DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 656

[RIN 1205–AB42]

Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of proposed rulemaking with request for comments.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (Department or DOL) is publishing a Notice of Proposed Rulemaking (NPRM or proposed rule) with request for comments to enhance program integrity and reduce the incentives and opportunities for fraud and abuse related to the permanent employment of aliens in the United States. First, DOL is proposing to eliminate the current practice of allowing the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. Second, DOL is proposing a 45-day period for employers to file approved permanent labor certifications in support of a petition with the Department of Homeland Security, United States Citizenship and Immigration Services (DHS). Third, the proposed rule expressly prohibits the sale, barter, or purchase of permanent labor applications and certifications, as well as other related payments. Finally, the proposed rule includes provisions highlighting existing law pertaining to submission of fraudulent or false information, clarifying current DOL procedures for responding to possible fraud, and adding procedures for debarment from the permanent labor certification program. Under this proposed regulation, these provisions to enhance program integrity and reduce fraud and abuse would apply to permanent labor certification applications and approved certifications filed under both the regulation effective March 28, 2005, and any prior regulation implementing the permanent labor certification program. This proposed rule also proposes clarifying modifications of applications filed after March 28, 2005, under the new streamlined permanent labor certification process. The Department solicits comments on each provision contained in this NPRM.

DATES: Interested persons are invited to submit written comments on the proposed rule on or before April 14, 2006.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205–AB42, by any of the following methods:

- Federal e-Rulemaking Portal: *http://www.regulations.gov*. Follow the Web site instructions for submitting comments.
- E-mail: Comments may be submitted by e-mail to *fraud.comments@dol.gov*. Include RIN 1205–AB42 in the subject line of the message.
- *Mail:* Submit written comments to the Assistant Secretary, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210, Attention: John R. Beverly, Interim Chief, Division of Foreign Labor Certification. Because of security measures, mail directed to Washington, DC is sometimes delayed. We will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments.

Instructions: All submissions received must include the RIN 1205–AB42 for this rulemaking. Receipt of submissions, whether by U.S. Mail or e-mail, will not be acknowledged. Because DOL continues to experience occasional delays in receiving postal mail in the Washington, DC, area, commenters are encouraged to submit comments via e-mail.

Comments will be available for public inspection during normal business hours at the address listed above for mailed comments. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this proposed rule may be obtained in alternative formats (*e.g.*, large print, Braille, audiotape, or disk) upon request. To schedule an appointment to review the comments and/or to obtain the proposed rule in an alternative format, contact the Division of Foreign Labor Certification at (202) 693–3010 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: John R. Beverly, Interim Chief, Division of Foreign Labor Certification, Employment and Training Administration, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210. Telephone (202) 693–3010 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of this proposed rule is to impose clear limitations on the acquisition and use of permanent labor certification applications and approved permanent labor certifications in order to reduce incentives and opportunities for fraud and abuse in the permanent labor certification program, and to propose measures to enhance the integrity of the permanent labor certification program.

A. Statutory Standard and Current Department of Labor Regulations

Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)), before the Department of Homeland Security (DHS) may approve petition requests and the Department of State (DOS) may issue visas and admit certain immigrant aliens to work permanently in the United States, the Secretary of Labor must certify to the Secretary of Homeland Security and to the Secretary of State that:

(a) There are not sufficient United States workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(b) The employment of the alien will not adversely affect the wages and working conditions of similarly employed United States workers.

If the Secretary of Labor, through the Employment and Training Administration (ETA), determines there are no able, willing, qualified, and available U.S. workers and employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers, the Secretary so certifies to DHS and to DOS by granting a permanent labor certification. If DOL can not make both of the above findings, the application for permanent labor certification is denied.

The INA does not address substitution of aliens in the permanent labor certification process. Similarly, the Department of Labor's regulations are silent regarding substitution of aliens.

The Department of Labor's regulation, found at 20 CFR part 656, governs the labor certification process for the permanent employment of immigrant aliens in the United States and sets forth the responsibilities of employers who

desire to employ immigrant aliens permanently in the United States.

On May 6, 2002, the Department of Labor published a Notice of Proposed Rulemaking (PERM NPRM) to streamline the permanent labor certification program. 67 FR 30466. A final rule implementing the streamlined permanent labor certification program through revisions to 20 CFR part 656 was published on December 27, 2004, and took effect on March 28, 2005. 69 FR 77326. The prior part 656 governs processing of permanent labor certification applications filed prior to March 28, 2005, except as previously filed applications may be refiled under the new rule, and except as certain provisions of this proposed rule would impact applications filed prior to March 28, 2005.

B. General Immigration Process Involving Permanent Labor Certifications

To obtain permanent foreign workers, U.S. employers generally must engage in a multi-step process that involves the DOL and DHS, and in some instances, the Department of State (DOS). The INA classifies employment-based (EB) immigrant workers into categories, based on the general job requirements, and the perceived benefit to American society. The United States employer must demonstrate the job requirements fit into one of these classifications. The first step in the process for the EB2 and EB3 classifications, described below, generally begins with the U.S. employer filing a labor certification application with the DOL under 20 CFR part 656. The U.S. employer must demonstrate to DOL through a test of the labor market there are no U.S. workers able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work. The employer must also demonstrate to DOL the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. After a review of the labor certification application, DOL may either approve or deny the labor certification application.

