

term "tribal organization" shall mean the recognized governing body of an Indian tribe (including the tribally recognized intertribal organization of such tribes), as well as any Indian tribe, band, or community holding a treaty with a State government.

(2) *Certification periods.* Any household residing on a reservation that is required to submit a monthly report shall be certified for two (2) years.

(i) A State agency may request a waiver from FCS to allow it to establish certification periods of less than two (2) years if it is able to justify the need for the shorter periods. Any request for a waiver shall include input from the affected Indian tribal organization(s) and quality control error rate information for the affected households.

(ii) The State agency may opt to continue the two-year certification period for any household that moves off the reservation. If the State agency adopts this option and the household is still living off the reservation at the time it is subject to required recertification, the household shall be subject to the certification period requirements in § 273.10(f)(4). If the State agency does not adopt this option, any household that moves off the reservation shall have its certification period shortened. A household continuing to be subject to monthly reporting shall not have its certification period shortened to less than six months. A household becoming subject to change reporting shall not have its certification period end any earlier than the month following the month in which the State agency determines that the certification period shall be shortened.

(3) *Missing and incomplete reports.* The State agency shall take the following actions when a household residing on a reservation fails to submit a monthly report or complete a monthly report the State agency has indicated is incomplete:

(i) *Failure to submit a monthly report by the issuance date.* If a household does not submit its monthly report by the issuance date, the State agency shall provide the household with the same issuance that the household received the previous month. This issuance must be provided to the household on the household's normal issuance date. If the household's monthly report is received prior to the issuance date, but too late to be processed without delaying the household's issuance, the household shall be provided its issuance on the normal issuance date.

(ii) *Failure to submit a complete monthly report by the issuance date.* If a household does submit its monthly report prior to the issuance date, but

that report is incomplete, the State agency shall attempt to have the household complete the report prior to the normal issuance date, in accordance with the procedures in paragraph (j) of this section. If the report cannot be completed by the normal issuance date, the State agency shall provide the household its issuance on the normal issuance date.

(iii) *Failure to submit two consecutive monthly reports or to complete two consecutive monthly reports.* If a household failed to submit a monthly report or submitted an incomplete monthly report that was never completed and then fails to submit the next consecutive monthly report or submits an incomplete report that is not completed by the issuance date, the household shall be terminated in accordance with the provisions in paragraph (m) of this section. The household shall not be terminated if it fails to ever submit or complete the first missing monthly report but does submit a completed report for the following month.

(4) *Benefit determination.* If a household's report is not completed by the issuance date, the State agency shall issue the household's benefits based on the previously submitted report without regard to any changes in the household's circumstances that were not completed or verified. The State agency shall adjust the benefits issued if there is any information on the incomplete report that can be used as submitted.

(5) *Reinstatement.* If a household is terminated for failing to submit or to complete a monthly report, the household shall be reinstated without being required to submit a new application if a monthly report is submitted no later than the last day of the month following the month the household was terminated.

(6) *Notices.*

(i) All notices regarding changes in a household's benefits shall meet the definition of adequate notice as defined in § 271.2 of this chapter.

(ii) If a household fails to file a monthly report, or files an incomplete report, by the specified filing date, the State agency shall notify the household within five days of the filing date:

(A) That the monthly report is either overdue or incomplete;

(B) What the household must do to complete the form;

(C) If any verification is missing;

(D) That the Social Security number of a new member must be reported, if the household has reported a new member but not the new member's Social Security number;

(E) What the extended filing date is;  
(F) That the State agency will assist the household in completing the report; and

(G) That the household's benefits will be issued based on the previous month's submitted report without regard to any changes in the household's circumstances if the missing report is not submitted or if incomplete or unverified information on the incomplete report is not completed or verified as required.

(iii) Simultaneously with the issuance, the State agency shall notify a household, if its report has not been received or if it is incomplete, that the benefits being provided are based on the previous month's submitted report and that this benefit does not reflect any changes in the household's circumstances. This notice shall also advise the household that, if a complete report is not filed timely, the household will be terminated.

(iv) If the household is terminated, the State agency shall send the notice so the household receives it no later than the date benefits would have been received. This notice shall advise the household of its right to reinstatement if a complete monthly report is submitted by the end of the month following termination.

(7) *Supplements and claims.* If the household submits or completes a monthly report after the issuance date but in the issuance month, the State agency shall provide the household with a supplement if warranted. If the household submits or completes a monthly report after the issuance date or the State agency becomes aware of a change that would have decreased benefits in some other manner, the State agency shall file a claim for any benefits overissued.

Dated: May 26, 1995.

**William E. Ludwig,**  
Administrator, Food and Consumer Service.  
[FR Doc. 95-13723 Filed 6-5-95; 8:45 am]  
BILLING CODE 3410-30-U

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## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

#### 8 CFR Part 204

[INS No. 1633-93]

RIN 1115-AD55

#### Employment-Based Immigrants

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Proposed rule.

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**SUMMARY:** This rule proposes to amend the Immigration and Naturalization Service regulations on employment-based immigrant petitions. The promulgation of this proposed rule is necessary to clarify and revise a number of issues concerning employment-based immigrant petitions which have arisen since the enactment of the Immigration Act of 1990. This proposed rule will provide more guidance to the public in filing employment-based immigrant petitions.

**DATES:** Written comments must be submitted on or before August 7, 1995.

**ADDRESSES:** Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS No. 1633-93 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Michael W. Straus, Senior Immigration Examiner, Adjudications Division, Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, telephone (202) 514-3228.

**SUPPLEMENTARY INFORMATION:** Section 121 of the Immigration Act of 1990 (IMMACT), Public Law 101-649, dated November 29, 1990, amended section 203 of the Immigration and Nationality Act (Act) by creating new classifications and procedures for employment-based immigration. On November 29, 1991, the Immigration and Naturalization Service (Service) promulgated regulations implementing section 121 of IMMACT (see 56 FR 60897-60913). Since the promulgation of its regulation, the Service has encountered a number of issues concerning employment-based petitions which require clarification and revision. On December 12, 1991, the President signed the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Public Law 102-232, which modified IMMACT. In light of the changes made by MTINA and the issues which need clarification and revision, the Service proposes to amend 8 CFR 204.5.

Section 203(b) of the Act, as amended by section 121 of IMMACT, created five new employment-based immigrant categories as follows:

1. Priority workers.
  - A. Aliens with extraordinary ability;
  - B. Outstanding professors and researchers;

C. Certain multinational executives and managers.

2. Members of the professions holding advanced degrees and aliens of exceptional ability.

3. Skilled workers, professionals, and other workers.

4. Certain special immigrants.

5. Employment creation immigrants.

Since the promulgation of the Service's regulations on employment-based immigrants on November 29, 1991, the Service has encountered a number of issues in adjudicating employment-based petitions which require revision or clarification. This regulation proposes to amend the current regulation on employment-based petitions in order to clarify portions of the regulations which have been problematic for the Service and the public. The proposed rule addresses petitions for employment-based immigrants, as well as priority dates for employment-based petitions, evidence required to show ability to pay the wage offered, and validity of labor certifications and employment-based petitions following changes in employer and job location. The Service will issue a separate proposed regulation on petitions for employment creation aliens at a later date.

