

office having jurisdiction over the beneficiary's residence in the United States. The original sponsor nonetheless retains financial responsibility for the beneficiary under the terms of the guarantee of financial support and intent to petition for legal custody which that sponsor executed, unless that responsibility is assumed by a new sponsor. In the event that the new sponsor does not comply with the terms of the new guarantee of financial support and intent to petition for legal custody and if, for any reason, that guarantee is not enforced, the original sponsor again becomes financially responsible for the beneficiary.

(2) *One-stage processing of petition.* If the petitioner chooses to have the petition processed under the one-stage processing procedure described in paragraph (e) of this section, the petitioner must submit all evidence required by paragraph (f)(1) of this section.

(g) *Decision*—(1) *General.* The director shall notify the petitioner of the decision and, if the petition is denied, of the reasons for the denial. If the petition is denied, the petitioner may appeal the decision under part 103 of this chapter.

(2) *Denial upon completion of preliminary processing.* The director may deny the petition upon completion of the preliminary processing under paragraph (d) of this section for:

(i) Failure to establish that there is reason to believe the alien was fathered by a United States citizen; or

(ii) Failure to meet the sponsorship requirements if the fingerprints of the sponsor, required in paragraph (f)(1) of this section, were submitted during the preliminary processing and the completed background check of the sponsor discloses adverse information resulting in a finding that the sponsor is not of good moral character.

(3) *Denial upon completion of final processing.* The director may deny the petition upon completion of final processing if it is determined that the sponsorship requirements, or one or more of the other applicable requirements, have not been met.

(4) *Denial upon completion of one-stage processing.* The director may deny the petition upon completion of all processing if any of the applicable require-

ments in a case being processed under the one-stage processing described in paragraph (e) of this section are not met.

(h) *Classification of Public Law 97-359 Amerasian.* If the petition is approved the beneficiary is classified as follows:

(1) An unmarried beneficiary under the age of twenty-one is classified as the child of a United States citizen under section 201(b) of the Act;

(2) An unmarried beneficiary twenty-one years of age or older is classified as the unmarried son or daughter of a United States citizen under section 203(a)(1) of the Act; and

(3) A married beneficiary is classified as the married son or daughter of a United States citizen under section 203(a)(3) of the Act.

(i) *Enforcement of affidavit of financial support and intent to petition for legal custody.* A guarantee of financial support and intent to petition for legal custody on Form I-361 may be enforced against the alien's sponsor in a civil suit brought by the Attorney General in the United States District Court for the district in which the sponsor resides, except that the sponsor's estate is not liable under the guarantee if the sponsor dies or is adjudicated as bankrupt under title 11, United States Code. After admission to the United States, if the beneficiary of a petition requires enforcement of the guarantee of financial support and intent to petition for legal custody executed by the beneficiary's sponsor, the beneficiary may file Form I-363 with USCIS. If the beneficiary is under eighteen years of age, any agency or individual (other than the sponsor) having legal custody of the beneficiary, or a legal guardian acting on the alien's behalf, may file Form I-363.

[57 FR 41066, Sept. 9, 1992, as amended at 63 FR 12986, Mar. 17, 1998; 74 FR 26936, June 5, 2009; 76 FR 53782, Aug. 29, 2011]

§ 204.5 Petitions for employment-based immigrants.

(a) *General.* A petition to classify an alien under section 203(b)(1), 203(b)(2), or 203(b)(3) of the Act must be filed on Form I-140, Petition for Immigrant Worker. A petition to classify an alien under section 203(b)(4) (as it relates to special immigrants under section

§ 204.5

8 CFR Ch. I (1-1-21 Edition)

101(a)(27)(C)) must be filed on kForm I-360, Petition for Amerasian, Widow, or Special Immigrant. A separate Form I-140 or I-360 must be filed for each beneficiary, accompanied by the applicable fee. A petition is considered properly filed if it is:

(1) Accepted for processing under the provisions of part 103;

(2) Accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program; and

(3) Accompanied by any other required supporting documentation.

(b) *Jurisdiction.* Form I-140 or I-360 must be filed in accordance with the instructions on the form.

(c) *Filing petition.* Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act. An alien, or any person in the alien's behalf, may file a petition for classification under section 203(b)(1)(A) or 203(b)(4) of the Act (as it relates to special immigrants under section 101(a)(27)(C) of the Act).