The Form I–140 is a petition filed with DHS by a United States employer for a prospective permanent alien employee. Most Form I–140 petitions filed under Sections 203(b)(2) and 203(b)(3) of the Act, which are commonly called the EB2 and EB3 classifications, must be accompanied by an approved labor certification issued by DOL. DHS has established procedures for filing Form I–140 petitions under 8 CFR 204.5.

DHS reviews the approved labor certification in conjunction with the I–140 petition and other supporting documents to evaluate whether the position being offered to the alien worker in the petition is the same as the position specified on the labor certification and the employment qualifies for the immigrant classification requested by the employer. In addition, DHS evaluates the alien worker's education, training, and work experience to determine whether the particular alien worker meets the job requirements specified on the labor certification. The approved labor certification is also used to establish the priority in which an immigrant visa will be made available to the alien worker, based on the date the labor certification application was filed with DOL.

A. Current Practices Involving Permanent Labor Certifications

DOL, as an accommodation to U.S. employers, has traditionally allowed employers to substitute an alien named on a pending or approved labor certification with another prospective alien employee. Labor certification substitution has occurred either while the certification application is pending at DOL or while a Form I–140 petition, filed with an approved labor certification, is pending with DHS. Historically, this substitution practice was permitted because of the length of time it took to obtain a labor certification or receive approval of the Form I–140 petition.

In addition to the substitution issue, another concern arises because once issued by DOL, labor certifications are valid indefinitely. Another issue stems from the fact that the current regulations do not address payments related to the permanent labor certification program or debarment authority. The Department now seeks to address problems that have arisen related to substitution, lack of validity periods for certifications, and financial transactions related to the permanent labor certification program.

II. Issues Arising From Current Practices

For a number of years, the Department has expressed concern that various immigration practices, including substitution, are subject to a high degree of fraud and abuse. *See, e.g.,* Interim Final Rule, 56 FR 54920 (1991).[1] This concern has been heightened by (1) A number of recent criminal prosecutions by the Department of Justice, (2) recommendations from the Department of Justice and the Department of Labor's Office of Inspector General, and (3) public comments concerning fraud received in response to the May 6, 2002, PERM NPRM. *See, e.g.,* 69 FR at 77328, 77329, 77363, 77364.

The Department's review of recent prosecutions by the Department of Justice, in particular, has revealed the ability to substitute alien beneficiaries has turned labor certifications into a commodity which can be sold by unscrupulous employers, attorneys, and agents to those seeking a ''green card.'' Similarly, the ability to sell labor certifications is enhanced by their current open-ended validity, providing a lengthy period when a certification can be marketed. In many of those applications, the job offer is fictitious. In others, the job in question exists but is not truly open to U.S. workers. Rather, the job is steered to a specific alien in return for a substantial fee or kickback. The Federal Government has prosecuted a number of cases resulting from employers, agents, or attorneys seeking to fraudulently profit on the substitution of aliens on approved labor certifications and applications. For example, one attorney filed approximately 2,700 fraudulent applications with DOL that he later sold to aliens for at least $20,000 a piece so they could be substituted for the named beneficiary on approved labor certifications. *See U.S.* v. *Kooritzky,* No. 02–502–A (E.D. Va.). Additional prosecutions have involved the sale of fraudulent applications or certifications. *See, e.g., U.S.* v. *Mir,* No. 8:03–CR–00156–AW–ALL (D. Md.); *U.S.* v. *Fredman et al.,* No. WMN–05–198 (D. Md.); *U.S.* v. *Lee,* No. 03–947–M (E.D. Va.); and *U.S.* v. *Mederos,* No. 04–314–A (E.D. Va.).

The final rule implementing the streamlined permanent labor certification program discussed DOL's concerns about the possibility of fraud in the permanent labor certification program and the steps the Department is taking to minimize the filing of fraudulent or non-meritorious applications. 69 FR at 77328. The Department noted the practice of allowing the substitution of alien beneficiaries may provide an incentive for fraudulent applications to be filed with the Department. 69 FR at 77363. The Department also concluded in the final rule the emerging ''black market''

[1] The 1991 Interim Final Rule included a provision prohibiting substitution. That provision was overturned by the U.S. Court of Appeals for the DC Circuit on a technical Administrative Procedures Act ground. *Kooritzky* v. *Reich,* 17 F.3d 1509 (DC Cir. 1994). The publication of this proposed rule for public notice and comment addresses the Court's concern.

for purchase and sale of approved labor certifications is not consistent with the purpose of the labor certification statute at § 212(a)(5)(A) of the INA. However, DOL was not able to address many of these fraud issues as they arguably involved matters that were not a logical outgrowth of the proposals contained in the PERM NPRM. The Department indicated it would be exploring regulatory solutions to address this issue. 69 FR at 77363.