#### **Filing of the Petition**

Most of the employment-based immigrant categories require that an employer desire and intend to employ an alien within the United States. See section 204(a)(1)(D) of the Act. The present regulation on employment-based petitions does not define the term "employer" as used in the statute. The Service has determined that this term should be clarified to provide some guidance to the public and to adjudicators on whether a petitioner qualifies as an employer. The proposed rule provides that the alien beneficiary must have an employer-employee relationship with the petitioner as indicated by the employer's ability to hire, pay, fire, supervise, or otherwise control the work of the employee. This definition of "United States employer" is consistent with the definition of this term in the H-1B regulations. See 8 CFR 214.2(h)(4)(ii). It is also consistent with the general definition of employment found in case law. See e.g. *Matter of Pozzoli*, 14 I&N Dec. 569 (Reg. Comm. 1974).

In the case of employers who are persons, the proposed regulation limits qualifying employers to individuals who are United States citizens or lawful permanent residents. Aliens, other than lawful permanent residents, may not offer permanent employment to U.S. or

other workers who seek to apply for the job offered. Allowing for aliens other than lawful permanent residents to file an immigrant petition is inconsistent with the overall statutory scheme. Specifically, all nonimmigrants who enter the United States, including those for whom there is no maximum duration of stay, are admitted for a limited period of time and for a particular purpose. Upon completion of their purpose for staying in the United States, they must depart, extend, or change their nonimmigrant status. The limited nature of their stay in the United States precludes them from being able to extend a permanent offer of employment and, therefore, from submitting an employment-based petition to accord immigrant status. Consequently, petitioning employers who are in nonimmigrant status are not competent to offer permanent employment, because their status is neither settled, stabilized, nor permanent. See *Matter of Thornhill*, 18 I&N Dec. 34, 35-36 (Comm. 1981). The Service notes that this proposed regulation is in accord with Department of Labor policy, which precludes nonimmigrants from filing labor certifications due to their temporary status. See Department of Labor, Technical Assistance Guide No. 656, Labor Certifications, at page 136. Accordingly, the Service proposes to limit the persons who are able to submit employment-based petitions to U.S. citizens and lawful permanent residents.

#### **Priority Date**

Following the enactment of IMMACT, the Service issued a proposed rule which provided that the priority date for an employment-based petition would be the date of filing an employment-based petition with the Service. See 56 FR 30703-30714, July 5, 1991. After receipt of comments to the proposed rule, the Service decided to continue the established rule on assignment of priority dates, which set the priority date as the date the office within the employment service system of the Department of Labor received the application for labor certification. See 56 FR 60897-60913. The Service also decided to add a new provision which allowed an alien to retain the priority date of any employment-based petition which the Service approved on his or her behalf, unless it is revoked. See 56 FR 60905; 8 CFR 204.5(e).

Before IMMACT became effective, the Department of Labor permitted an employer to substitute qualified labor certification beneficiaries after issuance of the labor certification. The petitioner

could return the labor certification to the certifying officer and request that another beneficiary be substituted. See Employment and Training Administration, Technical Assistance Guide No. 656, p. 105. In implementing IMMACT, the Department of Labor eliminated substitution of labor certification beneficiaries. See 56 FR 54920-54930; 20 CFR 656.30(c)(2). The Department of Labor determined that substitution of labor certification beneficiaries was unfair to U.S. workers and other aliens seeking to immigrate, was subject to fraud and abuse, and constituted a significant administrative burden. See 56 FR 54926. In 1994, the United States Court of Appeals for the District of Columbia Circuit enjoined enforcement of the Department of Labor's regulation precluding substitution of labor certification beneficiaries, based on the Administrative Procedure Act. See *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994). As a result of this decision, employers may request substitution of labor certification beneficiaries. In light of the court's decision, the Service has reconsidered its regulations on assigning priority dates.

The Service has concluded that it is unfair to other aliens who seek to immigrate to the United States on employment-based petitions if the substituted alien gains the priority date of the original alien beneficiary, since those aliens would receive a later priority date than a substituted alien. Currently, in certain employment-based immigrant categories, such as the third preference "other worker" category, an alien who benefits from a labor certification substitution can immigrate ahead of another alien who has been waiting for an immigrant visa for several years. Not only would allowing substituted aliens to receive the earlier priority date be unfair to other intending immigrants, it would also be contrary to the Service's policy of assigning a priority date to the alien rather than to the employer (see 8 CFR 204.5(e)).

Providing a priority date based on an employer's substitution of a labor certification beneficiary also carries the potential for fraud and abuse. Continuing this practice may encourage the creation of a market for labor certifications, particularly in categories in which there is a lengthy wait to receive an immigrant visa. For instance, it is conceivable that the original alien beneficiary might be induced to engage in the fraudulent practice of selling his or her status as a labor certification beneficiary to a substituted alien.

The Service, therefore, proposes to set the priority date for an alien who has

been substituted for another alien on a labor certification as the date the employer requested the substitution. This proposed rule will be fair to other aliens who apply under employment-based immigrant categories, and would be consistent with the Service's policy of according a priority date to the alien rather than to the employer, thereby eliminating an inducement to commit fraud.

#### **Retention of Employment-Based Priority Dates**

The Service's current regulation provides that an alien retains the priority date of any petition filed under the first, second, or third employment-based categories which the Service approved on his or her behalf. See 8 CFR 204.5(e). A petition revoked under sections 204(e) or 205 of the Act, however, will not confer a priority date. Section 205 of the Act permits the Attorney General to revoke an approved petition for good and sufficient cause. The regulations governing revocation distinguish between automatic revocation and revocation on notice. See 8 CFR part 205. For employment-based petitions, automatic revocation occurs upon invalidation of a labor certification, death of the petitioner, written withdrawal by the petitioner, or by dissolution of the petitioner's business. See 8 CFR 205.1(c). The Service has determined that the current regulation is difficult to administer, because the Service is not usually notified of actions which may result in automatic revocation. In addition, the regulation treats those aliens who fall under the automatic revocation provisions differently from those aliens whom the petitioner no longer seeks to employ for various reasons. For example, under the current regulation, if the petitioning employer dissolves or goes out of business, the petition is automatically revoked and the beneficiary loses his or her priority date. See 8 CFR 205.1(c)(4). However, if the petitioning employer remains in business but later decides not to offer the position to the beneficiary, the beneficiary can use the priority date for any subsequent petition filed on his or her behalf. Accordingly, the Service proposes to amend 8 CFR 204.5(e) to state that only a petition revoked on notice pursuant to 8 CFR 205.2 for fraud or misrepresentation will not confer a priority date for any subsequently filed employment-based petition. This change will allow for consistency and fairness in assignment of priority dates and easier administration for the Service.

