



U.S. Citizenship
and Immigration
Services

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Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
NATIONAL BENEFIT CENTER
DIRECTOR, OFFICER DEVELOPMENT TRAINING FACILITY, GLYNCO
DIRECTOR, OFFICER DEVELOPMENT TRAINING FACILITY, ARTESIA

From: William R. Yates /S/
Associate Director
Operations

Date: 09/23/05

Re: Interim Guidance Regarding the Impact of the Department of Labor's (DOL) PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6th Year.

Revisions to *Adjudicator's Field Manual (AFM)* Chapters 22.2(b)(2), 22.2(b)(3)(B), 22.2(b)(3)(F), (22.2(b)(5) and 33.3(g)(8) (AFM Update AD 05-15)

This memorandum provides interim policy guidance regarding:

1. Labor certification validity;
2. Determining priority dates for employment-based Form I-140 petitions;
3. Duplicate labor certification requests; and
4. Adjudicating extensions of H-1B status beyond the 6th year.

This interim guidance is being issued in light of the Department of Labor's (DOL) recently promulgated regulations governing the permanent labor certification process at 20 CFR Part 656 (PERM Rule), which became effective on March 28, 2005.

Questions regarding this memorandum may be directed through appropriate channels to Service Center Operations.

Please ensure that appropriate personnel within your jurisdiction are aware of this update.

Accordingly, the *AFM* is revised as follows:

☞ 1. Chapter 22.2(b)(2) is revised to read:

(2) Job Offers. In most cases, the beneficiary of an I-140 petition must be the recipient of a job offer from an employer in the U.S. As evidence of the job offer, most petitioners who file EB-2 and EB-3 immigrant I-140 petitions must first obtain an individual labor certification from the Department of Labor (DOL). In other cases where the alien is eligible for Schedule A blanket labor certification, labor certification applications are submitted to USCIS with the I-140 petition. In relatively few cases (those involving aliens seeking classification under section 203(b)(1)(A), as well as those seeking classification under section 203(b)(2) who qualify for a “national interest waiver”, the job offer is not required (see subchapter 22.2(d) of this field manual).

☞ 2. Chapter 22.2(b)(3)(B) is revised to read:

(B) Individual Labor Certifications. In general, U.S. employers who wish to file EB-2 and EB-3 employment-based I-140 petitions must file an individual labor certification application with DOL in order to test the labor market in the geographic area where the permanent job offer is located to establish that there are no able, qualified, and available U.S. workers who are willing to accept the permanent job offer, and that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. (See 212(a)(5)(A) and 203(b)(3)(C) of the Act.) DOL has established procedures for obtaining labor certifications under 20 CFR part 656. 20 CFR part 656 was amended by the DOL PERM final rule published December 27, 2004, which took effect on March 28, 2005 (69 FR 77326). Labor certification applications are approved and issued by DOL only after the U.S. employer has complied with DOL advertising and recruiting requirements and has rejected any U.S. job applicants for the position offered for valid-job related reasons. Approved labor certifications issued by DOL are certified with an official DOL certification stamp and may have a Letter of Labor Certification Determination attached to the front page of the document.

Labor Certifications Filed with DOL Prior to March 28, 2005. U.S. employers filed the Application for Alien Employment Certification, Form ETA-750, in order to obtain an approved labor certification prior to March 28, 2005. The Form ETA-750 has two parts. Part A focuses on the details of the position being certified and describes the name and address of the U.S. employer, where the job opportunity is located, the proffered wage for the position and the minimum education, training, or experience requirements to successfully perform the duties of the position. Part B focuses on the alien beneficiary and contains his or her name, date of birth, address, and describes his or her education, training and work history. To be valid, the Form ETA-750 must be

signed by the U.S. employer in Part A and the alien beneficiary in Part B, contain the DOL certification stamp, and be signed and dated by the DOL certifying officer in the endorsements section on the front page on Part A of the form.

