) If the alien is one of 10 or fewer employees, the employer must document any familial relationship between the employees and the alien.

(3) For a professional athlete or professional sports team coach job opportunity that meets the definition set forth in § 656.3, the employer must maintain the following documentation:

(i) A copy of the executed written contract, signed and dated by the employer and alien, covering the entire year or period that indicates the specific payment(s) made to the alien;

(ii) An employment letter stating that the alien will work a minimum of ten (10) hours per week during the off-season period; and

(iii) For an alien being sponsored for permanent employment as a professional athlete, a copy of a letter or response, whether electronic or print, from the Players' Association or applicable trade union(s) stating that it was provided notice from the employer, as required by § 656.14(a)(1), and has no objection to the filing of the *Application for Permanent Employment Certification*.

(f) *Filing date.*

(1) The filing date for any *Application for Permanent Employment Certification* received using the electronic method(s) designated by the OFLC Administrator will be the date on which the complete application, including all applicable appendices and supporting documentation, is submitted and accepted for processing with the NPC. The filing date will be based on the time of submission in the Eastern time zone of the United States.

(2) The filing date for any *Application for Permanent Employment Certification* received in accordance with paragraph (c)(2) or (3) of this section will be the postmark date affixed to the employer's *Application for Permanent Employment Certification* submission, provided that the NPC determines the application is complete.

(g) *Completeness.* The employer must file a complete *Application for Permanent Employment Certification* that meets all the requirements of this part. If an employer submits an incomplete *Application for Permanent Employment Certification*, it will be returned without review and will not retain a filing date. If an incomplete *Application for*

Permanent Employment Certification is returned unprocessed, the decision will be a final action and will not be subject to reconsideration or review under § 656.26.

(h) *Record retention requirements.* Copies of *Applications for Permanent Employment Certification* filed with DOL and all supporting documentation and records demonstrating compliance with this part must be retained by the employer for a period of 5 years from the latest of the following dates: the date on which the Immigrant Petition is approved by USCIS; the date the approved *Application for Permanent Employment Certification* expires, if the employer does not file an Immigrant Petition using the certification; or the date the *Application for Permanent Employment Certification* or Immigrant Petition is denied or withdrawn. .

§ 656.11 Substitutions and modifications to applications.

(a) Substitution or change to the identity of an alien on any *Application for Permanent Employment Certification* and on any resulting permanent labor certification is prohibited.

(b) Requests for modifications to any *Application for Permanent Employment Certification* filed with the NPC and on any resulting permanent labor certification are prohibited.

§ 656.12 Improper commerce and payment.

The following provision applies to any *Application for Permanent Employment Certification* and permanent labor certification issued under this part.

(a) *Applications for Permanent Employment Certification* and permanent labor certifications issued under this part are not articles of commerce. They may not be offered for sale, barter or purchase by individuals or entities. Any evidence that an *Application for Permanent Employment Certification* or a permanent labor certification has been sold, bartered, or purchased will be grounds for investigation under this part and

is grounds for denial under § 656.24, revocation under § 656.32, debarment under § 656.31(f), or any combination thereof.

(b) An employer must not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing an *Application for Permanent Employment Certification*, except when work to be performed by the alien in connection with the job opportunity would benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. An alien may pay his or her own costs in connection with a permanent labor certification, including attorneys' fees for representation of the alien, except that where the same attorney represents both the alien and the employer, such costs must be borne by the employer. For purposes of this paragraph (b), payment includes, but is not limited to, monetary payments; wage concessions, including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor.

(c) Evidence that an employer has sought or received payment from any source in connection with an *Application for Permanent Employment Certificatio*n or a permanent labor certification, except for a third party to whose benefit work to be performed in connection with the job opportunity would accrue, based on that person's or entity's established business relationship with the employer, will be grounds for investigation under this part or any appropriate Government agency's procedures, and is grounds for denial under § 656.24, revocation under § 656.32, debarment under § 656.31(f), or any combination thereof.

§ 656.13 Assurances and obligations of employers.

As part of the *Application for Permanent Employment Certification* and job offer, the employer seeking to employ an alien must declare, under penalty of perjury, that it

has knowledge of and will comply with all the requirements of this part and the conditions of employment set forth in this section. The official or employee declaring compliance for the employer under this part must be the official or employee who is most familiar with the content of and recruitment for the job opportunity and is authorized to provide all information and documentation supporting the *Application for Permanent Employment Certification,* and to communicate with the Department on behalf of the employer. Each assurance in this section is a material condition of certification, and the employer's declaration of compliance with each is a representation of fact on which the Department relies. A certification is not a substitute for the evidence required by this part, and the CO will not accept a declaration as establishing any fact that the employer is required by this part to document. Failure to attest to compliance with any of the conditions listed below will result in a denial of the *Application for Permanent Employment Certification*. A false declaration, or a failure to comply with any assurance or obligation in this section, is grounds for denial under § 656.31(a), revocation under § 656.32, and debarment under § 656.31(f); will be referred as provided in § 656.31(b); and is punishable under 18 U.S.C. 1001, 1546, and 1621.

(a) *Bona fide job opportunity and non-discrimination*.

(1) The job opportunity identified in the *Application for Permanent Employment Certification* is a bona fide full-time permanent position and the terms and conditions of employment comply with applicable Federal, State, and local laws and regulations.

(2) The job opportunity has been and will continue to be open to any qualified U.S. worker, regardless of race, color, national origin, age, sex, pregnancy, religion, disability, genetic information, or citizenship status, through the date on which the Immigrant Petition is approved by USCIS or the date of determination if the *Application for Permanent Employment Certification* or Immigrant Petition is denied or withdrawn, whichever is later.

(3) Rejection(s) of any U.S. worker(s) who applied or apply for the job were or will be only for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. The employer has not and will not reject any qualified U.S. worker over the prospective alien based on any cost justifications, including those based on differences in any term, condition, or privileges of employment, including compensation and fringe benefits, between any qualified U.S. worker and the prospective alien. The employer has and will continue to retain records of any hire(s) and rejection(s) as required by this part.

(4) *Compliance with anti-discrimination laws.* The employer has complied, and will continue to comply, with:

(i) Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits discrimination in hiring, discharge, compensation, and the terms, conditions, or privileges of employment because of race, color, religion, sex, or national origin, including discrimination against U.S. workers because of their national origin and in favor of workers of a different national origin, and which is primarily enforced by the EEOC; and

(ii) 8 U.S.C. 1324b, which prohibits discrimination in hiring, recruitment or referral for a fee, and discharge because of citizenship status against protected individuals as defined in 8 U.S.C. 1324b(a)(3) (including U.S. citizens and nationals, lawful permanent residents, refugees, and asylees), prohibits discrimination because of national origin by employers with four or more employees that are not covered by Title VII, prohibits unfair documentary practices in the employment eligibility verification process, and prohibits retaliation, and which is enforced by DOJ.

(iii) Nothing in this part limits any obligation under the laws described in paragraphs (a)(4)(i) and (ii) of this section, and compliance with this part is not a defense to liability under those laws.

(iv) The employer has retained documentation demonstrating that the wage and the terms, conditions, and privileges of employment offered to the alien do not differ from those offered to similarly situated U.S. workers employed in the same or substantially comparable positions within the area of intended employment.

(5) *No less favorable terms, conditions, and compensation for U.S. workers.* As a condition of certification under 8 U.S.C. 1182(a)(5)(A)(i)(II), and consistent with the obligations described in paragraph (a)(4) of this section, the employer has offered, and will continue to offer, to every able and qualified U.S. worker who applies for, is referred to, or is employed in the job opportunity or in a similarly situated position, terms, conditions, and privileges of employment—including hiring, job assignments, compensation, hours of work, training, fringe benefits, promotion, and demotion—that are no less favorable than those offered to the alien who is the subject of the *Application for Permanent Employment Certification*This paragraph states a wage-and-working-conditions requirement of the permanent labor certification program; it does not construe, limit, or expand Title VII of the Civil Rights Act of 1964, 8 U.S.C. 1324b, or any other law.

(b) *No strike, lockout, or work stoppage.* The employer assures that this job opportunity, including all places of employment for which the employer is requesting permanent labor certification, is not vacant because the former occupant(s) is (are) on strike or being locked out in the course of a labor dispute involving a work stoppage.

(c) *Offered wage and ability to pay guarantees.* The employer has offered, and will continue to offer a wage that:

(1) Equals or exceeds the highest of the applicable Federal, State, or local minimum wage, the PWD for the occupation that is issued by the Department to the employer, as reflected on the *Application for Permanent Employment Certification*. If, after the issuance of a PWD, the Department issues a new or revised PWD that is

assigned to the employer's *Application for Permanent Employment Certification*, the employer will offer a wage that equals or exceeds the highest of the new prevailing wage, the applicable Federal, State, or local minimum wage, unless notified otherwise by the Department.