#### **Maintaining Priority Dates for Employment-Based Petitions Filed Before October 1, 1991**

The current regulation states that any petition filed before October 1, 1991, and approved 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, provided the alien applies for an immigrant visa or adjustment of status within the 2 years following notification that an immigrant visa is immediately available. See 8 CFR 204.5(f). As of October 1, 1991, the priority dates for all employment-based immigrant categories were current. Subsequently, however, visa numbers for the other (unskilled) worker subcategory of section 203(b)(3) of the Act quickly became oversubscribed and retrogressed, as did visa numbers for some employment-based categories for natives of India, China, and the Philippines. Because many aliens who were current on October 1, 1991, were unable to complete the immigration process due to the rapid retrogression of visa numbers, this regulation needs to be amended out of fairness to these aliens. To further Congress' intent in enacting section 161(c)(4) of IMMACT, the Service proposes to amend the regulation to state that a petition filed under section 203(a)(3) or 203(a)(6) of the Act before October 1, 1991, and approved on any date, shall be deemed a petition approved under section 203(b)(2) or 203(b)(3) of the Act, provided the alien applies for an immigrant visa or adjustment of status within a 2-year time period during which the immigrant visa is continuously available.

Section 161(c)(4)(B) of IMMACT provides that the automatic conversion of petitions filed under section 203(a)(3) or 203(a)(6) of the Act before October 1, 1991, shall not occur if the priority date for issuance of a visa has been available for a 2-year period. In the current regulation, the 2-year period commences following notification that an immigrant visa is immediately available. See 8 CFR 204.5(f). Since the promulgation of this regulation in 1991, the Service has had difficulty defining the term "notification that an immigrant visa is immediately available." In the case of beneficiaries of approved petitions who apply for adjustment of status under section 245 of the Act, the Service only notifies the alien of the priority date for the approved petition. For alien beneficiaries who apply for immigrant visas, notification depends

on when the alien received immigrant visa forms from a U.S. consulate, the Transitional Immigrant Visa Processing Facility, or the National Visa Center. This method of determining when notification occurs leads to inconsistencies between those aliens who apply for adjustment of status and those who apply for an immigrant visa. For purposes of uniformity, the 2-year period will commence upon approval of the petition or when the priority date becomes available, whichever is later. A visa number must be continuously available during the 2-year period. Should the priority date retrogress within the 2-year period after which a visa number becomes available, the 2-year period provided for under section 161(c)(4)(B) of IMMACT will commence anew at the time the priority date once again becomes current. This change allows for consistency and adheres to the language of IMMACT.

#### **Additional Evidence**

The current regulation requires the petitioner to establish ability to pay the wage offered in the form of an annual report, a Federal tax return, or an audited financial statement. See 8 CFR 204.5(g)(2). In appropriate cases, the petitioner may submit or the Service may request additional evidence such as a profit/loss statement, bank account record, or personnel record. During the past 2 years, the Service has found that other documents such as payroll records and W-2 forms are useful types of evidence in establishing ability to pay the wage offered. Therefore, the Service proposes to add these two types of evidence to the list of examples of additional evidence. The proposed addition of these two types of documents does not suggest that the Service intends to allow these documents as primary evidence of ability to pay.

#### **Validity of Section 203(b) Petitions and Labor Certifications**

Following the issuance of a labor certification by the Department of Labor or the approval of an employment-based petition by the Service, the job location or the structure and ownership of the petitioning employer may change. Following the implementation of IMMACT, the Service and the Department of Labor entered into an agreement that the Service will determine the validity of labor certifications once the Department of Labor issues a labor certification. The proposed rule at 8 CFR 204.5(h) essentially restates the Department of Labor's regulation on validity and invalidation of labor certifications. See

20 CFR 656.30. In addition, it states that when an alien immigrates under an employment-based immigrant category, based on a labor certification, the labor certification will no longer be valid. The Service believes that an alien should not be able to immigrate and then re-immigrate using the same labor certification. This provision is consistent with Department of Labor policy, which states that a non-Schedule A labor certification is limited to a specific job opportunity. See Employment and Training Administration, Technical Assistance Guide No. 656 at 104. See Matter of Harry Bailen Builders, 19 I&N Dec. 412 (Comm. 1986) (holding that, based on the advice of the Department of Labor, the specific job opportunity ceases to exist when an alien immigrates based on the labor certification). It is not relevant whether the alien commenced the offered employment upon obtaining permanent resident status based on the labor certification. To allow an alien to use a labor certification twice would enable the alien to circumvent the immigration process if he or she abandons or otherwise loses his or her permanent residence and seeks to reimmigrate to the United States. Specifically, if the alien is able to use the labor certification twice, the alien can circumvent the labor certification requirement. Such a situation is not fair to other aliens who seek to immigrate to the United States. Moreover, it encourages fraud by discouraging the alien beneficiary from actually filling the job offered. Accordingly, the Service proposes to amend this regulation to provide that a labor certification is no longer valid when the alien immigrates to the United States under an employment-based category, based on that labor certification.

In furtherance of the agreement with the Department of Labor, the Service proposes to add a new paragraph on validity of labor certifications, based on changes of employer and job location.

#### *I. Changes in Job Location*

For non-Schedule A labor certifications, if the location of the job offered to the alien changes after the labor certification is approved, the Service will determine if the labor certification remains valid. The Service will follow existing Department of Labor regulations which provide that a labor certification is valid within the normal commuting distance of the site of the original offer of employment. See 20 CFR 656.30(c)(2); 20 CFR 656.3 (definition of area of intended employment). Any location within a Metropolitan Statistical Area (MSA) is

deemed to be within normal commuting distance. See 20 CFR 656.3. A Schedule A labor certification is valid throughout the United States. See 20 CFR 656.30(c)(1).

In the case of non-Schedule A labor certifications where there is a job location change after the approval of an Immigrant Petition for Alien Worker (Form I-140) or labor certification, the petitioning employer must file an I-140 petition with the service center having jurisdiction over the new location where the alien beneficiary will be employed. For Schedule A labor certifications, if there is a change in job location, the alien must submit a signed job offer Form ETA 750 at his or her interview for adjustment of status or immigrant visa.

#### *II. Successorship in Interest*

In cases where a petitioning entity changes ownership, the issue may arise whether the employment relationship has so changed as to render the petition invalid. Based on the above-noted agreement with the Department of Labor, the Service will determine whether there has been a "successorship in interest" and, therefore, whether an approved visa petition and/or labor certification remain valid. Generally, if a new employer is a "successor in interest" to the original petitioning employer, the Service will reaffirm the validity of the visa petition and/or labor certification. Successorship in interest can occur when the petitioning employer, or a division thereof, is merged, acquired or purchased by another business. A business restructuring or reorganization should not affect the validity of a petition, unless the job and/or wages offered to the beneficiary have changed. To establish successorship in interest, the successor entity must demonstrate substantial continuity with the original petitioner. The Service proposes that, to establish successorship in interest, the new employer must establish that it has substantially assumed the rights, duties, obligations and assets of the original employer and continues to operate the same type of business as the original employer. The new employer must also submit evidence of ability to pay the proffered wage. In addition, the successor in interest must also demonstrate that the original employer had the ability to pay the proffered wage when the labor certification was filed, if the Service did not approve an employment-based petition on behalf of original employer. See Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm. 1986). The Service invites comments on whether the "substantial

assumption" standard provides sufficient guidance to the public, reflects current business practice, and preserves the integrity of the immigration process. In addition, the Service welcomes comments on alternative ways to define successorship in interest.

