



# Federal Register

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**Thursday,  
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## **Part II**

## **Department of Labor**

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**Employment and Training Administration**

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**20 CFR Part 656**

**Labor Certification for the Permanent  
Employment of Aliens in the United  
States; Reducing the Incentives and  
Opportunities for Fraud and Abuse and  
Enhancing Program Integrity; Final Rule**

**DEPARTMENT OF LABOR****Employment and Training  
Administration****20 CFR Part 656**

RIN 1205-AB42

**Labor Certification for the Permanent  
Employment of Aliens in the United  
States; Reducing the Incentives and  
Opportunities for Fraud and Abuse and  
Enhancing Program Integrity**AGENCY: Employment and Training  
Administration, Department of Labor.

ACTION: Final Rule.

**SUMMARY:** The Department of Labor (DOL or Department) is amending its regulations to enhance program integrity and reduce the incentives and opportunities for fraud and abuse related to the permanent employment of aliens in the United States.

This Final Rule includes several major provisions. It prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. The Final Rule provides a 180-day validity period for approved labor certifications; employers will have 180 calendar days within which to file an approved permanent labor certification in support of a Form I-140 *Immigrant Petition for Alien Worker* (Form I-140 hereafter) with the Department of Homeland Security (DHS). The rule prohibits the sale, barter or purchase of permanent labor certifications and applications. In addition, this rule requires employers to pay the costs of preparing, filing and obtaining certification. An employer's transfer to the alien beneficiary of the employer's costs incurred in the labor certification or application process is strictly prohibited. The rule makes clear an alien may pay his or her own legitimate costs in the permanent labor certification process, including attorneys' fees for representation of the alien. The rule also reinforces existing law pertaining to the submission of fraudulent or false information and clarifies current DOL procedures for responding to incidents of possible fraud. Finally, the rule establishes procedures for debarment from the permanent labor certification program.

Consistent with the proposed rule, the provisions in this Final Rule apply to permanent labor certification applications and approved certifications filed under both the Program Electronic Review Management (PERM) program regulation effective March 28, 2005, and prior regulations implementing the

permanent labor certification program. This rule also clarifies the Department's "no modifications" policy for applications filed on or after March 28, 2005, under the new, streamlined PERM process.

**DATES:** This Final Rule is effective July 16, 2007.

**FOR FURTHER INFORMATION CONTACT:** William L. Carlson, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210. Telephone: (202) 693-3010 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339 (this is a toll-free number).

**SUPPLEMENTARY INFORMATION****I. Background**

The purpose of this Final Rule is to impose clear limitations on the acquisition and use of permanent labor certification applications and permanent labor certifications in order to reduce incentives and opportunities for fraud and abuse in the permanent labor certification program. It also promulgates key measures to enhance the integrity of the permanent labor certification program. This Final Rule continues efforts the Department initiated several years ago to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program. The Department laid the groundwork for greater integrity and security during the planning and promulgation of the 2004 Final Rule to implement the re-engineered PERM system. While fraud prevention has always been a goal of the Department's labor certification programs, our continuing program experience and that of other Federal agencies has demonstrated the need to focus on the specific opportunities for fraud and abuse addressed in this rule.

**A. Statutory Standard and Current  
Department of Labor Regulations**

Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), before the Department of Homeland Security (DHS) may approve petition requests and the Department of State (DOS) may issue visas and admit certain immigrant aliens to work permanently in the United States (U.S.), the Secretary of Labor (Secretary) must certify to the

Secretary of Homeland Security and the Secretary of State that:

(a) There are not sufficient U.S. workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(b) The employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

If the Secretary of Labor, through the Employment and Training Administration (ETA), is satisfied in his or her review of a sponsoring employer's application for certification that these two requirements have been met, he or she so certifies by granting a permanent labor certification. If DOL cannot make both of the above findings, the application for permanent labor certification is denied. The Department of Labor's regulation at 20 CFR part 656 governs the labor certification process for the permanent employment of immigrant aliens and sets forth the responsibilities of employers who wish to employ immigrant aliens permanently in the United States.

The INA does not specifically address substitution of aliens in the permanent labor certification process. Similarly, the Department of Labor's regulations are silent on the question of substitution.

On May 6, 2002, the Department published a Notice of Proposed Rulemaking (NPRM) to streamline the permanent labor certification program. 67 FR 30466 (May 6, 2002). A Final Rule implementing the streamlined permanent labor certification program through revisions to 20 CFR part 656 was published on December 27, 2004, and took effect on March 28, 2005. 69 FR 77326 (Dec. 27, 2004). The prior 20 CFR part 656 (2004) governs processing of permanent labor certification applications filed prior to March 28, 2005, except where certain provisions of this Final Rule will impact such applications. Previously filed applications may be refiled under the new PERM rule.

**B. General Immigration Process  
Involving Permanent Labor  
Certifications**

To obtain permanent alien workers, U.S. employers generally must engage in a multi-step process that involves DOL and DHS and, in some instances, DOS. The INA classifies employment-based (EB) immigrant workers into categories, e.g., EB-2 and EB-3, based on the general job requirements and the perceived benefit to American society.

U.S. employers must demonstrate that the requested job requirements, and in some cases the alien, fit into one of these classifications. The first step in the process for the EB-2 and EB-3 classifications, further described below, generally begins with the U.S. employer filing a labor certification application with DOL in accordance with 20 CFR part 656. The U.S. employer must demonstrate to DOL, through a test of the labor market, that there are no U.S. workers able, willing, qualified, and available at the time of the application for a visa and admission to the United States and at the place where the alien is to perform the work. The employer must also demonstrate that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Following review of the permanent labor certification application, DOL will either certify or deny the application.

The *Immigrant Petition for Alien Worker* (Form I-140) is a petition filed with the United States Citizenship and Immigration Services (USCIS), within DHS, by a U.S. employer for a prospective permanent alien employee. Most Form I-140 petitions filed under section 203(b)(2) and (3) of the Act, the EB-2 and EB-3 classifications, must be accompanied by an approved labor certification issued by DOL. DHS has established procedures for filing Form I-140 petitions under 8 CFR 204.5.

DHS reviews the approved labor certification in conjunction with the Form I-140 petition and other supporting documents to evaluate whether the position being offered to the alien named in the petition is the same as the position specified on the labor certification and whether the employment qualifies for the immigrant classification requested by the employer. In addition, DHS evaluates the alien's education, training, and work experience to determine whether the particular alien meets the job requirements specified on the labor certification. The approved labor certification is also used to establish the priority date for which an immigrant visa will be made available to the alien, based on the date the labor certification application was originally filed.

### C. Current ETA Practices Involving Permanent Labor Certifications

Although not mentioned in 20 CFR part 656, ETA has for years informally allowed employers to substitute an alien named on a pending or approved labor certification with another prospective alien employee. Labor certification substitution has occurred either while

the permanent labor certification application is pending at DOL or—by DOL's delegation to DHS—while a Form I-140 petition, filed with an approved labor certification, is pending with DHS. Historically, this substitution practice was permitted as an accommodation to U.S. employers due to the length of time it took to obtain a permanent labor certification or receive approval of the Form I-140 petition.

Currently, the regulations do not set any validity period on a permanent labor certification and, thus, permanent labor certifications are valid indefinitely. Also, DOL regulations do not address payments related to the permanent labor certification program or debarment authority. In this Final Rule, the Department addresses problems that have arisen related to substitution, lack of a validity period for certifications, and financial transactions related to the permanent labor certification program.

### D. Issues Arising From Current Practices

For more than 15 years, the Department has expressed concern that various immigration practices, including substitution, were subject to a high degree of fraud and abuse. See, e.g., Interim Final Rule, 56 FR 54920 (October 23, 1991).<sup>1</sup> This concern was heightened by a number of recent criminal prosecutions by the Department of Justice (DOJ) as well as recommendations from the Department of Justice and the Department of Labor's Office of Inspector General (OIG), and public comments concerning fraud received in response to the May 6, 2002, NPRM on PERM. See, e.g., 69 FR at 77328, 77329, 77363, and 77364 (Dec. 27, 2004).

The Department's review of recent prosecutions by DOJ, in particular, revealed that the ability to substitute alien beneficiaries has turned labor certifications into commodities which can be sold by unscrupulous employers, attorneys, or agents to those seeking a "green card." Similarly, the ability to sell labor certifications has been greatly enhanced by their current open-ended validity, providing a lengthy period

<sup>1</sup> The 1991 Interim Final Rule included a provision prohibiting substitution. That provision was overturned by the U.S. Court of Appeals for the D.C. Circuit on Administrative Procedure Act procedural grounds. *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994). DOL addressed the court's concern through publication of the NPRM for notice and comment on February 13, 2006, consideration of comments received and development of this Final Rule. 71 FR 7656 (Feb. 13, 2006). It is of no small significance that the plaintiff in that suit, an attorney, was later convicted for the criminal sale of fraudulent labor certifications used for substitution. *U.S. v. Kooritzky*, No. 02-502-A (E.D. Va. 2003).

during which a certification may be marketed. In many of these applications, the job offer was fictitious. In others, the job in question existed but was never truly open to U.S. workers. Rather, the job was steered to a specific alien in return for a substantial fee or "kickback." The Federal Government has prosecuted a number of cases resulting from employers, agents, or attorneys seeking to fraudulently profit from the substitution of aliens on approved labor certifications and applications. One attorney filed approximately 2,700 fraudulent applications with DOL for fees of up to \$20,000 per application. Many of these applications were filed for the sole purpose of later being sold to aliens who would be substituted for named beneficiaries on the approved labor certifications. See *U.S. v. Kooritzky*, No. 02-502-A (E.D. Va. 2003). Additional prosecutions have also involved the sale of fraudulent applications or certifications. See, e.g., *U.S. v. Ivanchukov*, et al., No. 04-421 (E.D. Va. 2005); *U.S. v. Mir*, No. 8:03-CR-00156-AW-ALL (D. Md. 2003); *U.S. v. Fredman*, et al., No. WMN-05-198 (D. Md.); *U.S. v. Lee*, No. 03-947-M (E.D. Va.); *U.S. v. Mederos*, No. 04-314-A (E.D. Va.); *U.S. v. Yum* (E.D. Va. 2006); *U.S. v. Mandalapa*, No. 205-NJ-03117-PS (D. N.J. 2006); *U.S. v. Heguman*, No. CR 04-1635(A)-RSWL (C.D. Cal. 2007). Our program experience confirms that such fraudulent activity adds to the cost of foreign labor certification programs—for example, resources spent processing fraudulent applications, anticipating and combating unscrupulous conduct, and assisting debarments or prosecutions after the fact.

The Final Rule implementing the streamlined permanent labor certification program also discussed DOL's and others' concerns about fraud in the program and the steps the Department would be taking to minimize the filing of fraudulent or non-meritorious applications. 69 FR at 77328, 77329, and 77363 (Dec. 27, 2004). As implemented, the basic labor certification process under the new PERM system incorporates fraud detection measures targeting areas that have historically shown vulnerability. These measures include system and manual checks in key areas, as well as the use of auditing triggers and techniques, both targeted and random, which can be adjusted as appropriate to maintain security and integrity in the process.

Personal Identification Numbers (PINs) and passwords for registration into the automated filing system are assigned to accounts issued to

sponsoring employers, who may then create sub-accounts for attorneys or agents who represent the employer. The initial stages of registration and application include system checks to verify the employer-applicant is a bona fide business entity. Once DOL's initial review of a filed application shows it to be technically acceptable for processing, the application transfers to a substantive review queue, where it may be selected for audit either randomly or based on specific criteria that tie closely to program requirements. Staff at ETA's National Processing Centers, where PERM applications are processed, also confirm information directly with employers, for example, to ensure each employer is aware an application has been filed on its behalf and is, in fact, sponsoring the alien named on the application.

While these measures are targeted based on our program experience, they focus largely on discrete activities (employer verification, sponsorship, etc.) or on program requirements as reflected in questions throughout the application, and do not address broader labor certification policies historically of concern to the Department. For example, in the Final Rule to implement the PERM program, the Department noted the practice of allowing the substitution of alien beneficiaries may provide an incentive for fraudulent applications to be filed. 69 FR at 77363 (Dec. 27, 2004). The Department also concluded in that Final Rule that the emerging "black market" for purchase and sale of approved labor certifications is not consistent with the purpose of the labor certification statute at section 212(a)(5)(A) of the INA. While DOL was not able to address many of these fraud issues in the PERM Final Rule because they arguably went beyond the scope of the proposals contained in the PERM NPRM, the Department clearly indicated it would be exploring regulatory solutions to address these issues. 69 FR at 77328, 77329, and 77363 (Dec. 27, 2004).

Similarly, the Department determined that additional regulatory action was required to reinforce and clarify core program components, both to strengthen fraud prevention and enhance program integrity. For example, a prohibition on modifications to applications was an original assumption of the PERM program and having such a clear, enforceable prohibition is critical to its long-term efficiency and effectiveness. A prohibition against the transfer of labor certification costs from sponsoring employers to alien beneficiaries keeps legitimate business costs with the employer, minimizes improper financial

involvement by aliens in the labor certification process, and strengthens the enforceability of the bona fide job opportunity requirement.

Accordingly, on February 13, 2006, the Department published in the **Federal Register** a Notice of Proposed Rulemaking to amend its regulations governing the permanent labor certification process to curb fraud and abuse and strengthen program integrity. 71 FR 7656. As proposed, the rule prohibited substitution of aliens not originally named on applications for permanent labor certification; limited the period of validity of a permanent labor certification to 45 calendar days; prohibited certain financial transactions or activities related to permanent labor certifications; and took other steps to enhance program integrity and reduce or avert fraud.

This Final Rule builds on the foundation laid in the 2004 Final Rule implementing the streamlined permanent program and follows through on the strong commitment reflected in the NPRM for this rulemaking, culminating a multi-year effort to enhance integrity and fraud prevention mechanisms in the permanent labor certification program.

To assist compliance and enforcement under this rule, the Department is reviewing available resources to determine its ability to establish a new toll-free telephone number, or to develop other means, to receive reports of potential violations. Calls would be screened by DOL staff, who would refer calls or inquiries to appropriate agencies within or outside the Department.

## II. Overview of the Regulation

In order to protect the integrity of the permanent labor certification program, reduce the incentives for fraud and abuse, and comply with the Department's statutory obligation to protect the wages and working conditions of U.S. workers, the Department proposed in the NPRM a number of regulatory changes. As stated in the NPRM, the revisions were proposed in part in response to concerns raised historically by stakeholder agencies and individual program users. They also responded to the numerous substantive comments received to the May 6, 2002 NPRM. At its essence, each change was motivated by our program experience and desire and responsibility under the authorizing statute to restore and maintain the integrity of the labor market test. The Department's regulations at 20 CFR part 656 establish the fact-finding process designed to develop information sufficient to support the Secretary of

Labor's determination, required under the statute, of the availability of or adverse impact to U.S. workers. The labor market test forms the basis for notice to U.S. workers of the job vacancy, for the recruitment process through which U.S. workers have the opportunity to apply and be considered for each job, and for employer attestations related to key terms and conditions of employment. While we remain sensitive to concerns raised by employers and others over the impact of these changes, we nonetheless have concluded, after careful review of comments on each proposal, that the identification and deterrence of fraud and the broader integrity of the program require a strong, comprehensive approach to which these regulatory reforms are critical. Accordingly, in this Final Rule the Department amends part 656 to add fraud prevention and redressive measures in the key areas identified in the proposed rule, as follows.