(2) Does not and will not result in less favorable treatment in compensation, fringe benefits, or other terms, conditions, and privileges of employment for current or prospective U.S. workers employed in, or seeking to be employed in, similarly situated positions at the employer, as required by all applicable federal anti-discrimination laws and regulations under Title VII of the Civil Rights Act of 1964 and the Immigration and Nationality Act's Antidiscrimination Provision, 8 U.S.C. Section 1324b.

(3) Is not based on commissions, bonuses, or other incentives, unless the employer guarantees an offered wage earned on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage.

(4) The employer has the ability to pay with existing, internally-available, non-contingent financial resources owned and controlled by the employer at the time of filing the *Application for Permanent Employment Certification* for work performed in the job opportunity identified in the *Application for Permanent Employment Certification*. The employer will be able to place the alien on the employer's payroll on or before the date of application for a visa and admission to the United States.

(d) *Good faith recruitment of U.S. workers.* The employer has conducted, and will continue to conduct, recruitment of U.S. workers, as required under this part, in good faith, in the same manner, through the same channels, and on terms no less favorable to U.S. workers as those on which it normally recruits and considers U.S. workers in the same job opportunities for which the employer does not seek labor certification to employ an alien(s). This applies to, but is not limited to, the following:

(1) The method, manner, and location of job postings (e.g., online versus paper job postings; posting in an employer's centralized job webpage versus specialized, PERM-specific job webpages) and the duration of any job posting;

(2) The method by which an applicant may apply (e.g., online via a centralized employer website versus PERM-specific email addresses, fax, or paper applications);

(3) The description of the job opportunity, qualifications, and requirements needed to perform the work, which cannot be tailored to the prospective alien and the requirements for applying cannot be unduly restrictive so as to make it difficult for U.S. workers to be deemed qualified.

(4) Interview requirements and procedures. Employers that wish to require interviews must conduct those interviews by phone or provide an alternative method (e.g., virtual meetings or conferencing, cloud calls) for the interviews to be conducted in the location where the U.S. worker(s) is/are being recruited so that the worker incurs little or no cost due to the interview. Employers cannot provide a prospective alien with more favorable treatment than U.S. workers with respect to the requirements for applying and conducting interviews for the job opportunity. The employer representative conducting the interview must be a U.S. worker and one who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien which do not involve labor certifications.

(5) Each method by which a U.S. worker may apply for the job opportunity must be operational, monitored, and capable of receiving and retaining applications throughout the period of recruitment, and the employer must retain and submit evidence of its operation as required by § 656.17(g).

(6) Recruitment for the job opportunity through any method, channel, or procedure that is less accessible or less favorable to U.S. workers than the employer's ordinary recruitment for similar job opportunities, or through an application channel that

does not meet paragraph (d)(5) of this section, is presumed not to have been conducted in good faith; is an independent ground for denial under § 656.24; and will be referred under § 656.31(b) to DOJ and, where the facts indicate possible discrimination because of national origin, to the EEOC.

(e) *Layoffs and consideration of laid-off U.S. workers.* With regard to layoffs of any U.S. worker(s) in the same or similar occupation (i.e., the same SOC code or a substantially comparable position) that is the subject of the *Application for Permanent Employment Certification* in the area of intended employment of the place(s) of employment, including the placement of the alien with another employer subject to paragraph (f) of this section, the employer:

(1) Must not have laid off any such U.S. worker(s) within 2 years prior to the filing of the application;

(2) If a layoff of any such U.S. worker(s) occurs after filing the application and before the date on which the Immigrant Petition is approved by USCIS, or the date of determination if the *Application for Permanent Employment Certification* or Immigrant Petition is denied or withdrawn, whichever is later, the employer:

(i) Must notify the NPC, and USCIS in the case of a pending Immigrant Petition, in writing or by any other method specified by the Department in a notice published in the Federal Register or specified by USCIS not later than 5 business days after such layoff(s) occurs; and

(ii) Must offer the job opportunity that is the subject of the *Application for Permanent Employment Certification* to those laid-off U.S. worker(s), at no less than the offered wage and on the terms and conditions stated in the *Application for Permanent Employment Certification*, and document whether the U.S. worker(s) refused the job opportunity, was rejected for the job opportunity for lawful, job-related reasons, or was hired.

(f) *Placing contract workers with other employers engaging in layoffs prohibited.* The employer has not placed, and will not place, the alien who is the subject of the *Application for Permanent Employment Certification* with another employer (including that employer's parent, subsidiary, or affiliate) where:

(1) There are indicia of an employment relationship between the alien and that other employer, consistent with the criteria set forth in § 655.738(d)(2) of this chapter;

(2) The other employer laid off U.S. workers in its workforce who are employed in the same or similar occupation that is the subject of the *Application for Permanent Employment Certification*, between the date that is 2 years prior to the filing of the application and the date on which the Immigrant Petition is approved by USCIS or the date of determination if the *Application for Permanent Employment Certification* or Immigrant Petition is denied or withdrawn, whichever is later.

(g) *Compliance with prohibition on improper commerce and employees paying fees*. The employer and its agents, attorneys, and/or employees have not offered, and will not seek to offer, for sale, barter or purchase to any individual or entity *Applications for Permanent Employment Certification* at any time, including applications certified by the Department, and have not sought or received, and will not seek to receive, payment of any kind from the worker(s) for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application, except when work to be performed by the alien in connection with the job opportunity would benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except where the same attorney represents both the alien and the employer, such costs must be borne by the

employer. Payment includes, but is not limited to, monetary payments; wage concessions, including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor.

(h) *Compliance with applicable laws.* The employer has complied and will continue to comply with applicable Federal, State and local employment-related laws and regulations, including, but not limited to, employment-related health and safety laws, Federal, State, and local anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) and 8 U.S.C. 1324b; anti-trafficking laws, including 18 U.S.C. chapter 77; and all applicable provisions of the Fair Labor Standards Act, 29 U.S.C. 201 et seq. In addition, the employer and its agents and attorneys are prohibited from holding or confiscating workers' passports, visas, or other immigration documents pursuant to 18 U.S.C. 1592(a).

(i) *Compliance with record retention requirements.* The employer filing an *Application for Permanent Employment Certification* will retain all documents and records demonstrating compliance with this part for a period of 5 years from the period specified in section 656.10(h).

(j) *Cooperation with federal compliance reviews relating to activities conducted under this part.* The employer will fully cooperate with any audit, supervised recruitment, compliance review, evaluation, or inspection conducted by DOL and any other federal agency related to compliance with this part.

§ 656.14 Notice of filing.

(a) An employer who desires to hire an alien for permanent employment in the United States must post notice of the filing of the *Application for Permanent Employment Certification* and be able to document that notice was provided, as follows:

(1) If there is a bargaining representative(s) for the employer's employees in the occupational classification located at the place(s) of employment, the employer must

provide written notice, electronically or by mail, by providing a copy of the *Application for Permanent Employment Certification* and maintaining documentation of where and when it was sent to the bargaining representative(s).

(2) If there is no bargaining representative(s), the employer must post notice in at least two conspicuous locations to all employees located at the place(s) of employment in which the work will be performed by the alien. Electronic posting, such as displaying the notice prominently on any internal or external website that is maintained by the employer, known and readily accessible to all employees, and customarily used by the employer for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. The notice must be of sufficient size, clearly visible, and unobstructed while posted and must be posted in conspicuous places where the employees of the employer would normally expect to see such employment-related notices and can readily read the posted notice on their way to or from their place of employment. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where and when it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

(b) If the employer intends to employ the alien under the *Application for Permanent Employment Certification* at a third-party worksite, the employer's obligation to provide notice under paragraph (a) of this section extends to the third-party worksite, regardless of whether the place(s) of employment is/are owned or operated by the employer or by some other person or entity.

(c) In the case of a private household, notice is required under this section only if the household employs one or more U.S. workers at the time the application for labor

certification is filed. The documentation requirement may be satisfied by providing a copy of the posted notice to the CO.

(d) The notice of the filing of an *Application for Permanent Employment Certification* must:

(1) State that notice is being provided in connection with the filing of an *Application for Permanent Employment Certification* by the employer to sponsor an alien for permanent employment in the job opportunity;

(2) State any person may provide information or documentary evidence bearing on the *Application for Permanent Employment Certification* to the OFLC Administrator of DOL; and

(3) Provide the physical address of the OFLC Administrator.

(e) The notice must contain the information required for advertisements by § 656.17(e) and contain the information required by paragraph (d) of this section.

