July 5, 2002

VIA HAND DELIVERY
Assistant Secretary for Employment and Training
U.S. Department of Labor
200 Constitution Avenue NW
Room C-4318
Washington, DC 20210

Attn: Dale Ziegler
Chief, Division of Foreign Labor Certification

RE: Comments of the American Immigration Lawyers Association to Proposed Rule, Certification for Permanent Employment of Aliens in the United States; Implementation of New System (67 Federal Register 30466, May 6, 2002)

Dear Assistant Secretary:

The American Immigration Lawyers Association ("AILA") is pleased to present its comments in response to the proposal of the Department of Labor ("DOL") to amend its regulations governing the filing and processing of labor certification for permanent employment of aliens in the United States and to implement a new filing and processing system for such applications.

AILA is a bar association of more than 7,800 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA's members are well acquainted with the labor certification process, having significant experience representing and educating employers who have

need of essential international personnel and the employees who meet those needs. The members of our association represent large and small businesses, academic institutions, research facilities and governmental entities that employ foreign nationals as well as U.S. workers. AILA is thus uniquely qualified to comment on DOL's proposed rule.

I. INTRODUCTION

As a preliminary matter, AILA would like to express its appreciation and support for DOL's efforts to design a streamlined system for the filing and processing of permanent alien labor certifications. Although AILA considers the DOL's current proposal deeply flawed, we support the concept of PERM and hope that DOL will continue to work on an equitable solution to increase efficiency in the labor certification process, with the help of AILA and other stakeholders.

A. Recent Developments Have Brought the Permanent Labor Certification Program to the Breaking Point.

As DOL is well aware, current national processing backlogs for labor certification applications have reached an all-time high. AILA's understanding is that roughly 300,000 permanent labor certifications are in the queue awaiting processing by State Workforce Agencies ("SWAs") and Certifying Officers ("COs"), with only 300 employees or fewer at both state and federal levels dedicated to the task. This renders the process of filing and obtaining timely certification of an application overwhelmingly daunting, if not impossible, for U.S. employers in need of talented foreign employees on a permanent basis.

A number of significant factors have helped to bring the labor certification system to this breaking point. The technological advances of the 1990s, the resulting strong economy and labor shortages led to greatly increased use of the labor certification process, in particular by large national employers with multiple openings who were recruiting large numbers of workers through bona fide recruitment campaigns undertaken in the normal course of business. These recruitment campaigns brought responses from U.S. workers and foreign nationals alike, and many workers from both groups were hired to meet increasing workforce needs. In response to this trend, DOL issued General Administrative Letter No. 1-97, *Measures for Increasing Efficiency in the Permanent Labor Certification Process* (October 1, 1996) ("GAL 1-97"), encouraging SWAs and COs to accept cases properly filed as "Reduction in Recruitment," or "RIR." Typically in these cases DOL would review the bona fide recruitment undertaken by the employer as part of the employer's normal business practice, and, assuming this recruitment adequately tested the labor market, it would be accepted in lieu of a DOL-supervised recruitment campaign. While RIR processing suffered from inconsistencies in implementation in various regions, once GAL 1-97 received general acceptance by the SWAs and the COs, the process helped to substantially reduce processing delays in most regions, and helped to reduce agency cost and staffing resources needed to process a large number of cases.

However, DOL's reasoned response to marketplace developments was undermined by other factors, most notably Congress' imposition of a short, artificial filing deadline of April 30, 2001, when it partially reinstituted Section 245(i) in December 2000. That short deadline, which allowed insufficient time to complete recruitment under an RIR, or even to properly prepare documentation, created a sudden influx of many thousands of filings, many of which needed more administrative assistance than usual most of which could not use the RIR process.

DOL's response to the recent economic downturn has also greatly increased its workload. In a memorandum titled *Evaluating Reduction in Recruitment (RIR) Requests in an Environment of Increased Layoffs*, issued to COs on March 20, 2002 ("March 20 memo"), DOL required COs to review long-pending labor certifications and determine whether employer or industry layoffs had created increased availability for the positions offered in these applications. Clearly these reviews, and the Notices of Findings ("NOFs") issued as a result, are causing a substantial strain on the already overtaxed DOL resources. Moreover, the memorandum encouraged COs to analyze whether RIR procedures were appropriate for certain labor certifications at the time of filing, thus rendering the RIR process a viable tool only in the most optimal economic conditions. This is leading employers to consider filing non-RIR cases in many regions, which will place a further burden on DOL.

Notwithstanding the growth of the program and the impossible backlogs, funding for the labor certification program has remained static. Without additional funding, it is doubtful that the current backlogs will ever be reduced, and DOL staff will continue to "tread water" simply to manage current filing levels.

B. The Regulatory Structure Supporting the Labor Certification Program is Outdated.

The regulatory structure supporting the current labor certification process derives from INA Section 212(a)(5)(A); 8 U.S.C. Section 1182 (a)(5)(A), which states:

"Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that—

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of [a member of the teaching profession or an individual with exceptional ability in the sciences or the arts]) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform the skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed."

The statute essentially provides a ground of inadmissibility for any potential employment-based immigrant, unless, at the time of admission as an immigrant, the Department of Labor can certify that there are insufficient workers available for the occupation in which the immigrant will work. Based upon the statutory language, DOL developed a regulatory system for making such certifications on an individual, case-by-case basis, with exceptions for the two groups set forth in the statute, as well as for occupations in chronic shortage such as nurses and physical therapists.

The statute clearly contemplated that most beneficiaries of the labor certification system would be waiting abroad for clearance to apply for an immigrant visa, and would not be in the U.S. already employed by the petitioning employer. Moreover, at the time of creation of the statutory and regulatory scheme, DOL envisioned a system capable of making a determination regarding the sufficiency of U.S. workers that would be fairly contemporaneous with the "time of admission" of the foreign national.

Changes over the years in both the business world and the immigration legal landscape have caused the labor certification system to become increasingly divorced from reality. The globalization of U.S. business and the interdependence of the U.S. and foreign economies, in conjunction with advances in technology that rapidly connect remote business centers, have led to an undeniable increase in international travel and a steady "internationalization" of the U.S. workforce.

Consistent with this trend, changes in the immigration laws over the past 12 years have increased mobility for international business persons and skilled workers. In particular, the Immigration Act of 1990, Pub. L. 101-649 ("IMMACT 90"), enabled employers of talented and essential foreign nationals in H-1B and L-1 status to pursue the permanent residence process on those individuals' behalf without jeopardizing their temporary stay. Moreover, as the technology boom of the late 1990s caused Congress to allow increased numbers of H-1B workers to enter the U.S. workforce, this, in turn, caused a greater number of employers to make use of the labor certification system in order to retain talented, trained staff in which they had already made a significant investment of time and money. As a result, the statutory and regulatory presumption of a foreign national awaiting labor certification while remaining abroad became, to a great extent, a legal fiction. In addition, in many cases, a bona fide test of the labor market – through standard corporate recruiting—actually took place prior to the initial hire of these foreign nationals and the acquisition of their lawful nonimmigrant visa status. This often rendered the test prescribed by the labor certification system duplicative and wasteful for U.S. employers.

As mentioned above, the heightened activity in the labor certification program, due to both the labor shortages of the mid to late 1990s and to the enactment of an artificial expiration date for Section 245(i), created tremendous processing backlogs. In addition, INS processing of immigrant visa petitions and applications for adjustment of status has been subject to serious delays. This greatly increased the period of time between the labor market test prescribed by the labor certification regulatory system and "the time of application for a visa and admission to the United States." Thus, the labor

certification process in essence ceased to be a "real-time" test of U.S. labor market needs.

Notwithstanding the downturn in the economy, employers are still turning to the labor certification program to relieve ongoing shortages in industries such as manufacturing, hospitality, construction and health care. However, due in great part to the factors outlined above, the labor certification system can no longer provide an efficient, immediate, reliable solution to these chronic shortages. The impotence of the system in this regard is having a serious negative impact on the stability of U.S. employers and their ability to deliver the products and services necessary to the well-being of all Americans.

C. PERM is an Opportunity to Make Labor Certification a "Real-World" Process.

The possibility of reforming the labor certification process presents a unique opportunity to examine carefully the flaws of the current system and bring the system in line with current real-world business practices and procedures, to the extent permitted by statute. In AILA's view, the optimal labor certification system would:

- Protect and offer employment opportunities to U.S. workers while enabling U.S. employers access to the foreign talent they require to remain competitive in the national and international marketplace. While this is not an easy balance to achieve, the system must be sufficiently agile to facilitate access to workers in various industries in times of great economic growth in those industries.
- Accommodate, and recognize the importance of, jobs requiring unique skills and knowledge to ensure that the employer has full access to international markets.
- Be capable of expeditious, but accurate, review and "real-time" adjudication, taking into account the importance and complexity of permanent labor certification and the value of the benefit granted.
- Function efficiently in various economic climates. Employers must be able to understand and comply with consistent, reliable "rules of the game," in any economy.
- Recognize and make use of "real-world" recruitment and normal business practices.
- Build in the flexibility to accommodate new types of jobs and new skill sets, and to recognize that some occupations become more complex and sophisticated over time, while others become more easily performed by a greater number of individuals. In this way the system also acts as a valuable source of new job market information to the DOL.
- Recognize the value of highly functioning, trained long-term employees, and reward—not punish—U.S. employers who have been able to retain such employees.

- Reward employers' good faith and efficiency.
- Penalize abusers ONLY.

D. The Process as Proposed by DOL Is Unworkable.

Unfortunately, DOL's PERM proposal does not meet these goals. The structure created under the proposed rule presumes that a labor certification can be adjudicated like a labor condition application ("LCA"). However, qualification for permanent labor certification is much more complex than qualification for the H-1B LCA, for which there is no labor market test required in most situations. Because the legal standards for obtaining an H-1B are completely different than those for obtaining labor certification, H-1B job descriptions are more amenable to broad categorization, and therefore it is a simpler matter to classify the position, obtain a prevailing wage and provide the information for automated review of an LCA by the Department of Labor.

Although many aspects of the labor certification process are plainly amenable to streamlining (as discussed further in this comment), some non-automated review is clearly necessary to ensure that employers have a full opportunity to explain adequately various aspects of position offered. This is appropriate because the nature of the benefit of labor certification to employers and employees is ultimately greater than that represented by an H-1B. Given these significant differences, it may be appropriate to automate the labor certification *filing* process, but not necessarily the *adjudicatory* process.

Secondly, the PERM proposal presumes—in substance as well as in tone—that most employers seek to manipulate the labor certification process in order to employ a specific foreign national. The terms of DOL's proposal are premised on the notion that employers inflate job requirements in order to avoid hiring minimally qualified U.S. workers. Instead of focusing on the few abusers of the process, DOL attempts to limit opportunities for all employers, and has structured the PERM process so that only the most narrowly-defined positions with minimal requirements can be processed. DOL also considers a position "encumbered" if the foreign national is currently serving the employer in the same position.

These presumptions ignore the reality of today's global marketplace, and any system based upon these presumptions will take the labor certification two steps backward, rather than one step forward. As was shown by the high use of RIR, many employers were hiring foreign nationals through precisely the same recruitment campaigns they were using to find U.S. workers. These employers weren't seeking out certain foreign nationals; rather, qualified foreign nationals happened to respond to their advertisements, just as qualified U.S. workers did.

Moreover, business necessity, alternate experience requirements and combination occupations are necessary in order to allow good faith users of the labor certification process to describe adequately legitimate positions that don't quite fit into standard

DOL definitions. This is particularly crucial in rapidly changing technological and global market landscapes, where new positions are developed with great frequency.

Finally, as discussed above, it is commonplace now, and completely lawful, for a foreign national to be in the employ of the sponsoring employer during the labor certification process. In many cases the employer has made a substantial investment in the foreign national, in training and promotion within the organization. Any process set forth by DOL must recognize this reality and find a way to assist employers retaining such valuable employees, rather than shutting them out of the system altogether.

AILA believes that a successful PERM program can be efficient, reflect and recognize business realities, and restrict those who would abuse the system. AILA hopes that DOL will consider its comments fully, and will continue to work with stakeholders to achieve a fair, workable labor certification system.

II. DOL'S PROPOSED RULE SIGNIFICANTLY INCREASES PUBLIC BURDENS

Executive Order 12866, The Regulatory Flexibility Act and The Small Business Regulatory Enforcement Fairness Act of 1996.

Presidential Executive Order 12866 (issued September 30, 1993, published at 58 Fed. Reg. 51735, October 4, 1993) instructs federal agencies to minimize the burden placed on the public, including the business community, to the maximum extent feasible when regulations implementing legislation are promulgated. The Regulatory Flexibility Act (5 U.S.C. 601-612) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis, describing the anticipated impact for the proposed rule on small entities. The Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104-21) requires the agency to assess any adverse effects that the proposed rule would have on the economy, in particular, on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete globally.

DOL's proposed rule simply gives lip service to these statutory and regulatory requirements, providing virtually none of the analysis required. DOL simply concludes, without support, that the proposed rule is not "economically significant" and not a "major rule." NPRM, 67 Fed. Reg. 30482. In so doing, DOL severely underestimates the economic burdens and competitive impact the proposed rule embodies, and fails to meet its statutory and regulatory mandates for proposed rule making.

The areas in which DOL fails to accurately assess the public burdens imposed by the proposed rule include the following:

- Additional advertising and recruiting: Instead of recognizing an employer's legitimate recruitment efforts, the proposed rule forces employers to undertake an artificial recruitment campaign for each application, which includes two print advertisements, a job order placed with the SWA, and three of six additional recruitment steps. Print advertisements are required to contain a full job description, the employer's name and the offered salary, elements that are typically not included in the advertising employers undertake in the normal course of business. DOL states that these recruitment steps "are designed to reflect what we believe, based on our program experience, are the recruitment methods that are most appropriate to the occupation." 67 Fed. Reg. 30471. However, DOL fails completely to address whether these increased steps have been found to be more effective than employers' standard recruiting practices in recruiting U.S. workers.

  DOL's mandatory recruitment scheme imposes significant additional economic burdens upon employers. Employers' recruiters or HR staff will now be required to expend additional time to craft special advertisements and engage in other recruitment activities not typical for those employers. These advertisements can easily cost over $1,500 each, exceeding by far the DOL estimate of $500 per advertisement. DOL fails completely to address the cost of the additional recruitment steps required. Participation in job fairs, use of placement agencies and internet ads can be extremely costly recruitment tools, thus imposing significant additional expense upon employers who wish to participate in the labor certification process, particularly small employers.

- Maintenance of recruitment records: DOL's proposed rule would require employers to track each and every applicant for a position so that the process by which each applicant was deemed qualified or unqualified for the position can be reported to the agency on an applicant by applicant basis. For a company of any size that is seeking to fill a number of similar or related openings and that is truly engaging in a pattern of active recruitment, the "one job at a time" approach is far removed from the business reality. Modern businesses that engage in active recruitment for multiple openings receive applications through a variety of avenues, and applications received are often not tied to a specific job opportunity, but rather to an occupation or field. Recruitment of human resources – particularly for larger employers – is no longer like a craft workshop creating one product at a time, but like a modern production line with mass customization that matches applicants' skills to job needs without restriction to one particular job opportunity. DOL fails to take into account the added expense for employers forced to assess job applicants in the way prescribed in its proposed rule.

- Prohibition on Counting Experience Gained with the Employer: DOL's proposed rule would eliminate completely an employer's ability to count experience gained by the foreign national with the same employer, under

principles enunciated in *Matter of Delitizer* Corp., 88-INA-482 (May 9, 1990) (*en banc*). DOL also asserts that an employer may not count experience gained by the foreign national at predecessor organizations, successors in interest, parent, branch or subsidiary companies, whether located in the U.S. or in another country.

DOL completely fails to acknowledge the wide-ranging economic and competitive impact of this broad prohibition. It is clear that the rule that will impact small and large businesses, and have adverse effects upon competition, employment, investment, productivity innovation and the global competitiveness of U.S. employers.

Employers typically invest thousands of dollars in the training and retention of valuable employees, whether they are foreign nationals or U.S. workers. DOL's rule would encourage, and even force, talented foreign national employees to change employment because of their inability to obtain permanent residence through their long-term employer. This would lead not only to a loss of the tremendous investment made by employers in these employees, but also—and perhaps more significantly—to a loss of the employers' competitive edge. The rule encourages significant instability in the job market.

With respect to predecessor organizations and successors in interest, it is crucial to understand that the know-how represented by a particular company's workforce is often one of the reasons driving mergers and acquisitions. The inability to retain a trained, highly-skilled workforce or a significant part of such a workforce may well have a chilling effect upon such corporate acquisitions, and in turn, upon the economy in general.

- Elimination of business necessity, and restrictions on alternative job requirements and combination occupations. DOL completely neglects to assess the economic consequences of these important changes. As technology advances and the job market changes to keep pace, employers require flexibility to describe new positions or new job requirements. Often foreign nationals are the first to have skills or training in a new technology or service. A prime example of this is the field of enterprise resource planning software, much of which was developed overseas.

  DOL's new restrictions will make it impossible for U.S. employers to retain foreign employees with unusual skill sets, thus creating a significant impact on the ability of these employers to remain competitive globally.

