

Employment and Training Administration, Labor

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evidence of fraud or willful misrepresentation in a Schedule A application filed under § 656.22 of this part or a shepherd application filed under § 656.21a(b) of this part.

(B) Documentary evidence submitted pursuant to paragraph (h)(2)(i) of this section shall be limited to information relating to possible fraud or willful misrepresentation. The INS may consider this information pursuant to § 656.31 of this part.

(Approved by the Office of Management and Budget under control number 1205-0015)

[45 FR 83933, Dec. 19, 1980, as amended at 49 FR 18295, Apr. 30, 1984; 56 FR 54927, Oct. 23, 1991]

§ 656.21 Basic labor certification process.

(a) Except as otherwise provided by §§ 656.21a and 656.22, an employer who desires to apply for a labor certification on behalf of an alien shall file, signed by hand and in duplicate, a Department of Labor *Application for Alien Employment Certification* form and any attachments required by this part with the local Employment Service office serving the area where the alien proposes to be employed. The employer shall set forth on the *Application for Alien Employment Certification* form, as appropriate, or in attachments:

(1) A statement of the qualifications of the alien, signed by the alien;

(2) A description of the job offer for the alien employment, including the items required by paragraph (b) of this section; and

(3) If the application involves a job offer as a live-in household domestic service worker:

(i) A statement describing the household living accommodations;

(ii) Two copies of the employment contract, each signed and dated by both the employer and the alien (not by their agents). The contract shall clearly state:

(A) The wages to be paid on an hourly and weekly basis;

(B) Total hours of employment per week, and exact hours of daily employment;

(C) That the alien is free to leave the employer's premises during all non-work hours except that the alien may work overtime if paid for the overtime

at no less than the legally required hourly rate;

(D) That the alien will reside on the employer's premises;

(E) Complete details of the duties to be performed by the alien;

(F) The total amount of any money to be advanced by the employer with details of specific items, and the terms of repayment by the alien of any such advance by the employer;

(G) That in no event shall the alien be required to give more than two weeks' notice of intent to leave the employment contracted for and that the employer must give the alien at least two weeks' notice before terminating employment;

(H) That a duplicate contract has been furnished to the alien;

(I) That a private room and board will be provided at no cost to the worker; and

(J) Any other agreement or conditions not specified on the *Application for Alien Employment Certification* form; and

(iii) (A) Documentation of the alien's paid experience in the form of statements from past or present employers setting forth the dates (month and year) employment started and ended, hours of work per day, number of days worked per week, place where the alien worked, detailed statement of duties performed on the job, equipment and appliances used, and the amount of wages paid per week or month. The total paid experience must be equal to one full year's employment on a full-time basis. For example, two year's experience working half-days is the equivalent of one year's full time experience. Time spent in a household domestic service training course cannot be included in the required one year of paid experience.

(B) Each statement must contain the name and address of the person who signed it and show the date on which the statement was signed. A statement not in the English language shall be accompanied by a written translation into the English language certified by the translator as to the accuracy of the translation, and as to the translator's competency to translate.

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(b) Except for labor certification applications involving occupations designated for special handling (see § 656.21a) and *Schedule A* occupations (see §§ 656.10 and 656.22), the employer shall submit, as a part of every labor certification application, on the *Application for Alien Employment Certification* form or in attachments, as appropriate, the following clear documentation:

(1) If the employer has attempted to recruit U.S. workers prior to filing the application for certification, the employer shall document the employer's reasonable good faith efforts to recruit U.S. workers without success through the Employment Service System and/or through other labor referral and recruitment sources normal to the occupation:

(i) this documentation shall include documentation of the employer's recruitment efforts for the job opportunity which shall:

(A) List the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade, or technical schools; labor unions; and/or development or promotion from within the employer's organization;

(B) Identify each recruitment source by name;

(C) Give the number of U.S. workers responding to the employer's recruitment;

(D) Give the number of interviews conducted with U.S. workers;

(E) Specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and

(F) Specify the wages and working conditions offered to the U.S. workers; and

(ii) If the employer advertised the job opportunity prior to filing the application for certification, the employer shall include also a copy of at least one such advertisement.

(2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:

(i) The job opportunity's requirements, unless adequately documented as arising from business necessity:

(A) Shall be those normally required for the job in the United States;

(B) Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs;

(C) Shall not include requirements for a language other than English.

(ii) If the job opportunity involves a combination of duties, for example engineer-pilot, the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of intended employment, and or the combination job opportunity is based on a business necessity.

(iii) If the job opportunity involves a requirement that the worker live on the employer's premises, the employer shall document adequately that the requirement is a business necessity.