(f) The notice of filing must be provided or posted within 10 business days before the *Application for Permanent Employment Certification* is filed with the NPC and continue to be available or displayed through the date on which the Immigrant Petition is approved by USCIS or the date of determination if the *Application for Permanent Employment Certification* or Immigrant Petition is denied or withdrawn, whichever is later.

§ 656.15 [Reserved]

§ 656.16 [Reserved]

§ 656.17 Pre-filing recruitment requirements.

(a) *Employer obligations.* Except for *Applications for Permanent Employment Certification* involving college or university teachers or professional athletes or professional sports team coaches using the recruitment procedures set forth in § 656.18,

an employer must attest to having conducted recruitment under this section prior to the filing of the *Application for Permanent Employment Certification* and comply with all advertising requirements set forth in paragraphs (b) through (e) of this section.

(b) *Required recruitment.*

(1) Place a job order with the SWA(s) serving the place(s) of employment.

(2) Where the employer maintains one or more websites for its business operations, place an advertisement for the job opportunity on the webpage the employer customarily uses to recruit for job opportunities in the same occupational classification that are not the subject of an *Application for Permanent Employment Certification*. If the employer does not customarily use its website(s) for its business operations to recruit for job opportunities that are not the subject of an *Application for Permanent Employment Certification*, the employer must post the job opportunity that is the subject of the *Application for Permanent Employment Certification* on a webpage on all of its business operations website(s) in a conspicuous location.

(3) Place an advertisement for the job opportunity on at least one job search website other than a website maintained by the employer or SWA(s). Where the employer customarily uses one or more job search websites to advertise the job opportunities in the same occupational classification that are not the subject of an *Application for Permanent Employment Certification*, the employer must place an advertisement for the job opportunity on all such websites using the same method(s) and location(s) that it uses for job opportunities in the same occupational classification that are not the subject of an *Application for Permanent Employment Certification*.

(4) Where the employer customarily uses one or more social media platforms to advertise job opportunities in the same occupational classification that are not the subject of an *Application for Permanent Employment Certification*, the employer must place an advertisement for the job opportunity on all such social media platforms using the same

method(s) and location(s) that it uses for job opportunities in the same occupational classification that are not the subject of an *Application for Permanent Employment Certification*.

(5) During the period of time the job order placed with the SWA under paragraph (b)(1) of this section is actively circulating, place an advertisement for the job opportunity in the occupational classification through at least one job fair, on-campus recruiting event, or with a college, university, or trade school's placement office. Where the employer customarily engages in one or more job fairs or on-campus recruiting events or placement offices at different colleges, universities, or trade schools to advertise job opportunities in the same occupational classification that are not the subject of an *Application for Permanent Employment Certification*, the employer must place an advertisement for the job opportunity in the same occupational classification that is the subject of the *Application for Permanent Employment Certification* using the same method(s) and location(s) for all such job fairs, on-campus recruitment events, or placement offices that it uses for job opportunities in the same occupational classification that are not the subject of an *Application for Permanent Employment Certification*.

(c) *Length of active recruitment*. All advertisements placed in connection with the requirements set forth in paragraphs (b)(1) through (4) of this section must be active for a period of no less than 90 calendar days or the total number of days the employer has customarily advertised for the same or similar job opportunities during the most recent 12 months that were not the subject of an *Application for Permanent Employment Certification*.

(d) *Completion of active recruitment*. Each of the advertisements placed in connection with the requirements set forth in paragraphs (b)(1) through (4) of this section must be completed no more than 60 calendar days and no less than 30 calendar days before the expected filing of the *Application for Permanent Employment Certification*.

(e) *Advertising requirements.*

(1) All recruitment conducted under this subpart must contain terms and conditions of employment that are not less favorable than those offered to the alien and, at a minimum, must comply with the assurances applicable to the recruitment of U.S. workers set forth in § 656.13. In addition, employers must enable any and all information systems they use for collecting, maintaining, and tracking applicants for non-PERM related recruitment to capture all applications that U.S. workers submit for PERM-related recruitment, and enable all applicant records to remain searchable in the same manner as applicant records for non-PERM related recruitment.

(2) All advertising must contain the following information:

(i) The employer's name and contact information;

(ii) A description of the job opportunity with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties and actual minimum qualifications or requirements to perform the services or labor and the hours of work per week;

(iii) The place(s) of employment or geographic area of employment, including a statement as to whether the position offers remote work, full-time telework, or a hybrid combination of telework and on-site work, with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the service or labor;

(iv) The wage offer or, in the event that there are multiple wage offers, the range of applicable wage offers, each of which must equal or exceed the highest of the prevailing wage or the Federal, State, or local minimum wage;

(v) If applicable, a statement that overtime will be available to the worker and the wage offer(s) for working any overtime hours; and

(vi) A statement that the job is a full-time position and, if the employer has more than one job opening, indicate the total number of job openings the employer intends to fill.

(3) An employer may recruit for multiple positions simultaneously through a single advertisement, provided that, with respect to each job opportunity for which certification is sought, the multi-position advertisement:

(i) Complies with the pre-filing recruitment timing requirements in paragraph (d) of this section;

(ii) Complies with the recruitment placement and duration requirements in paragraphs (b) and (c) of this section;

(iii) Includes sufficient information to apprise U.S. workers of each job opportunity, including all information required by this paragraph (e).

(f) *Recruitment report.*

(1) *Requirements of a recruitment report*. The employer must prepare, sign, and date a written recruitment report. The recruitment report must be completed before it is submitted concurrently with the filing of the *Application for Permanent Employment Certification*, as set forth in § 656.10, or on a date specified by the CO as required by the procedures for supervised recruitment set forth in § 656.21 and contain the following information:

(i) Identify the name of each recruitment activity, date(s) of advertisement, the uniform resource locator (URL) or other location of each advertisement, and, for each advertisement placed with a website, platform, publisher, or the SWA, the platform- or publisher-generated confirmation number, receipt, or order identifier and the posting and expiration dates it generated;

(ii) State the name and contact information of each U.S. worker, including those laid off by the employer, who applied or was referred to the job opportunity up to the date

of the preparation of the recruitment report, categorized by the advertising method through which the U.S. worker(s) applied for the job opportunity; and, for each U.S. workers, specify the date(s) of application, whether the U.S. worker met the actual minimum requirements, the name and title of each employee of the employer who reviewed, screened, or interviewed the applicant, the disposition of each U.S. worker, and whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined; and

(iii) If applicable, for each U.S. worker who applied for the job opportunity but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker. Where the employer is sponsoring a college or university teacher or an alien with exceptional ability in the sciences or the arts, explain why the alien is more qualified than each U.S. worker who applied.

(2) *Duty to update recruitment report.* The employer must continue to update the recruitment report whenever it experiences layoffs of any U.S. worker(s) in the same or similar occupation that is the subject of the *Application for Permanent Employment Certification* in the place(s) of intended employment through the date on which the Immigrant Petition is approved by USCIS or the date of determination if the *Application for Permanent Employment Certification* or Immigrant Petition is denied or withdrawn, whichever is later. The updated report must be signed and dated by the employer and made available upon request by the CO. The recruitment report update must contain the following information:

(i) For any U.S. worker(s) laid off in the same or similar occupation that is the subject of the *Application for Permanent Employment Certification* in the place(s) of intended employment, provide a detailed explanation of the method(s) used and date(s) on which the employer notified all potentially qualified laid off U.S. workers for the job opportunity;

(ii) State the name and contact information of each U.S. worker notified and identify each U.S. worker who applied to the job opportunity up to the date of the preparation of the recruitment report, categorized by the notification method through which the U.S. worker(s) applied for the job opportunity, and specifying the disposition of each U.S. worker and whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined.

(g) *Duty to maintain recruitment documentation*. Documentation sufficient to prove compliance with the pre-filing recruitment requirements of this section must be submitted concurrently with the filing of the *Application for Permanent Employment Certification*, as set forth in 656.10. Documentation sufficient to prove compliance with post-filing notification and consideration of U.S. workers must be retained by the employer in compliance with the requirements of § 656.10(h).

(h) *Further recruitment guidance*. The OFLC Administrator may from time to time and as necessary provide further clarifying guidance regarding recruitment requirements, methods, and practices. Should it be necessary, the OFLC Administrator will publish the updated guidance on OFLC's website and/or through a notice in the Federal Register.

§ 656.18 Optional pre-filing recruitment requirements for college and university teachers and professional athletes and professional sports team coaches.

(a) *Recruitment.* Prior to the filing of the *Application for Permanent Employment Certification*, the employer may conduct recruitment for a job opportunity involving a college or university teacher or a professional athlete or professional sports team coach using the procedures set forth in § 656.17 or must be able to document that the alien was selected for such job opportunity using a competitive recruitment and selection process. For purposes of this section, documentation associated with conducting recruitment using a competitive recruitment and selection process must include:

(1) A written statement, signed and dated by an official who has actual hiring authority from the employer, providing a detailed description of the recruitment procedures undertaken;

(2) A final report or other documentation from the organizational or administrative body making the recommendation or selection of the alien, at the completion of the competitive recruitment and selection process; and

(3) Evidence of all other recruitment sources utilized.