To establish successorship in interest, the new employer must submit a Form I-140 with the service center having jurisdiction over the intended place of employment along with documentation of successorship of interest and ability to pay. If the service center determines that the petitioner fails to qualify as a successor in interest, it will deny the I-140 petition. The petitioner may pursue an appeal with the Administrative Appeals Unit. If the service center finds that the petitioner is a successor in interest, it will approve the petition and accord the beneficiary the priority date of the previously approved petition.

#### **Aliens of Extraordinary Ability**

The current regulation at 8 CFR 204.5(h)(2) defines extraordinary ability as a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of a field of endeavor. The regulation lists evidence which needs to be presented to establish extraordinary ability. See 8 CFR 204.5(h)(3). Since the implementation of IMMACT, there has arisen some confusion over the role of various types of evidence listed in 8 CFR 204.5(h)(3). The evidence listed is intended to be a guideline for the petitioner and the Service to determine extraordinary ability in order to make the adjudicative process easier for both the petitioner and the Service. The fact that an alien may meet three of the listed criteria does not necessarily mean that he or she meets the standard of extraordinary ability. The Service adjudicator must still determine whether the alien is one of that small percentage who have risen to the very top of his or her field of endeavor. Accordingly, the Service proposes to amend the regulations to state that meeting three of the evidentiary standards is not dispositive of whether the beneficiary is an alien of extraordinary ability.

By statute, aliens who immigrate under this category do not require a labor certification to work in their area of extraordinary ability, since by definition, they will not be competing with the U.S. labor market. The situation is different, however, where the alien's primary source of earned income will be derived from an activity unrelated to his or her field of extraordinary ability. In such a case, the

alien may, in fact, be competing primarily with U.S. workers engaged in the unrelated field, thereby necessitating a test of the labor market and a labor certification. While the Service recognizes that aliens having extraordinary ability may reasonably be expected to engage in secondary activities within their field of extraordinary ability, whether or not for pay, the Service is responsible for ensuring that the alien's entry will not have an adverse impact on the U.S. labor market. The Service, therefore, proposes that the alien's primary source of earned income must come from the specific activity or activities for which he or she seeks priority worker classification.

#### **Outstanding Professors and Researchers**

Since the implementation of IMMACT, there has been some confusion over the role of various types of evidence listed in 8 CFR 204.5(i)(3). As in the case of the regulations governing petitions for aliens of extraordinary ability, the evidence listed is intended to be a guideline for the petitioner and the Service to determine whether the beneficiary stands apart in the academic community through eminence and distinction based on international recognition. See 56 FR 30703-30714 dated July 5, 1991. This list of evidence makes the adjudicative process easier for both the petitioner and the Service. The fact that the beneficiary may meet two of the listed criteria does not necessarily mean that he or she has the international recognition to be considered an outstanding researcher or professor. The Service adjudicator must still determine whether the alien is recognized internationally as outstanding in the academic field specified in the petition. The Service, therefore, proposes to amend this regulation to specifically state that having two types of the listed evidence does not compel a finding that the beneficiary is recognized internationally as outstanding.

The Service has also reviewed the five types of evidence listed in 8 CFR 204.5(i)(3)(i). The Service has determined that two of the paragraphs need to be reworded. Paragraph (i)(3)(i)(C) states that the petitioner may submit published material written by others about the beneficiary's work in the academic field. Some petitioners have interpreted this paragraph to mean that any reference to the beneficiary's work, including a reference in a footnote or bibliography, meets the evidentiary criteria of this paragraph. The Service proposes to amend the language of

paragraph (i)(3)(i)(C) to require that the publication discuss or analyze the beneficiary's work in the academic field. A short reference to the beneficiary's work in a professional publication does not demonstrate that he or she is recognized as outstanding. A much better indicator of the importance of the alien's work in the academic community is a thorough discussion or analysis of the beneficiary's work.

In 8 CFR 204.5(i)(3)(i)(D), the petitioner may submit evidence of the beneficiary's participation, either individually or on a panel, as the judge of the work of others in the same or related academic field. The Service believes that most college or university professors are involved in judging the work of others, and the Service has found that meeting the criteria under this paragraph is not a good indicator of whether the beneficiary is recognized as outstanding. Judging the work of other authorities and experts in the alien's academic field is a better measure of the beneficiary's international recognition. Therefore, the Service proposes to amend the paragraph to specify that the alien can meet the criteria in paragraph (i)(3)(i)(D) by submitting evidence that the beneficiary has judged the work of other professors, researchers, and Ph.D. candidates in the alien's academic field.

Section 203(b)(1)(B)(iii)(III) of the Act allows a private employer to petition an outstanding professor or researcher to conduct research if the employer has at least three persons engaged in research activities and has achieved documented accomplishments in the academic field. One issue that has arisen is whether a government agency which conducts research can petition an outstanding professor or researcher. It is the position of the Service that some government agencies such as the National Institutes of Health and the Food and Drug Administration should be able to file petitions on behalf of outstanding alien researchers, who may have valuable contributions to bring to the agency's research efforts. In order to allow for government agencies to sponsor certain outstanding researchers, the Service proposes to amend the regulation to include government agencies on the list of United States employers.

#### **Multinational Executives and Managers**

Section 203(b)(1)(C) of the Act provides for the immigration of multinational executives and managers if the alien, in the 3 years preceding the time of his or her application for classification and admission into the United States, has been employed for at least 1 year in a managerial or executive position abroad with the same

employer, or a subsidiary or affiliate thereof. To accommodate managers or executives who have been in the United States in nonimmigrant status for over 3 years, 8 CFR 204.5(j)(3)(i)(B) provides that an alien, already working in the United States for the same employer or a subsidiary or affiliate of the firm or corporation which employed the alien abroad as a manager or executive during at least one of the 3 years preceding his or her entry as a nonimmigrant, would qualify as a multinational executive or manager. In the case of an alien who is currently outside the United States, he or she must have been employed abroad by an affiliate, branch, or subsidiary of the petitioner as a manager or executive for at least 1 year during the 3-year period immediately preceding the filing of the petition. See 8 CFR 204.5(j)(3)(i)(A). Section 204.5(j)(3) of the regulations inadvertently omitted situations where the alien was in lawful nonimmigrant status while working for an unrelated employer, but worked for a qualifying company abroad in a managerial or executive position during at least 1 of the 3 years preceding the filing of the petition. The fact that the alien is working in the United States should not preclude him or her from qualifying as a priority worker. Aliens who have worked for an unrelated employer should be treated the same as aliens who are outside the United States for purposes of eligibility. Accordingly, the Service proposes to allow U.S. employers to file petitions on behalf of those aliens for managerial or executive positions.