  Several of these restrictions will hit new small businesses particularly hard. Under DOL's proposed rule, job requirements other than those relating to the amount of training or experience required, and those considered "normal to the occupation," may not be justified unless the employer can show

employment of a U.S. worker in a job with the same requirements within the two years prior to filing. Similarly, an employer wishing to file a labor certification for a "combination occupation," will have to show that it employed a U.S. worker in same position within 2 years of filing the labor certification. This will not be possible for new enterprises and small businesses, where unusual skill sets most often comprise the company's best prospects for attaining and maintaining market position.

As demonstrated by the technology boom of the late 1990s, small new companies are often at the forefront of the creation of important advanced technologies. It is easy to imagine that a small, newly created company might find it impossible to meet DOL's standard for unusual job requirements or combination occupations. This may prevent these businesses from being able to retain the talent they need to introduce these technologies and to grow as a business. DOL must reassess the economic impact of these new restrictions, particularly on small businesses.

- Changes in prevailing wage: DOL's analysis of the burdens it would place on the public completely misses the additional economic impact of its proposed changes to the prevailing wage regulations. Employers are currently permitted to offer a labor certification beneficiary at least 95% of the average wage expressed in a survey or in DOL data. This 5% variance was significant, because it helped to compensate for the fact that DOL's prevailing wage data is outdated, and artificially inflated by elements such as bonuses and commissions (elements that, under the DOL rule, may not be included in the employer's offered wage). The economic effect of the elimination of this variance upon U.S. business must be explored and discussed in DOL's rule.

  Moreover, DOL's PERM rule contains a provision requiring an H-1B employer to constantly shift an H-1B worker's compensation to meet a new prevailing wage, as the worker gains additional training. This will certainly result in constant analysis of an H-1B worker's abilities and performance that will be out of step with other employees' compensation and performance review. DOL completely fails to address the economic and paperwork impact of this significant change.

III. AILA RECOMMENDATIONS FOR AN ALTERNATIVE TO PERM

AILA is pleased to present several ideas for viable alternatives to the system proposed by DOL. AILA's alternative would build on the success of RIR, and would expand Schedule A to include certain categories of foreign nationals in occupations for which DOL has historically found that there is either little or no availability, or that, because of the special circumstances of the employment, there would not be a U.S. worker available and qualified for the position. AILA's recommendations also include an

attestation-based prevailing wage system that would avoid, to a great extent, the two-step system set forth in DOL's proposal, as well as an attestation-based reintegration of elements of the current system necessary to employer flexibility.

A. An RIR Option as Part of the PERM Program.

While the general structure of PERM may be appropriate for employers with a single job opening for which the employer has not yet conducted recruitment, it imposes significant additional recruitment obligations and expenses for employers that are conducting ongoing recruitment for multiple openings. Specifically, an employer with multiple openings that repeatedly publishes a "catch-all" type advertisement with job titles only, and conducts constant Internet recruiting, would still fail to satisfy the recruitment obligations set forth under PERM, because the advertising content would be deemed insufficient, and the employer would only be able to demonstrate one other recruitment step apart from the print advertisement. This result is absurd.

In order to ease the burden on such employers, and to recognize sufficient "real-world" recruitment, AILA recommends that DOL re-integrate an RIR option into the PERM structure. The RIR program would be relatively easy to convert to the attestation-based PERM approach, as both are geared toward pre-filing recruitment, and a PERM-based RIR program could comfortably coexist with the regular PERM program, which would be suitable for cases not eligible for RIR. This would also achieve the objective of making the new PERM system sufficiently flexible to deal with changes in the economy, periodic shortages and the like.

Integrating an RIR option as part of the PERM process would require DOL to consider setting standards in three general areas: (1) Eligibility for RIR, (2) Recruitment Requirements, and (3) Reporting Results of Recruitment.

- Eligibility for RIR under PERM

Under the PERM program, eligibility for RIR could easily be based upon the current eligibility standards set forth in GAL 1-97, and recently reiterated in the March 20 memo. Under those standards, occupations that qualify for RIR are those (1) with little or no availability, (2) with no unduly restrictive requirements, (3) that meet the prevailing wage, and (4) for which the employer could show adequate recruitment through sources normal to the industry over the previous six months.

An employer's choice of the RIR option could simply be indicated in a group of attestations on Form 9089. Section IV (1) of the form could be expanded to include an option stating that the application is for an RIR occupation. Questions (2) through (8) could easily be amended to solicit information regarding the recruitment undertaken for the RIR occupation.

- Recruitment Requirements

Recruitment requirements for a PERM-based RIR option could be the same as for the current RIR program. Employers would be required to establish a pattern of recruitment in the six-month period prior to filing. Although in recent years there has been a lack of uniformity across regions with respect to the issue of what constitutes a pattern of recruitment, the March 20 memo makes clear that only one print advertisement should be required, along with sufficient other recruitment activities.

PERM-based RIR recruitment standards can easily be structured around these requirements. PERM-based RIR could require at least one print advertisement with other sustained activities such as use of job fairs, company or job search web sites, campus recruiting, trade or professional publications, and employment firms. Unlike the regular PERM proposal, PERM-based RIR would allow patterns of recruitment chosen by, and typical of, the employer to qualify, rather than require a rigid prescribed formula.

The Form 9089 could solicit information on the advertisement that was placed by the employer, in the same way it currently solicits that information. With respect to the other activities that would constitute a pattern of recruitment, an employer could simply check the types of recruitment used. The form could provide boxes soliciting the duration or the number of times each form of recruitment was used. In this way, an employer that placed one print advertisement, but searched for candidates over three or six months of sustained use of an internet job site, would have the opportunity to reflect that on the attestation form.

- Advertisement Content

As DOL is aware, many employers that conduct continuous recruitment place large "catch all" advertisements that encompass many occupations but do not include a great deal of detail. Because this type of advertising is normal to many occupations and industries, it has been acceptable for RIR purposes in the past.

PERM-based RIR should incorporate these RIR standards for advertisement content. Employers would be free to include as much detail in the advertisement as they like, but would only be *required* to include occupation or job title, location and method of application for the position (mailing address, e mail, website address, etc.). This would allow employers to rely on actual advertisements that were placed during the course of an ongoing recruitment campaign rather than placing an artificial advertisement. The Form 9089 could include an attestation to the effect that the RIR ad was placed as part of on ongoing recruitment campaign and is typical for the employer and industry, to ensure that employers are not simply using the RIR option as a way to minimize advertising content.

- Recruitment Reports and Maintenance of Documentation

Employers using the RIR option should be required to report and retain summarized recruitment information as is now reported under the RIR program. For

employers with a large number of multiple openings, it is not typical to retain each and every resume received and information on each applicant for the position. A user of a PERM-based RIR option could be expected to report the number of openings for the occupation at the beginning and end of the recruitment period, the number of resumes received, the number of applicants interviewed, and the number of hires by the employer for the occupation in the same period. Consistent with the PERM program, the employer would be required to maintain the documentation to support the recruitment summary submitted to the DOL.

B. Multi-Use Labor Certification and National Filings.

Many U.S. employers typically seek to fill a number of openings for the same position at the same time. This is particularly true in times of low unemployment. Yet the labor certification process remains one in which a separate filing must be made for each beneficiary. This increases effort and expense for both DOL and for the employers involved.

AILA recommends that DOL consider establishing a procedure under which one ETA form for a particular position may be designated and used for a number of employer openings for the same position. An employer with multiple openings could complete the ETA 9089, designate the number of openings available, and then submit beneficiary information at the same time for all of the foreign national beneficiaries for whom the employer is seeking labor certification. If, for example, the employer has 20 openings and is seeking labor certification for six foreign nationals, the employer would supply only one PWDR and one ETA 9089, parts I-V. The ETA would contain an area where the employer could designate the number of openings and the number of alien beneficiaries. The employer would also submit six forms ETA 9089, part IV, one for each alien beneficiary. The case would be adjudicated by DOL as one case, thereby avoiding inconsistent results for the same position. Upon review and certification of the filing, the employer would be required to file the certified ETA 9089 parts I-V, and the six forms ETA 9089, together with six forms I-140 and accompanying evidence, as one package to the INS.

The process described above is efficient for both DOL and for employers who would otherwise file several separate labor certifications for the same position. At the same time, it does not allow the employer to file for a random number of unnamed beneficiaries. Although substitution would later be permitted, as it is under current rules, the labor certification would only have been approved for a fixed number of beneficiaries, the beneficiaries would be identified, and their basic qualifications reviewed.

DOL should also consider establishing a route for "national" labor certification filings. This would allow employers with multiple openings nationwide to file a multi-use labor certification for national openings in one jurisdiction, with prevailing wage information for each site in which there are openings. Permitting the filing of national labor certification would also assist national employers that may move employees from

worksite to worksite for various lengths of time, or where there is a possibility of transferring an employee to a different office during the green card process.

C. Expansion of Schedule A.

A crucial element of AILA's recommendation for an alternative system is the expansion of Schedule A. Schedule A was originally created to accommodate occupations, such as nurses and physical therapists, that are in chronic shortage in the United States, as well as employees, such as aliens of exceptional ability and multinational managers, who, because of their extensive accomplishments or their key significance to their employers, are essentially irreplaceable. Schedule A continues to provide a significant avenue for the DOL to recognize the importance to U.S. employers of foreign talent in these categories.

Schedule A should therefore be broadened in the following ways:

- Conform the "exceptional ability" category (Group II) to IMMACT 90

DOL recognized in its 1991 preamble to the regulations implementing IMMACT 90 that Congress modified the regulatory definition of "exceptional ability" in the science or arts by developing the higher standard of extraordinary ability. The prefatory comments to the regulations thus acknowledged a sizable category of persons who could not satisfy the now higher standard of extraordinary ability but who could demonstrate eligibility for the now-lower standard of exceptional ability.[1]

The 1991 DOL regulations, however, did not expressly implement the prefatory comment and instead left unchanged the former (pre-IMMACT 90) provision defining exceptional ability.[2] Experience has shown that this oversight has created problems in real-world practice. The INS has continued to apply DOL's pre-IMMACT 90 definition of eligibility criteria for exceptional ability, and thus has denied eligibility for Schedule A, Group II to aliens unless the higher post-IMMACT 90 standard of extraordinary ability can be satisfied. This unfortunate result defeats DOL's very purpose in retaining Schedule A, Group II, in 1991. Thus, the agency needs to make explicit what the agency acknowledged in its IMMACT 90 rule-making preamble: Exceptional ability is an easier standard to achieve. The regulation should therefore:

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[1] See the Department's comment in its interim final rule implementing the Immigration Act of 1990, found at 56 Federal Register 54920 (October 23, 1991)("Twenty-seven commenters addressed the issue of whether or not Group II should be deleted from Schedule A. These commenters included colleges and universities, labor organizations, various businesses, associations, SESAs, and practicing attorneys. The overwhelming majority of comments received addressing the proposed elimination of Group II expressed the view that Group II should be retained. . . .[T]he Department is persuaded that there is a possibility under the INS regulations that all aliens who may be able to qualify under Schedule A, Group II, will not be able to qualify under the new Preference Group 1. Therefore, Group II is being retained.").

[2] Currently, the DOL regulations defining criteria for exceptional ability aliens under Schedule A, Group II, are found at 20 CFR § 656.22(d) and would be at 20 CFR § 656.15(d)(1) under the proposed rule.

(a) define that standard in a manner that makes material distinctions between extraordinary and exceptional ability;
(b) develop a checklist of factors that establish exceptional ability (see, e.g., the INS exceptional ability criteria found at 8 CFR § 204.5(k)(2)[3];
(c) show that satisfaction of a certain number of eligibility criteria, e.g., at least three out of seven, would automatically satisfy the exceptional ability standard[4];
(d) allow exceptional ability aliens with a reasonable plan for direct or indirect job creation to self-sponsor under Schedule A even in the absence of a job offer from a specific employer; and
(e) allow persons with exceptional ability in business (including athletes in professional sports businesses) to be included within the Schedule A, Group II standard because business (including the business of professional sports) is a subset of science.

- Expand Schedule A to allow certain "special-merit" or key foreign nationals to qualify under this category.

The DOL proposed rule would deny a wide array of worthy aliens any opportunity for labor certification. This essentially deprives U.S. employers—and the economy as a whole—of "the best and the brightest," and of those in whom the employers have made a significant investment in training and retention. The unwelcome include company founders and investors; key employees who worked for affiliated, predecessor or successor entities; employees who gained irreplaceable experience with the same employer; and any alien who is "so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operations without the alien". This leads to the absurd result that the more important an individual is to a business' operations, the less eligible that person would become for permanent residence through that employer.

Many of these foreign nationals are essential to their employers and their companies in exactly the same way as multinational managers and executives—who, until the advent of IMMACT 90—were a part of Schedule A. Rather than shutting down any opportunity for a U.S. employer to retain these important workers, DOL should afford U.S. employers a reasonable way to retain these employees. An appropriate procedural avenue is to allow a Schedule A submission to be adjudicated where expertise, and the legal authority to charge a

[3] As provided in 8 CFR § 204.5(k)(2), "[e]xceptional ability in the sciences, arts or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." Compare this lesser exceptional ability standard with the much higher INS standard for extraordinary ability, found at 8 CFR § 204.5(h)(2)("Extraordinary ability means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.").

[4] See 8 CFR § 204.5(k)(3)(ii). The DOL expansion of Schedule A, Group II, should also allow, as does the INS regulation at 8 CFR § 204.5(k)(3)(iii), that other "comparable evidence" to be submitted to establish the alien's eligibility.

user fee, already exist, i.e., with the INS. An expansion of Schedule A in this manner would be entirely consistent with the philosophy of the proposed PERM rule which envisions a streamlined, highly efficient system, allowing DOL to conserve resources and avoiding DOL adjudication of complex issues (such as experience gained with the same employer.)

Accordingly, AILA suggests that Schedule A be amended to include the following categories:

(a) Company founders and managers whose role with the U.S. employer is so central that the company could not continue operations without their services;
(b) Key employees in managerial, executive or essential positions who worked in affiliated, predecessor or successor-in-interest companies;
(c) Employees who have been employed with the U.S. employer for a certain number of years and have gained irreplaceable on-the-job training and experience in distinct positions or in similar positions at lower levels of management authority.
(d) Other employees whose services are so central to the existence of the employer that the employer would likely not continue to exist without these services.

Clearly, certain basic eligibility criteria would need to be developed for each Schedule A category. However, once these standards are in place, an expanded Schedule A will achieve the goal of allowing employers to retain workers that are legitimately irreplaceable, while not burdening DOL's adjudicatory process.

- Develop a flexible "just-in-time" system for shortage occupations

DOL could transform Schedule A into a better tool for creating nimble responses to significant changes in the job market. As DOL acknowledges in its preface to the proposed rule, PERM will involve a great reliance on technology. By requiring submission of labor certification applications that will be automatically scanned and then evaluated preliminarily in an automated way, the agency has the opportunity to collect substantial real-world data on job needs in particular labor markets. Moreover, the agency is increasingly relying on technology in other significant ways. For example, from a technical data-gathering perspective, the OES system, now in use in the H-1B and permanent labor certification processes, as well as for a variety of other government purposes, may have the capability of gathering far more real-world information than prevailing wage data only. The procedures utilized in the OES system can collect *current* data on job openings and employer demand by metropolitan area, region, state and nation.

With this array of technology at its disposal, the DOL could thus develop a just-in-time, technology-based system of determining when and where labor

shortages materialize and when and where they disappear. The agency could, as a result, allow for the flexible opening and closing of a special Schedule A group for labor shortages by metropolitan area or broader geographic area to respond to acute labor shortages in a "real-time" manner. Such a system would be far different from the woe-begotten Labor Market Pilot Program authorized by IMMACT 90. The system will not become a political hot potato because it will be based on *real-world* economic data confirming the existence or non-existence of *real-time* labor shortages.

D. An Attestation-Based Prevailing Wage System.

Because OES wages are easily available to the public, the method of determining the prevailing wage for a particular occupation is one area in which the labor certification process could be further streamlined. AILA recommends that the employer be permitted to select the appropriate prevailing wage for the position in the first instance, as is the case with H-1B prevailing wage. Employers would then file the PWDR request directly with the ETA regional office, and there would be a a subsequent review of the prevailing wage by the CO in the context of review of the entire application.

The proposed regulations at 20 CFR §§655.731 and 656.40 set forth two different standards to determine prevailing wage rates for essentially the same occupations. The only distinction between the two methods is that the H-1B position is presumably temporary, although it can be permanent in nature, and the labor certification position must be permanent in nature.

AILA does not see any reason for the PERM proposal to perpetuate the two-tier prevailing wage system. The involvement of two agencies doubles processing times, opportunities for delay, and the likelihood of errors and inconsistencies.

During the last few years SWA determinations of prevailing wages have produced very erratic results. Some SWAs seem to arrive at fairly reasonable decisions on OES level assignments and fair reviews of alternate wage surveys. Other SWAs are known to rarely accept alternate wage surveys and routinely assign level 2 wages for almost every job regardless of the guidelines provided by DOL. SWAs also differ materially on whether they require a minimum sample size, as well as on their willingness to publish a list of alternate surveys accepted in the past. These inconsistent results punish many U.S. employers merely because they established their office in a state where the SWA is not following national guidelines or requires significant additional training.