(4) In addition, for a job opportunity involving a college or university teacher:

(i) A copy of at least one print or electronic advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements; and

(ii) A written statement attesting to the degree(s) of the alien's educational or professional qualifications and academic achievements.

(b) *Duty to maintain recruitment documentation.* Documentation to prove compliance with the requirements of this section must be submitted concurrently with the filing of the *Application for Permanent Employment Certification*, as set forth in § 656.10 and retained by the employer in compliance with the requirements of § 656.10(h).

§ 656.19 Processing of an application.

(a) *NPC review.* The CO will assign for processing all *Applications for Permanent Employment Certification*, review such applications for compliance with the requirements set forth in this part, and make a decision to conduct an audit examination using the procedures set forth in § 656.20, order supervised recruitment using the procedures set forth in § 656.21, or issue a final determination set forth in § 656.24.

(b) *Correspondence during processing.* Any notice or request sent by the CO(s) under this subpart to an employer requiring a response will be sent electronically, unless the employer was permitted to file by mail as set forth in § 656.10(c). For employers

permitted to file by mail, the CO will send any notice or request via traditional methods to assure next day delivery. The CO will use the address, including electronic mail address, provided on the *Application for Permanent Employment Certification* to send such notices or requests. The employer's response to such a notice or request must be filed electronically, except that an employer permitted to file by mail as set forth in § 656.10(c), may use traditional methods to assure next day delivery. The employer's response must be sent by the due date or the next business day if the due date falls on a Sunday or Federal holiday.

(c) *Response dates.* OFLC will determine the date of an employer's response to any notice or request sent to the employer during application processing as follows:

(1) For any *Application for Permanent Employment Certification* received using the electronic method(s) designated by the OFLC Administrator, response date(s) will be the date on which a response to a notice or request is submitted. Response date(s) will be based on the time of submission in the Eastern time zone of the United States.

(2) For any *Application for Permanent Employment Certification* received in accordance with § 656.10(c)(2) or (3), response date(s) will be the postmark date affixed to the employer's response submission.

(d) *Job duties and requirements.*

(1) Job requirements specified in the *Application for Permanent Employment Certification*, unless adequately documented as arising from business necessity, 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. To establish a business necessity, an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner.

(2) A foreign language requirement is prohibited, unless such a requirement is justified by business necessity. Demonstrating business necessity for a foreign language requirement may be based upon the following:

(i) The nature of the occupation and the specific duties to be performed in the job opportunity that normally requires regular use of a foreign language; or

(ii) The need to communicate with a large majority of the employer's customers, contractors, or employees who cannot communicate effectively in English, as documented by:

(A) The employer furnishing the number and proportion of its clients, contractors, or employees who cannot communicate effectively in English, and/or detailed executed contracts or agreements outlining plans to market products or deliver services in a foreign country; and

(B) A detailed explanation of why the duties of the job opportunity normally require frequent contact and communication with clients, contractors, or employees who cannot communicate effectively in English, including why the responsibilities of the position for which permanent labor certification is sought necessitate regular contact and communication with these individuals, and why it is reasonable to believe the foreign-language-speaking clients, contractors, and employees cannot communicate effectively in English.

(3) If the job opportunity involves a combination of occupations, the employer must document that it has normally employed workers for that combination of occupations, and/or workers customarily perform the combination of occupations in the place(s) of employment, and/or the combination job opportunity is based on a business necessity. Combination occupations can be documented by position descriptions, relevant payroll records, and/or letters from other employers stating their workers regularly

perform the combination of occupations in the same AIE, and/or documentation that the combination occupation arises from a business necessity.

(4)(i) If the job opportunity contains alternative requirements, those requirements must be substantially equivalent to the primary requirements of the job opportunity for which permanent labor certification is sought; and

(ii) If the alien already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the alternative requirements, the CO will deny permanent labor certification unless the *Application for Permanent Employment Certification* states that any suitable combination of education, training, or experience is acceptable.

(5) If the job opportunity involves a household domestic service worker, live-in requirements are acceptable only if the employer can demonstrate the requirement is essential to perform, in a reasonable manner, the job duties specified in the *Application for Permanent Employment Certification* and there are not cost-effective alternatives to a live-in household requirement. Mere employer assertions do not constitute acceptable documentation. For example, a live-in requirement could be supported by documenting two working parents and young children in the household, and/or the existence of erratic work schedules requiring frequent travel and a need to entertain business associates and clients on short notice. Depending upon the situation, acceptable documentation could consist of travel vouchers, written estimates of costs of alternatives such as babysitters, or a detailed listing of the frequency and length of absences of the employer from the home.

(e) *CO review of job requirements.*

(1) The job requirements, as described in the *Application for Permanent Employment Certification*, must represent only the actual minimum requirements to perform the duties in the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to the job opportunity described in the *Application for Permanent Employment Certification*.

(3) If the alien is already employed by the employer, in considering whether the job requirements represent the actual minimums, the CO will review any training and experience possessed by the alien at the time of hiring by the employer, including as a contract employee. The employer is prohibited from requiring that a U.S. worker(s) possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which permanent labor certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien satisfies the actual minimum requirements for the job opportunity described in the *Application for Permanent Employment Certification*, the CO will not consider any education or training obtained by the alien at the employer's expense unless the employer offers similar training to domestic worker applicants.

§ 656.20 Audit.

(a) *Discretion.* Prior to the issuance of a final determination, the CO may, at their discretion, select an *Application for Permanent Employment Certification* for audit to determine compliance with the requirements of this part.

(b) *Audit notice*. Where an *Application for Permanent Employment Certification* is selected for audit, the CO will issue a Notice of Audit Examination to the employer and a copy, if appropriate, to the employer’s agent or attorney. The notice will:

(1) Specify the documentation that must be submitted by the employer;

(2) Specify a date, no more than 30 calendar days from the date the audit notice is issued, by which the required documentation must be sent to the CO;

(3) Advise that if the required documentation has not been sent by the date specified the application will be denied.

(i) Failure to provide documentation in a timely manner constitutes a refusal to exhaust available administrative remedies; and

(ii) The administrative-judicial review procedure provided in § 656.26 is not available.

(4) Advise that failure to fully comply with the audit process will result in a denial of the *Application for Permanent Employment Certification* under § 656.24, and may result in the imposition of supervised recruitment under § 656.21 for the current and/or future filings of any *Application for Permanent Employment Certification* for up to 2 years, and/or debarment under § 656.31(f).

(c) *One-time extension request*. To request an extension, the employer must submit a request in writing to the NPC identifying the *Application for Permanent Employment Certification* and stating the reason(s) for the extension request. The CO may, in their discretion, provide one extension of up to 30 calendar days, to one response timeframe during audit.

(d) *Actions during processing*. During the course of the audit examination:

(1) The CO may issue one or more requests for supplemental information and/or documentation from the employer in order to complete the audit, and the CO will specify a timeframe of up to 30 calendar days for responding to any supplemental information request; and/or

(2) The CO may require the employer to conduct supervised recruitment under § 656.21.

(e) *Correspondence during audit.* Any notice or request sent by the CO(s) under this section to an employer requiring a response will be sent electronically, unless the employer was permitted to file by mail as set forth in § 656.10(c). For employers permitted to file by mail, the CO will send any notice or request via traditional methods to assure next day delivery. The CO will use the address, including electronic mail address, provided on the *Application for Permanent Employment Certification* to send such notices or requests. The employer's response to such notice or request must be filed electronically, except that an employer permitted to file by mail as set forth in § 656.10(c), may use traditional methods to assure next day delivery. The employer's response must be sent by the due date or the next business day if the due date falls on a Sunday or Federal holiday.

(f) *Failure to comply with audit.* If the CO determines that an employer failed to timely respond to a notice or request during audit or failed to comply with audit requirements ordered by the CO under this section, the application will be denied. Where the CO determines an employer's audit response is inadequate, the CO will deny the application. The CO may also impose the supervised recruitment procedures under § 656.21 for the employer's future applications for up to 2 years. In addition, the employer and/or its attorney or agent may be debarred consistent with § 656.31(f).

(g) *Potential referrals and information sharing.* In addition to measures in this subpart, the CO will provide the audit findings for an employer, attorney, or agent and underlying documentation to any enforcement agency with jurisdiction where the findings indicate a possible violation of law within that agency's jurisdiction, may provide such findings and documentation to any enforcement agency in any other case, and will provide such findings and documentation upon the written request of an enforcement agency, including the DOL Office of Inspector General (DOL-OIG), DHS, the Department of Justice (DOJ), including DOJ-IER, and the EEOC.