#### **Advanced Degree Holders and Aliens of Exceptional Ability**

The current regulation defines "exceptional ability" as a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. See 8 CFR 204.5(k)(2). The regulation at 8 CFR 204.5(k)(3)(ii) lists evidence which needs to be presented to establish exceptional ability. Since the Implementation of IMMACT, there has been some confusion over the role of various types of evidence listed in the regulation. As in the cases of aliens of extraordinary ability and outstanding professors and researchers, the Service intended that this list of evidence be a guideline for the petitioner and the Service to determine exceptional ability. Providing a list of possible types of evidence makes the adjudicative process simpler for both the petitioner and the Service. The fact that an alien may not meet three of the listed criteria does not necessarily mean that he or she meets the standard of exceptional ability. The Service

adjudicator must still determine whether the alien has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. Accordingly, the Service proposes to amend the regulation to state that meeting three of the evidentiary standards is not dispositive of whether the beneficiary is an alien of exceptional ability.

Under section 203(b)(2)(A) of the Act, professionals holding advanced degrees or their equivalent also qualify for classification under the employment-based second category. The Joint Explanatory Statement of the Committee of Conference, made at the time Congress adopted IMMACT, stated that the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." See H.R. Rep. No. 101-955, 101st Cong., 2d Sess. 121 (1990). Accordingly, the current regulation states that the job offer portion of the labor certification application (Form ETA-750) must demonstrate that the job requires a professional holding an advanced degree or equivalent. See 8 CFR 204.5(k)(4)(i). Since the Service began adjudicating petitions under the current regulation, some petitioners have interpreted this regulation to allow job offers which require only a bachelor's degree, plus 5 years of progressive experience, but not an advanced degree. This interpretation does not comport with the language of section 203(b)(2)(A) of the Act which, on its face, states that a job offer must require an advanced degree or equivalent in order to qualify the beneficiary as an advanced degree holder. Requiring a bachelor's degree and 5 years of experience does not equate to a requirement that the beneficiary hold an advanced degree. In order for the beneficiary to qualify as an advanced degree holder, the job offered in the labor certification must also accept an advanced degree as a minimum job requirement. Therefore, the Service proposes that the regulation be amended to state that if the job offer portion of the labor certification requires a person holding a bachelor's degree, followed by at least 5 years of experience in the specialty, it must also accept an advanced degree holder in the same field as meeting the minimum job requirements.

Section 212(a)(5)(C) of the Act states that a petition filed under the employment-based second category requires a labor certification. Section 203(b)(2)(B) of the Act provides that "the Attorney General may, when he deems it to be in the national interest, waive the requirement \* \* \* that an

alien's services in the sciences, arts, professions, or business are sought by an employer in the United States." The Service has determined that a waiver of the job offer constitutes a waiver of the labor certification. See 56 FR 60897-60913 dated November 29, 1991. Soon after the promulgation of the final rule on employment-based immigrant petitions in November of 1991, the President signed the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA). The MTINA added professionals to the list of aliens who are eligible to request a national interest waiver of the labor certification. Accordingly, the Service proposes to amend 8 CFR 204.5(k)(4)(ii) to add professionals to the list of aliens whom the service center director can exempt from the labor certification requirement.

After the Service issued a proposed regulation on employment-based immigrant petitions at 56 FR 30703-30714 on July 5, 1991, several commenters suggested that the Service define the term "national interest." The Service decided not to define the term "national interest" in the final regulation. See 56 FR 60897-60913 dated November 29, 1991. At that time, the Service believed that it was appropriate to leave the application of the national interest waiver as flexible as possible and that each case should be judged on its own merits.

Since the promulgation of the final regulation on November 29, 1991, the Service has received numerous petitions filed under the employment-based second category, which request a waiver of the labor certification requirement in the national interest. Since IMMACT became effective in 1991, the Service has been flexible in approving national interest waivers in a variety of situations. The Administrative Appeals Unit (AAU) has issued a number of non-precedent decisions on the national interest waiver. The AAU has listed some factors which relate to national interest. See Matter of \_\_\_\_\_, EAC 92 091 50126 (July 21, 1992). They include improving the U.S. economy, improving conditions of U.S. workers, improving education and training of children and under-qualified workers, improving health care, providing affordable housing, improving the environment, and a request from an interested government agency. Although these factors provide a list of national goals or objectives, they do not provide much guidance to the public or to Service adjudicators with respect to which aliens merit a national interest waiver.

Without specific guidelines, the service centers have found it difficult to

determine which aliens should qualify for the waiver. It has proven to be very difficult to determine on a case-by-case basis which petitions deserve a "national interest" waiver. The Service believes that, absent published general guidelines, it is very difficult to adjudicate consistently national interest waivers. Based on the Service's experience in adjudicating national interest waivers since 1991, the Service proposes that the petitioner establish four elements to qualify for a national interest waiver. These elements will allow for greater consistency in adjudication of national interest waivers as well as provide guidance to the public. They do not limit, or attempt to define, which types of activities are in the national interest. The four elements do, however, provide common indicators of whether the alien's admission to the United States would benefit the national interest.

The first element is that the alien must have at least 2 years of experience in the area in which he or she will benefit the United States. The Service believes that requiring some background in the area in which the alien will benefit the national interest is an appropriate measure of whether the alien has the commitment to pursue the activity which will promote a national interest, as stated in the petition. Unlike an alien who immigrates based on a labor certification, an alien who immigrates based on a national interest waiver does not require a specific job offer and a sponsoring employer. It is, therefore, more difficult in such waiver cases for the Service to determine whether the alien has the commitment to engage in the activity which will promote a national interest following his or her admission as an immigrant.

To illustrate this problem, the Service notes that it has received a number of petitions, accompanied by a request for a national interest waiver, from professionals who recently received an advanced degree and claim that they will be engaged in activities which will be in the national interest. One example is an attorney who recently passed the state bar examination and promises to devote some of his practice to representing indigent persons. Another example is someone who has just graduated from medical school and states that he or she will practice in a medically under-served area. Such petitions have been problematic for the Service to adjudicate. The aliens claim they will be engaged in activity in which they do not have a "track record." Under the current regulations, the Service has no means to determine whether the alien is truly committed to

performing the activity which promotes the national interest. The Service believes that it is appropriate to require the alien to have 2 years of full-time experience in the field of endeavor which will promote the national interest. The Service does not believe, however, that the required period of experience should include time in which the alien was a full- or part-time student. It is the position of the Service that 2 years of full-time experience is the minimum period of time to measure the alien's commitment to work in an area which will promote the national interest. In addition, this 2-year full-time experience requirement is necessary to determine whether the alien has sufficient qualifying experience in the field to play a significant role in an activity which will prospectively benefit the United States.