While there are regional differences in prevailing wages, there should not be regional differences in the gloss or interpretation of prevailing wage rules in the national labor certification program. The standards for determining prevailing wages should be uniform nationally. It is more likely that uniformity can be achieved if the U.S. DOL, with six regions, rather than the 50 SWAs, have responsibility for prevailing wage determinations.

If the attestation-based prevailing wage method currently in use for the LCA process were expanded to the labor certification process, with the opportunity for review at the CO level, then the U.S. employer would have method of establishing a prevailing wage that would afford some reliability and uniformity of result.

AILA proposes that DOL amend its proposed PERM rule to allow employers to obtain prevailing wage data in the first instance directly from published acceptable government sources such as OES, or from alternate wage sources acceptable under the criteria set forth in GALs 2-98 and 1-2000. The employer's choice of wage and wage source can then be reviewed directly at the CO level, thus eliminating the unnecessary, and extremely expensive step of having the SWA determine and assign the wage. Since many prevailing wage issues are currently resolved at the CO level in any event, adding such review to the adjudicatory duties of the CO would not extensively increase the burdens on these offices. Moreover, any disputes that cannot be resolved by the CO can be forwarded to the ETA Prevailing Wage Review Panel that DOL proposes to create.

Cuurent H-1B regulations provide a "safe harbor" when an employer obtains a prevailing wage directly from a SWA for a particular position, so that the wage cannot be later challenged by DOL in the course of an investigation. Consistent with this regulatory structure, AILA recommends retaining the option of obtaining an SWA-determined wage in advance of the filing of the labor certification.

E. Attestations to Preserve "Employer Flexibility"

DOL's proposed rule would sharply limit the discretion of employers to require certain skills and experience beyond an amount of experience and education or training in the occupation consistent with the SVP. The only exceptions permitted are requirements that are "normal to the occupation" and those possessed by U.S workers employed within two years of the application. These restrictions appear to stem from two major concerns: (1) that employers are using restrictive requirements to manipulate the labor certification system in favor of a foreign national worker, and; (2) that DOL no longer has resources and manpower to adjudicate complex cases involving business necessity and unusual combinations of duties. However, as discussed more fully later, new technologies and new products are causing employers continually to reevaluate and modify job requirements and create new jobs. GAL 1-97 fully appreciated this point in allowing employers to rebut an allegation of overly restrictive job requirements where there was a "major change in the business operation" of the employer. The proposed limitation of job requirements is inconsistent with a dynamic global economy which requires employers to change with the times.

DOL's proposed system is based upon attestations made in good faith by employers regarding employment opportunities, supported by retained documentation to be made available upon request by DOL. There is no reason that unusual job requirements or combinations of duties could not be subject to an additional set of attestations. AILA recommends that DOL restore a U.S. employer's ability to set forth unusual requirements or combinations of duties through a set of attestations that

acknowledge that the employer has included additional parameters beyond DOL's standard description of the position. A set of boxes could elicit what these requirements are. DOL could mandate that each employer using requirements that are not considered "normal to the occupation" or requiring a "combination of duties" maintain evidence of the business necessity of these requirements. DOL could require such evidence to be made available in the course of an audit or investigation. Thus, employers could retain their much-needed flexibility to reevaluate job requirements as technology and the global marketplace change, and DOL would retain the opportunity to investigate any employer that used such requirements solely to manipulate the labor certification process.

IV. COMMENTS ON THE PERM PROCESS AS PROPOSED

A. The PWDR Form.

In analyzing the prevailing wage determination request (PWDR) form, we have identified some problem areas. We explain our areas of concern and suggest some solutions for improving the form.

- Location of Work: Page 1 of 3, Section II

Under current DOL practice,[5] employers whose employees typically move from worksite to worksite as a part of their position may state, under location of work "Various unanticipated sites as required by headquarters." The application may then be filed in the DOL region with jurisdiction over the employer's headquarters. The PWDR form proposed by DOL does not accommodate this long-accepted practice. DOL should amend the form to allow an employer to indicate whether the beneficiary is a roving employee**.**

- Required education: Page 2 of 3, Block III, Job Opportunity, Item 2

Employers enter the highest level of education or training required in Block II. The options given are none, high school, technical, vocational, apprenticeship, associate, bachelor, master, or doctorate. The choices given do not provide for equivalency to a degree. It is well established that many employers consider various combinations of education and experience as qualifying for a particular position. For example, some employers will generally require a bachelor's degree but will also consider individuals qualified who have a combination of education and work experience that provides the individual with the same level of theoretical and practical knowledge as one who has completed a formal

[5] See Field Memorandum 48-94, May 16, 1994, to Regional Administrators from Barbara Ann Farmer, 71 Int.Rel. 870 (July 1, 1994), indicating on p. 4 that applications which require work in various unanticipated locations should be annotated to that effect in Item 7 of Form ETA 750A. This guidance has been widely followed in practice during the 8 years since its issuance.

baccalaureate level education. The H-1B regulations at 8 CFR Section 214.2(b)(h)(4)(iii)(D) provide a variety of factors that can be considered in determining whether a person's experience is equivalent to a bachelor's degree. For example, opinions by experts in the field, licensure, and published material about the foreign national can all be relevant. Other relevant factors include whether the person has worked alongside professionals with bachelor's degrees or higher, and whether the person could be admitted to a graduate school academic program despite absence of a degree.

Another important educational equivalency is equivalency to a Master's degree. 8 C.F.R. Section 204.5(k)(2) provides that a baccalaureate degree followed by five years of progressive experience is equivalent to a Master's degree. An INS memo (HQ70/6.2, AD00-08, dated March 20, 2000, from Michael D. Cronin and William R. Yates to the Service Centers), recognizes that many employers seek to qualify individuals for second preference under the INS regulation. The INS memo recognizes that labor certifications are frequently filed stating the job requirements as a Master's plus three years of experience or a Bachelor's plus five years of progressive experience. The PWDR form does not allow employers to express job requirements consistent with INS regulations and the INS memo allowing for equivalency to a Master's degree.

In the PERM labor certification process, the only place where the employer states the job requirements is on the PWDR form. Thus, we suggest that the form be amended to clarify that equivalency to a degree is acceptable. ETA Form 9089, Application for Employment Certification does ask (at Part VII, question 1), whether a foreign educational equivalent is acceptable. However, this question does not address the need to allow employers to specify equivalency to a bachelor's or master's degree through experience or a combination of education and experience.

- Alternative Degree Requirements: Page 2 of 3, Block III, Job Opportunity, Item 3

Employers designate the field of study in Part III, Item 3. This block does not provide sufficient space to list alternative degrees that would be acceptable to the employer. The experience of our clients shows that universities offer many different degrees that provide sufficient and appropriate training to prepare an individual for a particular job. A quick review of the classified ads supports this conclusion. In recent editions of the Sunday New York Times and Sunday Seattle Times, for example, the following examples can be found:

a. Master's degree in Business or Management;
b. Master's degree in Economics or equivalent combination of education and experience;
c. Bachelor's degree in psychology, social work, counseling, rehabilitation, adaptive technology, or education technology;

d. Bachelor's degree and 2-3 years experience OR Associates degree and 6 years experience.
e. B.S. in Engineering (Electrical preferred), Computer Science, Business or related field;
f. BS degree in civil/geotechnical engineering or a related field;
g. BA/BS or equivalent formal training in IT field
h. BS/BA in Web/Multimedia Development, Information Design and Development, or related field.

Employers give requirements in the alternative to increase the likelihood of finding a suitable candidate. The PERM regulations as a whole and the PWDR form in particular do not recognize the common concept of alternative requirements. Indeed, the PERM regulations suggest at 67 Fed. Reg. 30473 that alternative minimum requirements are only used for unskilled jobs and tend to be used when the employer is manipulating the requirements in favor of the alien, or to qualify an unskilled worker for skilled worker status. This is an inaccurate characterization. Far from being restrictive, alternative minimum requirements open the field to a greater number of candidates. Employers seek to open the door as wide as possible to find qualified candidates, and have hired individuals with different (but related) degrees into the job title with success. Employers recognize that similar skills are taught in a variety of disciplines. Item 3 of the PWDR form should be expanded so that employers have space to enter multiple fields of study in the alternative. The instructions to the PWDR form should specifically state that alternative degree and experience requirements are acceptable when each of the alternatives is normal to the occupation.

- Experience required to perform the job: Page 2 and 3, Items 4, 5, and 8

The employer enters specific skills or other requirements for the job into Part III, Item 8. This seems to be the equivalent of ETA 750A, Box 15. At present, Box 15 is used to list specific experiences which an applicant must have in order to qualify for the position. U.S. applicants are evaluated based on whether they meet the experience requirements. For example, if a Software Engineer position requires three years experience in designing, implementing and testing microcomputer software utilizing C programming language and Unix operating system, these requirements would currently be stated in ETA 750A, Box 15. For such a job, it is not sufficient if the applicant has three years of experience as a Software Engineer because it is entirely possible that the engineer would only be familiar with assembly language, Windows programming, Internet web development using HTML, or a number of other technologies other than C and Unix. If the employer has reasonably decided that the offered position requires an individual who can design and implement software using C programming language on the Unix platform at a level that requires three years of industry experience to achieve, ETA 750A Box 15 is the place to state this requirement.

Under the PERM regulations, the employer specifies these requirements at its peril. 20 CFR Section 656.17(g)(2) says that requirements other than those relating to number of months or years of experience in the occupation or education or training cannot be used unless justified by the employer showing that the employer employed a U.S. worker with the special requirements within two years of filing. Evidence to meet this requirement can include the name of the former employee and the job description, resume, letter from previous employee or recruitment documentation. 20 CFR Section 656.17(g)(2)(i). Section 656.17(g)(2)(ii) says that the employer can justify special requirements by showing that they are normal to the occupation and routinely required by other employers. Suitable evidence to show this includes state or local laws, regulations, ordinances, articles, help-wanted advertisements, or employer surveys.[6] The employer must specify in the ETA 9089, Application for Permanent Employment Certification, on p. 5 at Section VII, Item (4) and (5) whether the job has requirements other than length of time to prepare for the job; and if so, the employer must affirm that it hired a U.S. worker within the previous two years and the requirements are normal to the industry.

Under the PERM regulations, the employer must sign a summary report which, among other things, gives the lawful job related reasons for rejecting US applicants. Without listing special requirements other than years of experience, the employer will not be able to explain the reasons that applicants are unqualified for the position. In the example above, suppose the employer requires three years of experience as a Software Engineer. An applicant with three years of experience as a Software Engineer, but no background with the technologies needed for the job, could not be disqualified unless the employer specified the technologies that are required as special requirements other than years of experience. As a result, people who are not qualified for the job would appear to meet the requirements. Thus, as a practical matter, employers will frequently need to specify special requirements. Under the PERM regulations, they will be penalized by the new and potentially onerous requirements to collect documentation justifying the requirements. Because the requirements are new and untested, they will generate litigation and clarification as employers develop and flesh out their meaning. In contrast to the DOL's suspicious views, special requirements are not necessarily tailored to the qualifications of the alien, but rather a reflection of the complexity of the work world and the need to have properly trained and skilled individuals to perform technical, professional, and skilled work.

[6] Inexplicably, the regulations do not say whether the employer must meet the requirements of section (g)(2)(i) AND (g)(2)(ii); or whether either is sufficient. (Subsections (g)(2)(i) and (g)(2)(ii) should be separated by an "AND" or an "OR" for clarity.)

- DOT or SOC/OES?

The section of the form entitled State Agency Prevailing Wage Determination is where the SWA enters the prevailing wage. The PWDR form contains a nine-character block to enter the occupational code. Dictionary of Occupational Titles (DOT) codes have nine characters. The DOL claims to be relying on the OES/SOC survey, but OES/SOC codes have six or eight characters. It appears that DOL is expecting the SWAs to enter DOT codes even as it claims that the DOT is out of date and has been replaced by the OES/SOC survey. The DOL should explain why the occupational code block has space for nine characters, or revise it to the proper length for the OES/SOC codes.

- Suggesting an occupational code

It is unclear whether and how an employer may suggest an occupational code to the SWA. The SWA makes its own determination of the appropriate code, but it can save time and assist the SWA if the employer suggests a code. The form could be amended to allow space for the employer to recommend an occupational code.

- Validity period for PW determination

The SWA enters an expiration date on the PWDR form. According to the proposed PERM regulations at 20 CFR Section 656.40(c) , the validity period of the PW can be between 90 days and one year. 90 days is far too short a period of time for validity of a PWD. The employer will not start recruitment until it has obtained the PWDR form from the SWA. It takes time to place the first ad, the employer must wait 28 days before placing the second ad, and the employer must wait at least 30 days after the last recruitment step before filing the application. It takes time to collect the necessary documentation, to interview applicants and analyze their qualifications, and to prepare and sign the recruitment report. The employer must assemble all necessary backup documentation because, in the event of an audit, the employer has only 21 days to respond. It would be difficult to complete all necessary recruitment steps within 90 days of obtaining the PWDR form. Further, prevailing wages do not change appreciably in 90 days. All PWDR forms should be valid for one year. There is no rationale for allowing SWAs to validate a PW for only 90 days.

- Level 1 and level 2 guidance

We also comment on page 3 of the Application Instructions on ETA Form 9088, Item 7, Job Duties. This paragraph of the instructions addresses how to write the job description. The instructions are insufficient because they only mention one factor (level of supervision) of the several factors that are used by the SWA in deciding whether the prevailing wage shall be level 1 or level 2. Other

factors include whether the work is routine, entry level, moderately complex or highly complex, whether the employee uses judgment, and whether the employee uses advanced skills. In order to enable the SWAs to make accurate determinations of whether a job is at level 1 or level 2, the PWDR form instructions should provide a more complete description of level 1 and level 2 – or incorporate the standards for level 1 and level 2 in the instructions of how to complete the "job duties" block. As indicated elsewhere in this comment, AILA opposes the OES/SOC survey and level 1 and level 2. However, if they are retained, the PWDR form must provide more information to enable SWAs to use the levels correctly.

- Prevailing Wage Procedure and Priority Date

Under GAL 2-98, the prevailing wage may be documented by the SOC/OES survey or by a published survey that complies with the Section J requirements. SWAs are directed to accept compliant surveys without proof that such surveys are superior to the OES/SOC. In actual practice, however, the scale is heavily weighted in favor of the OES/SOC in some SWAs. Through liaison efforts, AILA has provided DOL with examples of respected and reliable surveys that have been rejected by the SWAs due to hypertechnical interpretations of GAL 2-98. In other situations, SWAs take significantly longer to process PW requests based on private surveys. Employers who wish to move their cases along quickly must revert to the OES/SOC.

The PERM procedure perpetuates this problem, because employers must file a PWDR and obtain a PW determination before they can file the labor certification and secure a priority date. The PERM regulations could provide that the priority date is the date the PWDR request is filed. Since PW determinations are limited in duration, and must be used to support a labor certification before the expiration date, there should be no fear that the employer is unfairly manipulating the system by filing a PWDR without filing labor certifications. Alternatively, the PWDR could be used as the priority date if the labor certification were filed within a reasonable time – six months – of the date of the PW determination. To implement this suggestion, a "date received" box would need to be added to the PWD form.

B. The ETA 9089.

We have reviewed the ETA 9089 and have some suggestions for improvement and clarification:

- Section II, Question 7, "Contact/Attorney/Agent's Name"

The instructions for this question must be amended to indicate that if the employer is represented by an attorney, correspondence from DOL will only be sent to the attorney if this question is completed.

- Section II, Question 10, "Is the employer a closely held corporation . . ."

This is a key question, since a "yes" response will most likely lead to an audit of the application, wherein the employer will be required to produce substantial documentation to demonstrate that the is a bona fide job vacancy, notwithstanding the foreign national's position or interest in the company. However, neither the instructions nor the question indicate that an employer must be prepared to submit certain documentation if the question is answered in the affirmative. Given that employers have only 21 days to provide documentation in the event of an audit, AILA suggests that, if DOL retains this limitation in its regulations, the instructions provide a statement to the effect that a labor certification cannot be granted where a beneficiary has a high degree of influence over the position, to the extent that a bona fide job vacancy does not exist. The instructions should also provide employers with a sense of the type of documentation they should retain if the question is answered in the affirmative.

- Section III, Question 2, "Offered Wage"

This section should be amended to provide space for the employer to state a wage range, as is the current practice. Instructions should state that a wage range is an option in these circumstances.

- Section III, Question 3, "Do you promise to pay the prevailing wage?"

AILA suggests that this question be rephrased as an attestation such as the following: "Employer promises to pay the alien at least the prevailing wage as of the date of admission as a lawful permanent resident." Changing the question to an attestation helps to avoid the confusion created by a "no" option, particularly for employers who may be filing the form without benefit of counsel. Moreover, adding the language "as of the date of admission for lawful permanent residence" conforms the question to current caselaw and practice as to when the prevailing wage must be paid. Inclusion of the words "at least" indicate that employers may pay above prevailing. AILA assumes that if DOL decides to retain the 5% variance (as recommended in these comments) , it will amend this attestation accordingly.

Similarly, question 4 in this section should be changed to an attestation as well. This attestation could read as follows: "If the offered wage is based on commissions, bonuses, or other incentives, employer guarantees payment of the offered wage on a weekly, bi-weekly or monthly basis."

- Section IV, Question 7, Other Recruitment

Entry of a single date next to these recruitment activities does not make sense, as these are typically ongoing recruitment activities of some duration.