III. Proposed Amendments to the Permanent Labor Certification Regulations

In order to protect the integrity of the permanent labor certification program, deter fraud, and comply with the Department's statutory obligation to protect the wages and working conditions of U.S. workers, the Department has determined a number of amendments are appropriate. The first amendment would prohibit the substitution of alien beneficiaries on pending applications for permanent labor certification and on approved permanent labor certifications not yet filed with DHS. This amendment could, at least to some degree, affect DHS's current practice of allowing U.S. employers to substitute an alien through the filing of a new Form I–140 petition, supported by a labor certification in the name of the original beneficiary. The second amendment would require a permanent labor certification be filed with DHS within 45 calendar days of the date it is certified by DOL. The third amendment would prohibit the sale, barter, and purchase of applications and approved labor certifications, as well as other related payments. Finally, the Department is proposing enforcement mechanisms, including debarment with appeal rights, to protect the integrity of the permanent labor certification program and deter individuals or entities from engaging in prohibited transactions or abusing the labor certification process. The Department invites public comment regarding all aspects of each of these proposed changes.

The Department believes these changes should be broadly implemented both to achieve greater impact in fraud deterrence and enhancement of program integrity. In addition to applications for permanent labor certification filed under the new PERM regulation that became effective March 28, 2005, approximately 355,000 applications for permanent labor certification are pending that will be processed under the prior regulation in the Department's new ''backlog elimination'' centers unless the employer chooses to re-file the application under the new regulation. *See* 69 FR 43716 (July 21, 2004) (Interim Final Regulation regarding backlog center procedures); 20 CFR 656.17(d) (refiling procedures under new regulation). Program integrity and fraud deterrence are concerns both for labor certifications filed under the current regulation effective March 28, 2005, and the prior regulation. Additionally, the proposed debarment and other program integrity mechanisms should be available for all actions should this rule be finalized.

Accordingly, the Department intends to make the amendments proposed in this NPRM generally applicable to applications and labor certifications under both the prior and current regulations, as further described below. This action would modify the statement in the preamble to the December 27, 2004, final rule that applications filed before that final rule's effective date will continue to be processed and governed by the then-current regulation. 69 FR at 77326. Specifically, the Department proposes as follows regarding applicability:

**Substitution*—Substitution of alien beneficiaries will be prohibited as of the effective date of a final rule resulting from this NPRM and that prohibition will apply to all pending permanent labor certification applications and to approved certifications not yet filed with DHS, whether the application was filed under the prior or current regulation. This regulatory change would not affect substitutions approved prior to the final rule's effective date.

**Validity period*—All permanent labor certifications approved on or after the effective date of a final rule issued in response to this NPRM will expire within 45 calendar days of certification, whether the original application was filed under the prior or current regulation. Likewise, all certifications approved prior to a final rule's effective date, whether filed under the prior or current regulation, will expire within 45 calendar days of that effective date unless filed in support of an I–140 petition with the Department of Homeland Security.

**Ban on sale, barter, purchase and certain payments*—The ban on sale, barter, purchase, and related payments will apply to all such transactions on or after the effective date of a final rule resulting from this NPRM, regardless of whether the labor certification application involved was filed under the prior or current regulation implementing the permanent labor certification program.

**Debarment and program integrity*—Last, on or after the effective date of a final rule resulting from this NPRM, the Department may debar an employer, attorney, or agent based upon any actions that were improper or prohibited at the time the action occurred, regardless of whether the labor certification application involved was filed under the prior or current regulation. New provisions applicable to applications filed under the prior or current regulation also highlight existing law pertaining to submission of fraudulent or false information, and clarify procedures for responding to possible fraud.

A. Elimination of the Practice of Allowing Substitution of Alien Beneficiaries on Labor Certifications and Applications, and Other Changes to Applications

The DOL's program experience, supplemented by information from other Federal agencies with an interest in the permanent labor certification program, and particularly Federal Government prosecutions, indicates the current practice of allowing substitution of alien beneficiaries provides a strong incentive for the filing of fraudulent labor certification applications, and creates an opportunity for fraud throughout the lawful permanent resident process.

If substitution is permitted, the certification or an application can be marketed to an alien who is willing to pay a considerable sum of money to be substituted for the named alien on the application or certification. The possibility of lucrative substitutions has encouraged several types of fraud. For example, to obtain permanent labor certifications that could be marketed to substitute aliens, fraudulent labor certification applications have been submitted on behalf of nonexistent employers, submitted without the knowledge of the employer, or submitted on behalf of employers who are paid for the use of their names. In many such cases, the named alien on the application may be fictitious or the same alien may be fraudulently named on multiple labor certification applications.

The Department has concluded these experiences provide sufficient reasons for eliminating the practice of allowing the substitution of alien beneficiaries on permanent labor certifications or permanent labor certification applications. No statutory entitlement exists to allow substitution of aliens on labor certifications or applications, nor do DOL regulations authorize or address the practice of alien substitutions. Rather, substitution has been permitted

as a procedural accommodation to employer applicants.

The DOL also has concluded the emerging ''black market'' in labor certifications or applications conflicts with the purpose of the permanent labor certification statute at section 212(a)(5)(A) of the INA and the Department's labor certification regulations at 20 CFR part 656. The purpose of the statute and regulations is to allow an employer to obtain a needed immigrant worker only if a qualified U.S. worker is not available and the admission of such an immigrant worker will not have an adverse effect on the wages and working conditions of similarly employed U.S. workers.