§ 656.21 Supervised recruitment.

(a) *Discretion.* The CO may, at their discretion, require supervised recruitment on any *Application for Permanent Employment Certification* pending a final determination or for all of an employer's future *Applications for Permanent Employment Certification* for up to 2 years pursuant to § 656.20(f).

(b) *Supervised recruitment notice.* Where an *Application for Permanent Employment Certification* is selected for supervised recruitment, the CO will issue a Notice of Supervised Recruitment to the employer and a copy, if appropriate, to the employer's agent or attorney. The notice will:

(1) Specify the procedures for conducting supervised recruitment, including the required method(s) and content for advertising the job opportunity to prospective U.S. applicants (e.g., whether to have applicants respond directly to the NPC), timeframes for compliance with the supervised recruitment process, and state that supervised recruitment will be incorporated as bona fide conditions and terms of the *Application(s) for Permanent Employment Certification*.

(2) Advise that if the required documentation has not been sent by the date specified the application will be denied.

(i) Failure to provide documentation in a timely manner constitutes a refusal to exhaust available administrative remedies; and

(ii) The administrative-judicial review procedure provided in § 656.26 is not available.

(c) *Requirements*. The supervised recruitment process will be in addition to any recruitment required of the employer by this part and may consist of, but is not limited to, one or more of the following:

(1) Requiring the employer to submit one or more draft advertisements to the CO for review and approval prior to conducting recruitment for U.S. workers;

(2) Designating the source(s) where the employer must recruit for U.S. workers and specifying the timeframe(s) in which the employer must place the advertisement(s) in such source(s);

(3) Requiring the employer to notify the CO in writing when the advertisement(s) are placed;

(4) Extending the length of the placement of any advertisement(s) and/or job order placed with the SWA, as necessary, to effectively recruit for U.S. workers;

(5) Requiring the employer to retain proof of publication of all advertisements and provide a copy of any documentation, upon request by the CO, verifying it conducted the recruitment as directed by the CO;

(6) Requiring the employer to submit a recruitment report meeting the requirements under § 656.17(f), including any additional information requested by the CO, within 30 calendar days of the CO's request for such a report; and

(7) Requiring the employer to provide updated notice to employees, as set forth in as set forth in § 656.21, when necessary.

(d) *Supplemental information request*. During the course of supervised recruitment, the CO may issue one or more requests for supplemental information and/or documentation from the employer in order to complete supervised recruitment. The CO will specify the timeframe of up to 30 calendar days for responding to the supplemental information request.

(e) *Correspondence during supervised recruitment.* Any notice or request sent by the CO(s) under this section to an employer requiring a response will be sent electronically, unless the employer was permitted to file by mail as set forth in § 656.10(c). For employers permitted to file by mail, the CO will send any notice or request via traditional methods to assure next day delivery. The CO will use the address, including electronic mail address, provided on the *Application for Permanent*

Employment Certification to send such notices or requests. The employer's response to such a notice or request must be filed electronically, except that an employer permitted to file by mail as set forth in § 656.10(c), may use traditional methods to assure next day delivery. The employer's response must be sent by the due date or the next business day if the due date falls on a Sunday or Federal holiday.

(f) *Failure to comply with supervised recruitment.* If the CO determines that an employer has failed to comply with requirements ordered by the CO under this section, the *Application for Permanent Employment Certification* will be denied, and the employer and/or its attorney or agent may be debarred consistent with § 656.31(f).

(g) *Potential referrals and information sharing.* In addition to measures in this subpart, the CO will provide the supervised recruitment findings and underlying documentation to any enforcement agency with jurisdiction where the findings indicate a possible violation of law within that agency's jurisdiction, may provide such findings and documentation to any enforcement agency in any other case, and will provide such findings and documentation upon the written request of an enforcement agency, including the DOL-OIG, DHS, DOJ, including DOJ-IER, and the EEOC.

(h) *One-time extension request*. To request an extension, the employer must submit a request in writing to the NPC identifying the *Application for Permanent Employment Certification* and stating the reason(s) for the extension request. The CO may, in their discretion, provide one extension of up to 30 calendar days, to one response timeframe during supervised recruitment.

§ 656.24 Labor certification determinations.

(a) *Determinations.* The OFLC Administrator is the Department's National CO. The OFLC Administrator and the CO(s), by virtue of delegation from the OFLC Administrator, have the authority to certify or deny *Applications for Permanent Employment Certification*. The OFLC Administrator has sole discretion to certify, deny,

or suspend processing of *Applications for Permanent Employment Certification* under 656.31(b) or for other appropriate reasons or to delegate authority to the CO to do so.

(b) *Criteria for certification.* The CO will grant certification only if:

(1) The employer has met all the requirements of this part.

(2) There are not sufficient U.S. workers to fill the job opportunity. In making a determination as to whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as able and available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, whom the employer has not rejected for a lawful, job-related reason.

(i) The CO must consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. For the purposes of this paragraph (b)(2)(i), a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on the-job training.

(ii) If the job involves an alien who is a college or university teacher or has exceptional ability in the sciences or the arts, the U.S. worker must be at least as qualified as the alien.

(3) The employment of the alien will not have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. In making this determination, the CO considers such things as: labor market information; the special circumstances of the industry, organization, and/or occupation; the prevailing wage in the place(s) of intended employment; and working conditions, such as hours, that are normal to the occupation and industry.

(c) *Approved certification.* If permanent labor certification is granted, the CO will send a final determination notice and a copy of the certified *Application for Permanent Employment Certification* to the employer and a copy, if applicable, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 656.10(c), the CO will send the final determination notice and a copy of the certified *Application for Permanent Employment Certification* using the mailing address for the employer identified on the application. The CO will send the certified *Application for Permanent Employment Certification* directly to USCIS using an electronic method(s) designated by the OFLC Administrator.

(d) *Denied certification.* If the *Application for Permanent Employment Certification* is denied, the CO will send a Notice of Denial to the employer and a copy, if appropriate, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 656.10(c), the CO will send the Notice of Denial by means normally assuring next day delivery. The Notice of Denial will:

(1) State the reason(s) certification is denied, citing the relevant regulatory standards;

(2) Offer the employer an opportunity to request reconsideration by the CO of the denial under § 656.26(a) or request review by BALCA under § 656.26(b);

(3) State that if the employer does not request reconsideration by the CO or review by BALCA within 30 calendar days of the date of the determination, as specified in § 656.26(a) or (b), the denial is final, and the Department will not accept any request for reconsideration or review on that *Application for Permanent Employment Certification*;

(4) State that if the employer does not request reconsideration or review of the denial under § 656.26(a) or (b), a new *Application for Permanent Employment Certification* may be filed at any time; and

(5) State that the employer is prohibited from filing a new *Application for Permanent Employment Certification* in the same occupation for the same alien while a request for reconsideration or review is pending under the procedures set forth in § 656.26 or § 656.27.

§ 656.26 Review of denials of permanent labor certification.

(a) *Request for reconsideration by the CO.*

(1) The employer may request reconsideration by the CO within 30 calendar days from the date of issuance of the Notice of Denial.

(2) A request for reconsideration may include only:

(i) Documentation that the Department actually received from the employer in response to a request from the CO to the employer; or

(ii) Documentation that the employer did not have an opportunity to present previously to the CO, but that existed at the time the *Application for Permanent Employment Certification* was filed and maintained by the employer to support the *Application for Permanent Employment Certification* in compliance with the requirements of § 656.10(h).

(3) Paragraphs (a)(1) and (2) of this section notwithstanding, the CO will not grant any request for reconsideration where the deficiency that caused denial resulted from the applicant's disregard of a system prompt or other direct instruction.

(4) The employer’s request must clearly state whether it is seeking a request for review by BALCA or a request for reconsideration by the CO. If it is not clearly stated whether the employer is requesting reconsideration by the CO or requesting review by BALCA, the CO will reconsider the determination.

(5) If the employer requests reconsideration, the CO will reconsider the *Application for Permanent Employment Certification*. If the reconsideration is denied, the Notice of Reconsideration Denial will:

(i) State the reasons for the Notice of Reconsideration Denial;

(ii) Quote the request for review procedures at paragraphs (b) and (c) of this section;

(iii) Advise that failure to request review by BALCA of the Notice of Reconsideration Denial within 30 calendar days of the date of determination constitutes a failure to exhaust administrative remedies;

(iv) Advise that, if a request for review is not made within 30 calendar days of the determination, the Notice of Reconsideration Denial will become the final determination of the Secretary;

(v) Advise that if the reconsideration is denied, and a request for review is not made in accordance with the procedures at paragraph (b) of this section, a new application may be filed at any time; and

(vi) Advise that a new application in the same occupation for the same alien cannot be filed while a request for review is pending with BALCA.