(d) *Priority date.* The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor shall be the date the labor certification application was accepted for processing by any office of the Department of Labor. The priority date of any petition filed for a classification under section 203(b) of the Act which does not require a labor certification from the Department of Labor shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with USCIS. The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with USCIS. The priority date of an alien who filed for classification as a special immigrant under section 203(b)(4) of the Act prior to October 1,

1991, and who is the beneficiary of an approved petition for special immigrant status after October 1, 1991, shall be the date the alien applied for an immigrant visa or adjustment of status.

(e) *Retention of section 203(b)(1), (2), or (3) priority date.* (1) A petition approved on behalf of an alien under sections 203(b)(1), (2), or (3) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any classification under section 203(b)(1), (2), or (3) of the Act for which the alien may qualify. In the event that the alien is the beneficiary of multiple approved petitions under section 203(b)(1), (2), or (3) of the Act, the alien shall be entitled to the earliest priority date.

(2) The priority date of a petition may not be retained under paragraph (e)(1) of this section if at any time USCIS revokes the approval of the petition because of:

(i) Fraud, or a willful misrepresentation of a material fact;

(ii) Revocation by the Department of Labor of the approved permanent labor certification that accompanied the petition;

(iii) Invalidation by USCIS or the Department of State of the permanent labor certification that accompanied the petition; or

(iv) A determination by USCIS that petition approval was based on a material error.

(3) A denied petition will not establish a priority date.

(4) A priority date is not transferable to another alien.

(5) A petition filed under section 204(a)(1)(F) of the Act for an alien shall remain valid with respect to a new employment offer as determined by USCIS under section 204(j) of the Act and 8 CFR 245.25. An alien will continue to be afforded the priority date of such petition, if the requirements of paragraph (e) of this section are met.

(f) *Maintaining the priority date of a third or sixth preference petition filed prior to October 1, 1991.* Any petition filed before October 1, 1991, and approved on any date, to accord status under section 203(a)(3) or 203(a)(6) of the Act, as in effect before October 1, 1991, shall be deemed a petition approved to accord status under section

203(b)(2) or within the appropriate classification under section 203(b)(3), respectively, of the Act as in effect on or after October 1, 1991, provided that the alien applies for an immigrant visa or adjustment of status within the two years following notification that an immigrant visa is immediately available for his or her use.

(g) *Initial evidence*—(1) *General*. Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required in individual cases. Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

(2) *Ability of prospective employer to pay wage*. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

(h) *Aliens with extraordinary ability*.

(1) An alien, or any person on behalf of the alien, may file an I-140 visa petition for classification under section 203(b)(1)(A) of the Act as an alien of extraordinary ability in the sciences, arts, education, business, or athletics.

(2) *Definition*. As used in this section: *Extraordinary ability* means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.

(3) *Initial evidence*. A petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. Such evidence shall include evidence of a one-time achievement (that is, a major, international recognized award), or at least three of the following:

(i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;

(iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought;

(v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

§ 204.5

8 CFR Ch. I (1-1-21 Edition)

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

(4) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

(5) *No offer of employment required.* Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of pre-arranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

(1) *Outstanding professors and researchers.* (1) Any United States employer desiring and intending to employ a professor or researcher who is outstanding in an academic field under section 203(b)(1)(B) of the Act may file an I-140 visa petition for such classification.

(2) *Definitions.* As used in this section:

Academic field means a body of specialized knowledge offered for study at an accredited United States university or institution of higher education.

Permanent, in reference to a research position, means either tenured, tenure-track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination.

(3) *Initial evidence.* A petition for an outstanding professor or researcher must be accompanied by:

(i) Evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition. Such evidence

shall consist of at least two of the following:

(A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;

(B) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;

(C) Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;

(D) Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;

(E) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or

(F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field;

(ii) If the standards in paragraph (i)(3)(i) of this section do not readily apply, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

(iii) Evidence that the alien has at least three years of experience in teaching and/or research in the academic field. Experience in teaching or research while working on an advanced degree will only be acceptable if the alien has acquired the degree, and if the teaching duties were such that he or she had full responsibility for the class taught or if the research conducted toward the degree has been recognized within the academic field as outstanding. Evidence of teaching and/or research experience shall be in the form of letter(s) from current or former employer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien; and

(iv) An offer of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:

(A) A United States university or institution of higher learning offering

Department of Homeland Security

§ 204.5

the alien a tenured or tenure-track teaching position in the alien's academic field;

(B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or

(C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

(j) *Certain multinational executives and managers.* (1) A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager.