If the original alien beneficiary is no longer available, then the employer must use some means to find a new worker. Prohibiting substitution will ensure the employer again makes the employment opportunity available to U.S. workers. In the event another alien is again the only qualified person available, the employer should be required to submit a new application reflecting the new recruitment process undertaken. Because the Department's role is to allow employers access to the international labor market only if there is no U.S. worker able, willing, qualified, and available for the employment opportunity, elimination of substitution will strengthen program integrity and will assist employers with a legitimate need for alien workers by ensuring appropriate use of the labor certification process and the judicious use of the limited number of available visas involving permanent labor certifications.

The DOL acknowledges that concerns have been expressed that substitution is unfair to other aliens waiting in queue for visas because, under existing practices, the substituted alien obtains a priority date [2] based on an application filed for a different alien and the date is often years earlier than the substituted alien would receive if named in a newly filed application.

The DOL has concluded that tolerating the sale of a public benefit is simply bad government. Allowing such a practice to continue would serve to undermine the belief and confidence of the public in the objectives and integrity of government programs in general and the permanent labor certification program in particular. By banning substitution, the Department does not undertake to determine the visa eligibility status of individual aliens. Rather, the Department has developed the proposed substitution prohibition to enhance program integrity and eliminate the current ''black market'' in labor certifications and applications. The Department also recognizes that banning substitution on pending or approved labor certifications could, at least to some degree, affect DHS's current practice of allowing U.S. employers to substitute an alien through the filing of a new Form I–140 petition, supported by a labor certification in the name of the original beneficiary.

In the past, the strongest argument in support of allowing substitutions was the long time it took to obtain a permanent labor certification. The streamlined process introduced by the new regulation, however, has reduced significantly the processing time for those employers who legitimately need to file a new application. If substitution is no longer necessary to accommodate long wait times, the Department believes there is no longer a compelling reason to allow the practice. Because the Department's primary concern in the permanent labor certification area is the protection of U.S. workers, if the original alien is no longer available, the purposes of the permanent labor certification program are most advanced if the employer is required to seek a new employee first among U.S. workers.

Accordingly, the Department is proposing in a new 20 CFR 656.11(a) and a revised 656.30(c) that only the alien named on the originally filed *Application for Alien Employment Certification* (ETA Form 750) or *Application for Permanent Employment Certification* (ETA Form 9089) may be the beneficiary of an approved labor certification. This regulatory change would not affect substitutions approved prior to the final rule's effective date.

DOL proposes to accomplish this change by explicitly providing in § 656.11(a) that substitution or change to the identity of an alien beneficiary is prohibited on any application filed with DOL for permanent labor certification, and on any resulting certification, whether filed under the current or any prior regulation. Further, DOL proposes to revise § 656.30(c) to provide that a certification resulting from an application filed under the current or prior regulation is only valid for the alien named on the original permanent labor certification application.

The Department is also proposing to clarify procedures for modifying applications filed under the new permanent labor certification regulation. Under proposed § 656.11(b), DOL clarifies that requests for modifications to an application submitted under the current regulation will not be accepted. This proposed clarification is consistent with the streamlined labor certification procedures of the new regulation. Nothing in the streamlined regulation contemplates allowing or permits employers to make changes to applications after filing. The re-engineered program is designed to streamline the process and an open amendment process that freely allows changes to applications or results in continual back and forth exchange between the employer and the Department regarding amendment requests is inconsistent with that goal. Further, the re-engineered certification process has eliminated the need for changes. The online application system is designed to allow the user to proofread and revise before submitting the application, and the Department expects and assumes users will do so. Moreover, in signing the application, the employer declares under penalty of perjury that he or she has read and reviewed the application and the submitted information is true and accurate to the best of his or her knowledge. In the event of an inadvertent error or any other need to refile, an employer can withdraw an application, make the corrections and file again immediately. Similarly, after an employer receives a denial under the new system, employers can choose to correct the application and file again immediately if they do not seek reconsideration or appeal. In addition, the entire application is a set of attestations and freely allowing changes undermines the integrity of the labor certification process because changing one answer on the application could impact analysis of the application as a whole.

B. Labor Certification Validity and Filing Period

The current indefinite validity of approved permanent labor certifications has contributed to the growth of the ''black market'' in approved labor certifications. Under the current regulations, labor certifications never expire, and they can be traded indefinitely and sold to the highest bidder. The Federal Government has prosecuted several cases involving the sale of fraudulent applications or certifications. Moreover, over time, the likelihood the certified job opportunity still exists as it appeared on the original application becomes more doubtful, and the labor market test and the prevailing

[2] The Department of State uses the filing date of the permanent labor certification application to establish the priority date of a preference visa applicant under Section 203(b)(2) and (3) of the Immigration and Nationality Act. See 20 CFR 656.17(c); 20 CFR 656.30(b); 8 CFR 204.5(d) and 22 CFR 42.53.

wage determination become less accurate or ''stale.''