(b) *Request for review by BALCA.*

(1) If a permanent labor certification is denied under § 656.24(d), if a request for reconsideration is denied under paragraph (a) of this section, if a permanent labor certification is revoked pursuant to § 656.32, or if a debarment is issued under § 656.31(f), a request for review of the denial of certification, denial on reconsideration, revocation, or debarment may be made to BALCA by the employer or debarred person or entity by making a request for such an administrative review in accordance with the procedures provided in this paragraph (b). In the case of a finding of debarment, receipt by the Department of a request for review, if made in accordance with this section, will

stay the debarment until such time as the review has been completed and a decision rendered thereon.

(2) A request for review of a denial of certification, denial on reconsideration, or revocation:

(i) Must be sent within 30 calendar days of the date of the determination to the CO who denied the application, denied the request for reconsideration, or revoked the certification;

(ii) Must clearly identify the particular labor certification determination for which review is sought;

(iii) Must set forth the particular grounds for the request; and

(iv) Must include a copy of the final determination.

(3) A request for review of debarment:

(i) Must be sent to the OFLC Administrator within 30 calendar days of the date of the debarment determination;

(ii) Must clearly identify the particular debarment determination for which review is sought;

(iii) Must set forth the particular grounds for the request; and

(iv) Must include a copy of the Notice of Debarment.

(4)(i) With respect to a request for review of either a Notice of Denial or a Notice of Reconsideration Denial, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal argument and only such evidence as was actually before the CO at the time of the CO's decision, even if such evidence is in the administrative file.

(ii) With respect to a revocation or a debarment determination, BALCA proceeding may be de novo.

(c) *Denial of certification, denial on reconsideration, or revocation Appeal File.* Upon the receipt of a request for review, the CO immediately must assemble an indexed Appeal File:

(1) The Appeal File must be in chronological order, must have the index on top followed by the most recent document, and must have consecutively numbered pages. The Appeal File must contain the request for review, the complete application file, and copies of all the written material, such as pertinent parts and pages of surveys and/or reports upon which the denial was based.

(2) The CO must send the Appeal File to BALCA, Office of Administrative Law Judges, the employer, the employer's attorney or agent (if applicable), and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. DOL (counsel), as soon as practicable.

(3) The employer may furnish or suggest directly to BALCA the addition of any documentation that is not in the Appeal File, but was actually before the CO at the time of the CO's decision. The employer must submit such documentation in writing, and must send a copy to the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

(d) *Debarment Appeal File.* Upon the receipt of a request for review of debarment, the OFLC Administrator, immediately must assemble an indexed Appeal File:

(1) The Appeal File must be in chronological order, must have the index on top followed by the most recent document, and must have consecutively numbered pages. The Appeal File must contain the request for review, the complete application file, and copies of all the written material, such as pertinent parts and pages of surveys and/or reports upon which the denial was based.

(2) The OFLC Administrator must send the Appeal File to BALCA, Office of Administrative Law Judges, the employer, the employer's attorney or agent (if applicable), and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. DOL (counsel), by means normally assuring next-day delivery.

(3) The debarred person or entity may furnish or suggest directly to BALCA the addition of any documentation in writing that is not in the Appeal File. The debarred person or entity must submit such documentation in writing, and must send a copy to the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor.

§ 656.27 Consideration by and decisions of the Board of Alien Labor Certification Appeals.

(a) *Panel designations.* In considering requests for review before it, BALCA may sit in panels of three members. The Chief ALJ may designate any BALCA member to submit proposed findings and recommendations to BALCA or to any duly designated panel thereof to consider a particular case.

(b) *Briefs and Statements of Position.* In considering the requests for review before it, BALCA must afford all parties 30 calendar days to submit or decline to submit any appropriate Statement of Position or legal brief. The CO is to be represented solely by the Solicitor of Labor or the Solicitor's designated representative.

(c) *Standard of Review.* When reviewing requests for review of denial of permanent labor certification under § 656.24(d), a denial of reconsideration under § 656.26(a), or an affirmation of a PWD under § 656.41, BALCA must uphold the CO’s decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

(d) *Review on the record.* BALCA must review a denial of permanent labor certification under § 656.24(d), a denial of reconsideration under § 656.26(a), a revocation of a certification under § 656.32, or an affirmation of a PWD under § 656.41 on the basis of the record upon which the CO's final determination was made, the request for review, and any Statements of Position or legal briefs submitted and, except in cases over which the Secretary has assumed jurisdiction pursuant to 29 CFR 18.95, must:

(1) Affirm the denial of the permanent labor certification, the denial of the request for reconsideration, the revocation of certification, or the affirmation of the PWD;

(2) Direct the CO to grant the certification only when the CO had an opportunity to review the merits of the application, overrule the revocation of certification, or overrule the affirmation of the PWD;

(3) Remand to the CO for further action; or

(4) Direct that a hearing on the case be held under paragraph (f) of this section.

(e) *Notifications of decisions.* BALCA must notify the employer, employer's attorney or agent (if applicable), the CO, and the Solicitor of Labor of its decision, and must return the record to the CO unless the case has been set for hearing under paragraph (f) of this section.

(f) *Hearings.*

(1) *Notification of hearing.* If the case has been set for a hearing, BALCA must notify the employer, the employer's attorney or agent (if applicable), the alien, the CO, and the Solicitor of Labor of the date, time, and place of the hearing, and that the hearing may be rescheduled upon written request.

(2) *Hearing procedure.*

(i) The "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges," at 29 CFR part 18, apply to hearings under this paragraph (f).

(ii) For the purposes of this paragraph (f)(2), references in 29 CFR part 18 to: "administrative law judge" mean the BALCA member or the BALCA panel duly designated under paragraph (a) of this section; "Office of Administrative Law Judges" means BALCA; and "Chief Administrative Law Judge" means the Chief ALJ in that official's function of chairing BALCA.

§ 656.30 Validity of labor certifications.

(a) *Validity period.* A permanent labor certification is only valid when filed in support of an initial Immigrant Petition with USCIS within 180 calendar days from the date on which the *Application for Permanent Employment Certification* is certified.

(b) *Scope of validity.* A permanent labor certification is valid only for the job opportunity, the alien, the place(s) of intended employment, and the employer specified on the certified *Application for Permanent Employment Certification,* including all appendices and any modifications approved by the Department. The permanent labor certification may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

§ 656.31 Applications involving fraud, willful misrepresentation, or violations of this part.

(a) *Denial.* The CO will deny any *Application for Permanent Employment Certification* under § 656.24 where the CO determines that the application contains false statements of material fact, is fraudulent, contains willful misrepresentations, or was otherwise submitted in violation of the requirements of this part.

(b) *Possible fraud or willful misrepresentation.*

(1) If the Department learns an employer, attorney, or agent is involved in possible fraud or willful misrepresentation in connection with the permanent labor certification program, the Department will refer the matter to DOJ, DHS, or other

government entity, as appropriate, for investigation, and send a copy of the referral to the DOL-OIG. If the Department learns an employer, attorney, or agent is involved in possible discrimination because of national origin, the Department will also refer the matter to the EEOC; where it indicates possible discrimination because of citizenship status, or because of national origin by an employer not covered by Title VII, the Department will also refer the matter to DOJ. In these cases, or if the Department learns an employer, attorney, or agent is under investigation by DOJ, DHS, or other government entity for possible fraud or willful misrepresentation in connection with the permanent labor certification program, the Department may suspend processing of any *Application for Permanent Employment Certification* involving such employer, attorney, or agent until completion of any investigation and/or judicial proceedings. Unless the investigatory agency, in writing, requests the Department to do otherwise, the Department will provide written notification to the employer and a copy, if appropriate, to the employer's agent or attorney of the suspension in processing.

(2) A suspension pursuant to paragraph (b)(1) of this section may last initially for up to 180 calendar days. No later than 180 calendar days after the suspension began, if no criminal indictment or information has been issued, or judicial proceedings have not been concluded, the CO may resume processing any of the *Applications for Permanent Employment Certification*, or may extend the suspension in processing until completion of any investigation and/or judicial proceedings.

(c) *Criminal indictment or information.* If the Department learns that an employer, attorney, or agent is named in a criminal indictment or information in connection with the permanent labor certification program, the processing of any of the *Applications for Permanent Employment Certification* related to that employer, attorney, or agent may be suspended until the judicial process is completed. Unless the investigatory or prosecutorial agency, in writing, requests the Department to do

otherwise, the Department will provide written notification to the employer and a copy, if appropriate, to the employer's agent or attorney of the suspension in processing.