Substitution—Consistent with the proposed rule, this Final Rule adds a new § 656.11 to prohibit the substitution of alien beneficiaries as of the effective date of the Final Rule. This prohibition will apply to all pending permanent labor certification applications and to approved permanent labor certifications, whether the application was filed under the provisions of 20 CFR part 656 in effect before March 28, 2005, or on or after March 28, 2005. Additionally, as proposed, the Final Rule revises § 656.30(c) to provide that a certification resulting from an application filed under 20 CFR part 656 in effect before March 28, 2005, or on or after March 28, 2005, is only valid for the alien named on the original permanent labor certification application. These regulatory changes do not affect substitutions approved by the Department or DHS under either regulation prior to this Final Rule's effective date. They also do not affect substitution requests in progress as of this rule's effective date. Due to the considerable evidence of past and continuing fraud in the permanent labor certification process, DOL through this Final Rule, among other measures, is eliminating the practice of substitution. The Department will work with the Departments of Justice and Homeland Security to explore appropriate circumstances under which substitution could be reinstated. We anticipate that there may come a time when all affected agencies are satisfied that there are sufficient anti-fraud protections to alleviate the concerns motivating this rule.

Modifications to applications—This Final Rule finalizes with minor changes the provision in the proposed rule prohibiting modifications to permanent labor certification applications once such applications are filed with the Department. The Department has implemented technological changes in the PERM program to alert applicants to technical grounds for deniability, thus eliminating the need for many modifications. Section 656.11(b) clarifies that requests for modifications to an application, where the application was filed after this Final Rule's effective date, will not be accepted. To comport with this clarification while ensuring due process, the Final Rule revises § 656.24(g) to more precisely define what evidence may be submitted with an employer's request for reconsideration.

Validity period—Although the Department had originally proposed permanent labor certifications be filed with DHS within 45 calendar days, this Final Rule extends that period to 180 calendar days. Accordingly, all permanent labor certifications approved on or after the effective date of this Final Rule will expire 180 calendar days after certification, whether the original application was filed under 20 CFR part 656 in effect prior to or after March 28, 2005, unless filed prior to expiration in support of a Form I-140 petition with DHS. Likewise, all certifications approved prior to this Final Rule's effective date will expire 180 calendar days after the Final Rule's effective date unless filed in support of a Form I-140 petition with DHS prior to the expiration date.

Ban on sale, barter, purchase, and certain payments—This Final Rule prohibits the sale, barter, and purchase of applications and approved labor certifications, as well as certain payments to employers in compensation or reimbursement for the employer's costs incurred to obtain labor certification. This ban will apply to all such transactions on or after the effective date of This Final Rule regardless of whether the labor certification application involved was filed under 20 CFR part 656 in effect before March 28, 2005, or on or after March 28, 2005. In consideration of comments, the Final Rule more precisely describes the payments being prohibited. Proposed § 656.12(b), now § 656.12(b) and (c), has been revised to reflect this approach and definitions have been added to § 656.3.

Debarment and program integrity—Finally, the Final Rule institutes several enforcement mechanisms as described in the proposed rule, with revisions to

clarify procedures and address comments received in response to the NPRM. On or after the effective date of this Final Rule, the Department may debar an employer, attorney or agent based upon certain enumerated actions such as fraud, willful provision of false statements, or a pattern or practice of noncompliance with PERM requirements, regardless of whether the labor certification application involved was filed under the prior or current regulation. In addition, other provisions related to all applications filed under 20 CFR part 656 in effect before March 28, 2005, or on or after March 28, 2005, highlight existing law pertaining to submission of fraudulent or false information and clarify our procedures for responding to possible fraud.

As proposed, this Final Rule extends from 90 to 180 days the period during which the Department may suspend processing of applications under criminal investigation. In addition, in response to comments requesting a materiality standard for the various debarment provisions, the Final Rule adds an intent requirement (“willful”) to the false information section; to be actionable, the employer must willfully provide false or inaccurate information to the Department. The Final Rule also raises the standard for debarment based on failure to comply with the terms of Forms ETA 9089 or 750, failure to comply with the permanent labor certification program's audit process, or failure to comply with the program's supervised recruitment requirements, to require there must be a pattern or practice of noncompliance in each case. These changes in the standard for debarment at § 656.31(f) work in tandem with the revision to § 656.26(a)(1). The new § 656.26(a)(1) expands the existing provision for a right to review the Department's denial of an application or revocation of a certification, to encompass a right to review of a debarment action. The request for review would be made to, and in appropriate cases a concomitant hearing would be held by, the Board of Alien Labor Certification Appeals (BALCA).

### III. Discussion of Comments on Proposed Rule

The Department received a total of 489 comments from attorneys, educational institutions, trade associations, individuals, and businesses. Many of the comments were duplicative in nature and have been grouped together for discussion purposes. Although most of the commenters were critical of one or more of the proposed changes, they also supported the Department's efforts to

deter fraud in the permanent labor certification program. Several commenters suggested alternatives for improving the fraud rule, while some suggested abandonment of the proposed rule entirely.

#### *A. Prohibition of Substitution or Change to the Identity of Alien Beneficiaries on Permanent Labor Certifications and Applications*

The proposed rule prohibited the substitution of alien beneficiaries on pending applications for permanent labor certification and on approved labor certifications. The comments we received on the prohibition of substitution raised concerns in a number of key areas: the Department's authority to make the rule change; the nexus between the proposed ban and the incidence and types of fraud that have occurred; the Department's premise that substitution is no longer needed, both because the new, automated system has significantly reduced processing time and because the backlog of permanent labor certification applications filed prior to March 28, 2005, will be eliminated by September 30, 2007; the application of the ban to all pending applications and approved certifications; and the hardships that employers would suffer and costs they would incur as a result of such a ban.

We address the comments bearing on each of these issues below. However, after thoughtfully reviewing and deliberating over the concerns raised, we continue to find that the public benefit of eliminating substitution on permanent labor certifications and applications outweighs any potential disadvantages to individual program users. Consequently, as originally proposed in the NPRM, the Final Rule includes a new § 656.11 providing that, as of the effective date of the Final Rule, substitution of alien beneficiaries will be prohibited: (1) On all pending permanent labor certification applications; and (2) on certifications, regardless of whether the application was filed under 20 CFR part 656 in effect before or on or after March 28, 2005. Likewise, once this Final Rule takes effect, the revised § 656.30(c) makes a certification valid only for the alien named on the original application.

As explained in the NPRM, this regulatory change has no retroactive effect on substitutions approved by the Department or DHS prior to this Final Rule's effective date. As made implicit by the new § 656.11(a), this Final Rule also has no retroactive effect on substitution requests in progress (submitted) prior to this rule taking

effect. These and the other regulatory changes promulgated in this Final Rule modify the statement in the preamble to the December 27, 2004, PERM Final Rule that applications filed before that Final Rule's effective date would continue to be processed and governed by the then-current regulation. 69 FR 77326 (Dec. 27, 2004).

#### 1. Statutory Authority

Several commenters questioned the Department's authority under the INA to eliminate substitution of aliens on certifications and applications.

Statutory authority relative to qualifications and identity of alien—Many commenters opposed the ban on substitution as being overbroad and overreaching. Commenters referred to the plain language of the authorizing statute and opposed the elimination of substitution on grounds that DOL's jurisdiction, based on 8 U.S.C. 1182(a)(5), stops with determining worker unavailability and adverse impact and does not extend to activities related to worker identity or qualifications. Commenters stated that the authority to scrutinize the qualifications of the alien named on the petition rests solely with USCIS.

More specifically, commenters questioned the Department's authority to join the labor certification application to a specific alien, asserting labor certifications are related to the job opportunity, not the employee. They argued that the identity of the specific alien employee, whether the original beneficiary or a substituted beneficiary, is not relevant to a good faith labor market test. One commenter stated that the elimination of substitution, requiring a second labor market test for the position, contravenes what it believes is the legislative intent that the labor certification process require only a single labor market test.

With respect to the statutory requirement that U.S. workers be unavailable, one commenter stated that the identity of the alien is not relevant to the labor market test, as long as he or she qualified for the job opportunity when the labor certification application was filed. With respect to the requirement of no adverse impact, the commenter stated that the alien's identity is also not relevant as long as the qualified alien is offered the appropriate wages and working conditions. The commenter raised concern that this rule would refocus labor certification from the job opportunity to the identity of the sponsored alien, and would do so without statutory change, evidence of fraud, or analysis of the increased costs

to the employer. In fact, this commenter stated that given the automated, largely attestation-based nature of PERM, DOL is clearly unprepared and lacking in resources to evaluate evidence bearing on whether the alien is qualified for the job.

The Department's authority to regulate and ban the substitution of aliens on labor certifications and applications is clear. The INA treats each alien individually and, for employment-based immigration requiring labor certification, makes every alien inadmissible, absent the Secretary of Labor's determination on U.S. worker availability and adverse impact. The trigger for such a determination has always been, at its core, the existence of a vacancy that an employer wishes to fill with an alien, and the burden of proof is always upon the petitioning employer to overcome the presumption of the inadmissibility of an individual intended immigrant employee through a test of the labor market.

The statute itself could not be clearer that the labor certification process is alien specific. In defining the Department's role in the admission of an alien for employment-based permanent residence, INA section 212(a)(5)(i) ties the required certification to "the place where *the* (emphasis added) alien is to perform such skilled or unskilled labor[.]" and the necessity of certifying that "the employment of *such* (emphasis added) alien will not adversely affect the wages \* \* \*." The plain language of these provisions (i.e., the use of terms such as "the alien" and "such alien") is meant to focus not on the process but solely on its use to admit one, specific alien.

It is this Department's responsibility to judge how and under what circumstances a labor market determination should be made, and what constitutes the employer's actual minimum requirements for performance of the job. It is appropriate and consistent with the broader statutory and programmatic intent to apply these requirements any time a position that is the subject of a labor certification application is or becomes vacant, regardless of whether the application covering it was previously in process and for how long. The labor market changes rapidly, and it is consistent with the Department's obligation to protect the jobs, wages and working conditions of U.S. workers to require that there be another labor market test when the job opportunity effectively changes through the unavailability of the original alien worker.

The Department's regulations authorize it to closely review the information provided on the application with respect to the named alien. Our authority to examine the stated qualifications of the alien named on the application also extends to our determination of whether an employer has accurately stated the minimum qualifications necessary to perform the job, or has inflated or misstated job requirements. 56 FR 54920 (Oct. 23, 1991); see 20 CFR 656.17(i).

Nevertheless, the Department does not undertake in this Final Rule to determine the visa eligibility of individual aliens. This rule governs the processing of labor certification applications, the validity of approved certifications, and other Department of Labor activities implementing relevant INA provisions and 20 CFR part 656; it does not speak to activities by the Departments of Homeland Security or State conducted under their respective authorities and jurisdiction. Further, the Department's focus is not on the identity of the individual alien but on the employer's failure to conduct a second labor market test for available U.S. workers when the original alien beneficiary becomes unavailable and, subsequently, when an employer seeks substitution. As stated in the NPRM, if the original alien beneficiary is no longer available, then the employer must use some means to fill that job opportunity. Clearly, the employer used some recruitment tool to find the new foreign worker for that newly opened job opportunity. Prohibiting substitution will ensure the employer again makes the reopened employment opportunity available to U.S. workers. In the event another alien is again the only qualified person available, then it is consistent with this program's purpose and the statute's plain language to require that the employer file a new application reflecting the new recruitment undertaken.

The *Medellin* decision—A number of commenters cited the decision in *Medellin v. Bustos*, 854 F.2d 795 (5th Cir. 1988) in support of the argument that the Department lacks authority to prohibit substitution. The commenters argue that in *Medellin*, the Fifth Circuit held that the Department's administrative decision (based on operational guidance to program staff) to revoke a permanent labor certification based on the employer's substitution of another alien in place of the named alien more than six months after the certification was granted was not in accordance with applicable law. The commenters further argued that limiting a labor certification to "the alien for

whom the certification was granted” ran contrary to both the INA provisions (now at INA section 212(a)(5)) stating the Secretary of Labor’s authority to determine worker availability and adverse impact, and the Department of Labor’s own regulations, which provided that a labor certification was valid indefinitely, hence disconnecting validity and any time limitations.

We carefully considered the Fifth Circuit’s opinion in *Medellin* prior to the issuance of the NPRM and concluded that the dictum relied upon by commenters in the decision was not so compelling as to overcome the strong argument, based on the Department’s authority and experience, that supports the elimination of substitution. We have reviewed that matter again as a result of comments and reach the same conclusion for a number of reasons.

First, the ultimate basis for the *Medellin* decision was an administrative law issue not relevant to this rulemaking. *Medellin* involved a challenge to provisions in an ETA Technical Assistance Guide (TAG) that permitted the substitution of an alien on an approved labor certification only for the first six months after issuance. As the *Medellin* court correctly noted, the TAG was not published using notice and comment rulemaking procedures. Further, the six-month limitation was inconsistent with the then regulation at 20 CFR 656.30(a) that made labor certifications valid indefinitely. This rulemaking directly addresses the administrative law problem identified in *Medellin* by clarifying, after notice-and-public comment rulemaking, that a labor certification is valid only for the alien who was the beneficiary of the original application and only for a limited time, 180 days.

The discussion in the *Medellin* decision about the relative responsibilities of DOL and INS in the labor certification process is *dictum* and clearly is not the legal grounds for the court’s decision. Further, the reasoning in that *dictum* is not compelling and reflects an overly narrow view of the Department’s role in the immigration process. Under the INA, the Department is responsible for requiring a labor market test that is the statutory prerequisite to the granting of a labor certification. Banning substitution enhances protections for U.S. workers by offering U.S. workers another chance when a job that was the subject of a labor certification once again becomes available through the departure of the alien employee.

Section 212(a)(5) of the INA makes a foreign worker inadmissible unless, as one condition precedent, the

Department determines there is no able, willing, and qualified domestic worker available to fill the position for which the foreign worker’s admission is sought. Judicial interpretation of the word “willing” led to the creation of the process that has been in place since 1978, whereby the certification approval is predicated on an employer’s demonstrated unsuccessful efforts to recruit a domestic worker. See *Production Tool Corporation v. Employment and Training Administration*, 688 F. 2d 1161 (7th Cir. 1982). The position that the job opportunity for which certification is being sought must be a job that a domestic worker can actually fill has been affirmed by two appellate courts subsequent to the *Medellin* decision. *Bulk Farms v. Martin*, 963 F. 2d 1286 (9th Cir. 1992); *Hall v. McLaughlin*, 864 F. 2d 868 (D.C. Cir. 1989).

Given these considerations, it is perfectly reasonable for the Department to require the employer to conduct a new test of the labor market, and file a new labor certification application, every time the job opportunity becomes vacant. The *Medellin* litigation simply did not take place in a context that allowed the Department’s concerns regarding the new test of the labor market to be adequately addressed.

Relationship to DHS regulations—One commenter supported the ban on substitution but expressed concern that the impact of the change may be quite limited until DHS adopts corresponding regulations to prohibit the substitution of aliens. Another commenter argued that the public should not be placed in the position of dealing with competing and possibly inconsistent regulations issued by different agencies and suggested that DOL should withdraw its proposal until DHS signals its equivalent concern.