DOL's form should be amended to allow an employer to indicate duration of these efforts. This would be particularly important if DOL accepts AILA's recommendation to integrate an RIR option into the PERM system, as ongoing recruitment activities will be crucial to the establishment of a pattern of recruitment.

- Section IV, Questions 10 through 13

These questions should all be rephrased as attestations. Question 10 is particularly confusing and should be simplified. AILA suggests the following language: "If the employer laid off workers in the area within six months immediately preceding the filing of the application, employer attests that it offered the job to laid-off U.S. workers able, willing and qualified to undertake the essential duties of the job opportunity." As discussed in greater detail below, employers should not be required to hire foreign nationals who can only undertake "a majority" of the essential duties of the position offered. If the duties are indeed "essential," a candidate must be capable of performing all of them in order to undertake the position.

- Section VI, Alien's Information, Question 4, "Current Visa"

This question is most likely meant to replace item 3 of the current Form ETA 750A, "Type of Visa." If so, "current visa status" may be the more appropriate terminology.

- Section VI, Questions 5 through 9, Education

This question does not allow the employer to indicate that the foreign national may have the equivalent of a bachelor's degree in years of experience. As discussed above in the section dealing with the PWDR form, many employers will accept a period of work experience, or a combination of education and experience, deemed equivalent to a Bachelor's degree by a professional educational evaluator. This part of the ETA 9089 form should be amended to allow an employer to state if the beneficiary possesses such an equivalent.

AILA notes that the description in Question 9 makes reference to the choice of education level in Question 2. This is a mistake. The reference should be to Question 5.

- Section VI, Questions 12 and 14, Employment of the foreign national with the sponsoring employer

DOL's decision to eliminate the possibility of counting experience gained with the sponsoring employer is discussed in greater detail elsewhere in these comments. AILA assumes that if DOL decides to permit qualifying experience to be gained with the sponsoring employer as per *Matter of Delitizer,* DOL will

either eliminate this question, issue instructions on the type of evidence necessary to show that the experience is qualifying experience, or include a set of attestations aimed at eliciting whether the experience may be counted under Delitizer. If DOL adopts AILA's suggestion and allows applications on behalf of certain experienced aliens to be processed under Schedule A, this question may become unnecessary.

AILA does not see the need for question 14, particularly if question 12 remains in some form.

- Section VI, Questions 4 and 5, Special Requirements and Combination of Duties

AILA notes that the proposed regulations allow special requirements apart from years of education and experience, if those requirements are "normal to the occupation." However, nothing in question 5 elicits whether the employer's special requirements are normal to the occupation. Question 5 only asks whether a U.S. worker possessing the same special requirements performed the job within the previous 2 years. Question 5 should be amended to include the other legitimate basis for special requirements.

As discussed elsewhere in these comments, AILA strongly opposes the elimination of business necessity, and the restriction on combination occupations. AILA assumes that if DOL amends its regulations to restore business necessity and liberalize the use of combination occupations, it will amend its form accordingly.

- Ability to Pay and to Place Alien on the Payroll

DOL proposes to eliminate the current requirement on the Form ETA 750, part A, that the employer document that it "has enough funds available to pay the wage or salary offered the alien", and that "(t)he employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States."

DOL has correctly identified that its efforts duplicate INS' review of the employer's ability to pay the wage. AILA supports this decision.

C. Changes to Schedule A.

- Nurses

AILA strongly opposes DOL's proposal to require permanent licensure prior to allowing an employer to file a Schedule A application for a nurse. The American Hospital Association currently estimates that there are 126,000 vacancies for registered nurses in hospitals across the United States. DOL should not implement regulations that further choke the supply of qualified nurses to the U.S.

The preamble to the proposed regulations states:

> "[O]nly a permanent license can be used to satisfy the alternative requirement to passing the Commission on Graduates of Foreign Nursing Schools exam that the alien hold a full and unrestricted license to practice professional nursing in the State of intended employment. INS has informed us that it has received applications with temporary licenses or permits filed as supporting documentation to Schedule A applications. Our intent in promulgating the current Schedule A procedures for professional nurses was to put an end to the pre-1981 practice whereby some nurses entered the United States on temporary licenses and permits, but failed to pass State examinations for a permanent license. As we have stated with respect to this issue, ''*it is not in the public interest to grant certification to nurses who will not be able to practice their profession* or who will likely limit or otherwise adversely affect the wages or job opportunities for U.S. workers in lower-skilled jobs.'' 45 FR 83926, 83927 (December 19, 1980); see also 20 CFR 656.22(c) (2) (1991)."

67 Fed Reg. 30469 (May 6, 2002). *(Emphasis supplied.)*

The proposed regulations implement the policy set forth above at 20 CFR 656.5(a) (2) by including in Group I the following covered persons:

> "Aliens who will be employed as professional nurses; and (i) who have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or (ii) who hold a permanent, full and unrestricted license to practice professional nursing in the State of intended employment."

Since December 19, 1980, when the current rule was promulgated at 45 FR 83926, 83927, Schedule A has required registered nurses to have either: (1) passed the predictor examination given by the Commission on Graduates of Foreign Nursing Schools (CGFNS) which is offered worldwide, or (2) hold a full and unrestricted state

license. The NCLEX examination which is required for state licensure is not offered abroad.

Passage of the CGFNS examination does not guarantee that a nurse will pass the NCLEX state license examination, but merely predicts that such a nurse, unable to enter the United States in order to take the NCLEX, will be able to pass that examination. Where a registered nurse has already passed the state license examination, this is a far more certain indication that she will be able to obtain a state license than is the passage of a predictor examination.

A number of foreign-born nurses have been granted visas to enter the United States to take the NCLEX, and have succeeded in passing the examination. However, because they are visitors or students, they are ineligible to obtain a social security number which is normally a prerequisite for state licensure. In lieu of a license, they receive a letter from the state licensing authority in the state of intended employment advising them that upon presenting a social security number, they will be issued a state license. As such, these nurses will be able "to practice their professions" shortly after arrival in the U.S. as immigrants without the need to undertake any more professional examinations.

Similarly, registered nurses who have achieved licensure in one state, but are petitioned by an employer in another state initially obtain a "temporary license" in the second state before being granted permanent licensure. The second license is achieved by "endorsement". No additional examination is required. In accordance with the "public interest" explanation stated above, the proposed regulations should be amended to provide that the possession of such a temporary license where no further examination is required for permanent licensure is an acceptable alternative to the passage of the CGFNS predictor examination and the possession of a full and unrestricted state license for the purpose of approving a Schedule A, Group 1 blanket labor certification for a registered nurse.

Since the intent of the regulation is to ensure that the nurse will be able to practice his or her profession, it is strongly recommended that the definition at 20 CFR 656.5(a)(2) be modified as follows:

> **Aliens who will be employed as professional nurses; and (i) who have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or (ii) who hold a permanent, full and unrestricted license to practice professional nursing in the State of intended employment.,** ***(iii) who are eligible to receive a permanent, full and unrestricted license to practice professional nursing in the State of intended employment upon arrival in the U.S. and the completion of merely ministerial acts as evidenced by a letter issued by the appropriate State agency, or (iv) who hold a temporary license in the State of intended employment and require no further examination to attain permanent licensure in that State.***

- Aliens of Exceptional Ability

AILA supports DOL's proposal to remove aliens of exceptional ability from special handling and place them on Schedule A. As discussed in AILA's recommendations for an alternative to PERM, AILA also urges DOL to incorporate the post-IMMACT 90 standards for adjudication of exceptional ability, which DOL acknowledged in its 1991 preamble to regulations implementing IMMACT 90 is less onerous than the standard for extraordinary ability.

- Posting and Prevailing Wage Requirements

Section 656.10(d)(1) requires posting of a recruitment notice for Schedule A occupations. However, Schedule A occupations are by definition those for which DOL has already determined "that there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed . . ., and that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations." Therefore, no recruitment is required for Schedule A positions, and the adjudication of whether the foreign national qualifies under Schedule A has been placed by DOL under the jurisdiction of INS. It would therefore appear to serve no purpose to post either a recruitment notice or the type of notice to employees required for Labor Condition Applications. DOL should consider eliminating this unnecessary burden for employers.

Similarly, DOL's proposal that employers filing Schedule A applications must first obtain a prevailing wage is an unwarranted requirement which imposes additional unnecessary effort on employers and on the SWAs. As mentioned above, with respect to Schedule A occupations, DOL has already pre-determined that the hiring of foreign nationals into these positions does not depress wages for U.S. workers. Therefore, a prevailing wage determination is an additional step that is completely gratuitous.

If DOL wishes Schedule A employers to use the PWDR form for job description purposes, DOL can easily amend the form to include an attestation that the employer is filing a Schedule A application and then add language exempting the employer from the requirement of obtaining a SWA-issued prevailing wage. Further, the INS already requires an employer offer letter or similar documentation describing the position and offered wage (see, generally, 8 CFR Section 204.5), so use of DOL's form may not even be necessary. At the very least, however, a prevailing wage determination should not be required for Schedule A applications.

D. Schedule B.

AILA supports DOL's decision to eliminate Schedule B. AILA concurs that Schedule B is outdated and does not effectively contribute to the protection of U.S. workers.

E. DOL's List of Occupations and Educational Prerequisites.

The proposed rule creates new categories of professional and non-professional occupations. Professional occupations are defined in the supplemental information section of the proposed regulations as "an occupation for which the attainment of a bachelor's or higher degree is the usual requirement for the occupation." Non-professional occupations are defined as 'any occupation for which the attainment of a bachelor's degree or higher degree is not a usual requirement for the occupation." The regulations set forth different recruitment requirements depending on whether the position is professional or non-professional. In addition, DOL is publishing an Appendix that is a list of occupations for which a bachelor's or higher degree is a usual requirement.

The definition of professional occupation should not be limited to an occupation for which the attainment of a bachelor's degree is a usual requirement. To set the standard between professional and non-professional based on whether the person has a bachelor's degree or not, is arbitrary and does not reflect the real world or take into account individuals who have gained professional expertise through work experience instead of education. The DOL should create a broader, more realistic definition such as "an occupation for which the attainment of a bachelor's or equivalent is the usual requirement for the occupation." The non-professional occupation definition should also reflect this more realistic understanding: "an occupation for which the attainment of a bachelor's or equivalent is not the usual requirement for the position."

Moreover, AILA urges DOL not to publish the Appendix A list of occupations which a Bachelor's or higher degree is a usual requirement. Although DOL states in its preamble to the proposed regulations that it does not intend to codify the list, the simple act of publishing such a list immediately creates a presumption that the listed occupations are the only occupations which the CO should consider 'professional'. AILA notes that several professional occupations, which may well require Bachelor's degrees or equivalent experience as a minimum entry requirement, such as highly-trained gourmet chefs, hotel managers and graphic artists, are not on the list at all. Apart from the potential for broader use of this list by DOL beyond its avowed recruitment purpose, AILA has grave concerns about the possible use of this list by INS for the purpose of classifying positions into preference categories. Publication of the list is tantamount to codification, and AILA opposes such publication.

Under current RIR procedure, the employer decides in the first instance on the educational requirements of the position and advertises accordingly. If the educational requirements of the position are beyond the SVP, and/or the advertising undertaken is not appropriate for the position offered, DOL may require the employer to amend the labor certification and/or readvertise. There is no reason why this procedure should change. The DOL regulations should simply define the terms professional and non-professional as described above only and allow employers to demonstrate that the position that is the subject of a labor certification application meets the regulatory definition of

'professional' or 'non-professional' for purposes of determining the pattern of recruitment that they must attest has occurred.

The proposed professional and non-professional classification should clearly relate only to the *recruitment* requirements (as shown on the ETA 9089 Section IV Recruitment Efforts Information) and not to the occupational requirements (as shown on the ETA 9088 Sec. III Job Opportunity). The designation of an occupation as being professional or non-professional should not restrict the ability of the employer to identify specific education and experience requirements (subject to the existing SVP guidelines) when completing ETA 9088. This difference can become a source of confusion for the Certifying Officer and employer. For example, an employer might mistakenly believe that if it designates 'professional' on ETA 9089, Sec. IV, that it is then required to indicate only a Bachelor's degree on ETA 9088. Or a Certifying Officer may mistakenly deny the application, if the employer designated 'professional' on ETA 9089, Sec. IV and only years of experience are indicated on ETA 9088.

F. The Pre-filing Recruitment Requirements.

DOL's required recruitment steps are out of touch with reality and onerous for employers. DOL does not take into account that employers recruit differently depending on whether they are recruiting for a unique single position or recruiting for a position which has commonly held skills. Such a distinction is critical to the business community. When an employer recruits for a "unique" position which requires specific duties and qualifications not commonly available in the marketplace, the employer might not normally advertise in a general circulation newspaper. Qualified individuals are difficult to find and the recruitment campaign will be focused much more narrowly, using headhunters/recruiters who specialize in finding the specific type of individual and recruiting through particular professional and trade associations. When an employer recruits for a position which requires more commonly held skills, for which it may have multiple openings, an advertisement in a general circulation newspaper would be more appropriate. This distinction in recruitment activity based on whether the position is unique or whether it is common applies equally to both professional and non-professional positions.

Secondly, the DOL requirement that the employer place one ad in a professional journal for professional positions which require experience and an advanced degree presumes that there will always be an appropriate professional journal, and that this type of recruitment is the customary practice in the business community. DOL must recognize that there could be circumstances where there is no appropriate professional journal, nor is it industry standard to advertise the job in a journal, and thus make the professional journal requirement optional.

In addition, the mandatory recruitment structure for non-professional occupations should recognize that in certain occupations, the employer's major source for positions might be through a trade or professional organization or a job fair. Thus, the

DOL should require as an alternative to the two advertisements, one advertisement and additional recruitment through a trade or professional organization or job fair.

DOL's proposed rule defines the 'pattern' of recruitment required by employers. We agree that providing a definition of the activity should help reduce inconsistent interpretations by the Certifying Officers across the country. However, in defining the 'pattern' of activity that must take place within 6 months of filing the application, the proposed rule does not take into account the urgency that employers have to fill their open positions. The PERM program is designed to allow employers who have already conducted recruitment activity to try and fill one or more positions, and to submit evidence of that activity through this attestation process. The DOL comments in the preamble create confusion by expanding on the regulatory requirements. The proposed regulations simply state that, for professional occupations, the mandatory recruitment steps must be conducted at least 30 days, but no more than 180 days, before the filing of the application. The regulations do not indicate when the alternative steps must be undertaken except that they must be 'within' 6 months of filing the application. However in the preamble, the DOL states "one of the additional recruitment steps may consist solely of activity that takes place within 30 days of the filing of the application." This conflict between the regulatory language and the preamble is confusing and should be clarified, at the very least.

The DOL requirement that the advertisements have at least "3 consecutive intervening Sundays between publications" and its comment that only one additional recruitment step can occur during the last 30 days before filing the application is unnecessary micro-management of the timing of the various required activities. When employers test the marketplace to find individuals to quickly fill their open positions, they may blitz the marketplace by doing numerous overlapping and concurrent activities occurring in a relatively short period of time (1-2 months). DOL should not dictate the timing of the requirements. It should leave the timing of the activity to the discretion of the employer based on its knowledge of the industry, the job and marketplace. As long as the employer has conducted the prescribed activities "at least 30 days, but no more than 180 days, before the filing of the application" the DOL should not regulate the timing of the activity any further. Similarly, DOL should clarify that recruitment does not have to occur in each of the prior six months, but merely be within the 180 day period.

For professional occupations, the recruitment requirement of 6 different activities appears arbitrary and onerous. The DOL should consider mandating just 2 forms of recruitment and allowing the employer the option of choosing 2 additional forms from the various types of recruitment activity that adequately test the diverse sources for finding the qualified individuals. The DOL can indicate that a job order with SWA is mandatory and then the employer must either place an advertisement in a newspaper OR in a professional journal (if appropriate) and then conduct two other forms of recruitment (from the list of 6 additional forms). Conducting recruitment activity which comes from 4 different sources is adequate activity to show that the employer has searched the marketplace.

G. Content of Advertisements.

Proposed Section 656.17(e) sets forth specific requirements for the content of the required print advertisements that are modeled after the requirements of the current standard (non-RIR) labor certification advertisements found in 656.21(g). That is, the print advertisements must include great specificity as to the position description, rate of pay, job requirements, and more. This is a regrettable step backwards. It was precisely this sort of highly specific and heavily prescribed advertisement for the standard labor certification process that made the old labor certification process so artificial. The old labor certification advertisements were instantly recognizable and seldom served to sincerely recruit U.S. workers. The best that could be said for them, albeit cynically, was that their high cost imposed a burden that only a serious employer would undertake.

The current RIR labor certification program is a much better model for the improvement of the labor certification program. Although at least one print advertisement is required, it need not contain the old level of specificity to which the Department is proposing to return. RIR is a better model because it recognizes that employers are in the best position to know their own recruiting market, and it encourages employers to rely on their regular form of recruitment and not artificial advertisements that are done only for the purpose of labor certification.

For many positions, employers have greatly reduced their reliance on print advertisements in favor of Internet recruitment, employee referrals, and campus recruiting. Studies and employers' own experiences have proven that these methods, not print advertisements, are the most effective way to recruit qualified applicants.