(2) *Definitions.* As used in this section:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity; or

(C) In the case of a partnership that is organized in the United States to provide accounting services, along with managerial and/or consulting services, and markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

Doing business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not

include the mere presence of an agent or office.

Executive capacity means an assignment within an organization in which the employee primarily:

(A) Directs the management of the organization or a major component or function of the organization;

(B) Establishes the goals and policies of the organization, component, or function;

(C) Exercises wide latitude in discretionary decisionmaking; and

(D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial capacity means an assignment within an organization in which the employee primarily:

(A) Manages the organization, or a department, subdivision, function, or component of the organization;

(B) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(C) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly,

less than half of the entity, but in fact controls the entity.

(3) *Initial evidence*—(i) *Required evidence*. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

(ii) *Appropriate additional evidence*. In appropriate cases, the director may request additional evidence.

(4) *Determining managerial or executive capacities*—(i) *Supervisors as managers*. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional.

(ii) *Staffing levels*. If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the reasonable needs of the organization, component, or function, in light of the overall purpose and stage of development of the organization, component, or function, shall be taken into account. An individual shall not be considered to be acting in a managerial or

executive capacity merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

(5) *Offer of employment*. No labor certification is required for this classification; however, the prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such letter must clearly describe the duties to be performed by the alien.

(k) *Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability*. (1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(2) of the Act as an alien who is a member of the professions holding an advanced degree or an alien of exceptional ability in the sciences, arts, or business. If an alien is claiming exceptional ability in the sciences, arts, or business and is seeking an exemption from the requirement of a job offer in the United States pursuant to section 203(b)(2)(B) of the Act, then the alien, or anyone in the alien's behalf, may be the petitioner.

(2) *Definitions*. As used in this section: *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

(3) *Initial evidence*. The petition must be accompanied by documentation

showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

(ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

(iii) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

(4) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program*—(i) *General*. Every

petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

(ii) *Exemption from job offer*. The director may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest. To apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate, as well as evidence to support the claim that such exemption would be in the national interest.

(1) *Skilled workers, professionals, and other workers*. (1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker.

(2) *Definitions*. As used in this part:
Other worker means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Professional means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.

Skilled worker means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two

years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

(3) *Initial evidence*—(i) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is a shortage occupation with the Labor Market Pilot Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree.

(ii) *Other documentation*—(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and

by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor. In the case of a Schedule A occupation or a shortage occupation within the Labor Market Pilot Program, the petitioner will be required to establish to the director that the job is a skilled job, *i.e.*, one which requires at least two years of training and/or experience.

(m) *Religious workers.* This paragraph governs classification of an alien as a special immigrant religious worker as defined in section 101(a)(27)(C) of the Act and under section 203(b)(4) of the Act. To be eligible for classification as a special immigrant religious worker, the alien (either abroad or in the United States) must:

(1) For at least the two years immediately preceding the filing of the petition have been a member of a religious denomination that has a bona fide nonprofit religious organization in the United States.

(2) Be coming to the United States to work in a full time (average of at least 35 hours per week) compensated position in one of the following occupations as they are defined in paragraph (m)(5) of this section:

(i) Solely in the vocation of a minister of that religious denomination;

(ii) A religious vocation either in a professional or nonprofessional capacity; or

(iii) A religious occupation either in a professional or nonprofessional capacity.

(3) Be coming to work for a bona fide non-profit religious organization in the United States, or a bona fide organization which is affiliated with the religious denomination in the United States.

(4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. A break in the continuity of the work during the preceding two years will not affect eligibility so long as:

(i) The alien was still employed as a religious worker;

(ii) The break did not exceed two years; and

(iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.

(5) *Definitions.* As used in paragraph (m) of this section, the term:

Bona fide non-profit religious organization in the United States means a religious organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the IRS confirming such exemption.

Bona fide organization which is affiliated with the religious denomination means an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code and possessing a currently valid determination letter from the IRS confirming such exemption.

Denominational membership means membership during at least the two-year period immediately preceding the filing date of the petition, in the same type of religious denomination as the United States religious organization where the alien will work.

