

opportunity as a college or university teacher, or for an alien whom the Certifying Officer determines to be currently of exceptional ability in the performing arts, the U.S. worker must be at least as qualified as the alien.

(iii) In determining whether U.S. workers are available, the Certifying Officer shall consider as many sources as are appropriate and shall look to the nationwide system of public employment offices (the "Employment Service") as one source.

(iv) In determining whether a U.S. worker is available at the place of the job opportunity, the Certifying Officer shall consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expenses, or, if the prevailing practice among employers employing workers in the occupation in the area of intended employment is to pay such relocation expenses, at the employer's expense.

(3) The employment of the alien will have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. In making this determination the Certifying Officer shall consider such things as labor market information, the special circumstances of the industry, organization, and/or occupation, the prevailing wage in the area of intended employment, and the prevailing working conditions, such as hours, in the occupation.

[45 FR 83933, Dec. 19, 1980, as amended at 56 FR 54930, Oct. 23, 1991]

**§ 656.25 Procedures following a labor certification determination.**

(a) After making a labor certification determination, the Certifying Officer shall notify the employer in writing of the determination and shall send a copy of the notice to the alien.

(b) If a labor certification is granted, the Certifying Officer shall follow the document transmittal procedures set forth at § 656.28.

(c) If a labor certification is not granted, the Certifying Officer shall issue to the employer, with a copy to the alien, a *Notice of Findings*, as de-

finied in § 656.50. The *Notice of Findings* shall:

(1) Contain the date on which the *Notice of Findings* was issued;

(2) State the specific bases on which the decision to issue the *Notice of Findings* was made;

(3) Specify a date, 35 calendar days from the date of the *Notice of Findings*, by which documentary evidence and/or written argument may be submitted to cure the defects or to otherwise rebut the bases of the determination, and advise that if the rebuttal evidence and/or argument have not been mailed by certified mail by the date specified:

(i) The *Notice of Findings* shall automatically become the final decision of the Secretary denying the labor certification;

(ii) Failure to file a rebuttal in a timely manner shall constitute a refusal to exhaust available administrative remedies; and

(iii) The administrative-judicial review procedure provided in § 656.26 shall not be available; and

(4) Quote the rebuttal procedures set forth at paragraphs (d), (e), and (f) of this section.

(d) Written rebuttal arguments and evidence may be submitted;

(1) By the employer; and

(2) By the alien, but only if the employer also has submitted a rebuttal.

(e) (1) Documentary evidence and/or written arguments to rebut all of the bases of a *Notice of Findings*, which may include evidence that the defects noticed therein have been cured, shall be mailed by certified mail on or before the date specified in the *Notice of Findings* to the Certifying Officer who issued the *Notice of Findings*.

(2) Failure to file a rebuttal in a timely manner shall constitute a failure to exhaust available administrative appellate remedies.

(3) All findings in the *Notice of Findings* not rebutted shall be deemed admitted.

(f) If a rebuttal, as described above, is submitted on time, the Certifying Officer shall review that evidence in relation to the evidence in the file, and shall then either grant or deny the labor certification pursuant to the standards set forth in § 656.24(b).

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(g) The Certifying Officer shall send a *Final Determination* form to the employer, and shall send a copy to the alien.

(1) If a labor certification is granted, the Certifying Officer shall follow the document transmittal procedures set forth at § 656.28.

(2) If the labor certification is denied, the *Final Determination* form shall:

(i) Contain the date of the determination;

(ii) State the reasons for the determination;

(iii) Quote the request for review procedures at § 656.26 (a) and (b); and

(iv) Advise that, if a request for review is not made within the specified time, the denial shall become the final determination of the Secretary.

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

(a) If a labor certification is denied, a request for review of the denial may be made to the Board of Alien Labor Certification Appeals:

(1) By the employer; and

(2) By the alien, but only if the employer also requests such a review.

(b) (1) The request for review shall be in writing and shall be mailed by certified mail to the Certifying Officer who denied the application within 35 calendar days of the date of the determination, that is, by the date specified on the *Final Determination* form; shall clearly identify the particular labor certification determination from which review is sought; shall set forth the particular grounds for the request; and shall include all the documents which accompanied the *Final Determination* form.

(2) Failure to file a request for review in a timely manner shall constitute a failure to exhaust available administrative remedies.

(3) If the denial of labor certification involves an application for a job opportunity as a college or university teacher or an application on behalf of an alien represented to be of exceptional ability in the performing arts, the employer may designate the names and addresses of persons or organizations of specialized competence which the em-

ployer has asked to submit *amicus* briefs.

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

(c) Upon the receipt of a request for review, the Certifying Officer shall immediately assemble an indexed Appeal File:

(1) The Appeal File shall be in chronological order, shall have the index on top followed by the most recent document, and shall have numbered pages. The Appeal File shall contain the request for review, the complete application file, and copies of all the written material, such as pertinent parts and pages of surveys and/or reports upon which the denial was based.

(2) The Certifying Officer shall send the Appeal File to the Board of Alien Labor Certification Appeals, Office of Administrative Law Judges, 800 K Street, NW., suite 400, Washington, DC 20001-8002.

(3) In denials involving college and university teachers and aliens represented to be of exceptional ability in the performing arts, two additional copies of the Appeal File shall be sent to the Board of Alien Labor Certification Appeals.

(4) The Certifying Officer shall send a copy of the Appeal File to the Solicitor of Labor, Attn: Associate Solicitor for Employment and Training Legal Services, suite N2101—Frances Perkins Bldg., 200 Constitution Avenue NW., Washington, DC 20210.

(5) Unless the certification was denied by the national Certifying Officer, the Certifying Officer shall send a copy of the Appeal File to the Director.

(6) The Certifying Officer shall send copies of the index to the Appeal File to the employer and to the alien. The Certifying Officer shall afford the employer and the alien the opportunity to examine the complete Appeal File at the office of the Certifying Officer, for the purpose of satisfying the employer and the alien as to the contents. The employer and/or the alien may furnish or suggest directly to the Board of Alien Labor Certification Appeals the