DOL disagrees that there is a likelihood of competing or inconsistent regulations between DOL and DHS. No DHS regulations address or authorize substitution of alien beneficiaries on labor certifications. Rather, at present, DHS permits substitution on permanent labor certifications through a delegation of authority from DOL. See March 7, 1996 Memorandum of Understanding between the Immigration and Naturalization Service (INS) and Employment and Training Administration (signed by Louis D. Crocetti, Jr., Associate Commissioner, Examinations, and Raymond Uhalde, Deputy Assistant Secretary for Employment and Training). INS (the portion of that agency that provided immigration benefits) later became U.S. Citizenship and Immigration Services

(USCIS) at the Department of Homeland Security. Pursuant to that 1996 MOU, when substitution is requested, DHS requires employers to submit a new (employer-completed but not processed) DOL permanent labor certification application form with the name of the substituted alien, along with the approved labor certification in the name of the original alien beneficiary. See USCIS Adjudicator’s Field Manual, Sec. 22.2(b)(6) (Sept. 12, 2006). This Final Rule alters the current practice by providing that labor certifications, once approved, are valid only for the alien named in the original application and that substitution of alien names on the certification is prohibited. DOL and DHS have agreed that DOL will rescind the delegation of authority contained in the 1996 MOU consistent with the terms of this Final Rule and effective on the same date as this Final Rule. Because substitution of aliens on labor certifications has occurred pursuant to DOL authority, regulatory action by DHS is not necessary to implement a termination of its delegated authority with respect to DOL permanent labor certifications.

Thus, following the effective date of this rule, employers will face a consistent approach to labor certifications: Substitution of the alien beneficiary on a permanent labor certification application or on the resulting certification is prohibited. As reflected throughout this Final Rule, the Department has determined that this prohibition on substitution is consistent with its statutory responsibilities and is necessary to achieve important objectives. DOL is responsible for administering the labor certification process and is authorized and accountable for improvements to the program, independent of employment-based immigration programs overseen by other Federal agencies. Therefore, although we have closely coordinated with DHS, DOL OIG, DOJ, and other appropriate agencies in this rulemaking and other fraud prevention efforts, DOL has determined, in light of the evidence of fraud and the continued concerns about fraud and program integrity raised by many sources, and the Department’s statutory responsibility to U.S. workers, that it is appropriate to issue this regulation governing the part of the employment-based immigration process for which we are responsible. The Department has authority to administer, enforce, and reform programs under its jurisdiction, including to regulate the meaning and nature of a permanent labor certification issued under 20 CFR part 656. Nothing in this Final Rule in

any fashion interferes with DHS' authority or its ability to address fraud issues through a rulemaking process of its own.

Entitlement to substitution—Many commenters asserted that since the practice of substitution has been permitted by DOL for several decades, the statute and regulations provide entitlement to substitution. One commenter asserted that the Department, under its current regulations at 20 CFR 656.30(c)(2), effectively provides that the labor certification application can be valid for any qualified worker, which the commenter interpreted to include a substituted worker. 20 CFR 656.30(c)(2). Another commenter opined that the absence of statutory entitlement to substitution is irrelevant to the clear value of substitution, which in its view far outweighs the perceived or potential benefits from reducing incentives for fraud.

The Department disagrees with these comments. While substitution has been a long-standing practice at the Department and by delegation to DHS, the statutory framework to allow the permanent admission of foreign nationals to perform work was deliberately protective of U.S. workers and contains nothing approaching an entitlement to substitution. It is consistent with the statute's presumption of alien inadmissibility that admissibility must be demonstrated by each employer for each alien and that the statute does not provide for substitution of individual aliens on labor certifications or applications. This regulatory action is also consistent with the Congressional intent to grant the Secretary of Labor broad discretion in implementation of the permanent labor certification program. Nor is it surprising that the practice of substitution has not been authorized or addressed in DOL's regulations. Substitution has been permitted simply as a procedural accommodation to employer-applicants. The Department recognizes that this accommodation has had a distinct benefit to employers and applicants in allowing them to retain an earlier priority date and apply the results of a completed labor market test. However, as discussed later in this Preamble, the equities do not support retention of the earlier priority date. Accordingly, in light of the evidence that substitution is an important contributor to fraud in the labor certification program and of DOL's statutory interest in protecting U.S. workers by reestablishing worker unavailability whenever a position once again becomes vacant, the demonstrated

"black market" in labor certifications, and the significant number of prosecutions for fraudulent activity related to the program, we conclude the benefits to elimination outweigh the potential disadvantages. As stated previously, the Department will continue to work with other Federal agencies with an interest in the employment-based immigration system to explore, under appropriate circumstances, potential alternatives to the current practice.

## 2. Evidence of Fraud

Several commenters mentioned that the Department has not provided evidence of or statistics on widespread labor certification fraud or abuse and needs to consider the benefits of substitution against relatively few abuses. One commenter opined that elimination is appropriate only when a policy is commonly or largely misused. It stated the burden is on the Department to show the connection between fraud and substitution, and to establish that its elimination will not impede legitimate business practices.

Some commenters questioned the effectiveness of eliminating substitution; they were concerned the rule does not target the most common sources of abuse or deter persons with intent to defraud. One commenter suggested that persons intending to engage in these abuses will find the substitution prohibition does not provide a significant obstacle to their endeavors. It stated such persons will remain free to file fraudulent applications naming the intended beneficiary and that substitution elimination will only succeed in moving the initiation of the fraudulent transaction with the foreign national back to a point in time before the filing of the application. The commenter asserted it is highly questionable whether such a minor achievement justifies the harm done to legitimate employers by the prohibition of substitution. Some commenters claimed the substitution prohibition will do little to eliminate the filing of applications without the knowledge of the employer, and the filing of applications by employers who are paid to engage in a fraudulent scheme and who have no intention of filling the job opportunity described in the application. Citing *U.S. v. Kooritzky*, No. 02-502-A (E.D. Va. 2003), they observed those who are determined to commit fraud will find a way to commit fraud.

The NPRM detailed the reasons for our proposal to eliminate the practice of substitution. Our experience with the failures of this practice is longstanding

and shared by other Federal agencies. The Department disagrees that eliminating substitution contributes only a "minor" achievement to addressing the realm of abuses over which the Department has control. The fraud cases prosecuted even within the recent past indicate a significant number of instances where substitution played a role in fraudulent activity in obtaining an immigrant benefit. See, e.g., *U.S. v. Yum* (E.D. Va. 2006); *U.S. v. Mandalapa*, No. 205-NJ-03117-PS (D.N.J. 2006).

The Department continues to believe, based on the activity in these and other cases, that fraudulent substitution is a core contributor to the marketability of labor certifications because it is only if one can substitute that one can benefit from a certified application naming another individual. This marketability results in the use of labor certifications for fraudulent purposes—by aliens and employers with no intent to have a legitimate employment relationship.

We agree there are numerous sources of fraud in employment-based immigration programs government-wide, and individuals intent on committing fraud and abusing the system may still find a way to do so. However, the existence of other types of fraud, separate from that generated by the practice of substitution, does not obviate the need to address the documented fraud related to alien substitution. As described earlier, the Department has instituted specific checks and balances in the PERM process to address and prevent the filing of applications without the employer's knowledge. For example, the National Processing Centers contact the employer directly to confirm it is aware of the application and is sponsoring the alien, and the ETA Form 9089 requires distinct contact information for the employer and the attorney or agent filing the application. The substitution prohibition enhances and supplements existing anti-fraud and program integrity measures.

Alternatives to a regulatory ban on substitution, including limiting or tailoring the option to substitute—One commenter asserted the elimination of substitution in no way facilitates the identification of fraudulent labor certification applications, and this rule instead takes a "shotgun" approach at the expense of legitimate program users. The comment stated the goal of reduced fraud is better achieved by heightened enforcement measures, which it states the Department has already put in place in the PERM program. The commenter also pointed to traditional law enforcement measures, like the

discernment of patterns in groups of applications filed by a given employer or attorney, to ferret out fraud and abuse. One commenter argued existing regulations provide a sufficient basis to prosecute employers, employees, and attorneys alike who engage in fraudulent activity associated with the permanent labor certification process. Others also suggested there is no need to ban substitution because of the additional provisions prohibiting the sale, barter, or purchase of labor certifications at § 656.12; the safeguards already in place at the Backlog Processing Centers to confirm the bona fide nature of applications; and the PERM program's strict employer registration requirements. Another commenter stated it is concerned about the elimination of substitution in small town or rural areas where employers have great difficulty finding qualified engineers, and requested the Department relax its requirements for rural or small town situations.

One commenter suggested that in order to limit occurrences of fraud, DOL should limit the prohibition on substitutions to filings made under section 245(i) of the INA. As an alternative, the commenter suggested the establishment of an exception to the rule for large corporations. The commenter also suggested the Department could establish appropriate criteria to allow employers who, for example, have a demonstrated record of filing appropriate labor certification applications to use substitutions.

The Department disagrees with these comments. The heightened enforcement measures in the PERM program are designed to catch fraud "in process" and do not address fraudulent activity that transpires thereafter, as the new substitution policy will. Further, the prohibition on substitution is not designed as a fraud detection mechanism, but rather as one of several protective measures to altogether prevent fraud related to this activity by preventing the commodification of labor certifications. The prohibition will be more effective because it will cover applications filed under 20 CFR part 656 in effect before and after March 28, 2005. Further, while we agree that other fraud prevention and detection methods may be available, the effectiveness of those other methods does not remove the need for additional, targeted techniques like those instituted in this Final Rule. For example, we are well aware of other laws, such as those governing perjury, that support detection and prosecution of fraud. However, such statutes are not always sufficient to prevent, deter and/or

redress unlawful conduct. By removing the opportunity to engage in the fraudulent activity, this rule permits existing investigative and prosecutorial resources to be better focused, and frees resources across government agencies for other pressing needs.

We have no programmatic evidence that applications filed under section 245(i) are particular sources of fraud. In addition, this suggested alternative would result in a one-time solution, since the INA section 245(i) cases have already been filed and are being processed in the Department's Backlog Processing Centers. Further, such a policy would establish unequal rules for employers based upon the unsupported assumption that applications filed under section 245(i) are the only ones in which substitution fraud occurs. Labor certifications issued for 245(i) cases are indistinguishable from others and require the same steps of employers; absent a strong rationale, they should not be subject to different conditions or limitations than the limitations that attach to other labor certifications.

We also do not agree that exceptions for large corporations or for rural areas are warranted. Exceptions for certain categories of employers, as suggested by commenters, do not further the Department's obligation to ensure a sufficient test of the labor market for the admission of each alien each time a job opportunity opens. We also have determined that it is not wise to establish a list of pre-approved employers, in part because the types of fraud we are targeting by this Final Rule are in some cases committed by attorneys and agents without the knowledge of the employer named on the application.

### 3. Change in Conditions That Originally Warranted Allowance of the Practice

Various organizations provided comments concerning current processing times and the Department's remaining backlog of permanent labor certification applications in relation to the proposed ban on substitution. These commenters generally took issue with the Department's premise that substitutions are no longer needed to accommodate application processing delays. Some commenters questioned the premise based on the number of applications pending at the Department's Backlog Processing Centers and experiences to date with applications filed under the PERM system. They stated even if the Backlog Processing Centers meet what appears to be an unrealistic backlog elimination goal, the premise is quite obviously false.

For example, one commenter stated it has 1,100 pending, unadjudicated labor certification applications and that, in many cases, because of the multi-year adjudication times for these applications, the original alien beneficiary has already moved on to a new position and the employee currently in the position has become the new intended beneficiary of the application. Another commenter referred to over 1,000 Reduction-in-Recruitment applications pending at the Department's Backlog Processing Centers, and stated about half of all of its PERM applications still remain pending for up to five months from date of submission. Both commenters suggested the Department should continue its efforts to eliminate the backlog and to speed up the PERM process prior to considering changes to the practice of substitution.

The Department disagrees. The agency operating conditions under which alien substitution was initially permitted have noticeably changed. The Department acknowledged in the preamble of the proposed rule that the strongest historical argument in support of substitution has been the length of time it once took to obtain a permanent labor certification. 71 FR at 7656, 7659 (February 13, 2006). However, the Department also noted the streamlined process introduced by the PERM regulation has significantly reduced the labor certification processing time for applications filed under the new system. Since the PERM program began accepting applications on March 28, 2005, 68 percent of the certified applications have been processed in less than 60 days. And in FY 2006 alone, approximately 75 percent of the certified applications were approved in 60 days or less. In addition, the PERM system will continue to improve as we gather baseline information from which to implement process improvements. In other words, we expect applications to be adjudicated at least as quickly in the future as the system builds upon its knowledge base.

With respect to the pending applications at our Backlog Processing Centers, we have significantly reduced the number of backlogged applications from an estimated 365,000 to less than half that number. This effort places us on target to meet our goal of eliminating the backlog by September 30, 2007. Thus, the argument in support of allowing substitutions to continue because of long processing delays has been appropriately addressed by both the new, streamlined PERM process and the large reduction in backlogged applications. In light of these changes,

we believe it is imprudent to wait to adopt this rule, as some commenters suggest, until all backlogs are completely eliminated, thus giving those who wish to fraudulently use substitutions additional time to do so.

#### 4. Extending Regulation to Pending Applications for Permanent Labor Certification and to Approved Certifications

The Department received a number of comments opposing the application of the substitution ban to applications filed under 20 CFR part 656 in effect either before March 28, 2005, or on or after March 28, 2005, and to certifications already granted. These commenters urged the prohibition on substitution should be limited to only those applications filed under the current streamlined regulation and should not encompass any applications filed under the 20 CFR part 656 in effect before March 28, 2005.

Commenters stated employers and employees across the country have made critical hiring and transfer decisions in reliance on the availability of substitution. They stated that by applying the rule change to all substitutions except those approved by the effective date of the Final Rule, the Department would be setting itself up for further challenges and pressures. The commenters cited *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988), asserting it supported their contention that a Federal agency lacks the power to issue retroactive rules absent a statutory grant of authority. They contended it is unfair, and most likely unlawful, for the Department to change the rules midstream, and that any change in the rules governing substitution should only be prospective in effect.

Others commented that the Department's proposed regulation constitutes a retroactive ban that raises legal questions. Some stated the proposed rule improperly seeks to retroactively invalidate approved labor certification applications, when such approval was obtained under the current rule that such certifications are "valid indefinitely." Others stated the proposed application is contrary to the prohibition on retroactive agency rules as found in the Administrative Procedure Act (APA). They noted that, under the APA, a rule is defined as the whole or part of an "agency statement of general or particular applicability and future [emphasis added] effect designed to implement, interpret, or prescribe law or policy." Commenters stated the Department would need specific authority from the Congress to

promulgate retroactive regulations. Several commenters referenced *Health Ins. Assn. of America, Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) for the proposition that, under the APA, rules may only have future effect. The court cited Justice Scalia's concurrence in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216–23 (1988), which interpreted the APA to mean that a rule is a statement that has legal consequences only for the future and found that a rule that alters a future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule may for that reason be found "arbitrary" or "capricious." One commenter asserted the proposed provisions eliminating substitution would be illegal retroactive rulemaking because employers have filed applications with the expectation of substitution as a potentially significant benefit should the original beneficiary drop out, and this benefit is a form of a property right.

One commenter argued the application of the rule prohibiting substitution to backlogged applications under the pre-PERM regulation was retroactive in nature and could be read as an attempt to force the time and expense of the new application under the PERM process on employers who already have an investment in applications in the backlog. The commenter said this would amount to a taking of a business investment without just compensation. Similarly, another commenter asserted the elimination of substitution constitutes a "taking without compensation" of an employer's significant investment in the preparation and filing of pending and approved labor certification applications. The commenter stated the prevention of an unknown and possibly insignificant level of fraud and abuse does not justify this devaluation of a company's investment. The commenter went on to observe that eliminating substitution would disproportionately impact large high-tech employers, which file large numbers of applications. Finally, this commenter stated years of processing delays have spurred employers to build substitution into a business practice as part of their respective programs.