The second element is that the national interest waiver not be based purely on the alien's ability to ameliorate a local labor shortage. Although the legislative history of IMMACT and MTINA does not address the meaning of the term "national interest," Congress clearly stated, in section 212(a)(5)(C) of the Act, that all aliens who immigrate under the second and third employment-based categories require a labor certification. Section 203(b)(2)(B) of the Act allows the Attorney General to waive the requirement that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States if it is in the national interest. By enacting the national interest waiver, Congress created an exception to the general labor certification requirement. It would, therefore, be superfluous to allow an alien to be exempted from the labor certification requirement based purely on a shortage of available U.S. workers. Congress has delegated to the Department of Labor the determination of whether local labor shortages exist. See section 212(a)(5)(A) of the Act. This does not mean, however, that the existence of a national labor shortage would not be relevant to whether an alien should be granted a national interest waiver. The fact that the alien has skills which are not available in the overall U.S. labor market may be a relevant consideration in deciding whether to grant a national interest waiver. However, should the Service determine that the basis of the request for a national interest waiver is solely to alleviate a local labor shortage, a labor certification will be the appropriate basis to qualify for an employment-based petition.

The plain language of the term "national interest" supports the Service's position on local labor shortages. The dictionary defines the word "national" as "pertaining to a whole nation" or "concerning or encompassing an entire nation." See The Random House College Dictionary (Rev. Ed. 1975). If the basis of the request for a national interest waiver is merely to solve a labor shortage in a limited area of the country, the impact of the alien's employment cannot be said to pertain directly to the entire Nation. There must be an impact on the Nation as a whole.

In conclusion, the Service has determined that local labor market concerns, standing alone, are not an appropriate basis for a national interest waiver, which exempts the alien from the normal labor certification requirement. Accordingly, the Service proposes to preclude aliens from obtaining a national interest waiver based purely on a local labor shortage.

The third element in determining whether the alien should be given a national interest waiver is that the alien will be involved in an undertaking which will substantially benefit prospectively the United States. This requirement follows the statutory language of section 203(b)(2)(B) of the Act, which makes it clear that the waiver request should be premised on an activity which will further an important national goal. The emphasis of this element is on the particular national goal the alien's proposed undertaking will promote.

The fourth element in determining whether the labor certification and job offer should be waived in the national interest is that the alien play a significant role in that activity which will prospectively benefit the United States. The Service has received a large number of requests for a national interest waiver from aliens who play relatively minor roles in an important project or activity which affects the national interest. One example is an alien who is an entry-level engineer who works for a company which conducts important research into new sources of energy, such as fusion. Another example is a physician who claims that he or she will work in primary-care, which the President's health care proposal emphasizes. In both examples, the alien states that he or she will be working in a field which will promote a national goal or cause. While this may be true, merely working in an area which benefits the national interest is not a sufficient basis to grant a national interest waiver. The alien must also establish that he or she will

play a significant role in advancing the particular national interest. In other words, the alien has the burden of proof that he or she will have a significant impact on an activity which will benefit the national interests of the United States.

This proposed regulation will serve as a guideline for aliens who apply for a national interest waiver. It emphasizes both the manner in which the alien will contribute to the national interest, as well as the activity or employment itself. The Service believes that the alien must show that he or she will play a significant role in an undertaking which will prospectively benefit the United States.

#### **Skilled Workers, Professionals, and Other Workers**

The employment-based third category under section 203(b)(3) of the Act has subcategories for professionals, skilled workers, and unskilled workers. Although there are 40,000 immigrant visa numbers allocated annually to the employment-based third category, section 203(b)(3)(B) of the Act limits the annual admissions of unskilled workers to 10,000. In order to qualify as a skilled worker, the job offered must require at least 2 years of training or experience. Under the current regulation, the Service determines whether a job offered is skilled or unskilled based on the minimum experience or training requirements which the prospective employer places on the job, as certified by the Department of Labor on Form ETA 750. See 8 CFR 204.5(l)(4). Block number 14 on Form ETA 750A (Offer of Employment) lists the minimum experience for a worker to satisfactorily perform the job offered. As a matter of practice, the Department of Labor permits the minimum experience required to satisfactorily perform the job offered to be in the job offered or in a related occupation.

The Service has received a number of petitions in which the minimum experience requirement in a related occupation is 2 years or more and the minimum experience requirement in the job offered is less than 2 years. This regulation proposes to place the beneficiary into the unskilled category if the experience requirement on Block 14 on Form ETA 750A for the job offered shows less than 2 years of experience. To do otherwise would mean that a job applicant could meet one of the minimum job offer requirements with less than 2 years of experience in the job itself. The Service has determined that focusing on the experience required for the job offered comports with the language of section 203(b)(3)(A)(i) of the

Act which defines skilled workers as qualified immigrants who are capable of performing skilled labor, requiring at least 2 years of experience or training. Accordingly, the Service proposes to add a sentence to emphasize that a worker will be considered unskilled if a job applicant can meet the minimum experience requirements in the job offered with less than 2 years of experience.

#### **Religious Workers**

Section 151(a) of IMMACT created a new immigrant category for ministers, religious professionals, and other religious workers. Section 101(a)(27)(C)(iii) of the Act provides that in order to qualify under this category, a minister must have been carrying on the vocation of minister during the previous 2 years. The Act also requires professional and other religious workers to carry on the religious work during the previous 2 years. The regulation currently states that ministers and religious workers must have been performing the vocation of minister or religious work continuously, either abroad or in the United States, for at least the 2-year period immediately preceding the filing of the petition. See 8 CFR 204.5(m)(1). The Service proposes to amend the regulation to expressly require that the 2 years of experience be full-time.

Before Congress enacted IMMACT in 1990, section 101(a)(27)(C) of the Act classified ministers as special immigrants. Under this category, the alien had to establish that he was "an immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of carrying on the vocation of minister of a religious denomination." This language is virtually identical with the current statute, except that Congress added a category for religious workers. The legislative history indicates that Congress did not intend to overrule pre-existing case law interpreting the experience requirement under former section 101(a)(27)(C) of the Act. See H. Rep. No. 723, 101st Cong., 2nd Sess. 75 (1990). In *Matter of Faith Assembly Church*, 19 I&N Dec. 391, 393 (Comm. 1986), the Commissioner determined that the term "solely" applies to both the alien's proposed ministerial activities as well as to the alien's previous experience as a religious minister. Because of the legislative history and the similarity in the statutory language, it is appropriate for the Service to require that the 2 years of

experience be full-time. In addition, this interpretation is consistent with the statutory framework, under which IMMACT also created a nonimmigrant category for religious workers. See section 101(a)(15)(R) of the Act. The 2-year experience requirement is the only difference between the nonimmigrant and immigrant religious worker category. Compare id with section 101(a)(27)(C)(iii) of the Act. Both categories require 2 years of membership in the religious denomination. Since membership in a religious denomination may entail some part-time volunteer work, part-time employment should not suffice to qualify the alien as a special immigrant religious worker. Permitting such part-time employment to count towards meeting the experience requirement for immigrant religious workers would render the distinction between the two categories, and, therefore, the experience requirement itself, superfluous.