(d) *No finding of fraud or willful misrepresentation.* If an employer, attorney, or agent is acquitted of fraud or willful misrepresentation charges, or if such criminal charges are withdrawn or otherwise fail to result in a finding of fraud or willful misrepresentation, the CO will resume processing of the *Applications for Permanent Employment Certification* in accordance with the requirements of this part based on the merits of the application.

(e) *Finding of fraud or willful misrepresentation.* If an employer, attorney, or agent is found to have committed fraud or willful misrepresentation involving the permanent labor certification program, whether by a court, the Department of State or DHS, as referenced in § 656.32(c), by the OFLC Administrator under paragraph (f)(3) of this section, or through other proceedings:

(1) Any suspension of processing of pending *Applications for Permanent Employment Certification* related to that employer, attorney, or agent will terminate.

(2) The CO will decide each such *Application for Permanent Employment Certification* on its merits and may deny any such *Application for Permanent Employment Certification* under § 656.24 and paragraph (a) of this section.

(3) In the case of a pending *Application for Permanent Employment Certification* involving an attorney or agent found to have committed fraud or willful misrepresentation, the Department will notify the employer associated with that *Application for Permanent Employment Certification* of the finding and require the employer to notify the Department in writing, within 30 calendar days of the notification, whether the employer will withdraw the *Application for Permanent Employment Certification*, designate a new attorney or agent, or continue the *Application for Permanent Employment Certification* without representation. Failure of the employer to

respond within 30 calendar days of the notification will result in a denial under § 656.24. If the employer elects to continue representation by the attorney or agent, DOL will suspend processing of any affected *Application for Permanent Employment Certification* while debarment proceedings are conducted under paragraph (f) of this section.

(f) *Debarment.*

(1) No later than 6 years after the date of filing of the *Application for Permanent Employment Certification* that is the basis for the finding, or, if such basis requires a pattern or practice as provided in paragraphs (f)(1)(iii) through (viii) of this section, no later than 6 years after the date of filing of the last *Application for Permanent Employment Certification* which constitutes a part of the pattern or practice, the OFLC Administrator may issue to an employer, attorney, agent, or any combination thereof a Notice of Debarment for not more than 3 years, based upon any action that was prohibited at the time the action occurred, upon determining the employer, attorney, or agent has participated in or facilitated one or more of the following:

(i) The sale, barter, or purchase of any *Application for Permanent Employment Certification*, or any other action prohibited under § 656.12;

(ii) The willful provision or willful assistance in the provision of false or inaccurate information in applying for permanent labor certification;

(iii) A pattern or practice of a failure to comply with the terms of the *Application for Permanent Employment Certification*;

(iv) A pattern or practice of failure to comply in the audit process pursuant to § 656.20;

(v) A pattern or practice of failure to comply in the supervised recruitment process pursuant to § 656.21;

(vi) Conduct resulting in a determination by a court, DHS, DOS, or the OFLC Administrator under paragraph (f)(3) of this section of fraud or willful misrepresentation

involving an *Application for Permanent Employment Certification*, as referenced in paragraph (e) of this section;

(vii) A pattern or practice, by an attorney or agent, of preparing or submitting *Applications for Permanent Employment Certification* on behalf of two or more unrelated employers that contain materially the same job duties, requirements, or recruitment procedures where the CO has determined that those requirements were not the employers' actual minimum requirements or that the recruitment was not conducted in good faith; or

(viii) Failure to pay the alien or a U.S. worker hired for the job opportunity the offered wage stated in the certified *Application for Permanent Employment Certification*.

(2) The Notice of Debarment will be in writing; will state the reason for the debarment finding, including a detailed explanation of how the employer, attorney or agent has participated in or facilitated one or more of the actions listed in paragraphs (f)(1)(i) through (viii) of this section; will state the start date and term of the debarment; will state that the employer, attorney, or agent will be debarred from all foreign labor certification programs (i.e., disqualified from filing any labor certification applications or labor condition applications or receiving approvals from OFLC) for the term of the debarment; and will identify appeal opportunities under § 656.26. The debarment will take effect on the start date identified in the Notice of Debarment unless a request for review is filed within the time permitted by § 656.26. DOL will notify DHS and the Department of State regarding any Notice of Debarment.

(3) *Independent Department finding.* The OFLC Administrator may determine that an employer, attorney, or agent has committed fraud or willful misrepresentation, as defined in 656.3, in connection with an *Application for Permanent Employment Certification*. Such a determination does not require, and is not contingent upon, any determination by a court, DHS, or the Department of State, and does not preclude a

referral under paragraph (b) of this section. A Notice of Debarment issued on the basis of such a determination will set forth the evidence relied upon, and the employer, attorney, or agent may seek review under 656.26.

(g) *False statements.* To knowingly and willfully furnish any false information in the preparation of the *Application for Permanent Employment Certification* and any supporting documentation, or to aid, abet, or counsel another to do so is a Federal offense, punishable by fine or imprisonment up to five years, or both under 18 U.S.C. 2 and 1001. Other penalties apply as well to fraud or misuse of DOL immigration-related documents and to perjury with respect to such documents under 18 U.S.C. 1546 and 1621.

§ 656.32 Revocation and invalidation of permanent labor certifications.

(a) *Basis for DOL revocation.* The OFLC Administrator may revoke a permanent labor certification issued under this part, if the certification was not justified.

(b) *DOL procedures for revocation.*

(1) The OFLC Administrator sends to the employer and a copy, if appropriate, to the employer's agent or attorney a *Notice of Intent to Revoke* an approved permanent labor certification which contains a detailed statement of the grounds for the revocation and the time period allowed for the employer's rebuttal. The employer may submit evidence in rebuttal within 30 calendar days of receipt of the notice. The OFLC Administrator must consider all relevant evidence presented in deciding whether to revoke the permanent labor certification.

(2) If rebuttal evidence is not filed by the employer, the *Notice of Intent to Revoke* becomes the final decision of the Secretary.

(3) If the employer files rebuttal evidence and the OFLC Administrator determines the approved permanent labor certification should be revoked, the employer may file an appeal under § 656.26.

(4) The OFLC Administrator will inform the employer within 30 calendar days of receiving any rebuttal evidence whether or not the approved permanent labor certification will be revoked.

(5) If the approved permanent labor certification is revoked, the OFLC Administrator will also send a copy of the notification to DHS and DOS.

(c) *DHS or DOS invalidation of labor certifications*. Either DHS or a Consul of the DOS may invalidate a permanent labor certification approved under this part upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the permanent labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the OFLC Administrator, the OFLC Administrator will notify DHS or DOS, in writing. The OFLC Administrator will also send a copy of the notification to the regional or national office, as appropriate, of the DOL-OIG.

5. Revise subpart D to read as follows:

Subpart D—Determination of Prevailing Wage

Sec.
656.40 Determination of prevailing wage for labor certification purposes.
656.41 Review of prevailing wage determinations.

§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) *Application filing requirements.* Except as otherwise permitted by this part, an employer who desires to file an *Application for Permanent Employment Certification* to hire an alien for permanent employment in the United States must obtain a PWD from the NPC designated by the OFLC Administrator. This section provides the procedures employers must follow when filing.

(1) *What to file*.

(i) An employer that desires to apply for permanent labor certification of an immigrant worker must file a completed *Application for Prevailing Wage Determination*,

including any relevant appendices and supporting documentation, to obtain a PWD from the NPC.

(ii) The *Application for Prevailing Wage Determination* must include the employer's legal name, trade name(s), and a valid FEIN as well as a valid place of business (physical location) in the United States.

(iii) If an employer is requesting a PWD based on a CBA covering the job opportunity, the employer must concurrently submit with its *Application for Prevailing Wage Determination* at the time of filing the following:

(A) A copy of the relevant sections of the CBA, which must include the validity dates of the agreement; the position(s) and description of the job(s) covered; the wage section, including tables and explanations; and the signature page with effective dates of the agreement;

(B) A letter on letterhead from the employer or employer's representative that states the relevant portions of the agreement with effective dates; the title of the position in the agreement appropriate to the job duties, requirements, and location; and wage value appropriate to the job duties, requirements, and location; and

(C) A letter on letterhead from the CBA authorized representative that states the relevant portions of the agreement with effective dates; the title of the position in the agreement appropriate to the job duties, requirements, and location; and wage value appropriate to the job duties, requirements, and location.

(iv) If an employer is requesting a PWD for a job opportunity for a professional athlete or professional sports team coach covered by professional sports league rules or regulations with wage provisions, the employer must concurrently submit with its *Application for Prevailing Wage Determination* at the time of filing a copy of the applicable league rules or regulations.