Minister means an individual who:

(A) Is fully authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct such religious worship and perform other duties usually performed by authorized members of the clergy of that denomination;

(B) Is not a lay preacher or a person not authorized to perform duties usually performed by clergy;

(C) Performs activities with a rational relationship to the religious calling of the minister; and

(D) Works solely as a minister in the United States, which may include administrative duties incidental to the duties of a minister.

Petition means USCIS Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, a successor form, or other form as may be prescribed by USCIS, along with a supplement containing attestations required by this section, the fee specified in 8 CFR 106.2, and supporting evidence filed as provided by this part.

Religious denomination means a religious group or community of believers that is governed or administered under a common type of ecclesiastical government and includes one or more of the following:

(A) A recognized common creed or statement of faith shared among the denomination's members;

(B) A common form of worship;

(C) A common formal code of doctrine and discipline;

(D) Common religious services and ceremonies;

(E) Common established places of religious worship or religious congregations; or

(F) Comparable indicia of a bona fide religious denomination.

Religious occupation means an occupation that meets all of the following requirements:

(A) The duties must primarily relate to a traditional religious function and

§ 204.5

8 CFR Ch. I (1-1-21 Edition)

be recognized as a religious occupation within the denomination.

(B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.

(C) The duties do not include positions that are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible.

(D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incidental to status.

Religious vocation means a formal lifetime commitment, through vows, investitures, ceremonies, or similar indicia, to a religious way of life. The religious denomination must have a class of individuals whose lives are dedicated to religious practices and functions, as distinguished from the secular members of the religion. Examples of individuals practicing religious vocations include nuns, monks, and religious brothers and sisters.

Religious worker means an individual engaged in and, according to the denomination's standards, qualified for a religious occupation or vocation, whether or not in a professional capacity, or as a minister.

Tax-exempt organization means an organization that has received a determination letter from the IRS establishing that it, or a group that it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the Internal Revenue Code of 1986 or subsequent amendments or equivalent sections of prior enactments of the Internal Revenue Code.

(6) *Filing requirements.* A petition must be filed as provided in the petition form instructions either by the alien or by his or her prospective United States employer. After the date stated in section 101(a)(27)(C) of the Act, immigration or adjustment of status on the basis of this section is limited solely to ministers.

(7) *Attestation.* An authorized official of the prospective employer of an alien

seeking religious worker status must complete, sign and date an attestation prescribed by USCIS and submit it along with the petition. If the alien is a self-petitioner and is also an authorized official of the prospective employer, the self-petitioner may sign the attestation. The prospective employer must specifically attest to all of the following:

(i) That the prospective employer is a bona fide non-profit religious organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation;

(ii) The number of members of the prospective employer's organization;

(iii) The number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion;

(iv) The number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years by the prospective employer's organization;

(v) The number of special immigrant religious worker and nonimmigrant religious worker petitions and applications filed by or on behalf of any aliens for employment by the prospective employer in the past five years;

(vi) The title of the position offered to the alien, the complete package of salaried or non-salaried compensation being offered, and a detailed description of the alien's proposed daily duties;

(vii) That the alien will be employed at least 35 hours per week;

(viii) The specific location(s) of the proposed employment;

(ix) That the alien has worked as a religious worker for the two years immediately preceding the filing of the application and is otherwise qualified for the position offered;

(x) That the alien has been a member of the denomination for at least two years immediately preceding the filing of the application;

(xi) That the alien will not be engaged in secular employment, and any salaried or non-salaried compensation

for the work will be paid to the alien by the attesting employer; and

(xii) That the prospective employer has the ability and intention to compensate the alien at a level at which the alien and accompanying family members will not become public charges, and that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization.

(8) *Evidence relating to the petitioning organization.* A petition shall include the following initial evidence relating to the petitioning organization:

(i) A currently valid determination letter from the Internal Revenue Service (IRS) establishing that the organization is a tax-exempt organization; or

(ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or

(iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, as something other than a religious organization:

(A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;

(B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;

(C) Organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization; and

(D) A religious denomination certification. The religious organization must complete, sign and date a religious denomination certification certifying that the petitioning organization is affiliated with the religious denomination. The certification is to be sub-

mitted by the petitioner along with the petition.