To address these concerns, the Department is proposing in 20 CFR 656.30(b) that an approved permanent labor certification must be filed in support of a petition with DHS within 45 calendar days of the date DOL grants certification. For those labor certifications granted before the effective date of a final rule resulting from this NPRM, employers would have 45 calendar days from a final rule's effective date to file the labor certification in support of a petition with DHS. These expiration provisions are proposed to apply whether the application was filed under the regulation effective March 28, 2005, or any prior regulation.

C. Prohibition on the Sale, Barter, or Purchase of Applications for Permanent Labor Certification and of Approved Permanent Labor Certifications, and Prohibition on Related Payments

The Department is proposing in 20 CFR 656.12 to prohibit improper commerce and several types of payments related to permanent labor certification applications and certifications. As noted above, permanent labor certifications have become commodities that too often are bought and sold by aliens seeking ''green cards.'' A ''black market'' has been created in which employers or agents agree to broker applications for permanent labor certifications on behalf of aliens in exchange for payment of some kind. Such payments are not compatible with the purposes of the permanent labor certification program and may indicate lack of a bona fide position truly open to U.S. workers. Further, these payments may indicate the wage stated on the application is not the true amount the employer will pay the alien. As with the substitution practice, the Department has concluded that allowing sales of a government benefit to continue is simply bad government, and therefore proposes in § 656.12(a) to create an explicit and complete ban on the sale, barter, and purchase of labor certification applications and certifications.

In addition, the Department is proposing in § 656.12(b) to prohibit employers from seeking or receiving payment of any kind, from any source, for filing an ETA Form 750 or an ETA Form 9089 or for other actions in connection with the permanent labor certification process. Prohibited payments would include, but not be limited to: Employer fees for hiring the alien beneficiary; receiving ''kickbacks'' of part of the alien beneficiary's pay whether through a payroll deduction or otherwise; paying the alien beneficiary less than the rate of pay stated on the application; goods and services or other wage or employment concessions; or receiving payment from aliens, attorneys, or agents for allowing a permanent labor certification application to be filed on behalf of the employer. The Department proposes to include in this prohibition a ban on alien payment, directly or indirectly, of the employer's attorney's fees and costs related to preparing, filing, and obtaining a permanent labor certification. Employers, not aliens, file a permanent labor certification application and, therefore, these employer costs are not to be paid or reimbursed in any way by the alien beneficiary.

In some instances, an alien's payment of these costs may indicate there is not a bona fide position and wage available to U.S. workers. Further, alien subsidization of employer costs adversely affects the likelihood that a U.S. worker would be offered the job when, for example, the alien is paying for the recruitment effort.

The Department recognizes the possibility that legitimate employers may have a practice of seeking reimbursement from the aliens they hire for the expenses the employers incur in acquiring the labor certification. The Department, however, believes that any such reimbursement, *e.g.*, of attorneys fees to prepare an employer's application or of recruitment expenses to determine whether domestic labor is available or other such employer expenses, is contrary to the purpose of the labor certification process and should be a cost borne exclusively by the employer.

For these reasons, the Department is proposing a complete prohibition on employers being reimbursed for the expenses they incur in acquiring permanent labor certifications, including payment by the alien of the employer's attorney's fees. The Department welcomes comments from the public on this issue.

D. Debarment and Program Integrity

This NPRM also contains several provisions to promote the program's integrity and assist the Department in obtaining compliance with the proposed amendments and existing program requirements. The Department proposes several revisions to § 656.31, the regulation section regarding the Department's response to instances of potential fraud or misrepresentation, including making the section applicable to applications filed under the current regulation and the regulation in effect prior to March 28, 2005. The Department proposes to revise 20 CFR 656.31(a) and (b) to clarify that the Department may suspend processing of any permanent labor certification application if an employer, attorney, or agent connected to that application is involved in either possible fraud or willful misrepresentation or is named in a criminal indictment or information related to the permanent labor certification program, and to clarify the Department's response to potential fraud. Given the breadth and increased sophistication of the immigration fraud that has been identified in the recent past, the Department needs added flexibility to respond to potential improprieties in labor certification filings. Although the Department already has the authority, this proposed rule also will clarify § 656.31(a) to state the Department may deny any application for permanent labor certification which contains false statements, is fraudulent, or otherwise was submitted in violation of the permanent labor certification regulations.

Proposed § 656.31(c) continues to provide that the Certifying Officer will decide each application on the merits in the event the employer, attorney, or agent is acquitted of wrongdoing or if criminal charges otherwise fail to result in a finding of fraud or willful misrepresentation. Where a court, DHS or the Department of State finds the employer, attorney, or agent did commit fraud or willful misrepresentation, the proposed revision to § 656.31(d) provides that any pending applications related to that employer, attorney, or agent will be decided on the merits and may be denied in accordance with § 656.24. For instances in which a pending application involves an attorney or agent who is the subject of a finding of fraud or willful misrepresentation, the proposed revision to § 656.31(d) also includes a procedure for notifying employers associated with those applications of the finding.

Further, in § 656.31(e), the Department proposes to create a debarment mechanism, with appeal rights as delineated in a proposed revision to § 656.26, to deter individuals or entities from engaging in fraudulent permanent labor certification activities, prohibited transactions, or otherwise abusing the permanent labor certification process. The Department acknowledges that not all debarment triggers should be treated equally, and will therefore take steps to ensure any debarment is reasonable and

proportionate to the improper activity. Debarment from the program is a necessary and reasonable mechanism to enforce permanent labor certification requirements and statutory objectives.