Of those who continue to use print advertisements, there is a great range of advertisement content, from the very specific to the very general. Some employers use very general print advertisements with the primary intention of directing candidates to their websites, where individual or multiple positions can be posted with more specificity. Other employers use very general print advertisements to recruit regularly for positions with multiple openings. In contrast, some employers do choose to use more specific print advertisements in order to narrow the number of applicants, or for internal reasons.

Both approaches (and others) are legitimate methods and should be recognized as such by the labor certification process. Employers should not be required to conduct normal recruitment according to sound business practices and then also conduct artificial "labor certification" recruitment in a "one size fits all" regimen to satisfy the Department's requirements.

The proposed requirements are unnecessarily onerous for employers. They would require employers to create long expensive advertisements that do not add any concrete value to the recruitment process or generate a larger pool of applicants.

The proposed regulations specify seven items that must be in the required print advertisements:

(1) Name of employer – While most employers will include their names in their advertisements, it is commonplace in many industries—including large public relations and advertising firms and investment banks—for employers to identify themselves by reference to size and industry (e.g., "Large multinational public relations firm seeks. . .") or other "buffers" rather than by employer name. As long as the industry, place of employment and type of position is identified, and there is a way to tie the employer to the advertisement, the name of the employer should not be required in the advertisement. Requiring the employer name does not add substance to the validity of the recruitment, and imposes an additional burden for many employers.

(2) Direct applicants to report or send resumes, as appropriate, to the employer - The applicants need only be directed to report or write to a place or mail or email location. The site need not be the employer's per se, as long as the geographic location of the employment is identified.

(3) Description of the "vacancy" sufficient enough to apprise the US workers of the job opportunity - Employers should be able to state just the occupation or job title, which in many cases will adequately describe the opportunity, and the regulation should explicitly state that in many cases the occupation or job title will be sufficient. E.g. "Provide the occupation, job title, or a description of the position for which certification is sought." The regulation should NOT use the subjective test "sufficient enough to apprise the US workers," as employers won't know if they are in compliance, even if they include all the language in the Prevailing Wage Determination Request.

(4) Describe the geographical area ...-- The advertisement should include the city or state where the alien will work, but shouldn't have to apprise applicants of any travel requirements or where the applicants are likely to have to live. Many real world advertisements are broad in scope in the interests of bringing in many qualified applicants, and the more the employer is required to include in the advertisement, the more some applicants will be discouraged from applying. Employers may well want to include travel requirements, but this should not have to be an absolute requirement in the print advertisement.

(5) State the rate of pay - The advertisement should not have to state the rate of pay. Rarely, if ever, is the disclosure of pay included in the employer ads. The employer should be free to indicate a wage or not. If the rate of pay is included in the advertisement, which AILA strongly opposes, DOL should allow a pay range to appear in the advertisement, as long as the bottom of the range meets prevailing wage requirements.

(6) Job requirements - The advertisement should not have to state the job requirements (which could discourage qualified applicants), as long as the title is sufficient to convey the basic duties of the position.

(7) Offer wages, terms or conditions which are no less favorable than those offered the alien- As discussed above, most real-world ads are fairly brief and do not contain a description of terms and conditions of employment. DOL should not require a description of the terms of employment to appear in the ad.

Although advertisements can be very general, employers should be able to use the requirements listed on the PWDR form to determine who is qualified for the job.

H. The Expanded Posting Requirement.

In Section 656.10(d)(ii), DOL significantly expands the internal posting requirement to mandate publication of the posting in any and all in-house media, whether electronic or printed, in accordance with the normal procedures generally used for recruiting for other positions in the employer's organization. AILA does not *per se* oppose this change, but urges that it be modified.

Requiring the employer to post in all "in house" media, including electronic or printed may be reasonable depending on the employer's normal practice for the type of position in question. Typically, employers will not post via "in house" media for certain positions, including senior or executive positions for which there might be confidentiality attached to the recruitment effort. AILA suggests that DOL amend its proposed rule to provide that an employer should post internally through any and all in-house media normally used to recruit for "other *similar* positions." In this way, employers would be required to use the kind of in-house recruiting that it uses typically uses in the normal course for specific type of job offered.

The proposed regulation requires the inclusion of items from Sections 656.17(e)(1) to (e)(7), including salary which is often not provided by most employers when using "in house"
media or is simply referred to by a grade level. Employers should be required to follow their normal procedures with respect to the inclusion of wage information in their in-house postings.

As mentioned above, Form ETA 9089, section III does not appear to allow for a salary range. This is a serious problem since salary ranges expressed in dollars or by a grade level are important in the hiring process and are widely used when employers use "in house" media to recruit. In addition, the alien's salary may be affected by additional experience gained on the job which is not reflected in the minimum requirements. Thus, an employer would have to post the alien's salary although it may not be the salary that would be paid to a worker who merely meets the minimum requirements. For example, the alien has a BS and 2 years experience at the time of hire. Three years later, the employer initiates a labor certification process. Under the proposed regulation, the employer would not be able to use any experience gained on the job, although all would agree that the alien should be compensated for this additional experience.

Requiring the employer to post the alien's actual salary which does not reflect the minimum requirements for the position is misleading and should not be required. Instead, the employer should be allowed to post the salary range that it normally uses for the position as long as the bottom of the range meets the prevailing wage.

BALCA has acknowledged that an employer should be allowed to pay U.S. workers less than the alien's actual salary under these circumstances. In *University of North Carolina*, 1990-INA-422 (June 9, 1992), the Board stated:

> "If the Employer is required by § 656.21(b)(6) and § 656.21(g)(6) to describe the position, and to advertise it, in terms of its minimum requirements, and if the Employer is also required to describe the requirements as they existed when the Alien was first hired, disallowing any training and experience acquired while in the job, it seems incongruous to also require the Employer to offer a wage that corresponds to the Alien's added on- the-job experience and training. In effect, the CO's interpretation requires the Employer to advertise the wage currently earned by the Alien, which reflects experience and training gained with the Employer, to U.S. workers who are not required to have that experience and training.
>
> . . . Instead, in light of the requirements at § 656.21(b)(6) and (g)(6), we construe the 'no less favorable than offered the alien' language of § 656.21(g)(8) to require the Employer to advertise a wage offer that is no less than the Alien's wage when initially hired (assuming, of course, the wage offer also meets or exceeds the prevailing wage). By doing so, the advertised wage offer will match the value of the minimum requirements**,** demanded of the Alien when initially hired, and of U.S. applicants, alike."

Therefore, employers should be permitted to follow their typical in-house posting procedures with respect to salary, and to use a salary range when wage information is included in the posting.

Finally, AILA notes that 656.10(d) states that the internal notice must be posted "between 45 and 180 days" before filing the application. This is confusing. Other recruitment must be undertaken not less than 30 days or more than 180 days before the filing of the application. AILA suggests that the timing of the notice be consistent with this time frame.

I. Recruitment Report and Rejection of U.S. Workers,

Section 656.17(f) of the proposed regulations describes the type of recruitment summary required under PERM. This section indicates that an employer must summarize the lawful job-related reasons for rejection of the applicants for the position.

As discussed above, these recruitment steps do not make a distinction between employers who recruit regularly for positions with multiple openings and employers

recruiting for a specific single position. The content of the recruitment report should depend on whether the employer has recruited for an individual job or recruited for a position that has multiple openings (more than one).

Employers with multiple openings should not have to match every resume received to an individual job and track its outcome. Good faith patterns of recruitment, exemplified by the number of openings and actual hiring, should satisfy the statutory requirement. For employers with multiple openings in the occupational classification, the summary report should only have to include (for the occupation) the number of openings at the beginning and end of the recruitment period, and the number of hires during the period. It is excessively burdensome to require an employer who is constantly recruiting and filling open positions, to have to summarize by the lawful job related reasons why each applicant was rejected. This is particularly the case where the employer is using recruitment conducted during the normal course of a company recruitment campaign, and has hired a number of U.S. workers through the same campaign.

In Section 656.17(f)(2) DOL imposes a new standard for the rejection of U.S. workers, stating that the employer may not reject U.S. workers if the workers do not meet each of the employer's minimum requirements, or if the worker can obtain the skills necessary to do the job during a reasonable period of on-the-job training. Although this new standard is discussed more fully below, AILA must register here its strong opposition to this subjective standard. A basic tenet of labor certification law is that the employer may only state the minimum entry requirements to perform the job offered. Now DOL announces that a U.S. worker may be permitted to reject a job applicant if he or she fails to meet even these bare minimum requirements.

As a preliminary matter, it is clear that this new standard derives from DOL's suspicion, inherent in other areas of this proposed rule, that all employers inflate job requirements when filing labor certifications. This presumption is a disservice to most U.S. employers who seek to use the process in good faith. Secondly, the standard, if implemented, will only create a forced mediocrity in the workforce. No employer should be obliged to hire any unqualified worker and provide any more training than a qualified applicant would receive. If DOL is concerned about fraud in the drafting of labor certifications or the recruitment of workers, DOL should design a reasonable process to investigate and punish those who would abuse the system, rather than penalize all employers for the abuses of the few.

Finally, requiring employers to provide on-the-job training to unqualified workers constitutes and unwarranted imposition of cost and effort, particularly on smaller employers. Training costs may be prohibitive for the small employer for any position other than a lesser skilled Schedule B type of occupation.

The proposal amounts to an unprecedented intrusion by the DOL into recruitment and training practices used by the U.S. business community. The proposed regulations do not even address how the certifying officers will gain the expertise to make this

determination involving hundreds of industries in a dynamic economic climate. The inevitable result will be arbitrary and capricious decision making.

J. Layoffs

Section 656.17 (j) of DOL's proposed rule relates to layoffs occurring in the geographic area within the six month period prior to the filing of the application, involving the same occupation or a related occupation. The regulation requires the employer to demonstrate that it has "notified and considered all potentially qualified laid off U.S. workers of the job opportunity."

AILA supports DOL's limitation of this provision to instances where there is a layoff in the geographic region in the occupation that is the subject of the labor certification or in a related occupation. AILA assumes that employers will not be required to supply any information on layoffs that do not meet these regulatory criteria.

However, AILA is extremely concerned about DOL's definition of "related occupation." "Related occupation" is defined as any occupation which requires workers to perform "a majority of the essential duties" involved in the occupation. AILA does not object to the requirement of notifying and possibly interviewing workers who were laid off in a related occupation, as they may, in fact, be qualified to perform the all the duties of the position offered. However, as indicated earlier, AILA strongly objects to the notion that an employer must consider a worker qualified if he or she can only perform the "majority of essential duties" of the position offered.

If certain duties are "essential" to the position, an employer should not be required to consider workers qualified who cannot perform all the duties. An individual who doesn't possess all the skills necessary to perform the essential duties of the job is simply unqualified for the position. In the real world, no one would want to be treated by a physician who could only perform 51% of the essential duties of a physician. No law firm would hire an attorney knowing that the attorney could only perform 75% of the job's basic duties. The same is true in the high tech industry, where many "essential skills" may constitute less than 51% of the job duties, but are driving factors in being able to perform the job as a whole.

Once again, AILA perceives that this standard is the result of DOL's pervasive and unfounded suspicion that employers inflate basic job requirements for labor certification purposes. DOL's new standard for recruiting U.S. workers—including laid off workers—renders meaningless the long-standing principle that the employer use minimum entry requirements on a labor certification. Therefore, while AILA has no objection in principle to the requirement to notify laid-off workers in related occupations, AILA urges DOL to change its standard governing whether such workers are considered qualified for the position in the labor certification.

K. Supervised Recruitment.

- Determination to order supervised recruitment, and requirements

AILA does not oppose giving a CO the option of ordering supervised recruitment. However, the proposed regulations state that such recruitment may be ordered in "any case," and do not set out any standards or guidelines for when and in what circumstances a CO may order such additional recruitment. This will result in inconsistent practices which are unpredictable for employers. At the very least, DOL should set some guidelines as to the circumstances in which supervised recruitment may be warranted, so that employers may be protected from abuse of discretion.

- Time for filing Recruitment Report

Section 656.21(d) requires the employer to provide a detailed written report of its recruitment efforts within twenty-one (21) days of the CO's request for that report. This report must contain significant detail as to every type of recruitment that the CO has ordered.

Under current practice in non-RIR cases, an employer must submit its Recruitment Report within 45 days of the SESA's notice that the recruitment period has ended. [For cases where the employer advertised in professional, trade or ethnic publications, however, the report must be submitted within 30 days of the date on which the employer's ad was published. See Section 656.21(j)(1).]

Under the proposed rule, the CO may order extensive additional recruitment through multiple sources. In light of the potential extensive nature of supervised recruitment, the proposed 21 day response period is not sufficient AILA urges DOL to adopt a longer response period. At the very least, the CO should have the discretion to extend the 21 day period.

- Subsection b, Grammatical Comment

The first paragraph of this subsection contains an incomplete sentence. The second sentence should include the highlighted language and should read as follows:

> "If published in a newspaper of general circulation, *the advertisement must* be published for 3 consecutive days, one of which must be a Sunday, or, if published in a professional, trade or ethnic publication, *the advertisement must* be published in the next published edition."

L. Conversion to PERM.

Section 656.17(c)(3) permits an employer to convert a case which was previously filed before the effective date of PERM without the loss of the filing, or priority, date. It is key to the success of PERM to ensure that conversion processes are procedurally effective and sufficiently streamlined to meet DOL objectives in reducing "the average time needed to process labor certification applications...[and to] ...eliminate the need to periodically institute special, resource intensive efforts to reduce backlogs which have been a recurring problem." (See, Summary of NPRM.) DOL's proposed conversion rule fails to meet this goal.

Section 656.17(c)(3)(i) requires the employer wishing to convert a case to PERM to "compl[y] with all of the filing and recruiting requirements of the current regulations...." In addition, section 656.17(c)(3)(ii) then requires the employer to '...withdraw the application....' which was previously filed under the former regulations."

This type of conversion process may have made sense when DOL implemented the conversion from "regular" to "RIR" in August 2000 because the employer had not yet conducted any recruitment and thus was not beginning a new, duplicative recruitment process. But the PERM conversion rules will dissuade thousands from converting if they ultimately require a new recruitment process. It is unduly burdensome to require an employer to undertake yet another recruitment campaign to comply with PERM. Under the proposed regulation, many U.S. employers may actually have to undertake three recruitment processes to fill one job permanently--one when it recruits the alien, the second when it files the RIR case, and the third when it files Form ETA 9089 to convert its pending RIR request to a PERM case.

Employers should not be required to continue to expend resources on additional recruitment unless there is a compelling governmental interest to support additional recruitment. The DOL should carefully access the additional financial burden on employers to recruit. Most Sunday ads in metropolitan areas cost $2000 and similar ads in journals can cost $1500 and up. In order for the conversion program to succeed and to clear up the backlog, DOL should stipulate that the pre-PERM recruitment rules can apply.

Moreover, given PERM's elimination of business necessity, alternative job requirements, ability to count qualifying experience gained with the sponsoring employer, and the restrictions on combination occupations, many employers may well prefer NOT to convert their cases to PERM, unless these restrictions are changed (as AILA recommends), or their cases are "grandfathered" with respect to the inclusion of any of these elements.

Procedurally, the employer should not be required to obtain a new prevailing wage on Form 9088. This would defeat the NPRM's intent to reduce duplicative efforts on the part of the SWA.

Conversion cases should be submitted by mail to the Certifying Officer with all supporting documentation and adjudicated in the order of the original filing date. This comports with the instructions to the ETA Form 9089 which appear to preclude automated processing because a copy of the previously submitted application and related documents are requested in Section I -Application Information. Given the current backlogs, the DOL should process PERM conversion cases ahead of new cases to avoid further delays for these cases.

M. Substitution of Beneficiaries.

The NPRM conforms DOL regulations to the 1994 federal district court decisions which invalidated the interim final rule of 10/23/91 which eliminated the substitution of beneficiaries. AILA supports this correction. The preamble makes clear that operational authority for substitution is delegated to INS under various memoranda of these agencies. Thus, the status quo on substitution is retained. However, in AILA's view, there is room for improvement of the process.

In many cases in which an employer legitimately seeks to substitute a beneficiary into an approved labor certification, the original certification is no longer available because it has been filed with the INS prior to withdrawal or revocation of the I-140. It is nearly impossible to obtain the original back from the INS. Similar problems arise when an original labor certification has been lost, or sent by the Certifying Office to the wrong address. Duplicate labor certifications may be requested by only the INS or a Consular officer, but the alien, employer or agent may initiate the process by petition to the officer. This is always an inordinately lengthy process.

AILA asks DOL to institute a reasonable process for certification of copies of labor certifications or issuance of duplicates. AILA understands that DOL may want to impose safeguards to prevent the fraudulent use of duplicate labor certifications. However, AILA is confident that DOL can institute a system wherein duplicates might be rapidly issued to INS upon direct request of the employer or counsel, demonstrating that an I-140 for substitution has been filed.

N. A Reasonable User Fee.

The preamble to DOL's proposed rule discusses the possibility that legislation may be passed authorizing collection of a user fee from employers for the filing of labor certifications. 67 Fed. Reg. 30469 –30470. AILA supports a user fee, provided that the fee is reasonable, related to the actual cost of processing the case, and placed in a special fee account to ensure that accrued fees are designated for use only in labor certification adjudication and backlog reduction.