(v) If an employer is requesting a PWD based on an employer-provided survey under paragraph (f) of this section, the employer must concurrently submit with its *Application for Prevailing Wage Determination* at the time of filing a copy of the survey containing specific information about the survey methodology, including sample size and source, sample selection procedures, survey job descriptions, job and wage leveling chart, and list of participants surveyed, to allow a determination of whether the survey meets all the requirements of this section.

(2) *Location and method of filing*.

(i) *Electronic filing*. The employer must file the *Application for Prevailing Wage Determination*, including any relevant appendices, with the NPC using the electronic method(s) designated by the OFLC Administrator. The NPC will return without review any application submitted using a method other than the designated electronic method(s), unless the employer submits the application in accordance with paragraph (a)(2)(ii) of this section.

(ii) *Filing by mail.* Employers that lack adequate access to electronic filing may file the *Application for Prevailing Wage Determination* by mail in accordance with the procedures set forth in § 656.10(c)(2) and (3).

(b) *NPC review*.

(1) The CO will review the *Application for Prevailing Wage Determination* for compliance with all applicable program requirements and make a decision to issue a Request for Information (RFI) under paragraph (c) of this section or a PWD.

(2) Any notice or request sent by the CO(s) to an employer requiring a response will be sent electronically, unless the employer was permitted to file by mail as set forth in § 656.10(c). For employers permitted to file by mail, the CO will send any notice or request via traditional methods to assure next day delivery. The CO will use the address, including electronic mail address, provided on the *Application for Prevailing Wage*

Determination to send such notices or requests. The employer's response to such a notice or request must be filed electronically, except that an employer permitted to file by mail as set forth in § 656.10(c), may use traditional methods to assure next day delivery. The employer's response must be sent by the due date or the next business day if the due date falls on a Sunday or Federal holiday.

(3) The CO will return without review any *Application for Prevailing Wage Determination* where a valid PWD has been issued for the same employer covering the same job opportunity and AIE(s) for the same wage year, including applications where the employer has requested review of a PWD under § 656.41.

(c) *Request for Information.*

(1) If the CO determines the *Application for Prevailing Wage Determination* is incomplete, contains errors or inaccuracies, or otherwise contains information that is not sufficient to issue a PWD, the CO will issue an RFI to the employer and to the employer's attorney or agent (if applicable). The CO may issue one or more additional RFIs before issuing a final decision.

(2) The RFI will:

(i) State the reason(s) the *Application for Prevailing Wage Determination* does not meet the criteria for issuing a PWD;

(ii) Offer the employer an opportunity to respond to the RFI within 7 calendar days from the date the RFI was issued by CO;

(iii) State that the CO's determination on whether to issue a PWD will be made based on a review of the employer’s response and the CO will make the necessary amendments to the *Application for Prevailing Wage Determination* to issue a PWD, as applicable; and

(iv) State that if the employer does not respond to the RFI within 7 calendar days from the date the RFI was issued by the CO, the *Application for Prevailing Wage*

Determination will be deemed abandoned, the CO will return the application to the employer without issuing a PWD, and the employer may file a new *Application for Prevailing Wage Determination* with the NPC.

(d) *Determinations.* Prevailing wages will be determined as follows:

(1) If the job opportunity is covered by CBA that was negotiated at arms-length between the union and the employer or by professional sports league rules or regulations with wage provisions, the wage rate set forth in the CBA agreement or professional sports league rules or regulations is considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it is considered the "prevailing wage" for labor certification purposes.

(2) If the job opportunity is not covered by a CBA or professional sports league rules or regulations, the prevailing wage for labor certification purposes will be the arithmetic mean, of the wages of workers similarly employed in the AIE, except as provided in paragraph (e) or (f) of this section. The wage component of the Occupational Employment and Wage Statistics Survey will be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (f) of this section.

(3) If the employer provides a survey acceptable under paragraph (f) of this section, the survey must provide an arithmetic mean of the wages of workers similarly employed in the AIE.

(4) The employer may utilize a current wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq.

(e) *Institutions of higher education and research entities.* In computing the prevailing wage for a job opportunity in an occupational classification in an AIE for an employee of an institution of higher education, or an affiliated or related nonprofit entity, a nonprofit research organization, or a Governmental research organization, the

prevailing wage level takes into account the wage levels of employees only at such institutions and organizations in the AIE.

(1) The organizations listed in this paragraph (e) are defined by DHS at 8 CFR 214.2(h)(19)(iii) as follows:

(i) Institution of higher education means an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965;

(ii) Affiliated or related nonprofit entity means a nonprofit entity that is related or affiliated with an institution of higher education, if it satisfies any of the following conditions:

(A) The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or control by the same board or federation;

(B) The nonprofit entity is operated by an institution of higher education;

(C) The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or

(D) The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education. A nonprofit entity may engage in more than one fundamental activity.

(iii) Nonprofit research organization or Governmental research organization. When a fundamental activity of a nonprofit organization is engaging in basic research and/or applied research, that organization is a nonprofit research organization. When a fundamental activity of a Governmental organization is the performance or promotion of basic research and/or applied research, that organization is a government research organization. A Governmental research organization may be a Federal, State, or local

entity. A nonprofit research organization or governmental research organization may perform or promote more than one fundamental activity. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. Both basic research and applied research may include research and investigation in the sciences, social sciences, or humanities and may include designing, analyzing, and directing the research of others if on an ongoing basis and throughout the research cycle.

(2) Nonprofit organization or entity, for the purpose of this paragraph (e), means an organization qualified as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6) (26 U.S.C. 501(c)(3), (c)(4) or (c)(6)), and which has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

(f) *Employer-provided wage information.*

(1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the CO will consider wage information provided by the employer in making a PWD.

(2) The survey submitted to the NPC must be based upon recently collected data.

(i) A published survey must have been published within 24 months of the date of submission to the NPC, must be the most current edition of the survey, and the data upon

which the survey is based must have been collected within 24 months of the publication date of the survey.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted to the NPC.

(g) *Similarly employed.* For purposes of this section, similarly employed means having substantially comparable jobs in the occupational category in the AIE, except that, if a representative sample of workers in the occupational category cannot be obtained in the AIE, similarly employed means:

(1) Having jobs requiring a substantially similar level of skills within the AIE; or

(2) If there are no substantially comparable jobs in the AIE, having substantially comparable jobs with employers outside of the AIE.

(h) *Validity of the PWD.*

(1) The CO must specify the validity period of the prevailing wage, which in no event may be less than 90 calendar days or more than 365 calendar days from the determination date. A request for review under § 656.41 renders the PWD invalid until the CO issues an affirmed or modified PWD.

(2) An employer must begin the recruitment of U.S. workers required by §§ 656.17, 656.18, or 656.21 within the validity period specified on the *Application for Prevailing Wage Determination.*

(3) Where the *Application for Prevailing Wage Determination* contains multiple AIEs covering the same job opportunity, the PWD issued by the CO on such an application may be used in connection with the filing of multiple *Applications for Permanent Employment Certification* under § 656.10.

(i) *Withdrawal of an Application for Prevailing Wage Determination.* The employer may withdraw an *Application for Prevailing Wage Determination* before the CO issues a PWD under this section by submitting a request in writing, electronically or,

if permitted to file by mail, via mail, to the NPC that identifies the unique application number and states the reason(s) for the withdrawal.

§ 656.41 Review of prevailing wage determinations.

(a) *Review of NPC PWD.* Any employer desiring review of a PWD made by a CO must make a request for such review within 30 calendar days of the date from when the PWD was issued. The request for review must be sent to the director of the NPC that issued the PWD within 30 calendar days of the date of the PWD; clearly identify the PWD from which review is sought; set forth the particular grounds for the request; and include all the materials pertaining to the PWD submitted to the NPC up to the date of the PWD received from the NPC**.**

(b) *Processing of request by NPC.* Upon the receipt of a request for review, the NPC will review the employer's request and accompanying documentation and add any material that may have been omitted by the employer, including any material the NPC sent the employer up to the date of the PWD.

(c) *Review on the record.* The director will review the PWD solely on the basis upon which the PWD was made and, upon the request for review, may either affirm or modify the PWD.

(d) *Request for review by BALCA.* Any employer desiring review of the director's determination must make a request for review by BALCA within 30 calendar days of the date of the Director's decision.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the director made his/her affirmation of the PWD.

(2) The request for review must be in writing and addressed to the director of the NPC making the determination. Upon receipt of a request for a review, the director will

assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The director will send the Appeal File to the Office of Administrative Law Judges, BALCA. BALCA handles the appeals in accordance with §§ 656.26 and 656.27.

6. Add a new subpart E to read as follows:

Subpart E—Severability

Sec.
656.50 Severability.

§ 656.50 *Severability*.

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision will be severable from this part and will not affect the remainder thereof.

Marek Laco,

Acting Assistant Secretary for Employment and Training, Labor.

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