In a similar vein, other commenters stated the prohibition of substitution is detrimental to parties who have relied on the current practice. Estoppel, they said, warrants that a person who has rightfully relied on a practice should get the benefit of that reliance. Employers and beneficiaries have depended on the ability to substitute and have foregone filing new applications because they

planned to use an application for a previous employee for a current employee.

One commenter argued that due process considerations of fair notice, reasonable reliance, and settled expectations, affirmed in *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001), should compel the Department to strip from the rule any provision applying the ban on substitution retroactively. This commenter asserted that, based on that case law, the 1996 Memorandum of Understanding between the Department and the Immigration and Naturalization Service delegating to INS responsibility for substituting a named beneficiary on a labor certification, and longstanding agency practice, the Labor Department may not now retroactively divest USCIS and employers with pending labor certification applications of the legal right to engage in the practice of substituting alien beneficiaries. This commenter further stated that if a case has not yet been adjudicated, it is difficult to imagine any harm resulting from a legitimate employer substituting a new beneficiary on the pending application.

Other commenters also pointed out the hardship that the ban on substitution would cause to certain aliens. They stated prohibiting substitution on applications pending prior to the effective date of the rule will render countless beneficiaries who are subject to the American Competitiveness in the Twenty-First Century Act (AC21), Public Law 106–313 (October 17, 2000), stranded and unable to extend their current stays, since such extensions depend on the existence of either a permanent labor certification application that has been pending for 365 days or more or a pending Form I–140 petition.

As an alternative to the proposal, one commenter recommended that substitution remain available for all cases currently pending at a Backlog Processing Center. The commenter also recommended substitution remain available for all cases as long as the employer can demonstrate it has engaged in some additional recruitment and can document there are no qualified U.S. workers available. One commenter recommended the substituted beneficiary should be assigned the priority date of the date of substitution or, in the event substitution is prohibited, that the prohibition start with the effective date of the rule, and not be applied retroactively. One commenter suggested a grace period prior to the ban becoming effective.

We have carefully reviewed these comments and find they do not present sufficient grounds to overcome the rationale reflected in the NPRM to prohibit the practice of substitution on all labor certifications issued after the effective date of this Final Rule. Assertions that the prospective ban on substitution of aliens is, instead, a retrospective ban are misplaced. Past substitution requests that already have been approved are unaffected by this rule. Current substitution requests pending on the effective date of this rule will continue to be processed. Even though substitution will not be permitted with respect to labor certifications granted prior to this rule's effective date and may upset expectations based on part 656 as it previously read, that does not make the ban retrospective.

The question of whether a rulemaking activity has a "retroactive" impact that renders that rule invalid is more complex than the commenters suggest. The United States Supreme Court has ruled that "[a] statute does not operate 'retroactively' merely because it is applied in case arising from conduct antedating the statute's enactment." *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994). The Court went on to note that determining whether a statute is improperly retroactive requires the application of "familiar considerations of fair notice, reasonable reliance, and settled expectations. \* \* \* " *Id.* at 270. Application of the *Landgraf* principles led the Court to reject a retroactivity challenge to the application of the Foreign Sovereign Immunities Act to wrongdoing that occurred prior to that law's enactment. *Republic of Austria v. Altman*, 541 U.S. 677 (2004). These same principles recently led an *en banc* Sixth Circuit to uphold the application of a change in Social Security Administration disability regulations to pending cases. *Combs v. Commissioner of Social Security*, 459 F.3d 640 (6th Cir. 2006). The Sixth Circuit followed the same approach in finding that there was no impermissible retroactive effect in applying certain amendments to the INA relating to the discretionary removal of relatives to aliens in the U.S. who sought to invoke the prior procedure. *Patel v. Gonzales*, 432 F.3d 685 (6th Cir. 2005). After applying these principles to the current rulemaking, the Department has determined its proposal is appropriate.

An application for permanent alien labor certification is filed at DOL with the employer-applicant's expectation that it will satisfy the exclusionary provision in 8 U.S.C. 1182(a)(5)(A), so as to support a petition to DHS to

import the alien beneficiary of the certification. That remains unchanged by this rule.

The Department has provided ample notice of its intention to eliminate substitution, sufficient for employers and their representatives to reduce or eliminate continued reliance on the practice. As early as 1991, we indicated our intention to discontinue the practice. 59 FR at 54920, 54925-54926 (Oct. 23, 1991). When the PERM Final Rule was published in 2004, its preamble discussed at some length questions relating to the practice of substitution, the Department's findings of an emerging market for fraudulent sale of labor certifications, and DOL's intent to examine the practice and "explor[e] in the near future regulatory solutions to address this issue." 69 FR at 77363 (Dec. 27, 2004). In the NPRM to this Final Rule, the Department again announced its intent to eliminate substitution. Thus, we are confident public notice and comment has been fair, open, and consistent with the Administrative Procedure Act. Any employer who has an application pending but who is either unable or unwilling to continue to sponsor the original alien has had more than sufficient opportunity to identify a new alien and take advantage of the past procedures.

We have determined that employers cannot demonstrate they reasonably relied on the prior practice. In filing an application for permanent labor certification, an employer is expressing its intent to and expectation that it will hire the alien named on that document if the application is approved. An employer's hypothetical need to substitute, should the first alien no longer be available, is not tantamount to detrimental reliance on an ability to do so. Commenters offered no explanation of how an employer's initial filing can be made in reliance on a future ability to substitute. The risk any employer sponsoring an alien takes is that the alien will not remain an employee through the entire permanent residence process, or at the end of that process, and the option of simply inserting another alien has never been an entitlement. The INA's rule of inadmissibility of immigrant workers without a test of the labor market for available U.S. workers, the statute's requirement that admissibility be determined for each alien individually, and the statute's overall protection of employment rights of U.S. workers, each further supports the Department's position.

With respect to the claim of employer expectations of an option to substitute,

the statute makes clear that an employer has no absolute right to a labor certification, and certainly no property interest in one. Employers, particularly regular users of the system, have known about the Department's intent to end the practice of substitution since the publication of the PERM regulations in 2004. No employer could after that date have had any reasonable expectation that the practice would be indefinitely available. Several commenters appear to argue that once they have applied for or secured a labor certification for a particular alien in a particular job, they have a right to bring in any alien they choose for that job. The statutory scheme, with its focus on individual aliens and presumption of each alien's inadmissibility, belies that argument.

Further, it is appropriate to apply the prohibition on substitution to the cases in our Backlog Processing Centers to ensure these needed fraud protections are applied throughout all permanent labor certification cases, regardless of where they reside in terms of processing. Accordingly, the Department has determined that, following the effective date of this Final Rule, the elimination of alien substitution will apply to all permanent labor certification applications pending with the Department and to all permanent labor certifications issued under the current or prior regulation. This Final Rule does not nullify substitutions already made or in progress, whether by the Department or DHS, but rather prohibits substitutions in the future, substitutions which employers presumably do not anticipate and are not planned and, hence, to which there is no right or reasonable expectation. No labor certification may be the subject of a substitution request submitted on or after the effective date of this rule.

This rule places no additional responsibilities on recipients of labor certifications approved prior to the effective date. At the time of certification a benefit was granted; none was waived. The required wage rate remains unchanged for employers. No further recruitment for U.S. workers is required of the employers under approved labor certifications. Once the certification is filed with DHS in support of a visa petition, and if the employer and alien comply with all other applicable provisions of the immigration laws, the alien beneficiary will be admitted as a permanent resident.

All that is changed is that the employer now will be encouraged to retain its original alien beneficiary (perhaps to that alien's benefit) or will

have to file a new application on behalf of a new alien. An employer seeking to substitute, in fact, always has had to engage in a limited test of the labor market. When the original alien beneficiary no longer is available for the job opportunity, the employer has had to recruit the substitute alien, either domestically among nonimmigrants, or abroad to import a new foreign worker. This rule would make that labor market test include not just foreign workers, but also U.S. workers, at prevailing wages and working conditions.

The standards in 8 U.S.C. 1182(a)(5)(A) “are quite broad. The Secretary must decide whether there are sufficient U.S. workers who are ‘able, willing, qualified, and available,’ and whether the alien’s employment would ‘adversely affect the wages and working conditions’ of these workers. The statute leaves to the Department a broad area for the exercise of its discretion in issuing labor certificates.” *Industrial Holographics, Inc. v. Donovan*, 722 F.2d 1362, 1365–1366 (7th Cir 1983). In the exercise of her discretion to issue labor certifications, the Secretary is within the extensive bounds created by the INA. *Id.* If the employer files a new application, it will be considered fairly and on its own merits. If approved, the new labor certification will be for a more current wage rate and subject to a more current labor market test, to the benefit of the new alien and/or U.S. workers similarly employed. This is within the intent of the statute, and is an appropriate preventative measure given the deleterious effect caused by substitution in the past. Given the Department’s expressed concerns about fraud in the labor certification process, particularly with respect to substitution, and the emerging “black market” in status as a beneficiary of a labor certification, DOL sees a compelling need to protect the program’s integrity regardless of the processing status of a certification on the effective date of the final rule. The Department’s duty also to protect job opportunities for U.S. workers, and the welfare of both U.S. and foreign workers, makes it necessary to end the process of substitution after the effective date. See section I.D of this preamble, above.

Effect on aliens who are H–1Bs and not entitled to benefit from substitution after the fifth year—The Department also received comments regarding the effect of the substitution ban on nonimmigrant aliens on whose behalf viable labor certifications have not been filed by the end of their fifth year in H–1B status, and specifically on these aliens’ ability to adjust their status to that of immigrants. Under current law,

nonimmigrant H–1B visa holders in their sixth year of H–1B status who are named on permanent labor certification applications that have been pending for 365 days or more qualify—upon petition to USCIS—for extension of their H–1B status in one-year increments. AC21, section 106(a). Currently, USCIS allows visa holders in H–1B status who are substituted into labor certification applications by the end of their fifth year to extend their nonimmigrant status beyond the normal six-year maximum. Commenters argued H–1B visa holders who are unable either to have a permanent labor certification application filed on their behalf or to be substituted into an existing application by that time will lose the opportunity for additional extensions of H–1B status.

The Department understands concerns that, as a result of this rule, H–1B nonimmigrant aliens who, after five years of employment in the United States, are not yet the beneficiary of a permanent labor certification application might not be permitted by USCIS to further extend their H–1B status prior to obtaining U.S. permanent resident status. However, the Department finds that continuing substitution as an accommodation to this small group of individuals, a group whose numbers and participation in the program are both speculative, is disproportionate to the adverse consequences of continuing the substitution practice which creates both an incentive and opportunity for fraud, and which deprives U.S. workers of job opportunities.

Some commenters have suggested that since AC21 increased the portability of H–1B visas, allowing such nonimmigrants to change employers, substitution by these foreign workers should continue to be allowed. Public Law 106–313, sec. 105. The Department sees no reason, as a general matter, to permit one type of nonimmigrant to continue benefiting from the practice of substitution over other nonimmigrants. The portability provision seeks to increase flexibility for a specific group of nonimmigrants—H–1B aliens—under a specific set of circumstances; it governs transfers between positions which aliens fill on a temporary basis, and is triggered by the filing of a new LCA and petition. It does not address, and does not extend to, substitution, which is a function of the permanent residence process. The statutory permission to move from one employer to another as a procedural accommodation does not in turn mandate increased flexibility through substitution in the permanent residence process.

These commenters’ analysis incorrectly pairs portability with the extension beyond the six-year H–1B employment limit allowed by section 106(a) of AC21. The Department finds that analysis flawed. The INA dictates that after six years, H–1B status must terminate. The specific exceptions to that termination are linked by AC21 to harm resulting from permanent residence backlogs, including backlogs in the permanent labor certification program. The extension beyond six years is intended by the statute to benefit an H–1B worker when 365 days or more have elapsed since the filing of a permanent labor certification application “on the alien’s behalf (if such certification is required for the alien to obtain status under such [INA] section 203(b)) \* \* \*.” Public Law 106–313 section 106(a)(1). Clearly, the alien intended to be helped by this provision is the alien who may have been prejudiced by the backlog in processing labor certification applications under DOL’s pre-PERM regulations. An H–1B worker seeking substitution may have benefited by working in the U.S. for six or more years, but has not necessarily been affected by the backlog at all. It is not inconsistent with the statutory intent of AC21 to limit the ability of that alien to continue his or her nonimmigrant status to a labor certification filed on his or her behalf rather than on someone else’s behalf.

The Department recognizes that those aliens who fall outside the five-year mark will potentially be unable to extend beyond the sixth year of H–1B status and otherwise might have been able to do so through substitution. This small group of affected individuals, however, does not present sufficient equities to persuade the Department to carve out an exception to the prohibition on substitution, since employers in such situations have had upwards of five years in which to initiate permanent resident status on their behalf.

Further, extension of an alien’s nonimmigrant visa status is the province of USCIS, not the Department of Labor. The Department’s mandate is not to preserve the opportunity or further the potential opportunity in all circumstances for an employer to hire an immigrant worker, nor is it a process driven by the interests of any or all aliens who may wish to enter the U.S. through employment-based immigration. The Department’s mandate, rather, is to design and implement a secure framework within which an employer with legitimate business needs may determine the availability of U.S. workers and, if such

workers are not found, bring in a foreign worker. Moreover, because the Final Rule prohibits only substitutions which have not yet been made, aliens who have not otherwise begun the permanent residence process before the end of the fifth year of H-1B status presumably do not anticipate and therefore cannot claim a reasonable expectation of benefiting from substitution.

##### 5. Effect of the Elimination of Substitution on Employers

The Department received many comments addressing the perceived hardships employers would suffer if substitution were prohibited.

**Added cost and burden—**Employers were concerned about loss of their investment in the first application; the loss of an important employee retention and recruitment tool; added cost and burden from a new application, including advertising and recruiting costs, staff time, legal fees; inherent delays to getting a new worker in place, and potential processing delays with the Department or other agencies; additional costs from other parts of the petitioning and visa application process; loss of place in the queue given visa retrogression; and retardation of business growth and loss of competitiveness from potential delays in getting products to market. Some pointed to the potential negative impact on special groups, such as high-tech employers, nonprofits, or businesses located in rural areas. One commenter stated that each set of costs should not be viewed in isolation, but rather multiplied by the number of applications for each employer, and the large number of employers that must respond to labor mobility and unforeseen business changes.

Despite a lack of consistent information from commenters on the additional costs associated with new filings, the Department is aware of and sensitive to the time and expense employers absorb to recruit and retain a qualified workforce. However, the costs associated with the employment-based immigration process, including the costs incurred by employers requesting permanent labor certification, have been an accepted part of the labor certification process for almost 30 years and are not unanticipated by the statute. The INA presumes inadmissibility of each alien, and requires the presumption be overcome for each foreign worker through, in part, the Secretary of Labor's determination. A demonstration of worker unavailability is inherent to the process of filing a labor certification application, and it is

not unreasonable or inconsistent with the INA to require recruitment every time an employer seeks to bring in a new foreign worker. Recruitment activities and the costs associated with them are equally as appropriate for the would-be substituted foreign worker as they were for the originally named alien. Accordingly, while we are sensitive to employers' concerns, we must nevertheless conclude that elimination of the current substitution practice is amply justified notwithstanding.

In addition, the Department fully recognizes that substitution has become a tool to address visa retrogression. However, the Department is not convinced it should retain a policy on substitution that gives rise to significant fraud and may adversely affect U.S. workers as a means to cope with the visa cap issue, or to support any unintended cost savings for employers that may have resulted from this practice.