V. ELIMINATION OF TIME-TESTED POLICIES, PROCEDURES AND BALCA CASE LAW AFFORDING FLEXIBILITY TO U.S. EMPLOYERS

A. Finding that U.S. Workers Who Don't Meet Minimum Requirements Are Qualified.

DOL's commentary to the proposed regulations announces a radical change in the definition of "qualified" U.S. workers. The proposed regulation appears to mandate that each and every U.S. worker is potentially qualified for a position even if he or she does not meet every minimum requirement. Under the rule as proposed, the new standard appears to be whether a U.S. worker is "sub-minimally" qualified for an offered position. Consequently, the DOL's proposed regulation creates an overbroad and unmanageable definition of the term "qualified" U.S. worker and flies in the face of customary recruiting, hiring, and training practices of U.S. employers.

At the same time that DOL is proposing to severely restrict an employer's ability to objectively define its job requirements by eliminating "business necessity," alternative minimum requirements, experience gained with a related foreign employer, and defining standard industry job requirements within a severely limited O*Net system, DOL is expanding, without limits, the definition of "qualified" U.S. workers to virtually *any* applicant who submits an application for an offered position.

Thus, the proposed regulation marks a dramatic change in long-standing labor certification adjudication standards by creating a subjective and unworkable system by which an employer will *never* be able to rely on lawful objective, job-related reasons for rejecting a U.S. worker. The proposed regulation outright ignores an employer's justified job requirements and mandates, in both supervised and pre-filing recruitment, that an employer must first determine whether the applicant's education, training, experience, or combination thereof would result in the applicant qualifying for the job. While recognizing that the latter test has been in place where an applicant appears to meet the minimum requirements for a position, it has never been the case that an employer must make this determination in every instance in which an applicant fails to meet the job requirements. Therefore, the proposed rule attempts to reverse the long accepted rule that an employer may reject a U.S. worker where the applicant lacks one or more stipulated and advertised minimum requirements for the position.[7]

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[7] See *United Parcel Service*, 90-INA-90 (Mar. 28, 1991); *Mancillas International Ltd.,* 88-INA-321 (Feb. 7, 1990); *Microbilt Corp.*, 87-INA-635 (Jan. 12, 1988). Where the employer's stated job requirements are not found to be unduly restrictive, an applicant who does not satisfy these requirements is not qualified. *Adry-Mart, Inc.*, 88-INA-243 (Feb. 1, 1989) (*en banc*); *New Consumer Products*, 87-INA-706 (Oct. 18, 1988) (*en banc*); *Concurrent Computer Corp.*, 88-INA-76 (Aug. 19, 1988) (*en banc*); *Cinecom International Films*, 90-INA-41 (Apr. 8. 1991); *City Public Service*, 89-INA-337 (Mar. 27, 1991); *St. Charles Borromeo School*, 89-INA-262 (Mar. 18, 1991); *Houston Music Institute, Inc.*, 90-INA-450 (Feb. 21, 1991); *Advanced Micro Devices, Inc.*, 89-INA-306 (Dec. 12, 1990); *Peta Software Services, Inc.*, 89-INA-112 (Nov. 16, 1990); *R.K. Plastics*, 89-INA-129 (May 29, 1990); *Intervoice, Inc.*, 89-INA-128 (Apr. 9, 1990); *Chatwal Hotels and Restaurants, Inc.*, 88-INA-68 (Feb. 20, 1990); *Integrated Management*,

DOL would place an additional burden on employers to establish that a U.S. worker who fails to meet the minimum requirements for the job may yet be qualified if "he/she can acquire during a reasonable period of on-the-job training, the skills necessary to perform as customarily performed by other U.S. workers similarly employed, the duties involved in the occupation." Presumably, an employer would be required to undergo this analysis for each and every applicant. Surely, even in the interest of protecting U.S. workers, the DOL cannot expect U.S. employers to seriously consider each and every applicant who simply does not meet acceptable industry-tested minimum job requirements.

In the real world of recruiting, an employer places an ad for a job opening and pre-screens applicants to determine whether the resume, on its face, demonstrates the applicant's ability to perform the job. If it does, an employer interviews the applicant and *then* determines whether the applicant's experience or other qualifications render the individual qualified for the job or, whether with proper training, an applicant would able to perform the job.

The better rule would be to retain the existing system of permitting U.S. employers to work within accepted DOL standards of defining the job based on real-world requirements and allowing the employer to apply objective and lawful job-related reasons for rejecting *unqualified* U.S. workers. To adopt the regulation as proposed will result in a subjective and unmanageable standard of labor certification adjudication which will severely undermine the DOL's goal of "streamlining the system." Further, the proposed regulation will inevitably encourage a substantial volume of litigation over the issues of whether training is feasible, what is a reasonable amount of time to learn the needed skills, and whether an applicant can learn the skills within that time. In short, the proposed regulation will require the DOL to second guess a U.S. employer in every single case in which the employer's summary of recruitment is challenged through the audit process. This is exactly what the DOL concedes it is in no position to do.

B. Elimination of Business Necessity Justification for Certain Job Requirements.

The proposed rulemaking seeks to eliminate the doctrine of business necessity, developed through BALCA and federal court case law and codified at current 22 CFR 656.21(b), as a justification for prerequisites for employment in excess of those perceived to be "normally required." This dramatic administrative transformation in existing law appears to be motivated by DOL's perception that such requirements generally result

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89-INA-4 (Dec. 18, 1989); *Southeast Diesel Corp.*, 89-INA-81 (Dec. 5, 1989); *Far Hills Management Corp.*, 89-INA-104 (Nov. 30, 1989); *Paradise Designer Cushions*, 89-INA-141 (Nov. 27, 1989); *Euclid Chemical Co.*, 88-INA-398 (May 4, 1989); *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989); *Quality Concrete Co.*, 88-INA-314 (Apr. 21, 1989); *Hong Kong Royale Restaurant*, 88-INA-60 (Oct. 17, 1988); *Annar Mangali*, 88-INA-177 (Oct. 12, 1988); *University of Utah*, 87-INA-702 (May 9, 1988). (*Cited in BALCA Law Library: http://www.oalj.dol.gov*).

from employer tailoring to the particular qualifications of the alien beneficiary, rather than from the actual needs of the employer.

DOL's skepticism appears premised on a virtually irrebuttable presumption that employers fabricate their actual minimum job requirements as an accommodation to their incumbent employees. Moreover, DOL has indicated that, particularly in "highly technical areas," its ability to assess the veracity of employer representations is unduly burdensome. Accordingly, the NPRM seeks to radically restrict employer ability to specify job requirements deviating from those enumerated in the dramatically reduced number of genericized occupational classifications in the as-yet untested O*NET, which is currently under development.

DOL's incredulity regarding the veracity of employer statement of job requirements appears grounded in unspecified, unfounded speculation for which no evidence is offered. Moreover, DOL's response to this skepticism appears to ignore the ready availability of existing mechanisms for deterring employer misrepresentation, ranging from the issuance of SWA assessment notices through CO deployment of NOFs and adverse final determinations and culminating in the institution of OIG investigations and, in particularly egregious cases, criminal prosecution of employers and/or their representatives alleged to be submitting perjured testimony.

Rejection of business necessity justifications for requirements deemed abnormal as accommodations to incumbent employees ignores a quarter century of cumulative business necessity experience and disregards the frequent observation that requirements deemed restrictive in a previous decade are now recognized as industry norms. Illustrative of this phenomenon would be the vigorous opposition by many SESAs during the 1980s to computer-related job requirements in the accounting and financial industries. Today, few would dispute the appropriateness of requiring experience in utilization of industry-specific computer systems by accountants or financial analysts.

While traditional reliance upon the admittedly imperfect *Dictionary of Occupational Titles* (DOT) has enabled DOL to compare stipulated job requirements/duties with DOT's enumeration of over 10,000 occupational titles, the O*NET consolidation of occupational titles to fewer than 900 categories obviously limits the sensitivity or accuracy of the projected reliance upon its occupational taxonomy. The reduction in the number and specificity of occupational categories seems particularly inappropriate in light of the continuing proliferation of new job categories through technological innovation, demographic transformation, growth of the international marketplace, and (until recently) marked growth in consumer spending.

This proposal flouts the virtually universal recognition that our economy is driven by technological advance with an associated proliferation of newly created job categories. Illustrative of occupations that have emerged in recent years are webmaster, data base security analyst, nuclear power plant decommissioning engineer, PET scan technician, llama rancher, and homeland security chief. Previously nonexistent areas of endeavor ranging from e-commerce through Zen meditation training have created economic

opportunity for U.S. workers and have stimulated economic growth, from coast to coast.

The assessment of job requirements in terms of a finite, inflexible catalog of standardized occupational categories unjustifiably renounces the legacy of BALCA and Federal Court recognition of the legitimacy and appropriateness of the imposition of job-specific requirements emanating from the particularized circumstances of employers in a dynamic, technologically innovative and ethnically diverse population. Illustrative of the evolving nature of occupational expansion is the emergence of distinct occupational categories such as computer hardware engineering, solar power engineering, and telecommunications engineering from a common precursor occupational category such as electrical engineering. The static model underlying the projected reliance upon a radical collapsing of occupational categories severely compromises the utility of labor certification as a means for securing the long-term employment of qualified and demonstrably labor-market-deficient alien workers of foreign workers in nationally critical emerging fields such as crystallography, sensor technology and encryption technology, each of which constitutes a recognized occupational category entirely distinct from the engineering or scientific discipline from which it has developed.

The proposed revision to Section 656.17(g)(1) appears to ban, without exception, job requirements relating to duration (years or months) of experience or education exceeding the Specific Vocational Preparation (SVP) level assigned by the newly established O*NET job zone system. Accordingly, a prestigious publisher of scientific journals in physics and chemistry would be unconditionally barred from imposing the industry-wide prerequisite for employment as President/Publisher in Chief of a doctorate in the physical sciences. It is difficult to perceive a benefit to the U.S. job market in the barring of durational requirements exceeding the presumably fallible O*NET data, but it is easy to forecast the benefit to foreign employers of disallowing the acquisition of permanent residence by qualified workers deterred from accepting positions with US employers. Moreover, a total ban on the stipulation of years of experience/education requirements deviating from O*NET data is likely to present serious procedural and substantive due process deficiencies in unconditionally depriving U.S. employers of the opportunity to document the necessity, normality and appropriateness of such requirements.

Proposed revisions to Section 656.17(g)(2) would similarly restrict employer imposition of job requirements other than those pertaining to years of experience or education. While not banned outright, other requirements for employment perceived to deviate from O*NET data would be permissible only if shown to have been met by a U.S. worker performing the sponsored position within 2 years of filing the application or if demonstrated to be "normal to the occupation" through documentation that other employers in the respective industry have "routinely" imposed these requirements. It is not clear whether both or either of these standards would have to be met. What is clear is that neither addresses the realities that often drive employers into the labor certification process.

A new company or a company that has created a new position to respond to the ever-changing market will not have had a U.S. worker filling the position within the last two years. A company attempting to trailblaze a product or market will not be able to show that its requirements are normal to the occupation because of the very uniqueness that makes it a trailblazer. For example, a U.S. food company attempting to enter the Chinese market may need a Chemist with knowledge of food restrictions and rules in China, in order to adapt products to that market. Knowledge of Chinese food restrictions and rules is not a normal requirement for a Chemist, but is a necessity for this job to enable this company to successfully enter the new market. The proposed rule's imposition of a sub-minimum qualification would defeat this company's attempt at growth.

Finally, it should be noted that the proposed rule-making commendably *retains* the business necessity justification for documenting the appropriateness of otherwise disallowed foreign language requirements, traditionally subject to justifiably enhanced scrutiny. It is puzzling that the generally more objectionable foreign language requirements, more prone to abuse, should be accorded a means of justification rendered unavailable through the NPRM to the often far less controversial job requirements discussed above, such as experience in a specialized quantitative technique or engineering methodology.

The NPRM commendably enables employers to justify a language requirement through documentation of the needs of its customers or contractors, but remains ambiguous with regard to scenarios wherein an employer's own employees (as opposed to its contractor's employees) are incapable of communication in English. It is urged that the rule-making should also recognize the not infrequent necessity of requiring knowledge of a foreign language in order to communicate with an employer's own employees, particularly in unskilled jobs within major urban areas. Recognition of the permissibility of such requirements where necessitated by the linguistic deficiencies of a contractor's personnel, but not of an employer's own staff, would seem to inexplicably encourage employers to substitute contractors for their existing employees, thereby exempting these employers from liability for unauthorized employment or taxation. Accordingly, inclusion of employees as a potential class of individuals necessitating a language requirement is recommended.

C. Combination of Occupations.

The NPRM seeks to amend 20 C.F.R. 656.17(g)(iv) to modify the traditional proscription against certification of positions traditionally perceived to constitute "[a] combination of duties" with the innovative term "combination of occupations." Commendably, the Supplementary Information prefacing the NPRM recognizes that "most jobs require the incumbent to perform a combination of duties." AILA wholeheartedly commends the wisdom of this observation, which clearly pertains to positions as diverse as President of the United States and immigration paralegal. In lieu of the apparently moribund combination of duties, the rule-making proposes the probably more realistic objection to labor certification of combination of occupations. As is the

case with nondurational job requirements, sponsored positions perceived by DOL to comprise elements of more than one distinct occupational category would be unamenable to labor certification, unless justified through the same two exclusive alternatives provided for job requirements; that an employer has employed a U.S. worker possessing the same combination of "occupations" within 2 years of filing, or that the combination of occupations constitutes an industry norm. However, inexplicably, in combination of occupation scenarios, the industry norm justification is limited to the area of intended employment, rather than to the industry in question.

Moreover, the accelerating hybridization of specialized occupational categories, many later recognized as singular occupations unto themselves, mandates an expansion, rather than contraction, of employer opportunity to substantiate the need for an employee to perform duties perceived by DOL to comprise aspects of two more distinct occupational categories.

The proposed elimination of business necessity would pose a challenge to certification in a substantial number of unquestionably meritorious applications submitted by employers of nationally critical personnel in cutting edge technologies. Absent prior employment of U.S. workers, performing the perceived combination of occupations, or documentation that other employers (presumably competitors) within the area of intended employment similarly impose the contested requirements, labor certification will be unavailable to workers in inherently hybridized fields such as cryptography, airport security system engineering, and terrorist profiling.

D. ***Experience Gained with the Same Employer.***

Section 212(a)(5) of the Immigration Act is a two-sided coin protecting U.S. workers and, at the same time, allowing employers to bring in needed skills and expertise which are in short supply in the U.S. The proposed regulation is unbalanced in that it disallows <u>any</u> experience or expertise gained with the present employer (with no exceptions) and then expands the definition of employer well beyond any practical application. Without statistics, citation, or evidence, empirical or otherwise, the preamble states that the DOL has concluded that "there is no material difference in the need to protect U.S. workers if the alien gained experience in a similar OR a dissimilar job OR…it is no longer feasible to train another worker for the job involved in the application." Based on that unsupported assertion, the proposed rule would preclude employers from ever requiring any experience that the alien has gained working for that employer or a related entity.

Citing *Matter of Haden, Inc.* (88 INA 245), the proposed rule defines employer in the most broadly drawn manner possible, thereby precluding any experience gained with any organization no matter how tenuously related. Wrapped up under the new definition of "employer" which includes predecessor organizations, successors in interest, parents, branches, subsidiaries, affiliates, in the United States or outside the United States, and even prior employment with contractors (who are paid by a different entity and temporary by definition), the Department of Labor proposes not only to disallow any

experience gained with the employer (with no flexibility in this proposal), but also to extend the definition of "employer" to ludicrous degree.

These new standards ignore current employment market realities in a global economy. Tremendous changes have taken place since the implementation of the present regulations in 1977. Employers now need to look worldwide to find expertise and talent. On occasion, this may mean hiring persons from related companies, whether subsidiaries, affiliates, parent, etc. Such a process is highly competitive. Often one company acquires another, at least in part, to obtain the services of its workforce. This is business reality, not an international conspiracy against U.S. workers. Many labor certifications are filed for individuals who have been with the same employer for years and have been promoted to new positions. If an employer cannot count on the continued services of a long-time experienced employee, instability is created within the company which affects its competitive edge.

Although the preamble cites *Matter of Haden* for the proposition that the definition of employer should be broadly drawn, there is absolutely nothing in the body of the decision which stands for such a proposition. There is only an oblique reference in Footnote 2 which refers to a previously approved labor certification on behalf of the same company and states in part: "If the C.O. had specified, and we had found, an interconnection between the other company and the employer beyond work on joint projects, our decision in that case might have been different. That case does not limit the C.O. from delving deeper into the facts of the relationships among the Haden companies in this, or any other, case." It is very difficult to extrapolate from this footnote the license taken by The Department of Labor to suggest that they can broaden the definition of "employer" to the degree proposed. In addition, the better reasoning of *Matter of Reiter Corporation* (2000 INA 193), a case decided 12 years later, has been ignored. BALCA, acknowledging the "increasing globalization of the marketplace" recognized the need for a more flexible standard and allowed that an employer that could show "distinct, operational independence" would be able to overcome a 656.21(y)(6) deficiency.