(iv) If the job opportunity has been or is being described with an employer preference, the employer preference shall be deemed to be a job requirement for purposes of this paragraph (b)(2).

(3) The employer shall document that its other efforts to locate and employ U.S. workers for the job opportunity, such as recruitment efforts by means of private employment agencies, labor unions, advertisements placed with radio or TV stations, recruitment at trade schools, colleges, and universities or attempts to fill the job opportunity by development or promotion from among its present employees, have been and continue to be unsuccessful. Such efforts may be required after the filing of an application if appropriate to the occupation.

(4) If unions are customarily used as a recruitment source in the area or industry, the employer shall document that they were unable to refer U.S. workers.

(5) The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience

than that required by the employer's job offer.

(6) If U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons.

(c) The local office shall determine if the application is for a labor certification involving *Schedule A*. If the application is for a *Schedule A* labor certification, the local office shall advise the employer that the forms must be filed with an INS or Consular Office pursuant to § 656.22, and shall explain that the Administrator has determined that U.S. workers in the occupation are unavailable throughout the United States (unless a geographic limitation is applicable) and that the employment of the alien in the occupation will not adversely affect U.S. workers similarly employed.

(d) The local office shall date stamp the application (see § 656.30 for the significance of this date), and shall make sure that the *Application for Alien Employment Certification* form is complete. If it is not complete the local office shall return it to the employer and shall advise the employer to refile it when it is completed.

(e) The local office shall calculate, to the extent of its expertise using wage information available to it, the prevailing wage for the job opportunity pursuant to § 656.40 and shall put its finding into writing. If the local office finds that the rate of wages offered is below the prevailing wage, it shall advise the employer in writing to increase the amount offered. If the employer refuses to do so, the local office shall advise the employer that the refusal is a ground for denial of the application by the Certifying Officer; and that if the denial becomes final, the application will have to be refiled at the local office as a new application.

(f) The local office, using the information on job offer portion of the *Application for Alien Employment Certification* form, shall prepare and process an Employment Service job order:

(1) If the job offer is acceptable, the local office, in cooperation with the employer, then shall attempt to recruit United States workers for the job opportunity for a period of thirty days, by placing the job order into the reg-

ular Employment Service recruitment system.

(2) If the employer's job offer is discriminatory or otherwise unacceptable as a job order under the Employment Service (ES) Regulations (parts 651-658 of this chapter), the local office, as appropriate, either shall contact the employer to try to remedy the defect or shall return the *Application for Alien Employment Certification* form to the employer with instructions on how to remedy the defect. If the employer refuses to remedy the defect, the local office shall advise the employer that it is unable to recruit U.S. workers for the job opportunity and that the application will be transmitted to the Certifying Officer for determination.

(g) In conjunction with the recruitment efforts under paragraph (f) of this section, the employer shall place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified, and available U.S. workers. The employer may request the local office's assistance in drafting the text. The advertisement shall:

(1) Direct applicants to report or send resumes, as appropriate for the occupation to the local office for referral to the employer;

(2) Include a local office identification number and the complete address or telephone number of the local office, but shall not identify the employer;

(3) Describe the job opportunity with particularity;

(4) State the rate of pay, which shall not be below the prevailing wage for the occupation, as calculated pursuant to § 656.40;

(5) Offer prevailing working conditions;

(6) State the employer's minimum job requirements;

(7) Offer training if the job opportunity is the type for which employers normally provide training;

(8) Offer wages, terms, and conditions of employment which are no less favorable than those offered to the alien; and

(9) If published in a newspaper of general circulation, be published for at

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least three consecutive days; or, if published in a professional, trade, or ethnic publication, be published in the next published edition.

(h) The employer shall supply the local office with required documentation or requested information in a timely manner. If documentation or requested information is not received within 45 calendar days of the date of the request the local office shall return the *Application for Alien Employment Certification* form, and any supporting documents submitted by the employer and/or the alien, to the employer to be filed as a new application.

(i) The Certifying Officer may reduce the employer's recruitment efforts required by §§ 656.21(f) and/or 656.21(g) of this part if the employer satisfactorily documents that the employer has adequately tested the labor market with no success at least at the prevailing wage and working conditions; but no such reduction may be granted for job offers involving occupations listed on *Schedule B*.

(1) To request a reduction of recruitment efforts pursuant to this paragraph (i), the employer shall file a written request along with the *Application for Alien Employment Certification* form at the appropriate local Job Service office. The request shall contain:

(i) Documentary evidence (which shall include, but is not limited to, a pre-application notice posted consistent with § 656.20(g) of this part) that within the immediately preceding six months the employer has made good faith efforts to recruit U.S. workers for the job opportunity, at least at the prevailing wage and working conditions, through sources normal to the occupation; and

(ii) Any other information which the employer believes will support the contention that further recruitment will be unsuccessful.