Finally, in this NPRM, the Department is proposing to add a new § 656.31(f) to emphasize existing laws codified under 18 U.S.C. 2, 1001, 1546, and 1621 that prohibit knowingly and willingly furnishing false information to the government, misusing immigration documents, and committing perjury. Although the Employment and Training Administration (ETA) does not have authority to investigate or prosecute these violations, ETA will refer suspected violations to the appropriate authority.

IV. Required Administrative Information

A. Regulatory Flexibility Act

We have notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification under the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule would not have a significant economic impact on a substantial number of small entities. The rule would affect only those employers seeking immigrant workers for permanent employment in the United States. Since any employer can file an application for permanent labor certification, the Department has assessed that the appropriate universe to determine the impact of the proposed rule on a substantial number of small entities in the United States is the entire universe of small businesses in the United States. The Department estimates in the upcoming year 60,000 employers will file approximately 100,000 applications for permanent employment certification. Some large employers file several hundred applications in a year. Therefore, the number of small entities that file applications is significantly less than the 60,000 employers that will file applications in the coming year. According to the Small Business Administration's publication, *The Regulatory Flexibility Act; An Implementation Guide for Federal Agencies*, there were 22,900,000 small businesses in the United States in 2002. Thus the percentage of small businesses that file applications for permanent alien employment certification is less than 0.27 percent (60,000 ÷ 22,900,000 = 0.262%).

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The standards for determining whether a rule is a major rule as defined by section 804 of SBREFA are similar to those used to determine whether a rule is an ''economically significant rule under Executive Order 12866.'' Because we certified that this Notice of Proposed Rulemaking is not a major rule under Executive Order 12866, we certify it is also not a major rule under SBREFA. It will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Order 12866

We have determined this proposed rule is not an ''economically significant regulatory action'' within the meaning of Executive Order 12866. This rule will not have an annual effect on the economy of $100 million or more, nor will it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The direct incremental costs employers would incur because of this rule, above business practices required of employers that are applying for permanent alien workers by the current rule, will not amount to $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments, or communities. The Department believes any potential increase in applications filed as a result of either employers withdrawing and then filing a corrected application, employers allowing a certification to expire and then filing a new application, or recruitment costs associated with this proposed rule would be more than offset by an anticipated reduction in average processing time, because the Department will not expend resources to process as many fraudulent applications. Aliens will save money if they are not forced to pay employer expenses nor provide kickbacks to certain agents and employers. Any cost savings realized, however, will not be greater than $100 million. This is a significant rulemaking, although not an economically significant one, and has therefore been reviewed by the Office of Management and Budget.

E. Executive Order 13132

This proposed rule will not have a substantial direct effect on the states, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, we have determined this rule does not have sufficient federalism implications to warrant the preparation of a summary impact statement.

F. Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The collection of information under part 656 is currently approved under OMB control number 1205–0015. This proposed rule does not include a substantive or material modification of that collection of information, because it will not add to or change paperwork requirements for employers applying for permanent labor certification. The only consequence of the proposed amendment eliminating the current practice allowing substitution of alien beneficiaries on applications and approved permanent labor certifications would be to require those relatively few employers that could have availed themselves of the substitution practice to file new applications on behalf of alien beneficiaries. The Department does not anticipate any paperwork burden resulting from the creation of a 45-day validity period for approved certifications, the prohibition on sale, purchase, and barter of applications and labor certifications and on related payments, the ban on changes to applications filed under the new streamlined permanent labor certification procedures, nor the

additional enforcement mechanisms in the NPRM. The Department anticipates an insignificant increase in volume of permanent labor certification applications filed as a result of either employers withdrawing and then filing a corrected application or employers allowing a certification to expire and then filing a new application. In either situation, employers could avoid the need to file additional applications by proofreading and complying with regulatory requirements. The Department invites the public to comment on its Paperwork Reduction Act analysis. Comments should be sent directly to the Office of Information Management, Department of Labor, Room N–1301, 200 Constitution Avenue, NW., Washington, DC 20210; and to the Office of Information and Regulatory Affairs, Office of Management Budget, Washington, DC 20503.

H. Assessment of Federal Regulations and Policies on Families

The proposed regulation does not affect family well-being.

I. Catalogue of Federal Domestic Assistance Number

This program is listed in the Catalogue of Federal Domestic Assistance at Number 17.203, ''Certification for Immigrant Workers.''

List of Subjects in 20 CFR Part 656

Administrative practice and procedure, Aliens, Employment, Employment and training, Enforcement, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

Accordingly, we propose that part 656 of Title 20, Code of Federal Regulations, be amended as follows:

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The authority citation for part 656 continues to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A), 1189(p)(1); 29 U.S.C. 49 *et seq.*; section 122, Pub. L. 101–649, 109 Stat. 4978; and Title IV, Pub. L. 105–277, 112 Stat. 2681.

2. Add § 656.11 to read as follows:

§ 656.11 Substitutions and modifications to applications.

(a) Substitution or change to the identity of an alien beneficiary is prohibited on any application filed with the Department of Labor for permanent labor certification, whether filed under the current or any prior regulation, and on any resulting certification.