The attempt by the DOL to make the process cookie-cutter, in terms of actual minimum requirements, reveals a misunderstanding of a workplace that is dynamic, not static. AILA believes current regulations provide adequate safeguards to protect U.S. workers while allowing a modest flexibility for those situations which cannot fit within the cookie-cutter mold.

E. *Beneficiary's Influence over the Job Opportunity.*

In the proposed rule, DOL has decided to adopt the factors articulated in the BALCA decision, Modular Container Systems, Inc. (89-INA-228, July 16, 1991) to help COs determine whether or not the job opportunity is bona fide or clearly open to U.S. workers. The proposed rule lists the type of documentation an employer must present in the event of an audit, if the employer is a closely held corporation and the beneficiary has an ownership interest in the company, or if there is a familial relationship between the beneficiary and the stockholders or the owners.

AILA supports the notion that a beneficiary's ownership interest in the company would only be material to the issue of whether there is a bona fide job opportunity if the company is a partnership or closely-held corporation. AILA therefore supports this limitation set forth in the proposed rule.

AILA has no fundamental objection to the requirement that an employer provide additional documentation showing a bona fide job opportunity if the beneficiary is a relative of the shareholders or owners of the sponsoring business. AILA notes, however, that under BALCA precedent, such a familial relationship does not invalidate the job opportunity *per se.* In *Altobeli Fine Italian Cuisine,* 90 INA 130 (October 16, 1991), the Board granted labor certification even where the alien's family (brother and sister-in-law) held 75% of the employer's stock. The lack of financial investment by the alien, together with the fact that the alien did not control the hiring decision and the employer made good faith recruitment efforts, were all favorable factors which led to the granting of certification in that case. The sound reasoning of this case law should be codified in the regulation.

AILA suggests that the regulations allow the employer to provide any other probative evidence on the issue of undue influence and bona fide job opportunity, aside from the list provided in the regulations. This may assist employers in establishing that a bona fide job opportunity exists, notwithstanding an ownership interest or family relationship.

F. Use of Alternative Requirements.

The Labor Department's commentary to the proposed regulations announces its intention to eliminate the use of alternative experience requirements as a means of qualifying for the position offered. The regulation would seemingly accomplish this very restrictive goal by disallowing any *educational or experiential* requirements "other than those relating to the number of months or years [of education or experience] *in the occupation***."**(Proposed Section 656.17(g)(2), at p. 30498).

First, we note that this proposed regulatory language is quite ambiguous and would suggest that alternative education and experience requirements *would* be permissible so long as the required education and experience were within the *same occupation*, as opposed to the *same job title*. For example, in the field of advertising, experience of a certain number of years gained in the lower level position of account executive would be regarded by all advertising agency human resources directors to be a reasonable and customary qualification for the higher level position of account supervisor. Therefore, if the Labor Department is requiring only that alternative experience requirements be in the same or similar general occupation as the job offered, this would be acceptable, provided the definition encompasses related occupations that could prepare an individual to perform the job duties. If, however, the Labor Department intends by its proposed regulation and commentary that the "same occupation" means the *identical job* to that being offered, then this would be a radical

restriction on long-standing labor certification practice, and would be wholly inconsistent with normal and customary hiring requirements followed by employers in virtually every industry.

DOL makes the astonishing assertion that in "virtually all instances involving alternative experience" the alien beneficiary has been employed in a position requiring less than two years of training or experience. The Labor Department offers no empirical support for this assertion. Indeed, AILA's members have filed many labor certification applications for professional and highly skilled positions on behalf of employers accepting alternative experience. That fact, in and of itself, calls the Department's assertion into question.[8] In most professional positions employers routinely accept as part of their normal hiring requirements alternative experience in lieu of experience in the exact job offered. For the Labor Department to suggest that "alternative requirements" is a phenomenon of lesser skilled positions is simply incorrect. In fact, alternative requirements actually expand job prospects for all applicants.

Here are just a few examples of how U.S. employers routinely and customarily allow for alternative hiring requirements for most professional positions:

Take the case of an employer searching for a database design analyst with three years of experience in that position might be able to accept a database administrator with three years of experience in this similar, but distinctly different, position. Or, what a about a company filing a labor certification application for a chief programmer/analyst? It could very well require either two years of experience in the position offered, or, in the alternative, it might hire an applicant with four years of experience in the lesser, though similar, position of programmer/analyst.

What if a major accounting firm were to file a labor certification for a managing tax accountant? It would most likely be willing to accept two years of experience in the position offered, or four years in the lower level position of senior tax accountant.

Or take the common situation of an advertising agency filing a labor certification for the position of account executive. The agency's normal experiential hiring requirements might well be two years as an account executive or four years in the closely related, but more junior position, of an assistant account executive. If alternative requirements were prohibited, the assistant account executive could never be qualified for a higher level position, no matter how many years he/she served in the more junior but closely related position.

Under each of these real-life examples employers normally utilize alternative experience or educational requirements. The Department's statement that alternative

[8] DOL seems to have multiple misconceptions surrounding lesser-skilled positions. The preamble erroneously states that the visa category for unskilled workers is "oversubscribed and there is approximately a 4 ½ year wait…." In fact, the unskilled workers category has been current, with no backlog, for the past year. Thus, the only wait in this category is the same one all other beneficiaries face: processing delays.

experience is used in "virtually all instances" for positions requiring less than two years of training or experience is wholly in error and contrary to established employment practices in most occupations in the United States. While AILA agrees wholeheartedly with the Labor Department's conclusion that U.S. workers must be protected, we emphatically do not agree that the use of alternative job requirements somehow manipulates the process. Rather, alternative experience requirements are a legitimate and necessary part of recruitment, and the regulations should explicitly recognize them as such.

It is puzzling that, on one hand, DOL would insist that an employer hire any worker who looks like he might be able to perform the job, but refuse to allow employers to chart out alternative requirements that could provide objective guidance as to whether an individual *could* perform the job, This proposed rule, in essence, would replace a well-developed, objective standard with an incomprehensible, subjective standard.

VI. AUDITS, REQUESTS FOR REVIEW & REVOCATION

A. Audits and the Elimination of NOFs

Although it is never pleasant to receive one, the NOF has served a highly useful purpose in labor certification practice. The process allows valid cases to be refined and re-focused where that is needed, and it provides a predictable and effective way for DOL and the employer to identify and address issues. Consistent with fundamental fairness and due process, the NOF allows the CO to provide basic notice to the parties that s/he has found deficiencies in the filing and an opportunity to cure those deficiencies.

This is particularly crucial because labor certifications can easily be denied for minor deficiencies, and many U.S. employers filing labor certifications are not represented by counsel. Under the current system, a SWA can assist the uninitiated employer or counsel through the process with a series of "assessments." Under the proposed system, an employer will really only have one opportunity to "get it right." One can easily imagine that an employer who is not well versed in the requirements of the system may satisfy all but one requirement, which under the proposed system, would be fatal as the case would be denied, without an opportunity to address and cure the deficiency.

In contrast, the proposed audit system appears aimed solely at preventing or punishing misrepresentation by eliciting from employers the documentation they are required to maintain in support of the attestations on the labor certification form, but not at curing or assisting employers with deficiencies. In the end, employers are left with no reasonable procedure through which they can gain assistance on a deficiency or guidance on what the CO views the deficiency to be. No set of rules is fully reconcilable to the settings in which it will be applied, least of all rules relating to labor certification. There must be a process by which the rules are applied to specific facts and thus more fully understood in that context. The proposed rule would allow no process for this development, and instead abandons decades of developed standards and them with a

game of "gotcha" whereby vague rules would result in instant denials. In light of this, DOL should consider either restoring the NOF, or expanding the audit process to allow an audit to be used for the purpose of pointing out and resolving labor certification mistakes and deficiencies.

Moreover, neither the preamble nor the regulation sets forth any criteria whatsoever for audits. The regulation states that some audits may be done randomly as a quality control measure. The preamble states that "various selection criteria . . .would allow applications to be identified for an audit." 67 Fed. Reg. 30475. This vagueness renders the process entirely unpredictable. DOL should specify the type of criteria that might flag a case for audit, so that employers may have a reasonable expectation of the factors that might lead to an audit.

Compounding this problem is DOL's announcement in the preamble that "Audit letters, would be, for the most part, standardized, computer generated documents, stating the documentation that must be submitted by the employer." 67 Fed. Reg, 30475. This type of notice is essentially useless for the employer, because it does not tell the employer what documentation is truly needed or indicate to the employer whether there is a particular problem with the application that needs to be addressed by the submission of additional evidence. It essentially amounts to a fishing expedition by DOL. Employers have a legitimate expectation that a government agency reviewing a filing would seek only that evidence that is needed to make a final decision and not more. Employers should not be routinely asked to gather a great deal of unnecessary material to submit to DOL.

Given the amount of paperwork that an employer will be expected to provide during an audit under the proposed rule, the 21 day filing deadline—with no extension permitted-- is both arbitrary and inadequate. AILA notes that the regulations, although quite strict regarding employer deadlines, provide absolutely no DOL processing deadlines for audits. With audit processing times potentially stretching out over months or even years, DOL's proposal to save two weeks in the name of "streamlining and reducing processing time," and to take that time out of the employer applicant's time needed to review, confer with their attorney, and if necessary prepare a response to a Certifying Officer's decision, is unjustified. DOL typically sends its decisions by regular first class U.S. mail, and not by courier, which means that decisions may take anywhere from three to 10 days to arrive at an employer or attorney's office. Other agencies (e.g., INS and most federal court procedures) provide a 30 day filing deadline with an additional 3 day allowance when a decision is mailed. *See, e.g.,* 8 C.F.R. § 103.5(a), Motions to Reconsider a decision by the Immigration and Naturalization Service, and 8 C.F.R. § 3.2(b), Motions to Reopen and Reconsider decisions by the Executive Office for Immigration Review. Thus, for cases subject to audit, the proposed 21 day filing deadline for requests for review (and by inference, motions to reconsider) is therefore wholly inadequate and deprives employers of their fundamental due process right of notice and an opportunity to be heard.

AILA requests that for cases subject to audit, DOL retain the current 35 day filing deadline for requests for review and motions to reconsider and not deprive employers of time needed to prepare a proper request or motion.

B. Presumption of Misrepresentation

Probably the most objectionable aspect of the audit process as proposed by DOL is the irrefutable presumption of material misrepresentation that arises automatically as a result of an employer's failure to send documentation within 21 days in response to an audit letter. The proposed imposition of a presumption that could read into all circumstances what could be viewed as an act of criminality, and certainly would be considered an unethical act, is so extreme as to be shocking. Concluding material misrepresentation without an examination of the facts of the situation violates fundamental precepts of fairness and, in the end, trivializes the codes of ethics by which businesses and attorneys are expected to conduct themselves. This proposal cannot be too harshly condemned.

One need only look at the many reasons why a response to an audit letter may not be sent, or not sent within the narrow time frame delineated. It may be simply that the employer and/or its counsel never received the audit letter, or the recipient was on vacation during the brief window allowed for receipt and response. The response may have been sent, but lost in transit. Even if the audit letter is received in a timely manner, the employer may have decided not to go forward with the application (for example, the employee may have left the employ of the sponsoring employer, causing the employer to decide to abandon the process). The proposed regulations do not appear to allow a labor certification to be withdrawn at this stage. Therefore the employer has the choice of expending time and money to respond to the DOL's audit request for a case it no longer wishes to pursue, or not respond and face penalties for misrepresentation.

AILA notes further that the presumption arises not just for failure to respond to the letter, but failure to provide required documentation. This means that an employer may be presumed to have made a misrepresentation even if the employer responds to the DOL in good faith but somehow fails to provide all the documentation the CO believes is required. Given that, as discussed above, DOL plans to issue standardized, computer-issued audit letters requesting a great deal of documentation, one can easily imagine an employer having difficulty deciding what parts of the request truly apply to the employer and what parts are general boilerplate. In this context, many employers might unintentionally fail to submit all required documentation. DOL should not penalize employers so harshly for such failures.

INS often issues requests for additional evidence with respect to petitions filed. The standard response time allotted is four months. Some of these letters state that the employer may choose to submit all or some of the information requested. The employer is put on notice that if it chooses to submit only partial information and that information is found insufficient, the petition will be denied. However, this is the only penalty

imposed. INS does not impose the additional penalty of finding that the employer made misrepresentation in the initial filing. Such a conclusion would be unjustified. AILA strongly urges DOL not to adopt the misrepresentation penalty proposed.

C. Penalties for Fraud and Misrepresentation.

Penalties remain much the same in the proposed regulation as they are under previous regulations. However, as noted elsewhere in this comment, a finding of fraud or misrepresentation may lead to DOL requiring an employer to submit to supervised recruitment for all its labor certifications applications filed under the new regulations for a period of up two years.

In addition, the proposed regulations impose a major penalty on employers in the form of delay where there is a mere allegation of fraud or misrepresentation or where a mere possibility that fraud is discovered. In general, the regulations have always made clear that allegations of fraud or misrepresentation should be referred to the Department of Justice or to the INS for investigation or prosecution. DOL, under the current regulation, is not required to stop all processing indefinitely while waiting for the INS or DOJ to make a final notification as to whether it will be pursuing a formal prosecution. The proposed regulation makes labor certification processing dependent on DOJ and INS prosecutors and investigators, even where the allegations of fraud or misrepresentation are weak. Further, in many instances fraud or misrepresentation is presumed in situations where an employer fails to provide evidence or rebuttal that meets DOL's expectations. Given that the consequences of delay, which are serious, as well as that DOL may force employers to face the onerous and time-consuming supervised recruiting process for up to 2 years, AILA proposes that the current regulation not be altered in this regard.

D. Motion for Reconsideration and Request for BALCA Review.

The proposed rule provides for a motion for reconsideration of a Certifying Officer's decision to be filed with the Certifying Officer, but also provides that "the Certifying Officer may, in his/her complete discretion, choose to treat the motion as a request for review [to the Board of Alien Labor Certification Appeals]." The proposed rule would also "reduce the time to file a request for review to 21 calendar days from the 35 days specified in the current regulations. The Department believes that 21 days is sufficient time for an employer to file a request for review." Since the Certifying Officer may choose to treat a motion for reconsideration as a request for review, the rule as proposed would require that a motion for reconsideration meet the same requirements as a request for review, including the proposed 21 calendar day filing deadline. The proposed rule states that the employer may request reconsideration at any time within 21 days "from the date of issuance of the denial." This time frame is insufficient to prepare a request for review. It is the same brief time frame proposed for response to an audit letter, in which one would presume that the needed documentation already exists. But, in an appeal (particularly where the appeal also constitutes the motion for reconsideration), factual and legal arguments must be marshaled and articulated, and documentation prepared. Asking an employer to do this within 21 days, much less within the approximately 11 to 18 days after it actually receives the decision, is wholly unreasonable.

DOL sends its decisions by regular first class U.S. mail, and not by courier, which means that decisions may take anywhere from three to 10 days to arrive at an employer or attorney's office. Given the significant delays inherent in sending decisions by ordinary first class U.S. mail, AILA requests that the 35-day deadline be retained, as it at least provides a 3 to 5 day allowance for mailed decisions to reach applicants and then 30 days to prepare the response.

E. Elimination of Remands by BALCA.

Section 656.27 (c) states that the BALCA must affirm the denial of the labor certification or direct the Certifying Officer to grant the certification or direct that a hearing on the case be held. No provision is made for remands to the Certifying Officer for further consideration or fact finding and determination as is allowed under current regulations.

DOL proposes to eliminate remands and thereby limit BALCA decisions to either affirmation or reversal of a Certifying Officer's decision on a labor certification application. The rationale for this change is DOL's expectation that "cases processed under the new system would be sufficiently developed by the time they get to the Board that there should be no need to remand a case to a Certifying Officer." 67 Fed. Reg. 30477.

DOL has provided no basis for its expectation that cases should be sufficiently developed by the time they get to the Board. Indeed, AILA's experience is quite the opposite, and it is not uncommon for the Board to reverse a Certifying Officer's decision because it disagreed with the basis on which the Certifying Officer denied the application, and then remand the case because it had insufficient information in the record to simply approve it. *See, e.g., Matter of M.N. Auto Electric Corp.,* 2000 INA 165 (BALCA, August 8, 2001, *en banc*).

The Administrative Procedure Act, 5 U.S.C.A. § 557 (c), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented in the record." Accordingly, applicant employers are entitled to an explanation of the reasons for denying their applications and an opportunity to appeal those denials. *See* 20 C.F.R. §§656.25 – 656.26. More fundamentally, the regulations should be mindful of a basic tenet of procedural due process: parties must be given notice and an opportunity to be heard concerning a government decision affecting their interests.

Remands are proper in situations where BALCA raises issues not previously raised or brought to the attention of the applicant, and the applicant would otherwise have no opportunity to respond to those issues. Since the burden is on the applicant to demonstrate eligibility for the labor certification, the "no remand" rule ensures that cases in such a posture could not be approved by the Board, and hence must be denied. Such a

situation violates fundamental due process rights of notice and an opportunity to be heard, and undermines the validity of the review process as a whole.

Based on the foregoing, AILA opposes the elimination of remands as an option for BALCA decisions.

F. Revocation of Improvidently Granted Labor Certifications.

AILA strongly opposes the proposed amendment of 20 CFR § 656.32 to authorize DOL to revoke approved labor certifications that DOL determines, apparently in its own unfettered and unreviewable discretion, were "improvidently granted."