Implementation of PERM Labor Certification System: DOL's new permanent labor certification system (PERM) was implemented on March 28, 2005. The labor certification application Form ETA-750 was replaced by the Form ETA-9089 on that date. PERM relies on pre-recruitment procedures instead of requiring recruitment efforts by U.S. employers under direct DOL supervision, and is designed to expedite the processing of the Form ETA-9089 labor certification applications. Additionally, labor certifications can either be electronically filed or filed by mail with DOL in the PERM system. These applications will be processed at DOL's National Processing Centers. Generally, labor certifications that are electronically filed in the PERM system will be processed in 30 – 45 days, while labor certifications that are submitted through the mail may take substantially longer. At the time of the implementation of the PERM system, DOL had approximately 300,000 pending labor certification applications that were filed under the old paper-based permanent labor certification process, some of which were filed as long ago as April of 2001. DOL devised the following backlog reduction strategy to address the backlog of Form ETA-750 labor certifications still pending as of March 28, 2005:

- DOL has created Backlog Reduction Centers that are tasked with collecting and processing all of the Form ETA-750 labor certification applications that are still pending at the SWAs and DOL Regional Offices. The labor certification applications are being shipped to the backlog reduction centers. Backlog reduction center personnel will key in information from the Form ETA-750 labor certifications into a national tracking system for labor certifications and process them according to DOL guidelines that were set forth in 20 CFR 626 prior to March 28, 2005. To every extent possible, the pending Form ETA-750 labor certification applications will be processed in chronological order.
- U.S. employers who have not already had a job order placed by the SWA for the original application may withdraw the pending Form ETA-750 labor certification application and re-file under the new PERM system. The new labor certification would be assigned a new priority date unless all of the elements relating to the job opportunity and the alien beneficiary on the newly filed Form ETA-9089 labor certification application were identical to the elements specified on the Form ETA-750 (with the exception of the prevailing wage determination.)

Labor Certifications filed with DOL on or after March 28, 2005: Pursuant to 20 CFR 656.17, the Application for Permanent Employment Certification (Form ETA-9089) replaced the Application for Alien Employment Certification (Form ETA-750) on March 28, 2005. Form ETA-9089 contains all of the pertinent information detailing the

specifics of the job offer and the alien beneficiary that were contained in the ETA-750 Part A and Part B. The ETA-9089 may be filed with DOL through the mail or it may be filed electronically. To be valid, the Form ETA-9089 must be signed by the U.S. employer in Section N, the alien beneficiary in Section L, and the form Preparer, if any, in Section M; contain the DOL certification stamp; and be signed and dated by the DOL certifying officer in Section "O." of the form.

A common misconception that U.S. employers have about the labor certification process is that by issuing a labor certification DOL is certifying that the alien beneficiary named on the labor certification qualifies for the position. DOL does not deny labor certifications based on whether the beneficiary is qualified for the requested job. DOL requires a statement of qualifications of the alien and supporting documentation to:

- Help ensure that the procedure for seeking labor certification is actually based on a need for the services of a specific individual, thereby eliminating the possibility that petitioners or agents will apply for "blanket type" certifications in advance for unknown individuals, just in case an actual need for someone arises, and
- Help guarantee that the proposed job description on the offer of employment submitted by the petitioner is not tailored to the specific skills, education, or experience of the alien beneficiary.

You must determine whether the beneficiary has met the minimum education, training, and experience requirements of the labor certification at the time the application for labor certification was filed with DOL. You cannot approve a petition for a preference classification if the beneficiary was not fully qualified for the preference by the priority date of the labor certification (See *Matter of Katigbak*, 14 I. & N. Dec. 45 (R.C. 1971) and *Matter of Wing's Tea House*, 16 I. & N. Dec. 158 (Acting R.C. 1977)).

3. Chapter 22.2(b)(3)(F) is revised to read:

(F) Issuance of a Duplicate Labor Certification. If the original labor certification has been lost, DOL will not issue a duplicate to the petitioner but will issue a duplicate directly to USCIS for Form ETA-750 labor certification applications filed prior to March 28, 2005 and to a Consular officer or an Immigration officer for Form ETA-9089 labor certifications filed on or after March 28, 2005.

(i) Duplicate Labor Certification Requests for Labor Certifications Filed Prior to March 28, 2005: DOL will only provide duplicate labor certifications at the written request by USCIS for labor certifications filed prior to March 28, 2005. You should only make the request to DOL if it is in conjunction with an I-140 petition being filed with USCIS where the original labor certification has been irretrievably lost or destroyed. The

duplicate labor certification must be retained as part of the record of the Form I-140 petition after it is received from DOL, and should not be forwarded to the petitioner or the petitioner's representative. (For example, you would **not** make such a request to DOL if the petitioner's attorney requested a duplicate labor certification in general correspondence to USCIS, merely because he or she wants a copy for his or her records.) Also, you should be alert to the possibility that the original was not, in fact, lost or destroyed, but rather used on behalf of another alien. If another alien has been substituted on a labor certification that the petitioner claims has been lost or denied, a request for a duplicate labor certification should not be granted.