**Loss of priority date—**Many commenters expressed concern over the loss of the visa priority date when a new application is required to hire a new alien. Our program experience indicates that the priority date plays a defining role in the commoditization of labor certifications; substitution enhances the labor certification's marketability. Commoditization stems from the ability to substitute aliens on labor certifications, which are valid indefinitely, while maintaining the priority date of the original filing. Indeed, the priority date is often a prime motivator for the marketability and added value of labor certifications. It is also not necessarily true that the availability of substitution is beneficial to aliens as a class. As stated in the NPRM, under the substitution process currently in place, the new alien beneficiary is inserted into an in-process application or certification initially filed for a different alien and with a filing date that is often years earlier than the substituted alien would have received if named in a newly filed application.

We are aware of concerns that these practices make substitution fundamentally unfair to other aliens (and their petitioning employers) seeking to immigrate to the U.S. who remain below the substituted worker in the visa priority date queue, as well as to U.S. workers. See 71 FR 7656 (Feb. 13, 2006) and 56 FR 54920 (Oct. 23, 1991). The need for a new labor market test and the Department's interest in removing aspects of the current process creating incentives for fraud, combined with the inequity to other aliens waiting in the visa queue who have not been

substituted in, outweigh the harm to an individual employer and alien from the loss of a priority date on a given application. In addition, the reasoning that the employer suffers a hardship from the inability to apply an earlier priority date to a subsequent application rests on an unsupported assumption that another test of the labor market would not yield a qualified and willing U.S. worker. We do not agree with this reasoning and find it contrary to our statutory responsibility to protect U.S. workers, as well as virtually impossible to legitimately accommodate in the administration of the permanent labor certification program.

##### *B. Prohibition of Modifications to Applications*

The proposed rule sought to clarify procedures for modifying applications filed under the new permanent labor certification regulation and, in particular, to prohibit modifications to applications once filed with the Department. We received numerous comments raising concern over this new provision. After careful consideration of these comments and for the reasons set forth below, this Final Rule codifies the new provision at § 656.11(b) with slight changes from the NPRM, clarifying that requests for modifications to an application submitted under the PERM regulation will not be accepted where the application was filed after this Final Rule's effective date. In considering how to implement the "no modification" provision, while ensuring due process to applicants for labor certification, we have determined that it is advisable to revise the language of § 656.24(g) to more precisely define what documentation may be submitted with a request for reconsideration.

Codifying the "no amendments" requirement through notice and comment—As explained in the NPRM, the clarification made by this Final Rule is consistent with the streamlined labor certification procedures governed by the regulation that went into effect March 28, 2005. Nothing in the regulation contemplates permitting employers to make changes to applications after filing. That practice was one the Department specifically sought to change through the Final Rule implementing the re-engineered PERM program. The re-engineered program is designed to streamline the process, and an open amendment process that either freely allows changes on applications or results in continual back and forth exchange between the employer and the Department regarding amendment requests is inconsistent with that goal. Further, the re-engineered certification

process has eliminated the need for changes.

The Department has instituted screening and guideposts for electronic permanent labor certification applications. The online application system, especially in light of the technological enhancements described below, allows the user to proofread, revise, and save the application prior to submission, and the Department expects users will do so. ETA has received frequent, positive feedback from stakeholders on what they have found to be the time and cost-saving nature of this review.

Moreover, in signing the application, the employer declares under penalty of perjury that it has read and reviewed the application and the submitted information is true and accurate to the best of its knowledge. In the event of an inadvertent error or any other need to refile, an employer can withdraw an application, make the corrections and file again immediately. Similarly, if an employer receives a denial under the new system, it can choose to correct the application and file again immediately if it does not seek reconsideration or appeal.

Immediate feedback on deficiencies or deniability prior to submission of an application—Prohibiting the modification of applications will allow the Department to process employer applications more quickly and support greater uniformity and consistency in their adjudication. However, as part of our continuing upgrades to PERM processing capabilities, as well as in response to comments on the NPRM and the suggestion by the BALCA in its decision in *In the Matter of HealthAmerica*, No. 2006–PER–1 (July 18, 2006), we have dramatically increased the nature and number of system “prompts” and warnings in an effort to provide employers and others with additional opportunities for correction prior to submission of an application.

The Department has added system capabilities in the form of “pop-up” edit alerts to notify each applicant when a response to a question is technically in conflict with either the PERM regulation or certain of the formal instructions for completion of the form. The applicant is allowed to continue, but with full warning of possible deniability. The system permits submission of the application, but the applicant assumes the risk that the application will be denied based on the failure to fully comply with the technical requirements and alerts of the program. This electronic advisory system is much more detailed and more robust than

anything available previously to online users, and it is continuing to reduce the type of automated denials that gave rise to *HealthAmerica*.

The majority of form preparation errors that have occurred to date will now generate an automated prompt, warning the filer that it may have entered erroneous information that may cause a denial of the application. As described above, similar manual mechanisms are in place to detect and correct errors on mailed applications. The Department reiterates, however, the fundamental responsibility to submit an application which does not contain typographical or similar errors remains with program users.

Under the system upgrades now in place, applications containing errors in contravention of system alerts are denied. Consistent with the “no modifications” policy codified by this rule and the evidentiary parameters of the revised § 656.24(g) described below, requests for reconsideration based on such denials will not be granted, where an application filed after this rule’s effective date is at issue. Requests for reconsideration based on such denials involving applications filed prior to this rule’s effective date will be reviewed on a case-by-case basis; they will be placed in the appropriate queue and reviewed on a “first in, first out” basis and as workload permits.

Evidence in support of requests for reconsideration and amendment of § 656.24(g)—We have made one change from the NPRM in this Final Rule based on the BALCA’s decision in *HealthAmerica*. Among other issues, the Board addressed the meaning of the current § 656.24(g) governing requests for reconsideration. That section provides that reconsideration requests “may not include evidence not previously submitted.” The Board concluded that evidence “previously submitted” encompassed material in the possession of the employer at the time of filing. That reasoning was the basis for the Board’s decision that allowed the employer to modify its application to correct a mistake. To the extent the BALCA favored allowing the employer in *HealthAmerica* to present evidence that effectively changed the response to a question on the application, the BALCA’s approach is inconsistent with the Department’s objective and the NPRM proposal that applications cannot be changed or modified after submission.

However, the Department recognizes that there will be situations where—although an employer will not be permitted to amend its response to a question as it did in *HealthAmerica*—it

may nonetheless be appropriate to consider information not previously in the Certifying Officer’s (CO’s) physical possession in order to provide appropriate evaluation of the employer’s request for reconsideration. The Department has determined an approach that allows for submission with a motion to reconsider of documentation in existence at the time of filing and held by an employer as part of its compliance responsibilities under the PERM recordkeeping requirements is appropriate. Accordingly, we have adopted a modified approach to that proposed in the NPRM, continuing to prohibit application modifications but recognizing the appropriateness of an opportunity to present and consider evidence that was generated to comply with record retention requirements of the PERM program.

Accordingly, the Department is including as part of this Final Rule a revised § 656.24(g) setting the new standard for applications filed on or after the effective date of this Final Rule. The new § 656.24(g) describes the evidence that can be submitted with a motion to reconsider and clarifies the interplay with the no-modification provision of § 656.11(b). The revised § 656.24(g) limits evidence submitted at reconsideration to documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or documentation that the employer did not have an opportunity to present to the Certifying Officer, but that existed at the time the application was filed, and was maintained by the employer to support the application for permanent labor certification to meet the documentation requirements of § 656.10(f). Revised § 656.24(g) also provides that the Department will not grant motions to reconsider where the deficiency that caused denial resulted from the applicant’s disregard of a system prompt or other direct instruction. These changes together adequately ensure that employers and others have sufficient opportunity to present evidence on salient points, even if denied that opportunity during the application’s consideration, while enabling the PERM program to function in its intended streamlined manner.

#### 1. Issues Raised by Public Comments

Authority to limit modifications to an *Application for Permanent Employment Certification*—Many commenters questioned the Department’s authority to limit and prohibit an employer’s ability to modify a Form ETA 9089, *Application for Permanent Employment Certification*. We disagree. Federal

agencies have the authority, and sometimes the necessity, to write strict procedural rules in order to manage their respective responsibilities. *HealthAmerica*, slip op. at 17. Our past practice and program experience led us to make regulatory changes in the nature of the permanent labor certification program, changes that were publicized through extensive stakeholder outreach and during numerous public meetings across the country. The resulting efficiency and effectiveness measures have contributed to overall program productivity increases and have reinforced, among other factors, the critical need to discontinue what has historically been continual, unduly time-consuming communication between ETA Certifying Officers and employers or their representatives.

The Department recognizes that the accountability-based standard it put in place in PERM was, at least for purposes of the modifications issue, not made sufficiently clear in the text or preamble to the original December 27, 2004 Final Rule. The BALCA pointed out in its *HealthAmerica* decision that a requirement for precise filing can be imposed with proper notice, citing *Glaser v. FCC*, 20 F.3d 1184, 1186 (D.C. Cir. 1994); *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985); *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994); *Florida Cellular Mobil Communications Corp. v. FCC*, 28 F.3d 191 (D.C. Cir. 1994). In these cases, the D.C. Circuit found the FCC could appropriately and legitimately write regulations requiring certain license applications be "letter-perfect" (i.e., complete and sufficient) when submitted because the requirement was provided for in agency regulations that had been subject to notice and comment. The BALCA noted the issuance of the NPRM as evidence that such a "letter-perfect" requirement did not exist under the PERM regulations as initially issued. This rulemaking satisfies public notice and comment objectives.

Relationship to fraud—One commenter suggested the Department is insinuating that any request for modification is grounded in fraud. We disagree. As we have stated, the "no amendments" clarification in this rule simply codifies a policy the Department assumed was part and parcel of the re-engineered program, and which was an (albeit unstated) assumption of the PERM Final Rule. The "no modifications" policy furthers administrative efficiency. In addition, it protects against certain program abuses, such as the submission of a form with incomplete or inaccurate information

simply to save the priority date. Thus, the policy serves a number of purposes not limited to fraud prevention.

Need for modifications—Many commenters stated modifications to applications were necessary because alleged errors made by the Department in reviewing mailed-in applications led to erroneous case denials. For example, the Department issued denials for failure to include the language that the employer would accept "any suitable combination of education, training, or experience," when, in fact, the language was included in the application. Further, commenters stated other applications have been denied because the Department allegedly stated the alien did not possess the required academic credentials when, in fact, he or she did, and those credentials were clearly noted in the application in the appropriate place.

Commenters suggested in the event of an inadvertent error, there are many reasons why re-filing is not usually a viable alternative, thus making modifications necessary. For instance, they stated that often an application preparer is not aware an error has been made at the time the employer submits the electronic Form ETA 9089. Even if the mistake comes to light before the Department issues a denial, it may be too late to re-file because the recruitment may have become stale. Further, certain post-filing, pre-certification events, including but not limited to changes in corporate structure resulting in a change of employer name, tax identification number, or address, may require the amendment of the application. One commenter suggested the inability to modify inadvertent mistakes could have serious ramifications as such a mistake may result in an inability to refile the application, cause a denial of the application, or be construed as a false statement.

The Department disagrees that these comments require alteration of the no-modifications policy reflected in the NPRM. As outlined above, going forward, electronic system prompts will most often alert the employer or its agent to the grounds for deniability, so a filer will be able to learn prior to submitting the application if the system would deny the application as currently completed. Further, as always, an employer has the right to seek reconsideration and beyond that, appeal to the BALCA, when it believes a denial was unjustified, without loss of the priority date which attached to the application. Hence, the "no modifications" policy does not institute a standard not previously envisioned,

and does nothing to limit or undermine employer due process rights.

When filing the *Application for Permanent Employment Certification*, the employer certifies and declares under penalty of perjury that it has read and reviewed the application, and the information provided therein is true and accurate to the best of its knowledge. The Department understands that human error occurs in limited circumstances, which is why we have elected to increase our system "prompts" to help avoid such errors. These additions sufficiently address commenter concerns. Further, the Department believes it is capable of distinguishing between typographical or inadvertent errors and willful false statements.

Tailoring the "no modifications" policy—One commenter suggested the current regulations governing PERM should permit a single opportunity to the employer or agent to correct minor technical deficiencies. According to this commenter, applications should be decided based on their substantive merits instead of on non-material technical errors. The Department agrees that applications should be adjudicated upon their respective merits. However, typographical or similar errors are not immaterial if they cause an application to be denied based on regulatory requirements. The Department encourages those who submit applications to carefully review all information for completeness and accuracy and has modified the online application system to assist them to do so. Attentive filers will accrue the benefits of the new streamlined system, as "clean" applications are usually processed and adjudicated within 60 days of filing.

Many commenters suggested it is highly unlikely that employers will need more than one opportunity to correct any minor technical deficiencies and the nature and number of technical errors is highly unlikely to have a significant detrimental impact on the overall efficiency of the PERM process. Commenters suggested the new system has, in fact, had a dramatic impact on the processing of applications for permanent labor certification through, among other things, centralization and implementation of new technology. According to these commenters, permitting a single opportunity to amend an application to overcome a non-substantive technical error will neither require substantial Department resources nor render the PERM system ineffective or inefficient.

We disagree with the commenters' premise that permitting modifications

will not negatively impact the processing and review of applications. The processing of requests for reconsideration of denials poses a significant, costly resource drain on the PERM case management system and staff. The opportunity cost and inequity to other employers are also high, as resources must be transferred from review of applications that do meet technical requirements to those that may not. Moreover, as we have discussed above, the alerts and prompts that we have built into the system will provide employers the opportunity to correct minor technical deficiencies before they ever submit their applications. This is a reasonable balancing of available resources. Therefore, the Department is finalizing the standard noted in the NPRM of not allowing modifications to an application. The revisions to § 656.24(g) will enable employers to present evidence in a request for reconsideration that will permit filers the opportunity, if necessary, to present evidence outside the four corners of the application.

Many commenters suggested it is reasonable to request that the modification prohibition, if adopted, should only apply to applications filed after publication of the Final Rule. We have adopted this suggestion. The changes to §§ 656.11 and 656.24 contained in this rule apply only to applications filed after the effective date of the rule; they do not impact the processing of motions for reconsideration filed with respect to applications filed prior to that date.

Concern prohibiting modifications will generate backlogs—One commenter suggested prohibiting modifications under proposed § 656.11(b) would be an open invitation to intractable increases in backlogged applications, rather than the radical reduction in pending applications and processing times contemplated by the PERM reforms. The efficiencies created by the new system prompts, which are proving to be an effective screen for program users against system-generated denials for technical errors, as well as the “no modifications” policy put in place by this rule, will allow us to significantly reduce the pending queues of denied applications and, consequently, to process all other applications more quickly and effectively.

Distinguishing policies for backlog and PERM—One commenter suggested the Department should clarify its position on modifications under the new PERM streamlined system, relative to applications filed with the Backlog Processing Centers, by clearly

explaining the difference in treatment in the regulatory text. As proposed in the NPRM, the “no modifications” policy in this Final Rule will apply only to the PERM program since only the PERM regulation is amended in this Final Rule. In addition, this preamble describes more fully the process the Department will follow in its review of applications filed up to the effective date of the rule. This information provides sufficient notice of the expectations for employers and their representatives regarding the treatment of technical and other modifications going forward.

*C. Prohibition on the Sale, Barter, or Purchase of Applications for Permanent Labor Certifications and of Approved Permanent Labor Certifications, and Prohibition on Related Payments*

The proposed rule, at § 656.12, prohibited the sale, barter, and purchase of applications and approved labor certifications, as well as other related payments. The Department received numerous comments on this proposal. Commenters overwhelmingly opposed § 656.12(b), which would prohibit employers from seeking or receiving payment of any kind for any activity related to obtaining a permanent labor certification.