(2) Upon receipt of a written request for a reduction in recruitment efforts pursuant to this paragraph (i), the local office shall date stamp the request and the application form and shall review and process the application pursuant to this § 656.21, but without regard to §§ 656.21(f), 656.21(g), and 656.21(j)(1) of this part, advertisement, and job order; and the wait for results).

(3) After reviewing and processing the application pursuant to paragraph (i)(2) of this section, the local office (and the State Employment Service office) shall process the application pursuant to paragraphs (j)(2) and (k) of this section.

(4) The Certifying Officer shall review the documentation submitted by the employer and the comments of the local office. The Certifying Officer shall notify the employer and the local (or State) Employment Service office of the Certifying Officer's decision on the request to reduce partially or completely the recruitment efforts required of the employer.

(5) Unless the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer shall return the application to the local (or State) office so that the employer might recruit workers to the extent required in the Certifying Officer's decision, and in the manner required by §§ 656.20(g), 656.21(f), 656.21(g), and 656.21 (j) of this part (*i.e.*, by post-application internal notice, employment service job order, and advertising; and a wait for results). If the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer then shall determine, pursuant to § 656.24 whether to grant or to deny the application.

(6) Notwithstanding the provisions of paragraph (i)(1)(i) of this section, an employer may file a request with the SESA to have any application filed on or before August 3, 2001, processed as a reduction in recruitment request under this paragraph (i), provided that recruitment efforts have not been commenced pursuant to paragraph 656.21(f)(1) of this section.

(j) (1) The employer shall provide to the local office a written report of the results of all the employer's post-application recruitment efforts during the 30-day recruitment period; except that for job opportunities advertised in professional and trade, or ethnic publications, the written report shall be provided *no less than* 30 calendar days from the date of the publication of the employer's advertisement. The report of recruitment results shall:

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(i) Identify each recruitment source by name;

(ii) State the number of U.S. workers responding to the employer's recruitment;

(iii) State the names, addresses, and provide resumes (if any) of the U.S. workers interviewed for the job opportunity and job title of the person who interviewed each worker; and

(iv) Explain, with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed.

(2) If, after the required recruitment period, the recruitment is not successful, the local office shall send the application, its prevailing wage finding, copies of all documents in the particular application file, and any additional appropriate information (such as local labor market data), to the Employment Service agency's State office or, if authorized, to the regional Certifying Officer.

(k) A Employment Service agency's State office which receives an application pursuant to paragraph (j)(2) of this section may add appropriate data or comments, and shall transmit the application promptly to the appropriate Certifying Officer.

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§ 656.21a Applications for labor certifications for occupations designated for special handling.

(a) An employer shall apply for a labor certification to employ an alien as a college or university teacher or an alien represented to be of exceptional ability in the performing arts by filing, in duplicate, an *Application for Alien Employment Certification* form, and any attachments required by this part, with the local Employment Service office serving the area where the alien proposes to be employed.

(1) The employer shall set forth the following on the *Application for Alien Employment Certification* form, as appropriate, or in attachments:

(i) A statement of the qualifications of the alien, signed by the alien.

(ii) A full description of the job offer for the alien employment.

(iii) If the application involves a job offer as a college or university teacher, the employer shall submit documentation to show clearly that the employer selected the alien for the job opportunity pursuant to a competitive recruitment and selection process, through which the alien was found to be more qualified than any of the United States workers who applied for the job. For purposes of this paragraph (a)(1)(iii), evidence of the "competitive recruitment and selection process" shall include:

(A) A statement, signed by an official who has actual hiring authority, from the employer outlining in detail the complete recruitment procedure undertaken; and which shall set forth:

(1) The total number of applicants for the job opportunity;

(2) The specific lawful job-related reasons why the alien is more qualified than each U.S. worker who applied for the job; and

(3) A final report of the faculty, student, and/or administrative body making the recommendation or selection of the alien, at the completion of the competitive recruitment and selection process;

(B) A copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements;

(C) Evidence of all other recruitment sources utilized; and

(D) A written statement attesting to the degree of the alien's educational or professional qualifications and academic achievements.

(E) Applications for permanent alien labor certification for job opportunities as college and university teachers shall be filed within 18 months after a selection is made pursuant to a competitive recruitment and selection process.

(iv) If the application is for an alien represented to have exceptional ability in the performing arts, the employer shall document that the alien's work experience during the past twelve months did require, and the alien's intended work in the United States will