A request for duplicate labor certification should be made on USCIS letterhead and should include the employer's name and address, the date the original labor certification was issued (DOL files certifications by date and cannot locate the record without it), the alien's name and occupation, the attorney's name and telephone number, if applicable, and DOL's ETA Case Number, if known. The duplicate labor certification request should be sent to the DOL Backlog Reduction Center with jurisdiction over the location where the beneficiary is to be employed, (either the Philadelphia Processing Center or the Dallas Processing Center.) A list of each processing center's area of jurisdiction, mailing address, and phone/fax numbers can be accessed at <http://atlas.doleta.gov/foreign/contacts.asp>.

(ii) Duplicate Labor Certification Requests for Labor Certifications Filed on or after March 28, 2005: DOL will provide duplicate labor certifications at the request of a Consular or Immigration officer, an alien, employer, or an alien's or employer's attorney or agent for labor certifications filed on or after March 28, 2005. The written request for a duplicate labor certification must be made to the DOL National Processing Center where the labor certification was issued, (either the Atlanta Processing Center or the Chicago Processing Center), and must include documentary evidence that a visa application or visa petition has been filed, and must include the U.S. Consular Office or USCIS case tracking number that is associated with the visa application or visa petition. DOL will only send the duplicate labor certification to a Consular or Immigration officer, regardless of who makes the request. (See 20 CFR 656.30(e)) A list of each national processing center's area of jurisdiction, mailing address, and phone/fax numbers can be accessed at <http://atlas.doleta.gov/foreign/contacts.asp>.

☞ 4. Chapter 22.2(b)(5)(A) is revised to read:

(5) Priority Dates. The priority date is used in conjunction with the Visa Bulletin issued by the Department of State (DOS) to determine when the beneficiary can apply for adjustment of status or for an immigrant visa abroad. Determining the correct priority date for an immigrant visa petition is very important. Of equal importance is making sure

that the Form I-140 approval notice carries the correct date. Another USCIS office or DOS may use the information on the approval notice to make a determination on the beneficiary's eligibility to file an application for adjustment or for a visa. Issuance of an incorrect approval notice can cause multiple problems for USCIS, other DHS entities, consular posts, petitioners, and alien beneficiaries.

(A) Determining the Priority Date. In general, if a petition is supported by an individual labor certification issued by DOL, the priority date is the earliest date upon which the labor certification application was filed with DOL. In those cases where the alien's priority date is established by the filing of the labor certification, once the alien's Form I-140 petition has been approved, the alien beneficiary retains his or her priority date as established by the filing of the labor certification for any future Form I-140 petitions, unless the previously approved Form I-140 petition has been revoked because of fraud or willful misrepresentation. This includes cases where a change of employer has occurred; however, the new employer must obtain a new labor certification if the classification requested requires a labor certification (see the section on successorship of interest).

(i) Schedule A Labor Certifications. The priority date for a petition supported by a Schedule A designation, or for a petition approved for a classification which does not require a labor certification, is the date the petition is filed with USCIS.

(ii) Individual Labor Certifications Filed with DOL Prior to March 28, 2005: The priority date for a petition supported by a Form ETA-750 labor certification filed with DOL prior to March 28, 2005, is the earliest date the application for labor certification, Form ETA-750, was accepted by any office in the employment service system of DOL.

(iii) Individual Labor Certifications Filed with DOL on or after March 28, 2005: The priority date for a petition supported by a Form ETA-9089 labor certification filed with DOL on or after March 28, 2005, is the earliest date the application for labor certification is filed with the ETA Processing Center.

(iv) Re-filed Individual Labor Certifications During PERM Transition: The priority date for a petition supported by a Form ETA-9089 labor certification that was filed with DOL on or after March 28, 2005 as a re-filed labor certification application after a withdrawal of a previously filed Form ETA-750 will be the filing date that DOL specifies in Section "O." of the Form ETA-9089. Please Note: As part of the implementation of the PERM labor certification system DOL is allowing U.S. employers who have not already had a job order placed by the SWA for labor certification applications that were filed

prior March 28, 2005, to withdraw the pending Form ETA-750 labor certification application and re-file under the new PERM system. The new labor certification will be assigned a new priority date unless all of the elements relating to the job opportunity and the alien beneficiary on the newly filed Form 9089 labor certification application are identical to the elements specified on the Form ETA-750 (with the exception of the prevailing wage determination.) DOL will examine the previously filed Form ETA-750 and compare it with the newly filed Form ETA-9089 to make that determination and will annotate the correct priority date in Section "O." of the Form ETA-9089.