After carefully considering comments received, the Department has decided to move forward on all provisions, but in response to comments has clarified the types of prohibited payments, as further described below. The prohibitions in this section will apply to all such transactions on or after the effective date of this Final Rule, regardless of whether the labor certification application involved was filed under the prior or current regulation implementing the permanent labor certification program.

1. Improper Commerce

The proposed rule provided, at § 656.12(a), that permanent labor certification applications and certifications are not articles of commerce and they may not be sold, bartered, or purchased by individuals or entities. The majority of comments favored the proposal, and only a few were in opposition. Some comments were ambiguous; it was not clear whether the commenters were commenting primarily on § 656.12(a), prohibiting commerce in labor certification applications and certifications, or on § 656.12(b), which prohibits several types of payments related to labor certification applications and certifications.

The Department’s extensive experience in the administration of this

program leaves no doubt that some labor certifications are treated as commodities and sold at substantial gain by those who wish to engage in the existing secondary market. In one example from 2005, a joint investigation with DHS’ Immigration and Customs Enforcement (ICE), the Federal Bureau of Investigation, the Department of State OIG and the Internal Revenue Service resulted in several employers, agents and attorneys being convicted of numerous visa fraud schemes. See *U.S. v. Ivanchukov et. al.* (No. 04–421, E.D. Va. 2005); see also DOL OIG Semiannual Report (October 1, 2005–March 31, 2006) (available at <http://www.oig.dol.gov/public/semiannuals/55.pdf>). In the *Ivanchukov* case, labor certifications were being sold for as much as \$120,000.00. As a reminder of how common this activity has become, one commenter to the NPRM for this rulemaking provided the Department with a website that advertises the sale of pre-approved labor certifications. The Department has reasonably concluded that there is a need to prohibit improper commerce in permanent labor certifications.

Sale, barter or purchase—Two commenters indicated that prohibiting sale, barter, and purchase was one of the most effective amendments the Department could promulgate to reduce fraud in the permanent labor certification program, as it removes the economic incentive for unscrupulous behavior. Some commenters indicated the terms “sold,” “bartered,” and “purchased” were impermissibly vague. Other commenters stated the proposed ban on sale, barter, purchase, and related payments was overbroad and did not take into account that both employer and employee benefit when an employee obtains permanent residence. The Department acknowledges these concerns by adding definitions of the terms sale, barter, and purchase to the definitions at § 656.3, and by specifying and clarifying what constitutes the ban on sale, barter, purchase, and related payments. A labor certification is a certification from the Department that there are no able, willing, and qualified U.S. workers available for the specific job opportunity stated on the employer’s application. Converting this labor certification into a commodity is an example of selling, bartering, or purchasing.

Many commenters suggested that if DOL wants to make selling labor certifications illegal, it should make such sales illegal and prosecute those who break the law rather than punishing everyone. We disagree that the rule punishes everyone; this aspect

of the rule only impacts an individual or employer when there is an actual sale. Further, our program experience clearly indicates that not "everyone" uses the substitution accommodation or wishes to sell labor certifications.

One commenter suggested we should remove institutions of higher education from the prohibition on barter, sale and purchase, suggesting that the prohibition be tailored to industries where the prohibited activity has been shown to occur. The Department's rationale for prohibiting the sale of labor certifications is based upon a broader policy concern than the commenter implies. Any such activity is contrary to the statutory purpose of the program. There is no basis upon which to exempt one industry sector or type of employer. Further, as other commenters have stated, there is no legitimate reason for an employer to sell or barter permanent labor certifications. Further, if such activity is not occurring in a particular industry, then employers in that industry will not be affected by the prohibition.

Attorneys' fees for preparing and filing labor certification applications—Two commenters supported the improper commerce provisions, contingent upon clarification that attorneys' fees for preparing and filing an application would not be prohibited or deemed a sale or purchase. It is not the Department's intent to prohibit attorneys from charging fees for preparing and filing labor certification applications for employers or to deem such fees by themselves to be a sale or purchase of the application or resulting certification.

Corporate restructuring—One commenter was troubled that the proposed rule could be construed broadly to prohibit transfer of a labor certification that arises as the consequence of a merger, acquisition, spin-off or other type of corporate restructuring. The commenter went on to say the proposed rule could be construed to contradict the intent of the Congress in stating in AC21 that corporate restructuring should not have any adverse impact on the immigration process. According to the commenter, in cases where one company is acquired by another, the acquiring company often compensates the acquired entity for the cost of pending labor certifications and other types of applications. In other cases, the employer filing the labor certification application may spin off part of the company and wish to sell the pending labor certification to the spun-off entity so that it can be used to obtain a green card for the original beneficiary, who now works for that spun-off entity.

According to the commenter, the proposed rule is ambiguous with respect to both of the above factual situations. The commenter requested the rule be clarified to state that the prohibition against sale, barter or purchase of labor certification applications and certifications does not apply to transfers stemming from legitimate corporate restructuring activities such as mergers, acquisitions, or spin-offs.

The Department did not intend this provision to govern corporate restructuring or internal corporate accounting and finance practices which exist independently of the permanent labor certification program. The Department has determined that further clarification on this question is not necessary.

## 2. Prohibition on Employers Seeking or Receiving Certain Payments, Including Payment of Attorneys' Fees

As proposed, the rule would have added a new § 656.12(b) to prohibit employers from seeking or receiving payment of any kind, from any source, for filing a Form ETA 750 or a Form ETA 9089 or for other actions in connection with the permanent labor certification process. The Department proposed to include in this prohibition a ban on payment or reimbursement, directly or indirectly, of any employer-incurred attorneys' fees and other costs related to the preparing, filing, and obtaining of a labor certification, whether payment was by the alien or another individual or entity. The Department received numerous comments in response to this proposal, most in strong opposition to the proposal.

Following careful review of comments and weighing our growing program experience with this issue, and for the reasons explained in detail below, the Department finds the need for program integrity outweighs any interest in the ability of the employer to receive payment or reimbursement from the alien or others in exchange for the filing of a labor certification application, especially when such payment or reimbursement has led to abuse of the process or exploitation of individual aliens. The Department's unique responsibility to reduce the incentive for fraud in the permanent labor certification program while simultaneously protecting the rights and working conditions of U.S. workers requires us to focus on the nature of the payment that an employer would receive from an alien or others for costs or fees relating to the preparation and filing of the labor certification application or obtaining permanent

labor certification. The Department's concern, which is shared by other Federal agencies, is that such a payment undermines the labor certification process by potentially corrupting the search for qualified U.S. workers and creating serious doubt as to whether the employer is offering a bona fide job opportunity and making it available for U.S. workers.

Accordingly, consistent with the proposed rule, the intent of this Final Rule is to make it clear that employers who submit applications for permanent labor certification do so with the full understanding that the costs they incur for the preparation and filing of the application and obtaining permanent labor certification are to be exclusively borne by the employer. Thus, the Final Rule prohibits an employer from receiving payment of any kind as an incentive or inducement to file, or in reimbursement of the costs of preparation or filing of, an application for labor certification, including covering the costs of the employer's attorneys' fees, except as specifically provided for certain third-party payments. The Final Rule also prohibits an employer filing an application for labor certification from reducing the wages, salary or benefits of an alien named on the application for any expense related to the preparation and filing of the application. This prohibition includes the payment by the alien of costs (for recruitment or other activities in furtherance of the labor certification) as well as the employer's attorneys' fees.

In addition, this Final Rule prohibits employers engaged in the labor certification process from withholding from an alien's wages, either in increments or in lump sum, any payment in reimbursement to the employer for costs associated with that process.

As first described in the NPRM, prohibited payments include, but are not limited to: Employer fees for hiring the alien beneficiary; receipt of "kickbacks" of part of the alien beneficiary's pay, whether through a payroll deduction or otherwise; reducing the alien beneficiary's pay for purposes of reimbursement or prepayment; goods and services or other wage or employment concessions; kickbacks, bribes or tributes; or receipt of payment from aliens, attorneys, or agents for allowing a permanent labor certification application to be filed on behalf of the employer.

There are strong and ample grounds upon which to prohibit these payments or arrangements, including the payment by the alien of the employer's attorneys'

fees. Permanent labor certification is an employer-driven process; employers, not aliens, must file permanent labor certification applications. To the extent the alien beneficiary who is the subject of the labor certification application and, later, the immigrant petition, is financially involved in the application process directly or indirectly, this involvement casts suspicion on the integrity of the process and the existence of a bona fide job opportunity. Payment by the alien of employer costs allows him or her some level of control over what must remain an employer-driven process. The degree of that control, at least at the labor certification stage, directly and unduly influences the legitimacy of the job opportunity and whether that opportunity has been and remains truly open to U.S. workers. In other words, as stated in the NPRM, alien subsidization of employer-incurred costs adversely affects the likelihood that a U.S. worker will be offered the job when, for example, the alien is paying for the recruitment effort.

The essence of this aspect of this Final Rule is that expenses that rightfully belong with an employer should not be transferred to an alien beneficiary or others. An alien is free to retain counsel to represent his or her interests in the labor certification process and also to assume responsibility for those costs. This Final Rule does not seek to regulate or control payments to, or the identity of, the alien's attorney. However, to the extent that any attorney is preparing or filing a labor certification application and thus engaged by the employer as well as with the alien, the costs attributable to work for the employer must be paid by the employer. Costs for attorneys' fees outside the labor certification process are not part of this rulemaking.

The Department is aware of the import of its position—the implications are at the center of the reasons we find the prohibition a necessity. We recognize the vast majority of aliens for whom permanent labor certifications are filed are already employed by the employer. In initiating the permanent residence process, the employer demonstrates a desire to retain the alien on a more permanent basis than permitted by his or her nonimmigrant status. The pre-existing relationship provides the employer with significant incentive to conduct the recruitment process in a manner that favors the alien. The cost incurred in the labor certification recruitment process by the employer serves as an identifiable disincentive to that outcome. It serves at least to make the employer examine the value it places on retaining the alien. By

requiring employers to bear their own costs and expenses, including the representation of the employer, the Department is ensuring that the disincentive to pre-qualify the alien in the job opportunity—keeping the job open and the recruitment real—remains in the process. This enables the Department to remain in its statutory role as the arbiter of the presence of otherwise-eligible U.S. workers in relation to the admissibility of the alien.

The complexities associated with multiple-party financial involvement in the labor certification process are not new. The provisions in this section work in concert with other parts of the regulation and reflect the Department's determination to keep the recruitment process open, fair and available to U.S. workers. For example, as stated in the preamble to the final PERM regulation, evidence that the employer, agent, or attorney required the alien to pay employer costs may be used under the regulation at § 656.10(c)(8) to determine whether the job has been and clearly is open to U.S. workers. The rule prohibiting the payment of an employer's fees or costs by the alien and the rule requiring the presence of a bona fide job offer, in turn, are consistent with the prohibition on sale and barter in the Final Rule, as they support the Department's desire to actively prevent and prohibit activities that directly commoditize permanent labor certifications.

Under the authority of § 656.10(c)(8) of the current regulation, Form ETA 9089<sup>2</sup> already requires employers to disclose and specify "payment[s] of any kind [emphasis added] for the submission of [the] application." The decision to seek this disclosure as part of the information related specifically to recruitment reflects the Department's concern that such payments may adversely impact the availability of the job opportunity to the U.S. workforce. The provisions added by this Final Rule are simply a logical extension and clarification of the type of information the Department considers relevant to this concern.<sup>3</sup>

This Final Rule clarifies the application of § 656.10(c)(8) to the issue of alien payment. It prohibits employer practices that require an alien to pay employer labor certification costs,

including prohibiting practices that require the alien beneficiary to cover all labor certification costs, requirements that an alien cover specific activity-related costs (all recruitment costs, all in-house legal expenses), and wage deductions to the alien's paycheck as reimbursement for or in anticipation of such costs, regardless of the labor certification activity they cover. As with the modifications policy, this Final Rule reinforces the PERM rule's policy; it also specifies in greater detail the specific activities the prohibition is meant to cover.

As stated in the NPRM, the Department recognizes the possibility that legitimate employers may have a practice of seeking reimbursement from the aliens they hire for the expenses they incur in filing and obtaining the permanent labor certification. The Department has determined that any such reimbursement including, but not limited to, attorneys' fees to prepare an employer's application, recruitment expenses to determine whether domestic labor is available, or other such employer expenses, is contrary to the purpose of the labor certification program and such costs should be borne exclusively by the employer. An alien employee who reimburses his employer is effectively being paid a lower wage than agreed to by the employer on the labor certification, which undermines the Secretary's finding that the wages and working conditions of the job will not adversely affect U.S. workers and the Secretary's duty to protect U.S. workers.

### 3. Issues Raised by Comments on Attorneys' Fees

The Department received a significant number of comments on the proposed prohibition on payment or reimbursement of the employer's attorneys' fees or other employer costs related to preparing and filing a permanent labor certification application and obtaining permanent labor certification. The overwhelming majority of the commenters were opposed to this proposal.

Relationship of this prohibition to purpose of the rule—Commenters questioned the relationship between the prohibition against aliens paying or reimbursing the employer for expenses related to the labor certification application, including attorneys' fees, and the Department's efforts to limit the opportunities and incentives for fraud in the labor certification program. They believed the Department's statements in the preamble to the NPRM were vague and did not establish a logical relationship between illegal

<sup>2</sup> Section "I. Recruitment Information," Subsection "e. General Information," Question 3.

<sup>3</sup> In the PERM regulation, the Department reserved the right to request any information the Certifying Officer deems relevant to a labor certification application. 20 CFR 656.20(d). The existence of a bona fide job opportunity and the disclosure of payments are always relevant to the application.

merchandising of labor certifications and such payments or reimbursements. Commenters also questioned the reasoning behind the Department's statement in the NPRM at 71 FR at 7660, that an alien's payment of the employer's costs might indicate there is not a bona fide position and wage available to U.S. workers.

The Department stands by its reasoning. An alien's reimbursement or payment to an employer for filing a labor certification on his behalf turns labor certifications into commodities, increases the likelihood that a prejudicial arrangement exists which precludes any consideration of U.S. workers, and undermines the integrity of the labor market test required for certification under Section 212(a)(5)(A) of the INA. An alien employee who reimburses his employer via deductions from his paycheck or a lump payment is effectively being paid a lower wage than agreed to by the employer on the labor certification. A U.S. worker is non-competitive with the alien worker unless he too accepts the actual lower wage. Therefore, the practice of aliens reimbursing employers for expenses the employer incurred in the labor certification process adversely affects the compensation of U.S. workers. Because the INA mandates that the Department may only approve a labor certification if there are not qualified U.S. workers for the position, and if the wages and working conditions of similarly employed U.S. workers are not adversely affected, the Department will not permit the practice of reimbursement of attorneys or other fees or costs associated with obtaining a labor certification. There is a direct correlation between an alien's financial participation in the labor certification process and the likelihood that an arrangement exists which precludes legitimate consideration of U.S. workers, affecting the integrity of the labor market test required by INA section 212(a)(5)(A). The statute charges the Department to ensure an adequate, good faith test of the labor market—that an alien will not be admitted for a job for which a qualified U.S. worker is available. It is, therefore, the Department's role and statutory responsibility to remove the potential for this undue influence.

