

Employment and Training Administration, Labor

§ 656.26

(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

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addition of any documentation which is not in the Appeal File, but which was submitted prior to the issuance of the *Final Determination* form. The employer and/or the alien shall submit such documentation in writing, and shall send a copy to the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

(d)-(h) [Reserved]

(i) If a labor certification has been ordered granted, the Certifying Officer shall grant the certification and shall follow the document transmittal procedures set forth at § 656.28.

[45 FR 83983, Dec. 19, 1980, as amended at 52 FR 11218, Apr. 8, 1987; 56 FR 54930, Oct. 23, 1991]

§ 656.27 Consideration by and decisions of the Board of Alien Labor Certification Appeals.

(a) *Designations.* In considering requests for review before it, the Board of Alien Labor Certification Appeals may sit in panels of three members. The Chief Administrative Law Judge may designate any Board of Alien Labor Certification Appeals member to submit proposed findings and recommendations to the Board of Alien Labor Certification Appeals or to any duly designated panel thereof to consider a particular case.

(b) *Briefs and Statements of Position.* In considering requests for review before it, the Board of Alien Labor Certification Appeals shall afford all parties 21 days to submit or decline to submit any appropriate Statement of Position or legal brief. The Department of Labor shall be represented solely by the Solicitor of Labor or the Solicitor's designated representative. In the cases involving college or university teachers and aliens represented to be of exceptional ability in the performing arts, if the employer has designated a person or organization to submit an *amicus curiae* brief, the Board of Alien Labor Certification Appeals shall afford *amicus curiae* 21 days to submit a brief. Briefs, statements, and *amicus curiae* briefs submitted pursuant to this paragraph (b) shall be deemed timely if either mailed or delivered to the Board of Alien Labor Certification Appeals on

or before the end of the 21-day period set forth in this paragraph, and shall be consistent with the requirements of § 656.26(b)(4) of this part.

(c) *Review on the record.* The Board of Alien Labor Certification Appeals shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made, the request for review, and any Statements of Position or legal briefs submitted and shall:

(1) Affirm the denial of the labor certification; or

(2) Direct the Certifying Officer to grant the certification; or

(3) Remand the matter to the Certifying Officer for further consideration or factfinding and determination; or

(4) Direct that a hearing on the case be held pursuant to paragraph (f) of this section.

(d) *Notifications of decisions.* The Board of Alien Labor Certification Appeals shall notify the employer, the alien, the Certifying Officer, and the Solicitor of Labor of the decision pursuant to paragraph (c) of this section, and shall return the record to the Certifying Officer unless the case has been set for hearing pursuant to paragraph (f) of this section.

(e) *Remanded cases.* If the case is remanded, the Certifying Officer shall do the additional factfinding or consideration in accordance with §§ 656.24 and 656.25 of this part, but such factfinding and consideration shall be limited to the issues for which the case has been remanded.

(f) *Hearings.* (1) *Notification of hearing.* If the case has been set for a hearing, the Board of Alien Labor Certification Appeals shall notify the employer, the alien, the Certifying Officer, and the Solicitor of Labor of the date, time, and place of the hearing, and that the hearing may be rescheduled upon written request and for good cause shown.

(2) *Hearing procedure.* (i) The "Rules of Practice and Procedure For Administrative Hearings Before the Office of Administrative Law Judges", set forth at 29 CFR part 18, shall apply to hearings pursuant to this paragraph (f).

(ii) For the purposes of this paragraph (f)(2), references in 29 CFR part 18 to: "administrative law judge" shall