5. Chapter 33.3(g)(8) is revised to read:

(8) Extension of H-1B Status Based on a Pending Labor Certification Application or Employment-Based (EB) Immigrant Petition. As discussed in section 31.2(d) of the *AFM*, assuming the alien is otherwise qualified for an extension of H-1B status, USCIS will grant an extension beyond the 6th year if the filing date of a pending or approved labor certification application or a pending or approved EB immigrant petition is 365 days or more prior to the requested employment start date on the H-1B petition. Such extension should be granted regardless of whether the H-1B extension application was filed prior to the passage of such period. However, if the alien would no longer be in H-1B status at the time that 365 days from the filing of the labor certification application or immigrant petition has run, then the extension of stay request cannot be granted. The Secretary of Homeland Security is required to grant the extension of stay of such H-1B nonimmigrants in one-year increments until a final decision is made to:

- Deny the application for labor certification, or, if the labor certification is approved, to deny the EB immigrant petition that was filed pursuant to the approved labor certification;
- Deny the EB immigrant petition; or
- Grant or deny the alien's application for an immigrant visa or for adjustment of status.

A decision to certify or deny an application for labor certification is made by one of Department of Labor's certifying officers. If the application is denied, the employer is advised that there is a period of time in which the decision may be appealed to the Board of Alien Labor Certification Appeals (BALCA). For Form ETA-750 labor certification applications filed prior to March 28, 2005, the employer must file an appeal within 90 days. For Form ETA-9089 labor certification applications, the employer must file an appeal within 30 days. If the employer does not file an appeal within that period, the denial becomes the final decision of the Secretary of Labor. The USCIS will not

consider a DOL decision to be final until either the time for appeal has run and no appeal has been filed or, if an appeal is taken, the date a decision is issued by BALCA. Therefore, the labor certification will still be considered “pending” while the denial of such certification may be appealed, or while the appeal is actually pending, for the purposes of determining if an H-1B nonimmigrant is eligible for extension of stay.

Note: As stated elsewhere in the AFM, while extension for a period beyond the alien’s 6th year may only be granted in one-year increments, such extensions may in certain cases be combined with earlier extension requests provided the above criteria and all eligibility criteria are met. The total maximum grant for any H-1B extension request is 3 years. Thus, for example, a single H-1B petition and request for extension may be filed combining a request to extend the alien’s H-1B status for years 5 and 6, and also for year 7. See separate AC21 memos for additional guidance.

Documentation for Form ETA-750 Labor Certifications Filed Pre-PERM and Still Pending:

The USCIS will accept the following documents as evidence that an application for labor certification filed on behalf of the H-1B beneficiary has been pending 365 days or more:

- A document from a State Workforce Agency (SWA) reflecting that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more; or
- A document from one of Department of Labor’s Employment and Training Administration (ETA) regional offices reflecting that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more, or
- A database screen-print from one of Department of Labor’s Employment and Training Administration (ETA) backlog reduction centers reflecting that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more.

The above documents must include the name of the petitioning employer, the date that the Form ETA-750 was filed, the name of the alien beneficiary, and the case number assigned to the pending Form ETA-750. If the H-1B nonimmigrant is requesting an extension based upon a labor certification that has been pending 365 days or more but was certified in the name of another alien, the H-1B nonimmigrant may be eligible for the extension provided the H-1B petitioner submits evidence that the beneficiary is using the labor certification to obtain status as an EB immigrant. This means that the alien will be the beneficiary of a pending or approved Form I-140 based on that labor certification.

If such documentation is unavailable due to DOL's transition to the PERM labor certification system, and until DOL notifies USCIS that it has resolved the database screen-print backlog, USCIS will accept documentary evidence of the mailing of the Form ETA-750 labor certification application to DOL, such as copies of USPS certified mail receipts or proof of delivery documents issued by private package handlers may be submitted in support of the H-1B extension requests, accompanied by a signed attestation by an authorized official of the petitioning employer, which must include the name of the petitioning employer, the date that the Form ETA-750 was filed, the name of the alien beneficiary, and the case number assigned to the pending Form ETA-750.

Misrepresentation Regarding the Filing and Pendency of Labor Certifications: In the event the alien beneficiary, the petitioning H-1B employer or its authorized representative has made a false claim that a labor certification was filed with DOL and is pending at the Backlog Elimination Center in connection with an application to extend the stay of an alien beneficiary beyond the 6th year in H-1B status, USCIS may in its discretion deny a pending Form I-129 H-1B petition and extension request or revoke the approved Form I-129 H-1B petition.