Accordingly, the Service proposes to amend the regulation to expressly require that the 2 years of experience be full-time. In order for the qualifying experience to be considered full-time, the alien must have worked in a qualifying religious vocation or occupation for at least 35 hours per week or more, depending on what constitutes "full-time" experience in the particular religious occupation or vocation.

#### *Regulatory Flexibility Act*

In accordance with 5 U.S.C. 605(b), the Commissioner of the Immigration and Naturalization Service certifies that this rule will not, if promulgated, have a significant adverse economic impact on a substantial number of small entities. This proposed rule merely modifies existing regulations for employment-based immigration. It will not significantly change the number of persons who immigrate to the United States based on employment-based petitions. Any impact on small business entities will be, at most, indirect and attenuated.

#### *Executive Order 12866*

This rule is not considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, § 3(f), Regulatory Planning and Review, and the Office of Management and Budget has waived its review process under section 6(a)(3)(A).



*Executive Order 12612*

The regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

*Executive Order 12606*

The Commissioner of the Immigration and Naturalization Service certifies that she has addressed this rule in light of the criteria in Executive Order 12606 and has determined that it will have no effect on family well-being.

**List of Subjects in 8 CFR Part 204**

Administrative practice and procedure, Aliens, Employment, Immigration, Forms.

Accordingly, part 204 of chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

**PART 204—IMMIGRANT PETITIONS**

1. The authority citation for part 204 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1186a, 1255; 8 CFR part 2.

2. In § 204.5, paragraph (c) is revised to read as follows:

**§ 204.5 Petitions for employment-based immigrants.**

\* \* \* \* \*

(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). For purpose of this part, a United States employer must be a person who is a United States citizen or permanent resident, a firm, corporation, contractor, or other association or organization in the United States which engages a person to work in the United States, which has an employer-employee relationship with respect to employees as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of such employee.

\* \* \* \* \*

3. In § 204.5, paragraph (d) is amended by adding the following

sentence immediately after the first sentence, to read as follows:

**§ 204.5 Petitions for employment-based immigrants.**

\* \* \* \* \*

(d) *Priority date.* \* \* \* If the United States employer substitutes another alien on a labor certification, the priority date shall be the date the employer requests the substitution.

\* \* \* \* \*

4. In § 204.5, paragraph (e) is amended by revising the third sentence to read as follows:

**§ 204.5 Petitions for employment-based immigrants.**

\* \* \* \* \*

(e) *Retention of section 203(b)(1), (2), or (3) priority date.*—\* \* \* A petition revoked pursuant to 8 CFR 205.2 for fraud or misrepresentation will not confer a priority date, nor will any priority date be established as a result of a denied petition. \* \* \*

\* \* \* \* \*

5. In § 204.5, paragraph (f) is revised to read as follows:

**§ 204.5 Petitions for employment-based immigrants.**

\* \* \* \* \*

(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-year period following approval of the petition during which an immigrant visa is continuously available for his or her use.

\* \* \* \* \*

**§ 204.5 [Amended]**

6. Section 204.5(g)(2) is amended in the last sentence by adding the phrase "payroll records, W-2 forms," immediately after the phrase "bank account records,".

7. In § 204.5, paragraphs (h) through (n) are redesignated as paragraphs (i) through (o), respectively, and a new paragraph (h) is added to read as follows:

**§ 204.5 Petitions for employment-based immigrants.**

\* \* \* \* \*

(h) *Validity of section 203(b) petitions and labor certifications*—(1) A petition approved pursuant to section 203(b) of the Act is valid indefinitely unless revoked under section 205 of the Act. A labor certification is valid until the alien immigrates or adjusts status under an employment-based petition based on the labor certification, unless there is a finding by the Service or the State Department that the labor certification was obtained through fraud or a material misrepresentation.

(2) *Changes in job location*—(1) *Non-schedule A labor certifications.* A labor certification is valid only for the area within normal commuting distance of the site of the original offer of employment. Any location within a Metropolitan Statistical Area is deemed to be within normal commuting distance. If there is a change in job location after a Form I-140 Immigrant Petition for Alien Worker has been approved, the petitioner shall file a new Form I-140 petition with the service center having jurisdiction over the intended place of employment.

(ii) *Schedule A labor certifications.* A Schedule A labor certification is valid anywhere in the United States.

(3) *Successorship in interest.* If there has been a successor in interest to the original petitioning employer, the Service will reaffirm the validity of the labor certification or previously approved Form I-140 petition for the new employer. For purposes of this paragraph, to be a successor in interest, the new employer must have substantially assumed the duties, rights, obligations, and assets of the original employer. In addition, the new employer must offer the same wages and working conditions to its employees, offer the beneficiary the same job as stated in the labor certification, and continue to operate the same type of business as the original employer. The new employer must submit a Form I-140 petition with the service center having jurisdiction over intended place of employment along with evidence that it is a successor in interest and documentation showing the change in ownership and ability to pay the wage offered. If the Service did not approve a petition filed by the original employer, the new employer must also establish that the original employer had the ability to pay the proffered wage when the labor certification was submitted.

\* \* \* \* \*

8. In § 204.5, newly redesignated paragraphs (i)(4) and (i)(5) are revised to read as follows:

§ 204.5 Petitions for employment-based immigrants.

\* \* \* \* \*

(i) \* \* \*

(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. Meeting three of the evidentiary standards listed in paragraph (i)(3) of this section is not dispositive of whether the beneficiary is an alien of extraordinary ability. The petitioner has the burden of proof to establish that he or she is an alien of extraordinary ability.

(5) No offer of employment required. Neither an offer of 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 prearranged 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. The alien's primary source of earned income must come from the specific activity or activities for which he or she seeks classification as an alien of extraordinary ability.

\* \* \* \* \*

9. Section 204.5 is amended by:

- a. Revising newly redesignated paragraph (j)(3)(i) introductory text;
- b. Revising newly redesignated paragraph (j)(3)(i) (C) and (D); and by
- c. Revising the first sentence in newly redesignated paragraph (j)(3)(iii)(C), to read as follows:

§ 204.5 Petitions for employment-based immigrants.

\* \* \* \* \*

(j) \* \* \*

(3) \* \* \*

(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. Meeting two of the following evidentiary standards listed in paragraph (j)(3)(i) of this section is not dispositive of whether the beneficiary is outstanding internationally as outstanding in the academic field specified in the petition. The petitioner has the burden of proof to establish that the beneficiary is an outstanding researcher or professor:

\* \* \* \* \*

(C) Published material in professional publications written by others discussing or analyzing 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 other professors, researchers, or Ph.D. candidates in the same or related academic field;

\* \* \* \* \*

(iii) \* \* \*

(C) A department, division, or institute of a private employer or a state, local, or Federal Government agency offering the alien a permanent research position in the alien's academic field.

