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Part II

Department of Labor

Employment and Training Administration

20 CFR Parts 655 and 656

**Labor Certification for the Permanent
Employment of Aliens in the United
States; Implementation of New System;
Final Rule**

application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent, as appropriate, and a copy of the notification is sent by the Certifying Officer to the alien and to the Department of Labor's Office of Inspector General.

§ 656.32 Revocation of approved labor certifications.

(a) *Basis for DOL revocation.* The Certifying Officer in consultation with the Chief, Division of Foreign Labor Certification may take steps to revoke an approved labor certification, if he/she finds the certification was not justified. A labor certification may also be invalidated by DHS or the Department of State as set forth in § 656.30(d).

(b) *Department of Labor procedures for revocation.* (1) The Certifying Officer sends to the employer a *Notice of Intent to Revoke* an approved 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 days of receipt of the notice. The Certifying Officer must consider all relevant evidence presented in deciding whether to revoke the 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 Certifying Officer determines the certification should be revoked, the employer may file an appeal under § 656.26.

(4) The Certifying Officer will inform the employer within 30 days of receiving any rebuttal evidence whether or not the labor certification will be revoked.

(5) If the labor certification is revoked, the Certifying Officer will also send a copy of the notification to the DHS and the Department of State.

Subpart D—Determination of Prevailing Wage

§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) *Application process.* The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Unless

the employer chooses to appeal the SWA's prevailing wage determination under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

(b) *Determinations.* The SWA determines the prevailing wage as follows:

(1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between the union and the employer, the wage rate set forth in the CBA agreement 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, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(3) of this section, of the wages of workers similarly employed in the area of intended employment. The wage component of the DOL Occupational Employment Statistics Survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (g) of this section.

(3) If the employer provides a survey acceptable under paragraph (g) of this section that provides a median and does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.

(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.*

(c) *Validity period.* The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

(d) *Similarly employed.* For purposes of this section, similarly employed means having substantially comparable jobs in the occupational category in the

area of intended employment, except that, if a representative sample of workers in the occupational category can not be obtained in the area of intended employment, similarly employed means:

(1) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(e) *Institutions of higher education and research entities.* In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment 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 area of intended employment.

(1) The organizations listed in this paragraph (e) are defined 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. Section 101(a) of that Act, 20 U.S.C. 1001(a)(2000), provides an institution of higher education is an educational institution in any state that:

(A) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;

(B) Is legally authorized within such state to provide a program of education beyond secondary education;

(C) Provides an educational program for which the institution awards a bachelor's degree or provides not less than a two-year program that is acceptable for full credit toward such a degree;

(D) Is a public or other nonprofit institution; and

(E) Is accredited by a nationally recognized accrediting agency or association or, if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary of Education for the granting of preaccreditation status, and the Secretary of Education has determined there is satisfactory assurance the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(ii) *Affiliated or related nonprofit entity* means a nonprofit entity (including but not limited to a hospital and a medical or research institution) connected or associated with an institution of higher education, through shared ownership or control by the same board or federation, operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

(iii) *Nonprofit research organization or Governmental research organization* means a research organization that is either a nonprofit organization or entity primarily engaged in basic research and/or applied research, or a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research. 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 commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. 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. It may include research and investigation in the sciences, social sciences, or humanities.

(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) *Professional athletes*. In computing the prevailing wage for a professional athlete (defined in Section 212(a)(5)(A)(iii)(II) of the Act) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage (see Section 212(p)(2) of the Act). INA Section 212(a)(5)(A)(iii)(II), 8 U.S.C. 1182(a)(5)(A)(iii)(II) (1999), defines

“professional athlete” as 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.

(g) *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 SWA must consider wage information provided by the employer in making a prevailing wage determination. An employer survey can be submitted either initially or after SWA issuance of a prevailing wage determination derived from the OES survey. In the latter situation, the new employer survey submission will be deemed a new prevailing wage determination request.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the SWA with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the SWA to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the ETA national office.

(3) The survey submitted to the SWA 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 SWA, 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 SWA.

(4) If the employer-provided survey is found not to be acceptable, the SWA must inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for the SWA’s consideration is not acceptable, may file supplemental information as provided in paragraph (h) of this section, file a new request for a prevailing wage determination, or appeal under § 656.41.

(h) *Submittal of supplemental information by employer*. (1) If the employer disagrees with the skill level assigned to its job opportunity, or if the SWA informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer may submit supplemental information to the SWA.

(2) The SWA must consider one supplemental submission about the employer’s survey or the skill level the SWA assigned to the job opportunity or any other legitimate basis for the employer to request such a review. If the SWA does not accept the employer’s survey after considering the supplemental information, or affirms its determination concerning the skill level, it must inform the employer of the reasons for its decision.

(3) The employer may then apply for a new wage determination or appeal under § 656.41.

(i) *Wage can not be lower than required by any other law*. No prevailing wage determination for labor certification purposes made under this section permits an employer to pay a wage lower than the highest wage required by any applicable Federal, state, or local law.

(j) *Fees prohibited*. No SWA or SWA employee may charge a fee in connection with the filing of a request for a PWD, responding to such a request, or responding to a request for a review of a SWA prevailing wage determination under § 656.41.

§ 656.41 Certifying Officer review of prevailing wage determinations.

(a) *Review of SWA prevailing wage determinations*. Any employer desiring review of a SWA PWD must make a request for such review within 30 days of the date from when the PWD was issued by the SWA. The request for review must be sent to the SWA that issued the PWD within 30 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 SWA up to the date of the PWD received from the SWA.

(b) *Transmission of request to processing center*. (1) Upon the receipt of a request for review, the SWA must review the employer’s request and accompanying documentation, and add any material that may have been omitted by the employer, including any material sent to the employer by the SWA up to the date of the PWD.

(2) The SWA must send a copy of the employer’s appeal, including any material added under paragraph (b)(1) of

this section, to the appropriate ETA application processing center.

(3) The SWA must send a copy of any material added by the SWA under paragraph (b)(1) of this section to the employer.

(c) *Designations.* The director(s) of the ETA application processing center(s) will determine which CO will review the employer's appeal.

(d) *Review on the record.* The CO reviews the SWA PWD solely on the basis upon which the PWD was made and, upon the request for review, may:

(1) Affirm the prevailing wage determination issued by the SWA;

(2) Modify the prevailing wage determination; or

(3) Remand the matter to the SWA for further action.

(e) *Request for review by BALCA.* Any employer desiring review of a CO prevailing wage determination must make a request for review of the determination by the Board of Alien Labor Certification Appeals within 30 days of the date of the decision of the CO.

(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 affirmation of the PWD by the SWA was based.

(2) The request for review must be in writing and addressed to the CO who made the determination. Upon receipt of a request for a review, the CO must immediately assemble an indexed appeal file in reverse chronological

order, with the index on top followed by the most recent document.

(3) The CO must send the Appeal File to the Office of Administrative Law Judges, Board of Alien Labor Certification Appeals, 800 K Street, Suite 400-N, Washington, DC 20001-8002.

(4) The BALCA handles the appeals in accordance with § 656.26 and § 656.27 of this part.

Signed in Washington, DC, this 13th day of December, 2004.

Emily Stover DeRocco,
Assistant Secretary, Employment and Training Administration.

Editorial Note: The ETA Form 9089 and instructions will not appear in the Code of Federal Regulations.

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