(b) After submission of a permanent labor certification application under this part, requests for modifications to the submitted application will not be accepted.

3. Add § 656.12 to read as follows:

§ 656.12 Improper commerce and payment

The following provisions apply to applications filed under both this regulation and the regulation in effect prior to March 28, 2005, and to any certifications resulting from those applications:

(a) Applications for permanent labor certification and approved labor certifications are not articles of commerce. They may not be sold, bartered, or purchased by individuals or entities. Any evidence that an application for permanent labor certification or an approved labor certification has been sold, bartered, or purchased shall be grounds for investigation under this part or any appropriate Government agency's procedures, denial under § 656.24, revocation under § 656.32, debarment under § 656.31(e), or any combination thereof.

(b) An employer shall not seek or receive payment of any kind for any activity related to obtaining a permanent labor certification. Payment or reimbursement of the employer's attorney's fees or other employer costs related to preparing and filing a permanent labor certification application and obtaining permanent labor certification is prohibited. For purposes of this subsection, payment includes, but is not limited to, monetary payments, wage and employment concessions, and goods and services. Evidence an employer has sought or received payment from any source in connection with an application for permanent labor certification or an approved labor certification shall be grounds for investigation under this part or any appropriate Government agency's procedures, denial under § 656.24, revocation under § 656.32, debarment under § 656.31(e), or any combination thereof.

4. Amend § 656.26 by revising paragraph (a) and adding a new paragraph (c), to read as follows:

§ 656.26 Board of Alien Labor Certification Appeals review of denials of labor certification.

(a) *Request for review.* (1) If a labor certification is denied, or revoked pursuant to § 656.32, or if a debarment is rendered under § 656.31(e), a request for review of the denial, revocation, or debarment may be made to the Board of Alien Labor Certification Appeals by the employer or debarred person or entity by making a request for such an administrative review in accordance with the procedures provided in this paragraph (a). The request for review must be made in accordance with paragraph (a)(2) of this section for denials and revocations or paragraph (a)(3) of this section for debarment.

(2) Request for review of denials and revocations:

(i) Must be sent within 30 days of the date of the determination to the Certifying Officer who denied the application or revoked the certification;

(ii) Must clearly identify the particular labor certification determination for which review is sought;

(iii) Must set forth the particular grounds for the request; and

(iv) Must include a copy of the Final Determination.

(3) Request for review of debarment:

(i) Must be sent to the Chief, Division of Foreign Labor Certification within 30 days of the date of the debarment determination;

(ii) Must clearly identify the particular debarment determination for which review is sought;

(iii) Must set forth the particular grounds for the request; and

(iv) Must include a copy of the *Notice of Debarment.*

(4) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal argument and only such evidence that was within the record upon which the denial of labor certification, revocation, or debarment determination was based.

* * * * *

(c) *Debarment Appeal File.* Upon the receipt of a request for review of debarment, the Chief, Division of Foreign Labor Certification, immediately must assemble an indexed Appeal File:

(1) The Appeal File must be in chronological order, must have the index on top followed by the most recent document, and must have consecutively numbered pages. The Appeal File must contain the request for review, the complete application file(s), and copies of all the written material, such as pertinent parts and pages of surveys and/or reports or documents received from any court, DHS, or the Department of State, upon which the debarment was based.

(2) The Chief, Division of Foreign Labor Certification, must send the

Appeal File to the Board of Alien Labor Certification Appeals, Office of Administrative Law Judges, 800 K Street, NW, Suite 400–N, Washington, DC 20001–8002.

(3) The Chief, Division of Foreign Labor Certification, must send a copy of the Appeal File to the debarred person or entity. The debarred person or entity may furnish or suggest directly to the Board of Alien Labor Certification Appeals the addition of any documentation that is not in the Appeal File, but that was submitted before the issuance of the *Notice of Debarment.* The debarred person or entity must submit such documentation in writing, and must send a copy to the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210.

5. Amend § 656.30 by: revising paragraphs (a), (b), and (c); and adding a new paragraph (e)(3), to read as follows:

§ 656.30 Validity of and invalidation of labor certifications

(a) *Priority Date.* (1) The filing date for a Schedule A occupation or sheepherders is the date the application was dated by the Immigration Officer.

(2) The filing date, established under § 656.17(c), of an approved labor certification will be used by the Department of Homeland Security and the Department of State as appropriate.

(b) *Expiration of labor certifications.* For certifications resulting from applications filed under this regulation and the regulation in effect prior to March 28, 2005:

(1) An approved permanent labor certification granted on or after [effective date of the final rule] expires if not filed in support of a petition with the Department of Homeland Security within 45 calendar days of the date the Department of Labor granted the certification.

(2) An approved permanent labor certification granted before [effective date of the final rule] expires if not filed in support of a petition with the Department of Homeland Security within 45 calendar days of [effective date of the final rule].

(c) *Scope of validity.* For certifications resulting from applications filed under this regulation and the regulation in effect prior to March 28, 2005:

(1) A permanent labor certification for a Schedule A occupation or sheepherders is valid only for the occupation set forth on the *Application for Alien Employment Certification* (ETA Form 750) or the *Application for Permanent Employment Certification* (ETA Form 9089) and only for the alien named on the original application, unless a substitution was approved prior to [effective date of the final rule]. The certification is valid throughout the United States unless the certification contains a geographic limitation.