(9) *Evidence relating to the qualifications of a minister.* If the alien is a minister, the petitioner must submit the following:

(i) A copy of the alien's certificate of ordination or similar documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination; and

(ii) Documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination, as well as evidence that the alien has completed any course of prescribed theological education at an accredited theological institution normally required or recognized by that religious denomination, including transcripts, curriculum, and documentation that establishes that the theological institution is accredited by the denomination, or

(iii) For denominations that do not require a prescribed theological education, evidence of:

(A) The denomination's requirements for ordination to minister;

(B) The duties allowed to be performed by virtue of ordination;

(C) The denomination's levels of ordination, if any; and

(D) The alien's completion of the denomination's requirements for ordination.

(10) *Evidence relating to compensation.* Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. If IRS documentation, such as IRS Form W-2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

§ 204.5

8 CFR Ch. I (1–1–21 Edition)

(11) *Evidence relating to the alien's prior employment.* Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:

(i) Received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns.

(ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.

(iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.

If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

(12) *Inspections, evaluations, verifications, and compliance reviews.* The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection,

satisfactory completion of such inspection will be a condition for approval of any petition.

(n) *Closing action*—(1) *Approval.* An approved employment-based petition will be forwarded to the National Visa Center of the Department of State if the beneficiary resides outside of the United States. If the Form I-140 petition indicates that the alien has filed or will file an application for adjustment to permanent residence in the United States (Form I-485) the approved visa petition (Form I-140), will be retained by the Service for consideration with the application for permanent residence (Form I-485). If a visa is available, and Form I-485 has not been filed, the alien will be instructed on the Form I-797, Notice of Action, (mailed out upon approval of the Form I-140 petition) to file the Form I-485.

(2) *Denial.* The denial of a petition for classification under section 203(b)(1), 203(b)(2), 203(b)(3), or 203(b)(4) of the Act (as it relates to special immigrants under section 101(a)(27)(C) of the Act) shall be appealable to the Associate Commissioner for Examinations. The petitioner shall be informed in plain language of the reasons for denial and of his or her right to appeal.

(3) *Validity of approved petitions.* Unless approval is revoked under section 203(g) or 205 of the Act, an employment-based petition is valid indefinitely.

(o) *Denial of petitions under section 204 of the Act based on a finding by the Department of Labor.* Upon debarment by the Department of Labor pursuant to 20 CFR 655.31, USCIS may deny any employment-based immigrant petition filed by that petitioner for a period of at least 1 year but not more than 5 years. The time period of such bar to petition approval shall be based on the severity of the violation or violations. The decision to deny petitions, the time period for the bar to petitions, and the reasons for the time period will be explained in a written notice to the petitioner.

(p) *Eligibility for employment authorization in compelling circumstances*—(1) *Eligibility of principal alien.* An individual who is the principal beneficiary of an approved immigrant petition for classification under sections 203(b)(1),

203(b)(2) or 203(b)(3) of the Act may be eligible to receive employment authorization, upon application, if:

(i) In the case of an initial request for employment authorization, the individual is in E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status, including the periods authorized by §214.1(1)(1) and (2), as well as any other periods of admission authorized by this chapter before a validity period begins or after the expiration of a validity period, on the date the application for employment authorization (Form I-765) is filed;

(ii) An immigrant visa is not authorized for issuance to the principal beneficiary based on his or her priority date on the date the application for employment authorization is filed; and

(iii) USCIS determines, as a matter of discretion, that the principal beneficiary demonstrates compelling circumstances that justify the issuance of employment authorization.

(2) *Eligibility of spouses and children.* The family members, as described in section 203(d) of the Act, of a principal beneficiary, who are in nonimmigrant status at the time the principal beneficiary applies for employment authorization under paragraph (p)(1) of this section, are eligible to apply for employment authorization provided that the principal beneficiary has been granted employment authorization under paragraph (p) of this section and such employment authorization has not been terminated or revoked. Such family members may apply for employment authorization concurrently with the principal beneficiary, but cannot be granted employment authorization until the principal beneficiary is so authorized. The validity period of employment authorization granted to family members may not extend beyond the validity period of employment authorization granted to the principal beneficiary.