Under the proposal, DOL would have the authority to revoke "improvidently granted" labor certifications within one year following the date on which labor certification is granted or before a visa number becomes current, whichever event occurs first. At any time, and for no well-defined reasoned, within this potentially expansive and overly broad time period, a CO would merely have to send out a form notifying an employer, whose labor certification application has long since been adjudicated, that it has 21 days to respond to the CO's decision to revoke the labor certification. While the regulation would require a CO to consider "all relevant evidence presented" in such a proceeding, it fails to articulate any reasonable standards with respect to the basis for which, or thetypes and sufficiency of evidence from which, a CO can elect to commence revocation proceedings. Nor does the rule provide any process by which an employer whose labor certification is revoked may seek administrative review of the decision to revoke. As a result of its obvious shortcomings, the rule suffers from defects under both the APA and Due Process Clause of Fifth Amendment to the United States Constitution.

The regulation also fails to define the meaning of its most essential term - namely the phrase "improvidently granted." Indeed, the use of the term itself harkens back to a regulation superceded more than 25 years ago, suggesting that DOL is intent on impermissibly expanding its power to revoke labor certifications, a task which current regulations assign to INS under strict procedural guidelines. Under former section 60.5(g) of Title 29 of the Code of Federal Regulations, which was replaced in 1977, following a 1976 statutory change, by language nearly identical to that in force today, certifications were invalid if the representations upon which they are based were deemed materially incorrect. The phrase "materially incorrect" meant that if the correct facts had been known a certification could not have been issued. Black's Law Dictionary defines the term "improvidently" to mean, "a [decision] … given or rendered without adequate consideration … or without proper information as to all the circumstances affecting it, or based upon a mistaken assumption or misleading information or advice." Thus, DOL appears to be reaching back to a long invalidated rule to expand its authority without adequate justification of the reasons for its decision, and without providing basic procedural protections.

While the prefatory comment to the proposed regulation expresses that COs should exercise this new authority in "limited" circumstances, the value of this undefined

limitation is uncertain. Both the current regulations and the proposed regulations provide the INS authority to invalidate labor certifications either before approval or after approval in situations where it is established that the approval was based on fraud or misrepresentation. Also, INS is responsible for adjudicating immigrant petitions, during the adjudication of which it reviews the facts giving rise to the classification for which certification was granted. Consequently, current regulations provide adequate protections to ameliorate the consequences of labor certification which were truly improvidently granted.

Interestingly, this rule would permit a certifying officer to circumvent the requirements of presenting the evidence to the INS or DOJ for appropriate action and it fails to define clear standards as to the burden of proof required and evidence necessary to demonstrate the reasons for revocation, in clear violation of DOL's authority.

The rule is largely unnecessary, and it is vague and overly broad. However, its consequences are major in that the revocation of a labor certification serves to automatically invalidate an employment-based immigrant petition for which the labor certification application was filed. The proposed regulation, as drafted, not only lacks clarity and articulable procedural and substantive standards, but it also fails to adequately recognize and protect the settled expectations that employers, employees and DOL, should be able to rely upon in a fair and reasonable labor certification system. The proposed regulation broadly permits DOL to file a motion to reopen *sua sponte* under circumstances of its own choosing. Notably, DOL would, under the regulation, strip employers of their right to petition the government for reconsideration of denied cases.

In light of the foregoing, AILA strongly recommends that DOL eliminate this proposal from any final regulation.

VII. CHANGES TO PREVAILING WAGE RULES

A. Collective Bargaining Agreements, Davis Bacon Act (DBA) and Service Contract Act (SCA).

DOL proposes to eliminate the hierarchical wage determination system found in the existing regulations. AILA agrees with DOL that the system should be eliminated and that the Davis Bacon Act (DBA) and Service Contract Act should not be required. We agree that the first order of priority should be an applicable collective bargaining agreement. The regulations should make it clear that the collective bargaining agreement should be considered evidence of the prevailing wage only if the position is *in fact* a union position covered by the agreement.

The proposed regulations state that the SCA and DBA nevertheless may be used as a wage source by the employer. The regulation should be clarified to state that use of the DBA and SCA wage determinations are prima facie evidence of the prevailing wage if the employer opts to rely on one of those surveys.

While the DBA and SCA surveys may have inherent faults, these surveys are no more flawed than the OES survey or other wage resources. The proposed regulations actually eliminate a major flaw of the DBA/SCA, that is, that the DBA/SCA methodology prefers the median over the mean.

DOL has queried how DBA/SCA wages should be reviewed. As stated above, AILA believes that DBA/SCA should be prima facie evidence of a prevailing wage if the employer chooses to use one of these surveys. If, however, a dispute arises concerning the appropriateness of the occupational classification, the dispute should be submitted for review to the Prevailing Wage Panel and treated like any other review.

B. The OES Wage Survey and the Proposed Elimination of the 5% Variance.

In the preamble to the proposed regulations, DOL takes the position that the OES survey is the most comprehensive and statistically precise wage survey conducted by an agency of the Federal Government. 67 Fed. Reg. at 30479. Putting aside for the moment the issue of whether the DOL has to authority to prefer one wage source over another, the OES survey has a considerable number of serious defects in spite of its advantages. These defects often lead to an artificial inflation of prevailing wages, putting employers in the position of having to pay a wage that is considerably in excess of typical wages for the occupation in the geographic area of the job.

The OES survey has the following serious deficiencies:

1. The OES survey includes the use of discretionary items including production bonuses, commissions, cost-of-living allowances, incentive pay and piece rates. DOL's regulations, and the proposed PERM regulations, are very clear that wages offered by en employer in connection with a labor certification may not include such items as bonuses and commissions, unless guaranteed. See 656.40, 655.731, and 656.20(c)(3) (to be changed to 656.110(c)(2).) However, OES wages contain all of these elements, thereby creating a seriously inflated prevailing wage. It is blatantly inequitable to expect employers to rely upon a wage survey that is inconsistent with DOL's own regulations on wages.

2. The wage computations in the OES survey essentially offer neither a weighted average nor a median of the salaries of workers surveyed. The OES survey does not obtain specific salaries for each worker but rather requests that employers identify how many employees fit into a series of pre-defined wage ranges. These wage intervals may be set apart by $7000 or more and can easily result in substantial inaccuracies in computing the prevailing wage.

3. The OES wage data uses the standard occupational classification system which reduces the universe to only several hundred possible occupation designations. This results in gross overgeneralization.

4. OES divides all occupations into two levels. Level I encompasses entry level positions and positions that are highly supervised. Level II encompasses all other skill levels. The two levels were arrived at through a basic arithmetic demarcation taking the lowest one third of the wage survey results and assigning them to the Level I category, and assigning the remaining upper two thirds of the data to the "experienced" Level II classification. This is anything but statistically precise. Other authoritative surveys, many of which were used by SWAs in the past, use four or five experience levels. Multiple levels allow for a reasoned wage based upon years of experience and levels of responsibility that reflect real world patterns. Level II of the OES survey uses the same wage for moderately experienced positions and the most senior positions within an occupation. The use of only one wage for all experienced workers creates gross inaccuracies at both ends of the spectrum.

5. OES wage data is old. The current OES wage data was collected in 1999, when the job market, and salaries, were quite different than they are now.

AILA has been informed by DOL that the OES is the best system that is available and that it cannot be replaced or modified at the current time. But given the inherent flaws in OES, it is simply astounding that DOL now proposes to eliminate the current 5% variance on all prevailing wages based upon the putative inherent superiority of the OES survey. As discussed above, the OES is not so statistically superior that a variance is no longer necessary. Moreover, as the proposed regulations still allow employers to use other surveys to establish prevailing wage, there is no justification at all for eliminating the variance for all prevailing wage sources. In light of these issues, AILA strongly opposes this proposed change.

In lieu of the change proposed by DOL, AILA suggests the following:

1. Maintain the 5% variance for all employer provided wage surveys. There is no rationale for eliminating this percentage for these surveys. Increase the variance to 7% if the OES survey is used to account for the "add ons" such as discretionary bonuses and commissions. Alternatively, employers should be able to add the previous years average bonuses and/or commissions to the salary offer to make the remuneration offer consistent with the methodology of the OES figures.

2. There is in existence, a one-level OES survey that appears to comply no less than the two level survey developed for labor certifications. Given the difficulties under the two level OES survey, and the fact that this exists only by reason of a departure from the methodology otherwise required by the rules, the rule should make clear that the single level OES will be an acceptable alternative for positions classifiable as Level I. Alternatively, this survey which produces figures between Level I and Level II should be an acceptable alternative for middle level positions which require in the range of 2-5 years of experience. This would produce a

much more equitable system with minimal cost to the government and it would more accurately reflect the market in this range than the OES Level II wages which are frequently far above the market because they include highly-experienced workers and count total compensation including bonuses rather than wages as contemplated by the rule.

C. Using The Median and Additional Flexibility in the Use of Employer Provided Surveys.

AILA welcomes the proposed change in the rule that allows use of surveys using the median instead of the mean. This different statistical measurement is used by many reputable surveys. By allowing use of surveys that use the median, DOL will increase the employer's options which have been limited under current guidelines.

DOL should use the rule-making opportunity to expand the allowable use of employer provided surveys. Specifically, DOL should consider liberalization in the areas of "blended" surveys, mathematical modeling, geographic areas, industry wide surveys, and methodology.

1. Blended surveys – Surveys that are a compendium of surveys have been rejected because they may count a position more than once. This mechanical adherence to the rule of arithmetic mean is self-defeating because this approach actually broadens the universe of jobs canvassed. The reliability engendered by doing so, and by demonstrating a consensus, far outweighs the departure from accepted norm.

2. Mathematical modeling – The OES developed for labor certifications is itself a departure from the rule in that it mathematically derives the two levels rather than canvases positions that conform to the defined levels. While this is a departure from the rule, such flexibility should be afforded when an employer introduces other surveys. Reliable survey organizations will routinely use mathematical modeling for example to age a survey for the current time frame, or to show a wage for a particular location (as does the Watson Wyatt survey for Houston, Texas). Given the difficulty of producing reliable data for all locations, such information should be accepted where, for example, a state or national survey is used with percentage variations for a particular locality.

3. Geographic Area – AILA applauds the proposed change that allows for the use of a geographic area broader than commuting distance when "it is not possible to obtain a representative sample of similarly employed workers in the area of intended employment." This amendment appears to allow default to Consolidated Metropolitan Statistical Area (CMSA) or statewide data when a survey provides data for a Metropolitan (MSA) but defaults to a broader geographic area because of lack of adequate sample size. This has been the actual recent practice at many, but not all of the SWAs. We are of the opinion, however, that this refinement does not go far

enough. Many reputable surveys start with the CMSA as the lowest geographical area. We submit that these surveys should be acceptable. Even though employees may not commute throughout the entire CMSA, these wages are reasonably uniform and tend not to vary significantly from MSA data.

4. Cross-Industry Surveys - Current regulations require that surveys be cross-industry. There are, however, many reliable industry wide or employer specific surveys that should be permitted.

5. Methodologies – The rule should make clear that methodologies employed by established surveys are acceptable and should not leave room for speculation by a SWA that surveys which canvas a non-random sample are unacceptable. Some of the most reliable and respected surveys may be surveys of members of an association in a specific industry or those who pay a fee and provide information in order to obtain the survey publication. Although not a random sample pool, these are nonetheless quite reliable surveys of the positions surveyed because the members are willing to share information with each other and there would be a high and reliable rate of response. Industry wide surveys are frequently done as an industry wide effort so that competitors can see if they are offering competitive salaries. There is no cogent reason why these surveys should not be permitted as an option for prevailing wage practice.

   In addition, some published surveys break down their data into employer-specific criteria, such as size of employer or profit vs. non-profit. For example, some of the Watson Wyatt Data Services surveys differentiate between profit and not-for-profit sectors. If a survey also offers cross-employer data, this data should be the data of choice. But where an otherwise valid published survey isolates the data into employer specific categories, the survey should be allowed.

   In light of the above, we suggest that the final rules disregard such a harsh interpretation of *Matter of Hathaway Children's Service*, 91-INA-388 (BALCA Feb. 4, 1994) as to disallow surveys that segregate data on the basis of the type of employer. It is noted that much of *Hathaway* was overturned by Congress in the American Competitiveness and Workforce Improvement Act (ACWIA) by exempting all employees of institutions of higher education, related nonprofit entities and nonprofit or government research organizations from the *Hathaway* rule. *Hathaway* dealt with the differentiation of profit and non-profit entities. At the very least, if part of *Hathaway* is to prevail in the final regulations, its holding should only cover the profit and non-profit dichotomy and not be extended to rule over other types of employer differentiation.

D. Transition of H-1B Workers from Inexperienced to Experienced

DOL proposes that, where a survey that is the basis for a prevailing wage for an H-1B occupation provides more than one wage rate for the occupational classification, the employer must update the H-1B employee's salary as the employee gains experience,

based upon the applicable prevailing wage for more experienced levels. Contrary to DOL's assertion in the preamble that the change is consistent with statutory requirements, this change is in direct contravention of the statute, completely undermines the three year validity period of an LCA, and imposes an undue and unwarranted burden upon employers.

AILA strongly opposes this change, as it is manifestly and directly contrary to the statute governing H-1B workers. 8 U.S.C. Section 1182(n) (1) (A) (INA Section 212 (n)(1)(A)) clearly states that an employer must attest to the Secretary of Labor that the employer:

> (i) is offering and will offer *during the period of authorized employment* to aliens admitted or provided status as an H-1B nonimmigrant wages that are at least-
>
> (I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or
> (II) the prevailing wage level for the occupational classification in the area of employment,
> (whichever is greater, *based on the best information available as of the time of filing the application* . . .
>
> (emphasis added)

The statute clearly contemplates that the prevailing wage determination is made based on the information available at the time of filing the application, and NOT thereafter. Moreover, under the statute, the higher of the actual wage or the prevailing wage, as determined at the time of filing, is the wage that is paid to the H-1B worker during the period of authorized employment. The statute neither authorizes, nor contemplates, review of the applicability of the prevailing wage to the position after the time of filing.

AILA also notes that an LCA is valid for three years, under applicable law and regulation. A rule that mandates that an employer may no longer rely on a prevailing wage obtained at the time of filing of the LCA essentially undermines the 3 year validity of the LCA. In essence, the LCA loses its validity as soon as the H-1B workers gain some experience. Congress did not intend the wage attestation on the LCA to become a "moving target" for employers.

Moreover, the proposed rule sets absolutely no guidelines for what types of change in employment level should trigger the employer to check the applicability of the prevailing wage. . Will it be sufficient if an employer reviews the positions held by all of its H-1B employees at the end of the year and then adjust salaries accordingly? If the company is growing quickly should it do so more often? Should the company document

that it has completed a review of all H-1B positions and prevailing wages? Where should the company keep this information? May a company be penalized for not reviewing the position and salary of its H-1b workers even if the H-1B workers are being given raises in line with their experience? What of the H-1B who develops at a faster than usual rate? Must her wage be revisited at a time different from others? May a company be required to pay back wages if the DOL decides an employee was given more independence during the validity of the original prevailing wage without being given an increase in salary? Clearly, the proposed rule will place ridiculous and unnecessary burdens on employers of H-1B workers.

The proposal of a dynamic prevailing wage becomes even more onerous if the employer has used an OES prevailing wage. Because OES only contains two levels, and there is a dramatic difference between many OES level 1 and 2 wages as mentioned previously, the required change would be so extensive as to be past the scope of any normal, rational pay increase. A company may be required to pay enormous, unwarranted back wages if a DOL investigation determines an employee moved into even a slightly more independent position during the validity of the original prevailing wage, and his salary increases did not rise to a Level II salary.

Clearly this proposal must be eliminated from the final regulations. DOL does not have any statutory authority to impose this additional burden on H-1B employers, and the requirement makes no sense.

E. Prevailing Wage Panel

The PERM regulation would create a prevailing wage panel to adjudicate appeals by employers of SWA prevailing wage determinations. AILA supports this proposal. We believe that a single adjudicative body for resolution of prevailing wage issues would be desirable. Currently, there are differences among the SWAs as to the acceptability of alternative sources of wage data in general, the acceptability of particular surveys and the application of level I and level I of the OES survey. Some SWAs release lists of acceptable surveys and others make the decision on a case-by-case basis. Guidance from the DOL national office has not yet resulted in consistent prevailing wage determinations out in the field. A single, nation-wide prevailing wage panel could set consistent standards and result in a body of decisions used to guide all of the SWAs and the employer community. We suggest that the prevailing wage panel should include membership with private sector experience in compensation policy. The prevailing wage review panel should be required to render decisions in a fixed but reasonable period of time.

VIII. CONCLUSION

While the concept of PERM is laudable, its execution as expressed in this proposal is completely unworkable. Electronic filing is the wave of the future, and one that DOL should embrace. But exclusively electronic adjudication, where the standards necessarily involve thought and analysis, would doom the program to failure. Promoting

an automated process at the expense of business' flexibility is completely unacceptable. But this does not mean that PERM is doomed to the trash heap. An agile program is possible, as long as DOL keeps some thought and analysis in the process. AILA hopes that the alternatives proposed herein will assist DOL in developing a responsive and workable PERM system.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

by:_____
Crystal L. Williams, Director of Liaison & Information