Authority—Many of the commenters questioned the Department's authority to dictate who should not pay attorneys' fees and other costs. They asserted that there is no statutory authority for such a rule and stated that had the Congress intended to give DOL the authority to regulate the attorney-client relationship and/or to set limits on the payment of

attorneys' fees, it would have done so explicitly and unambiguously as it has in other contexts. They cited the authority in INA section 212(n) for the H-1B program as an example. Many commenters opined the proposed rule would be restrictive of freedom to contract.

In addition, many commenters expressed the belief the Department was intruding into the licensing and regulation of attorneys. They stated this issue has been left exclusively to the states, which prescribe the qualifications for admission to practice and the standards of professional conduct and are responsible for attorney discipline. These commenters believed the Department has neither statutory nor other authority to regulate payments to the attorneys that parties to proceedings before the Department are entitled to retain. They further stated any changes to this complex relationship should be left to the regulatory bodies that traditionally make them—states and their bar associations.

The Department disagrees with those comments. This Final Rule's prohibition on improper payments governs employers and aliens engaged in the labor certification process, not the attorneys retained by the employer. The rule prohibits employers from receiving financial incentives or reimbursement for filing labor certification applications and from withholding payments from workers for that purpose (among other things). These are activities that undermine the legitimacy of the labor market test that is required to be conducted by the law before the Department may approve a labor certification. The Department's focus is not on attorneys' fees, but rather on the actual wage paid to the alien employee and the effect that a lower wage or reimbursement of costs has on the wages and opportunities available to U.S. workers. The transfer of the responsibility for payment of attorneys' fees or other costs associated with preparing, filing and obtaining labor certification from employer to alien (or others) signals preselection in the hiring decision, contrary to the requirement of an open recruitment process with full consideration of U.S. workers. The INA broadly empowers the Secretary to ensure that there is a bona fide job opportunity open to U.S. workers and that there is no adverse effect on the wages and working conditions of U.S. workers before approving a labor certification. As part of its statutory charge, the Department is responsible for eliminating factors which undermine the legitimacy of the job opening and of the recruitment process, including the

improper allocation of costs and fees associated with labor certification. Prohibiting the alien, directly or indirectly, from paying the employer's attorneys' fees and other costs is a critical step toward ensuring employers or others do not degrade the validity of the labor market test. The fact that section 212(n)(2)(C)(vi)(II) of the INA prohibits an employer from accepting reimbursement from an alien employee for the fees for an H-1B nonimmigrant petition does not support the argument that the Department lacks authority to prohibit the reimbursement of attorneys' fees and other costs associated with permanent labor certifications. To the contrary, that specific prohibition in the nonimmigrant context highlights Congress' interest that the employer should bear the costs associated with hiring alien employees and not pass them onto the alien.

It is well settled that an agency is empowered to take all reasonable actions, even if not particularly specified in the statute, to effect the objective and policy of the statute. The Department is charged with ensuring that an employer's hiring of an alien employee does not displace U.S. workers or distort wages and working conditions in the U.S. labor market before approving permanent labor certifications, and this prohibition against the reimbursement of attorneys fees and other costs directly furthers that mandate. The Final Rule in no way precludes an employer from hiring and paying an attorney for the services provided to the employer or an alien from hiring and paying an attorney for the services provided to the alien, or for that matter an employer paying for an attorney who exclusively represents the alien employee. The rule does not speak to the qualifications of an attorney or the professional standards with which the attorney practices. The rule simply seeks to ensure the integrity of the labor certification process by removing an incentive to manipulate that process in favor of an alien worker and against the interests of U.S. workers.

Right to counsel; attorney-client relationship—Commenters also asserted that because the labor certification application is signed by both the employer and the alien, both are parties to the proceeding and both are exposing themselves to sanctions under the law for any misrepresentations made on the application. They maintained that each is entitled to counsel of his or her choosing and the Department may not limit the choice and interfere in the attorney-client relationship by regulating who may pay attorneys' fees. Some commenters included reasons as

to why the alien might want independent counsel and other commenters read the proposed rule to mean the alien could not have independent counsel. Some commenters also interpreted the proposed rule as prohibiting dual representation of both employer and alien by a single attorney.

These commenters misconstrued the NPRM. The Department is not seeking to limit either party from choosing counsel. The act of seeking legal representation, the identity of legal counsel, and similar activities are all outside the scope of this regulation. As previously noted, the alien is free to retain counsel to represent his or her interests in the labor certification area or any other area in which the alien desires counsel. Nothing in this regulation prohibits the alien from hiring the same attorney as the employer. This regulation simply prohibits an employer from transferring his legal and other costs associated with procuring a permanent labor certification to the alien employee.

**Vagueness**—Several commenters asserted the Department has not provided sufficient description of the conduct that it would deem to be a violation of this proposed rule. Commenters specifically identified the language in § 656.12(b) stating, “An employer shall not seek or receive payment of any kind for any activity related to obtaining a permanent labor certification” as vague.

In response to this concern, the Department has clarified the prohibited behavior in this Final Rule. The rule provides specific examples of prohibited transactions, including kickbacks, improper wage withholdings, bribes, and lump sum reimbursements. It also prohibits non-monetary transactions, such as free labor. Further, it exempts certain third-party payments from the prohibition, as discussed below, allowing these payments to be made in connection with labor certifications.

To whom labor certification benefits accrue—Many commenters disagreed with the Department’s premise that because the employer files the labor certification application, the employer should bear all of the costs. These commenters believed there is a benefit to both the employer and the alien from the labor certification and since both are interested parties, these parties should be free to negotiate payment arrangements. Some commenters also claimed that the permanent resident status is a benefit to the alien and only benefits the employer if the employee remains on the job beyond attaining permanent status. A significant number

of commenters described agreements frequently used which require reimbursement if a foreign employee resigns upon being granted permanent residence or prior to a specified length of time after obtaining permanent residence status. They compared these reimbursement arrangements to widely used employer-employee agreements linking relocation costs or training and education costs incurred by an employer to an employee commitment to remain in a job for a specified period of time or otherwise reimburse a portion or all of the costs. Other commenters stated that, under section 204(j) of the INA, since the alien beneficiary now has the ability to move to another employer even before attaining permanent residence (as soon as 180 days after filing an adjustment application), the extent of the benefit realized has shifted even more substantially to the employee and increases the employer’s need for the agreement described above.

Several commenters claimed the interest in the labor certification application is weighted to the alien even more strongly. To support this argument, one commenter referenced *DerKevorkian v. Lionbridge Technologies*, No. 04-cv-01160-LTB-CBS, U.S. Dist. LEXIS 4191 (D. Colo. Jan. 26, 2006). In this unreported decision, the court held that an employer’s promise to sponsor an alien employee for permanent residence created claims for promissory estoppel and breach of fiduciary duty by the employee against the employer. Some commenters asserted that this decision supports the proposition that an employee has legal rights in the labor certification process, even when an application has yet to be filed with the Department. The commenters further asserted this case could stand for the proposition that an employer may limit its legal liability by requiring an alien to retain his own attorney. Additionally, commenters referenced various provisions for continued employment rights for H-1B nonimmigrants which purport to recognize the alien’s rights and interests in the labor certification process.

Others believed the alien should rightfully participate in paying some or all of the costs related to the labor certification application because the recruitment process and completion of the application is, in reality, an “artificial” recruitment being conducted solely to satisfy the Department’s requirements. They maintained the actual recruitment that was paid for by the employer is the recruitment which produced the non-U.S. worker, and therefore, the need for the recruitment

used in the labor certification process is directly tied to the alien employee and the alien should be able to contribute to the payment of the employer’s costs. Further, many permanent alien workers are first hired by employers under H-1B or other nonimmigrant visas for which there is no requirement of a pre-employment labor market test to determine whether U.S. workers are available.

We disagree with the commenters’ assumption that an alien’s interest in labor certification warrants payment by the alien of the employer’s expenses. For purposes of employment-based visas requiring labor certification, the application to the Department of Labor and the Secretary of Labor’s determination initiate a much broader, multi-agency process whose function is to consider and complete a specified alien’s entry into the United States for the sole purpose of filling an employer’s job vacancy. First, the unreported *DerKevorkian* decision merely suggests that an alien may have a private right of action against an employer for failure to properly proceed after agreeing to sponsor an alien for permanent residence. The court did not hold that an alien has a legal interest against the Department in the approval of a labor certification. Second, an alien does not apply to the Department for approval of a labor certification, the employer does. Finally, the purpose of the labor certification is not to provide an alien with permanent residence, rather it is to certify that the alien’s admission into the United States to work in a particular position will neither displace a U.S. worker nor distort the U.S. labor market. The fact that aliens may leave employment early or change employers is a risk which is no different from the risk of hiring any U.S. worker and which should be duly considered by employers as they carefully consider whether to invest the resources they believe are required to pursue an employment-based immigration solution to their workforce shortage. This rule does not seek to govern the large majority of employment agreements between employers and alien workers—those that may require reimbursement to the employer for travel, moving expenses, loans and other expenditures that apply equally to both U.S. and foreign workers and can be shown were made directly for the benefit of that worker. The Department must weigh the undeniable benefit to the employer and the alien of sharing certification costs against the interests of U.S. workers who must, under the statute, be considered for that job

opportunity before it can be offered to the alien.

Payment by the employer of the costs associated with the preparation, filing and obtaining a labor certification keeps the alien outside the process and insulates the process from financial relationships that would subvert the permanent labor certification process' goal of protecting U.S. workers. The Department has decided its statutory mandate is best served by removing this incentive for a less-than-valid test of the labor market. Under the terms of the labor certification program, the protection of U.S. workers outweighs any employer interest in obtaining financial remuneration from alien employees for the costs associated with labor certifications.

As stated, the Department is not seeking to prohibit, limit, or regulate dual legal representation of alien and employer in the permanent residence process. However, it is the Department's expectation that in such situations attorneys' fees and costs associated with the preparation, filing and obtaining of the labor certification are to be borne by the employer. Various Federal, state and local laws regulate payment of wages, prohibit or restrict deductions from wages, outlaw "kickbacks," restrain assignments, and otherwise govern the frequency and manner of paying wages. In accord with the restrictions promulgated in this rule, any attempt by an employer to recover labor certification costs from an employee through deductions from wages, uncompensated additional work by the employee, or otherwise, would be considered an attempt to circumvent the rule and could result in the debarment of the employer from the program as provided in the rule, as well as subject the employer to appropriate enforcement actions for violations under other applicable authorities.

Disparate treatment—Several commenters were concerned the proposed rule would result in disparate treatment of nonprofit organizations, hospitals, public universities, and small businesses. According to these commenters, these organizations may not have in-house counsel or the resources to hire counsel and have traditionally negotiated a cost-sharing agreement with the alien employee. Commenters also claimed the proposed rule would penalize those same institutions—nonprofit research organizations and institutions of higher education—that the Congress has expressly recognized as worthy of support. The different standard for prevailing wages and the exemption from training fees under the H-1B

program were cited as examples of Congressional intent. These commenters believed the effect of the rule would be to move the program to the exclusive domain of highly profitable employers in the United States.

Commenters also stated disparate treatment of workers could result. They asserted if employers were to be required to pay the fees for labor certification, the end result would be that the alien employees would receive a specific benefit and better treatment (i.e., payment of legal fees) than similarly situated U.S. workers. Other commenters were concerned the rule as proposed would have a disparate impact on alien workers, some of whom would be given access to employer funds for legal costs and some of whom would not, based on budgetary allocations, the type of benefit sought, or other factors. One commenter suggested that this would have a disparate effect on professors and researchers in universities that, for various reasons, require their in-house or outside counsel to file labor certifications, resulting in a different outcome than their colleagues who were considered "outstanding" and thus able to bypass the labor certification process.

The Department disagrees. The recruitment, legal, and other costs associated with labor certification are transaction costs necessary for or, in the case of legal fees, desired by the employer to complete the labor market test, allow the Department of Labor to make its determination, and enable the employer to move to the next step of the hiring process, a step it will complete with DHS. The employer's responsibility to pay these costs exists separate and apart from any benefit to the alien from his or her eventual entry as an immigrant. Moreover, employers may legitimately offer benefits to employees on a selective basis in almost all areas—educational benefits offered to certain sectors of a workforce but not to others, relocation expenses offered to those at certain geographic distances but not others, training offered to managers but not to nonexempt employees, to name just a few examples. The costs involved in a labor certification are just one instance where benefits may be, at the employer's option, extended to some employees or classes of employees but not to others. The same is true of those who bypass the labor certification process entirely and who are able to file an immigrant petition directly with DHS, such as the outstanding professors and researchers noted by the commenters. The Department reminds employers, especially those small employers and non-profits who

commented on this issue, that there is no statutory or regulatory requirement that an application for permanent labor certification be prepared by and/or submitted by an attorney, nor is the Department setting any standards for what such costs should be.

Third party situations—Commenters have raised questions about payments by third parties and asserted that, by deeming attorneys' fees to be only the employer's expense, the Department was forbidding the employer from passing the expense to another party. These commenters suggested the Department is also prohibiting third party payments directly to the attorney, even though such payment is not a reimbursement of the employer's expenses.

Commenters also described purportedly common situations that involve the payment of attorneys' fees by entities other than "the employer." As an example, one commenter stated physicians frequently have split appointments between a Veterans Affairs Medical Center (VAMC) and an affiliated institution of higher education. In these cases, although there is one "employer of record" who files the labor certification application, the university reimburses the VAMC for the proportion of the fees commensurate with the proportion of the work week spent at the university.

The Department finds these comments largely meritorious and has revised the regulation at § 656.12(b) to recognize such situations. It is not our intent to look behind the employment that is the subject of the labor certification to ascertain the legitimacy of the employer vis-à-vis other entities with a legitimate interest in the alien. Where there is a legitimate third-party relationship in which the payment by the third party of the fees and costs that should be borne by the employer would not contravene the intent of the program, the payment does not adversely affect the fairness of the labor market test. In cases where there is a legitimate, pre-existing business relationship between the employer and the third party, and the work to be performed will benefit that third party, the employer is not influenced to the point of preselection of the alien worker in the labor market test. By requiring that the relationship be a business interest that predates the labor certification process, the Department is protecting against fraudulent relationships.

The Department also received comments regarding money paid to a trust fund established by a union for defraying the costs of legal services for

employees, their families, and dependents. The proposed rule, the commenters maintained, would prohibit payment of attorneys' fees and costs for an alien employee by such a union fund because payment would not be coming from the employer. These commenters believed the proposed rule may contravene Supreme Court cases confirming a union's First and Fourteenth Amendment right to assert legal rights. This comment is misplaced. To the extent such a trust fund is reimbursing a worker for the worker's legitimate costs and not for the employer's costs, reimbursement is not prohibited by the Final Rule.

The Department reiterates that this Final Rule seeks to require the employer to pay its own costs, including attorneys' fees, for its own activities related to obtaining permanent labor certification, which is an employer-driven process. However, this rule does not regulate payment by an alien or others of their own costs, attorneys' fees or other expenses. Nor does this rule regulate contract arrangements, cost allocation and financial transactions within a corporation or its affiliates, between an entity and its insurers or legal service providers, or between and among entities engaged in a joint enterprise.

**Employer paying alien's attorney—** Another commenter described a scenario in which an alien retains his or her own attorney separately from counsel retained by his or her employer and the employer is willing to pay the attorneys' fee, but the attorney may be prohibited from accepting such a payment under state bar rules. As previously noted, this rule does not regulate the attorney-client relationship or the alien's retention of counsel. Neither does this rule prohibit payment by the employer of costs beyond those that are exclusively the employer's—payment, for example, of the alien's attorneys' fees or other costs attributed solely to the alien. Finally, nothing in this regulation regulates payment by an alien, or others, of their own attorneys' fees or other expenses.