\* \* \* \* \*

10. In § 204.5, newly redesignated paragraph (k)(3)(i) is amended by redesignating paragraphs (k)(3)(i) (C) and (D) as paragraphs (k)(3)(i) (D) and (E) respectively; and by adding a new paragraph (k)(3)(i)(C) to read as follows:

§ 204.5 Petitions for employment-based immigrants.

\* \* \* \* \*

(k) \* \* \*

(3) \* \* \*

(i) \* \* \*

(C) If the alien is already in the United States working for an employer which is not the same employer or a subsidiary or affiliate of the entity by which the alien was employed overseas, in the three years 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;

\* \* \* \* \*

11. In § 204.5, newly redesignated paragraphs (l)(1), (l)(3)(iii), and (l)(4) are revised to read as follows:

§ 204.5 Petitions for employment-based immigrants.

\* \* \* \* \*

(l) 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 the alien 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.

\* \* \* \* \*

(3) \* \* \*

(iii) If the standards in paragraph (l)(3) do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility. Meeting three of the evidentiary standards listed in paragraph (l)(3)(ii) of this section is not dispositive of whether the beneficiary is an alien of exceptional ability. The petitioner has the burden of proof to establish that the alien is an alien of exceptional ability.

(4) Labor certification or evidence that the 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. If the job offer portion of the labor certification requires a baccalaureate degree or foreign equivalent degree followed by at least five years of progressive post-baccalaureate experience in the specialty, it must also provide that an advanced degree holder may meet the minimum job requirements.

(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 and members of the professions if exemption would be in the national interest.

(A) To show that such exemption would be in the national interest, the petitioner must establish the following:

(1) The alien has at least two years of full-time experience in the activity in which he or she will benefit the United States;

(2) The alien's request for a waiver of the labor certification requirement is not based purely on a local labor shortage;

(3) The alien will engage in an undertaking which will substantially benefit prospectively the United States; and

(4) The alien will play a significant role in the undertaking described in paragraph (l)(4)(ii)(A)(3).

(B) 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.

\* \* \* \* \*

12. In § 205.5, newly redesignated paragraph (m)(4) is revised to read as follows:

**§ 204.5 Petitions for employment-based immigrants.**

\* \* \* \* \*

(m) \* \* \*

(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. A worker will be considered unskilled if the prospective employer's minimum experience requirement, as certified by the Department of Labor, indicates that less than two years of experience, either in the job offered or in a related occupation, is required. 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 one, i.e., one which requires at least two years of training and/or experience.

\* \* \* \* \*

**§ 204.5 [Amended]**

13. In § 204.5, newly redesignated paragraph (n)(1) is amended in the fourth sentence by adding the phrase "on a full-time basis" immediately after the phrase "or other work".

14. In § 204.5, newly redesignated paragraph (n)(3)(ii)(A) is amended by adding the phrase "full-time" between the words "of" and "experience".

15. In § 204.5, newly redesignated paragraph (n)(4) is amended in the second sentence by adding the phrase "and will be working for the religious organization on a full-time basis" immediately after the term "or solicitation of funds for support".

16. In § 204.5, newly redesignated paragraph (o)(1) is revised to read as follows:

**§ 204.5 Petitions for employment-based immigrants.**

\* \* \* \* \*

(o) *Closing action*—(1) *Approval.* An approved employment-based petition

will be forwarded to the Department of State National Visa Center. If the petition indicates that the alien will apply for adjustment to permanent residence in the United States, the approved petitions will be retained by the Service for consideration with the application for permanent resident (Form I-485).

\* \* \* \* \*

**§ 204.5 [Amended]**

17. In § 204.5, newly redesignated paragraph (o)(3) is removed.

Dated: March 3, 1995.

**Doris Meissner,**

*Commissioner, Immigration and Naturalization Service.*

[FR Doc. 95-13806 Filed 6-5-95; 8:45 am]

BILLING CODE 4410-10-M

**DEPARTMENT OF AGRICULTURE**

**Animal and Plant Health Inspection Service**

**9 CFR Part 98**

[Docket No. 94-006-1]

**Importation of Embryos From Ruminants and Swine From Countries Where Rinderpest or Foot-and-Mouth Disease Exists**

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the regulations to allow, under specified conditions, the importation of embryos from all ruminants, including cervids, camelids, and all species of cattle, and from swine from countries where rinderpest or foot-and-mouth disease exists. The regulations currently provide for importing only embryos from certain species of cattle in countries where rinderpest or foot-and-mouth disease exists. Research now indicates that embryos from all species of cattle, from ruminants other than cattle, and from swine, which are produced, collected, and handled under certain conditions in countries where rinderpest or foot-and-mouth disease exists, could be imported with virtually no risk of introducing communicable diseases of livestock into the United States. This action would make additional sources of genetic material available to domestic animal breeders.

**DATES:** Consideration will be given only to comments received on or before August 7, 1995.

**ADDRESSES:** Please send an original and three copies of your comments to

Docket No. 94-006-1, Regulatory Analysis and Development, PPD, APHIS, Suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690-2817 to facilitate entry into the comment reading room. **FOR FURTHER INFORMATION CONTACT:** Dr. Roger Perkins, Staff Veterinarian, Import/Export Animals, National Center for Import and Export, VS, APHIS, Suite 3B05, 4700 River Road Unit 39, Riverdale, MD 20737-1231. Telephone: (301) 734-8170.

**SUPPLEMENTARY INFORMATION:**

**Background**

The regulations in 9 CFR part 98 (referred to below as the regulations) govern the importation of animal germ plasm so as to prevent the introduction of contagious diseases of livestock or poultry into the United States. Subpart A of part 98 applies to ruminant and swine embryos from countries free of rinderpest and foot-and-mouth disease (FMD), and to embryos of horses and asses. Subpart B applies to certain cattle embryos from countries where rinderpest or FMD exists. Subpart C applies to certain animal semen. Subpart B currently allows for the importation of embryos from cattle (*Bos indicus* and *Bos taurus*) from countries where rinderpest or FMD exists only if embryos are produced, collected, and handled under certain conditions. However, research<sup>1</sup> has demonstrated that the same conditions would effectively ensure that embryos from all species of cattle, and from swine, and from ruminants other than cattle, including camelids and cervids, can also be imported into the United States from countries where rinderpest or FMD exists without significant risk of introducing these diseases.

At this time, only *Bos indicus* and *Bos taurus* cattle embryos may be imported into the United States from countries where rinderpest or FMD exists. The available gene pool for swine and ruminants other than cattle cannot be enlarged by using embryos from animals in countries where rinderpest or FMD exists. Because of this, U.S. livestock interests, except cattle-related interests,

<sup>1</sup> Information about pertinent research may be obtained from the Animal and Plant Health Inspection Service, Veterinary Services, National Center for Import-Export, 4700 River Road Unit 38, Riverdale, Maryland 20737-1231.