(3) *Eligibility for renewal of employment authorization.* An alien may be eligible to renew employment authorization granted under paragraph (p) of this section, upon submission of a new application before the expiration of such employment authorization, if:

(i) He or she is the principal beneficiary of an approved immigrant peti-

tion for classification under section 203(b)(1), 203(b)(2) or 203(b)(3) of the Act and either:

(A) An immigrant visa is not authorized for issuance to the principal beneficiary based on his or her priority date on the date the application for employment authorization, (Form I-765) is filed; and USCIS determines, as a matter of discretion that the principal beneficiary demonstrates compelling circumstances that justify the issuance of employment authorization; or

(B) The difference between the principal beneficiary's priority date and the date upon which immigrant visas are authorized for issuance for the principal beneficiary's preference category and country of chargeability is 1 year or less according to the Department of State Visa Bulletin in effect on the date the application for employment authorization (Form I-765), is filed. For example, if the Department of State Visa Bulletin in effect on the date the renewal application is filed indicates immigrant visas are authorized for issuance for the applicable preference category and country of chargeability to individuals with priority dates earlier than November 1, 2000, USCIS may grant a renewal to a principal beneficiary whose priority date is on or between October 31, 1999 and October 31, 2001; or

(ii) He or she is a family member, as described under paragraph (p)(2) of this section, of a principal beneficiary granted a renewal of employment authorization under paragraph (p)(3)(i) that remains valid, except that the family member need not be maintaining nonimmigrant status at the time the principal beneficiary applies for renewal of employment authorization under paragraph (p) of this section. A family member may file an application to renew employment authorization concurrently with an application to renew employment authorization filed by the principal beneficiary or while such application by the principal beneficiary is pending, but the family member's renewal application cannot be approved unless the principal beneficiary's application is granted. The validity period of a renewal of employment authorization granted to family members may not extend beyond the

§ 204.6

8 CFR Ch. I (1–1–21 Edition)

validity period of the renewal of employment authorization granted to the principal beneficiary.

(4) *Application for employment authorization.* (i) To request employment authorization, an eligible applicant described in paragraph (p)(1), (2), or (3) of this section must:

(A) File an application for employment authorization (Form I-765), with USCIS, in accordance with 8 CFR 274a.13(a) and the form instructions.

(B) Submit biometric information as may be provided in the applicable form instructions.

(ii) Employment authorization under this paragraph may be granted solely in 1-year increments, but not to exceed the period of the alien's authorized admission.

(5) *Ineligibility for employment authorization.* An alien is not eligible for employment authorization, including renewal of employment authorization, under this paragraph if the alien has been convicted of any felony or two or more misdemeanors.

[56 FR 60905, Nov. 29, 1991, as amended at 59 FR 502, Jan. 5, 1994; 59 FR 27229, May 26, 1994; 60 FR 29753, June 6, 1995; 61 FR 33305, June 27, 1996; 67 FR 49563, July 31, 2002; 73 FR 72291, Nov. 26, 2008; 73 FR 78127, Dec. 19, 2008; 74 FR 26936, June 5, 2009; 81 FR 2083, Jan. 15, 2016; 81 FR 82484, Nov. 18, 2016; 85 FR 46922, Aug. 3, 2020]

§ 204.6 Petitions for employment creation immigrants.

(a) *General.* An EB-5 immigrant petition to classify an alien under section 203(b)(5) of the Act must be properly filed in accordance with the form instructions, with the appropriate fee(s), initial evidence, and any other supporting documentation.

(b) [Reserved]

(c) *Eligibility to file and continued eligibility.* An alien may file a petition for classification as an investor on his or her own behalf.

(d) *Priority date.* The priority date of a petition for classification as an investor is the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed. The priority date of an immigrant petition approved for classification as an investor, including immigrant petitions whose approval was revoked on grounds other than those

set forth below, will apply to any subsequently filed petition for classification under section 203(b)(5) of the Act for which the alien qualifies. A denied petition will not establish a priority date. A priority date is not transferable to another alien. In the event that the alien is the petitioner of multiple immigrant petitions approved for classification as an investor, the alien shall be entitled to the earliest qualifying priority date. The priority date of an immigrant petition approved for classification as an investor shall not be conferred to a subsequently filed petition if the alien was lawfully admitted to the United States for permanent residence under section 203(b)(5) of the Act using the priority date of the earlier-approved petition or if at any time USCIS revokes the approval of the petition based on:

(1) Fraud or a willful misrepresentation of a material fact by the petitioner; or

(2) A determination by USCIS that the petition approval was based on a material error.

(e) *Definitions.* As used in this section:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien investor, provided that the alien investor is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in