(2) A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to [effective date of the final rule]), and the area of intended employment stated on the *Application for Alien Employment Certification* (ETA Form 750) or the *Application for Permanent Employment Certification* (ETA Form 9089).

* * * * *

(e) * * *

(3) A duplicate labor certification shall be issued by the Certifying Officer with the same filing and expiration dates, as described in paragraphs (a) and (b) of this section, as the original approved labor certification.

6. Revise § 656.31 to read as follows:

§ 656.31 Labor certification applications involving fraud, willful misrepresentation, or violations of this part.

The following provisions apply to applications filed under both this regulation and the regulation in effect prior to March 28, 2005, and to any certifications resulting from those applications:

(a) Possible fraud or willful misrepresentation. If the Department discovers an employer, attorney, or agent is involved in possible fraud or willful misrepresentation in connection with the permanent labor certification program, the Department will refer the matter to DHS for investigation, and send a copy of the referral to the Department of Labor's Office of Inspector General. DOL may suspend processing of any permanent labor certification application involving such employer, attorney, or agent until completion of any investigation and/or judicial proceedings. If 180 days pass without the filing of a criminal indictment or information, the initiation of judicial proceedings, or receipt of a notification from DHS, DOL OIG, or other appropriate authority that an investigation is being conducted, the Certifying Officer may continue to process some or all of the applications, or may continue the suspension in processing until completion of any investigation and/or judicial proceeding. A Certifying Officer may deny any application for permanent labor certification if the officer finds the application contains false statements, is fraudulent, or was otherwise submitted in violation of the DOL permanent labor certification regulations.

(b) Criminal indictment or information. If DOL learns an employer, attorney, or agent is named in or under investigation connected to a criminal indictment or information in connection with the permanent labor certification program, the processing of any applications related to that employer, attorney, or agent may be halted until the judicial process is completed. Unless the employer is under investigation, the Department must provide written notification to the employer of the suspension in processing.

(c) No finding of fraud or willful misrepresentation. If an employer, attorney, or agent is acquitted of fraud or willful misrepresentation charges, or if such criminal charges are withdrawn or otherwise fail to result in a finding of fraud or willful misrepresentation, the Certifying Officer shall decide each pending permanent labor certification application related to that employer, attorney, or agent on the merits of the application.

(d) Finding of fraud or willful misrepresentation. If an employer, attorney, or agent is found to have committed fraud or willful misrepresentation involving the permanent labor certification program, whether by a court, the Department of State or DHS as referenced in § 656.30(d), or through other proceedings:

(1) Any suspension of processing of pending applications related to that employer, attorney, or agent will terminate.

(2) The certifying officer will decide each such application on the merits, and may deny any such application as provided in § 656.24.

(3) In the case of a pending application involving an attorney or agent who is the subject of a finding of fraud or willful misrepresentation, DOL may notify the employer associated with that application of the finding and require the employer to notify DOL in writing, within 30 days of the notification, of whether the employer will withdraw the application, designate a new attorney or agent, or continue the application without representation. Failure of the employer to respond within 30 days of the notification will result in a denial. If the employer elects to continue representation by the attorney or agent, DOL will suspend processing of affected applications while debarment proceedings are conducted under subsection (e).

(e) *Debarment.* (1) The Chief, Division of Foreign Labor Certification, may issue to an employer, attorney, agent, or any combination thereof, a *Notice of Debarment* from the permanent labor certification program for a reasonable period of no more than three years, based upon any action that was improper or prohibited at the time the action occurred, upon determining the employer, attorney, and/or agent has participated in or facilitated:

(i) The sale, barter, or purchase of permanent labor applications or certifications, or any other action prohibited under § 656.12;

(ii) The provision of false or inaccurate information in applying for permanent labor certification;

(iii) Failure to comply with the terms of the ETA Form 9089 or ETA Form 750;

(iv) Failure to comply in the audit process pursuant to § 656.20;

(v) Failure to comply in the supervised recruitment process pursuant to § 656.21; or

(vi) Conduct resulting in a determination by a court, the DHS or the Department of State of fraud or willful misrepresentation involving a permanent labor certification application, as referenced in § 656.31(d).

(2) The notice shall be in writing, shall state the reason for the debarment finding, the start and end dates of the debarment, and shall identify appeal opportunities under § 656.26. Debarment shall take effect on the start date indicated unless a request for review is filed within the time permitted by § 656.26. DOL will coordinate with DHS and the Department of State regarding any *Notice of Debarment.*

(f) *False Statements.* To knowingly and willingly furnish any false information in the preparation of the *Application for Permanent Employment Certification* (ETA Form 9089) or the *Application for Alien Employment Certification* (ETA Form 750) and any supporting documentation, or to aid, abet, or counsel another to do so is a Federal offense, punishable by fine or imprisonment up to five years, or both under 18 U.S.C. 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S.C. 1546 and 1621.

Signed in Washington, DC, this 6th day of February, 2006.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration.

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