Effect of Withdrawn Form ETA-750 Labor Certifications and Re-Filing Under PERM

During Transition: If a Form ETA-750 labor certification is withdrawn by DOL as part of the filing of a new Form ETA-9089, the filing date of the withdrawn Form ETA-750 labor certification may be deemed to be the filing date in order to determine if the labor certification was filed 365 days or more prior to the requested employment start date on the H-1B petition only in the following circumstances:

1. If the elements relating to the job opportunity and the alien beneficiary on the newly filed Form ETA-9089 labor certification application are identical to the data elements specified on the previously filed Form ETA-750 (with the exception of the prevailing wage determination), then DOL will allow the employer to retain the original priority date which will be reflected in Section "O." of the Form ETA-9089.
2. If DOL does not allow the employer to retain the priority date on the Form ETA-750 or if the Form ETA-9089 is still pending at the time of filing the H-1B extension petition, if the elements relating to the job opportunity and the alien beneficiary on the new labor certification application are not materially different from the data elements specified on the previously filed Form ETA-750 (with the exception of the prevailing wage determination).

As an example, with all other things being equal, if the Form ETA-750 indicated that the job opportunity was located in La Jolla, CA, and the Form ETA-9089 indicated that the

job opportunity was located in Del Mar, CA, the elements of the job opportunity on the Form ETA-9089 would still be materially the same as the job opportunity on the Form ETA-750, as the location of the position would still be within the same geographic area. In this instance, the filing date of the Form ETA-750 could be used to determine if the labor certification was filed 365 days or more prior to the requested employment start date as reflected on the Form I-129 petition.

Conversely, if the Form ETA-750 indicated that the minimum education requirement for entry into the position was a Bachelor's degree in Computer Science, but the Form ETA-9089 indicated that the minimum education requirement for the position was a Master's degree in Computer Science, then the elements of the job opportunity would not be materially the same. In this instance, the filing date of the Form ETA-750 could not be used to determine if the labor certification was filed 365 days or more prior to the requested employment start date as reflected on the Form I-129 petition.

Document Required to Establish Eligibility to Retain Original Filing Date for H-1B Extensions After Re-Filing Under PERM: In order to retain the priority date under these circumstances for H-1B extension purposes only, the following documentation must be provided:

1. In the instances where DOL has allowed the employer to retain the priority date and the retained priority date is reflected in Section "O." of the certified Form ETA-9089, a complete copy of DOL certified Form ETA-9089, or
2. In the instances where the Form ETA-9089 is still pending or has been certified by DOL, but the Form ETA-9089 does not reflect the original filing date in Section "O." of the form, the documentation to show that the elements of the job opportunity and the alien beneficiary are materially the same on both the Form ETA-750 and the Form ETA-9089 must include:
 - A signed statement from an authorized official of the petitioning employer that outlines the elements of the job opportunity and data relating to the alien beneficiary that differ between the Form ETA-750 and the Form ETA-9089, the date that the Form ETA-750 was filed, the name of the alien beneficiary, and the case number assigned to the Form ETA-750,
 - A complete copy of the Form ETA-750, Part A and B, and
 - A complete copy of the Form ETA-9089, with evidence that shows the date that the document was filed with DOL.

6. The AFM Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read:

AD 05-15	Chapters 22.2(b)(2),	This memorandum revises Chapters 22.2(b)(2),
[INSERT	22.2(b)(3)(B), 22.2(b)(3)(F),	22.2(b)(3)(B), 22.2(b)(3)(F), 22.2(b)(5) and
SIGNATURE	22.2(b)(5) and 33.3(g)(8)	33.3(g)(8) of the <i>Adjudicator's Field Manual</i>
DATE OF THIS		(AFM) to provide interim policy and procedural
MEMO]		clarification for Determining Labor Certification
		Validity; Priority Dates for Employment-Based
		Form I-140 Petitions; Duplicate Labor
		Certification Requests; and Requests for
		Extension of H-1B Status Under AC21 Beyond
		the 6 th Year as they are Impacted by the
		Department of Labor (DOL) PERM Regulations
		at 20 CFR 656.

cc: USCIS Headquarters Directors
Bureau of Immigration and Customs Enforcement
U.S. Customs and Border Protection

Found at www.immigration.org