#### *D. Labor Certification Validity and Filing Period*

The Department received numerous comments about the proposed language at § 656.30(b) establishing a validity period of 45 calendar days for permanent labor certifications. Although some commenters asserted the Department lacks the authority to define a validity period, the majority of commenters focused instead on proposing alternative time periods ranging from ninety days to five years.

Some cited possible delays in both DOL and DHS processes, which they claimed would make the filing of an immigrant visa petition with DHS within the 45-day time period impractical, if not impossible.

Commenters provided very similar if not identical lists of reasons why a validity period of only 45 days would be inadequate. The reasons included: Untimely receipt of labor certifications from DOL; a prolonged absence of the individual, or individuals, necessary to the I-140 and I-485 filing processes; unavailability of documentation; and general, unforeseeable delays. Opportunities for delays notwithstanding, many commenters did not oppose a validity period and some expressly supported the concept of a labor certification being valid for only a finite length of time. Most, however, believed a longer time period was warranted. Others opposed a finite validity period but were willing to accept such a period only if it was for a time longer than 45 days.

After reviewing the arguments, considering the reasons presented for needing a longer validity period, and weighing the merits of alternative time periods, the Department, in this Final Rule, increases the validity period for a permanent labor certification from 45 to 180 days. The Department has determined that increasing the validity period to 180 calendar days is a reasonable alternative, in that it provides additional time to accommodate possible delays, while maintaining the integrity of the labor market test and the security of the labor certification. Labor market conditions are subject to rapid change, and it is consistent with DOL's mandate under INA section 212(a)(5)(A) to require a retest of the market after the passage of that time.

The question of the appropriate validity period directly addresses the reliability of the information that underlies and supports the Secretary's determinations of the availability of U.S. workers and whether the job opportunity's wages and working conditions will adversely affect the wages and working conditions of U.S. workers. The Department's certification speaks to the unavailability of U.S. workers and, hence, extends only to the point (either because of the passage of time or because, as in the case of substitution, the circumstances surrounding the job opportunity have changed) at which point availability again comes into question. The PERM regulation reflects the determination, made by the Department when the new program was instituted, that 180 days is

the maximum window for the viability of labor market information. Consistent with this determination, the current regulation, at § 656.17(1)(i) and (ii), requires that mandatory recruitment be conducted no more than 180 calendar days prior to filing. A 180-day validity period after certification aligns programmatically with this recruitment requirement and follows a similar rationale.

The Department has determined that 180 days provides sufficient time for an employer to move to the next step in the permanent residence process while minimizing the risk of potential changes in local economies. Taken together, the timeframe as currently conceived (i.e., recruitment within six months of submission of the application, PERM's average processing time which is greatly improved and generally within 60 days, and a 180-day validity period) will all provide as valid and timely a picture of the labor market as current program parameters will allow while providing sufficient flexibility for contingencies in the employment-based immigration process.

#### 1. Statutory Authority

Some commenters opposing imposition of a validity period claimed the Department is exceeding its statutory authority under INA section 212(a)(5)(A) which requires the Secretary of Labor's determination on U.S. worker availability and adverse impact on wages and working conditions. Most asserted that although the statute does not expressly provide for a validity period, it does refer to DOL's determination being used "at the time of application for a visa." The Department does not agree it lacks the authority. To the contrary, by limiting the period of validity of the labor market test that underlies the Secretary's determination, the Department more closely adheres to the letter of the law. The statute requires the Secretary to make the certification as a function of evaluating the introduction of the alien immigrant into the workforce; the Secretary's determination is to be made at the time of the application for admission. A validity period serves to forge a closer temporal link between the determination and the admission.

One commenter argued that the INA limits the Department's authority to an assessment of the employment opportunity, i.e., the test of the labor market, in order to make a determination of whether or not to certify. No such limiting language exists in the INA. The test of the labor market was instituted by the Department as a means by which to implement the

requirements of the statute. Procedures for the examination of the labor market and the larger labor certification process of which it is a part have varied, but the labor market test has always functioned as a prerequisite to the employment-based admission of an alien. The imposition of a validity period is a logical mechanism by which the Department can ensure that the information upon which a determination was based remains legitimate.

## 2. Delays in Processing of Applications and Receipt of Labor Certifications

Some commenters attempted to establish a nexus between the long processing times at both DOL and DHS and a validity period. They contended the Department's argument that a certification grows stale with the passage of time is disingenuous, given the extremely long processing times and resultant staleness of at least some information in applications submitted years earlier, and implied the Department's argument is not justifiable. The Department disagrees. The Final Rule addresses the question of validity post-certification. While questions of wages and recruitment are adjudicated on an individual basis as applications come up for review in our Backlog Processing Centers—independent of how long each of those applications has been pending—the Department must determine how long it will stand behind those certifications once issued, and when it is appropriate to once again test the market. The question of a validity period addresses these broader concerns.

We also note the PERM system was implemented in direct response to the long processing times experienced under the previous program model, and we have already significantly reduced processing times from years to months. The reduction in time provides the Department assurance that the information upon which a determination is based is current and valid.

Commenters also complained of frequent and long delays in the receipt of granted labor certifications and suggested that another basis, other than the date of issuance, should be the starting point from which the time period begins to run. While it is true that delays in delivery, when they occur, negatively impact timely filing with DHS, these comments were based on the experiences at the outset of the new PERM program. Labor certifications are now being adjudicated in a more timely manner. Moreover, the longer validity period of 180 days serves to

provide the time necessary to accommodate any delay that may occur in certification receipt.

## 3. Relationship to Fraud

Some comments in support of a validity period argued that indefinite validity allows some unscrupulous companies to stall the filing with DHS as a means of preventing the worker from leaving their employ, and that it also allows employers so disposed to prolong non-payment of the wage indicated on the application. One commenter opposed to a validity period hypothesized that an employer might not want to file the I-140 within an imposed validity period if it would be unable to demonstrate to DHS the ability to pay the wages attested to on the Form ETA 9089. We agree that indefinite validity may contribute to a variety of undesirable or unlawful behaviors and, further, that the longer the period of time the labor certification is in circulation, the greater the probability that the information on the application, not only that pertaining to recruiting, is stale or increasingly less relevant.

Some commenters pointed to other provisions currently in place or proposed in the NPRM, including the elimination of substitution, which serve to protect against fraud and argued that more fraud protection is unnecessary and merely prejudices the honest employer. As stated above with respect to the elimination of substitution, while we do not doubt that other fraud prevention and detection methods are available, the appropriateness or effectiveness of those other methods does not obviate the need for additional, targeted techniques to address the problems generated by a specific issue, such as, in this case, the indefinite validity periods for labor certifications. It is difficult to see how a reasonable validity period prejudices honest employers who presumably wish to obtain the admission of the alien worker they have sponsored as quickly as possible. The revised validity period accommodates the need for a reasonable period of time in which to submit the I-140.

## 4. Increased Burden at DOL Due to Untimely Filings and at DHS Due to Incomplete or Inaccurate I-140 Filings

Several commenters argued that imposing the requirement that a Form I-140 petition be filed within a limited period of time will result in increased burdens for both DOL and DHS. That likelihood is overstated. Commenters posited that DOL will likely see an increase in filings due to the re-

submission of applications to replace labor certifications that expire before the Form I-140 can be filed, which will, in turn, result in filing backlogs. This claim does not take into consideration the efficiency of the PERM system. Moreover, given the importance of the labor certification for both the employer and the alien, it is unlikely that a significant number of labor certifications will be allowed to expire. Similarly, the claim that a "rush to file" the Form I-140 will result in inaccurate and incomplete Form I-140 filings is also difficult to envision, given the significance of the filing. DOL expects that employers, attorneys and agents will be thoughtful and careful as they complete each labor certification application and immigrant petition and that at least some preparation for the entire permanent residence process would have taken place in advance of certification. Furthermore, the lengthening of the validity period from 45 to 180 days will provide the employer a reasonable period of time in which to ensure that all documentation and information necessary are accurate and complete prior to filing.

## E. Program Integrity and Debarment

The preamble to the PERM Final Rule indicated the Department would consider the imposition of stricter remedial measures in any future rulemaking involving the permanent program. Consistent with this intent, the NPRM to this Final Rule contained several provisions to promote the program's integrity and assist the Department in obtaining compliance with the proposed amendments and existing program requirements. The Department proposed several revisions to § 656.31, the regulatory section governing the Department's response to instances of potential fraud or misrepresentation, including extending the time for potential suspension of processing for applications filed by certain employers, attorneys, or agents. In addition, the NPRM made the section applicable to applications filed under the current regulation and the regulation in effect prior to March 28, 2005. This Final Rule adopts the provisions on suspension of applications and notice to employers largely as proposed in the NPRM.

As stated in the proposed rule, given the breadth and increased sophistication of the immigration fraud that has been identified in the recent past, the Department requires added flexibility to respond to potential improprieties in permanent labor certification filings. While the Department already has the authority, this Final Rule clarifies

§ 656.31(a) to state the Department may deny any application for permanent labor certification which contains false statements, is fraudulent, or otherwise was submitted in violation of the permanent labor certification program regulations.

The Department received a variety of comments on the proposed amendments to § 656.31. While we carefully considered these comments, we have elected to keep the provisions largely as proposed. However, in response to comments, the Final Rule amends the debarment provisions to clarify the intent requirements (“willful”) and other review standards applicable to debarment.

#### 1. When an Employer, Attorney, or Agent Is Involved in Possible Fraud or Willful Misrepresentation

In § 656.31(b), the Final Rule revises what was § 656.31(a) in the NPRM and current regulation to clarify that if an employer, attorney, or agent connected to a permanent labor certification application is involved in either possible fraud or willful misrepresentation, the Department may, for up to 180 days, suspend the processing of any permanent labor certification application involving that employer, attorney, or agent. Thereafter, the Certifying Officer may either continue to process some or all of the applications or extend the suspension until completion of any investigation and/or judicial proceeding.

“Possible fraud” standard—One commenter maintained § 656.31(b) (§ 656.31(a) in the NPRM) proposed a new legal standard of “possible fraud.” The discovery of “possible fraud or willful misrepresentation” is not a new legal standard. This basic provision, allowing applications to be suspended for a period of time if the Department discovers possible fraud or willful misrepresentation involving a labor certification, has been in the permanent labor certification regulations since 1977 (see 42 FR 3449 (January 18, 1977)). The Final Rule continues the use of the language “discovers \* \* \* possible fraud or willful misrepresentation.”

Use of “knowing” instead of “willful”—One commenter suggested using “knowing” instead of “willful” in the phrase “willful misrepresentation” in § 656.31(b) (proposed as § 656.31(a)). The Department should be required to prove, the commenter continued, that the employer, attorney, or agent knew the nature of his acts, and that he or she knew his acts violated the regulation; and to promote fair notice and minimize risk of arbitrary enforcement, there

should be an opportunity for persons to present an affirmative defense that they mistakenly believed their conduct was allowed.

As always, applicants must remain aware of their responsibilities under the permanent labor certification process and of the consequences of submitting false or misleading information to a Federal agency. The application form makes it clear that the person signing the form is certifying, under penalty of perjury, to the accuracy of the information contained in the application. No one who signs an application should be confused about the capacity in which he or she signs it.

After review of the comments, the Department has decided to retain the use of “willful” as the more appropriate terminology. *Black’s Law Dictionary* provides that a “[w]illful act may be described as one done intentionally, knowingly, and purposely” [emphasis supplied]. Hence, the phrase “willful misrepresentation” as used in the permanent labor certification program regulations means a person who intentionally and knowingly meant to make a misrepresentation.

Suspension of case processing for 180 days—The Department proposed to increase the initial suspension of case processing in § 656.31(b) (§ 656.31(a) in the proposed rule) from 90 to 180 days and to allow the suspension of any permanent labor certification application involving such employer, attorney, or agent until completion of any investigation and/or judicial proceeding. The Department also proposed to revise § 656.31(b) and (c) (§ 656.31(a) and (b) in the NPRM) to clarify the Department may suspend processing of any permanent labor certification application if an employer, attorney or agent connected to the application is involved in either possible fraud or willful misrepresentation or is named in a criminal indictment or information related to the permanent labor certification program. Virtually all commenters objected to these proposals.

The Department has concluded that, in view of the extensive history of fraud in the permanent labor certification program, the need to promulgate what are now paragraphs (b) and (c) of § 656.31—concerning initially suspending applications for 180 days and clarifying the Department’s authority as to which permanent labor certification applications may be suspended—outweighs the concerns raised by the commenters. Our responsibility as a government agency to cooperate with law enforcement agencies in the investigation and

prosecution of possible criminal activity supports this position. In addition, after due consideration, the Department has concluded the proposed provisions extending the suspension period are exempt from the notice and comment provision of the Administrative Procedure Act as matters of agency practice and procedure and as part of the agency’s inherent authority to effectuate the labor certification review process. See 5 U.S.C. 553(b). Accordingly, this Final Rule includes the provisions allowing the Department to suspend, initially for up to 180 days, the processing of any application relating to an employer, attorney, or agent involved in possible fraud or willful misrepresentation.

Terms recommended for deletion and/or considered inappropriate in § 656.31(a)—In this Final Rule, the Department has taken the last sentence of proposed § 656.31(a) and finalized it as the entirety of § 656.31(a), moving the remainder of the proposed text to § 656.31(b). One commenter took issue with the portion of § 656.31(a) which reads: “A Certifying Officer may deny any application for permanent labor certification if the officer finds the application contains false statements, is fraudulent, or was otherwise submitted in violation of the DOL permanent labor certification regulations.” This commenter recommended the phrases “false statements” and “or was otherwise submitted in violation of the regulations” should be deleted from § 656.31(a). According to the commenter, the term “false statements” should be removed because attorneys, aliens, employers, or agents may inadvertently make mistakes on the labor certification application about minor details, or omit inconsequential information. The commenter believed it improper to equate such “innocent errors or omissions” with fraud, and insisted the section improperly imposed penalties for innocent errors. The phrase “or was otherwise submitted in violation of the regulations,” according to the commenter, is overbroad and simply too vague to be understood or fairly applied. Because other sections of the regulations already explain when denial is appropriate, the commenter recommended that § 656.31 should only focus on fraud and willful misrepresentation.

The technological enhancements to the PERM system discussed above make it difficult to have inadvertent errors or omissions, and those few that will be made despite these enhancements may still not rise to the level of a false statement. The provision is not designed to impose penalties for innocent errors

not in the control of the submitter but is applicable to any material inaccuracy. Although a false statement may not rise to the level of fraud, the statement may involve information or a subject matter that is material to the application. The phrase "or was otherwise submitted in violation of the regulations" is in large measure merely a restatement of the authority already provided in § 656.24(b)(1) of the current permanent labor certification regulations. Section 656.24(b)(1) provides, in relevant part, that one of the factors the Certifying Officer considers in making a determination to either grant or deny a certification is whether or not the employer has met the requirements of part 656.

As stated in the NPRM, we have added the above sentence to clarify the Department's authority. As a further clarification, the Department has removed the last sentence from § 656.31(a) as published in the NPRM and has placed it alone as the first paragraph and designated it § 656.31(a). The other paragraphs are redesignated accordingly.

## 2. When an Employer, Attorney, or Agent Is the Subject of a Criminal Indictment or Information

With minor changes from the proposed rule, the Final Rule revises § 656.31(c) (§ 656.31(b) in the NPRM) to clarify that, if the Department learns an employer, attorney, or agent is named in a criminal indictment or information in connection with the permanent labor certification program, it may suspend the processing of any applications related to that employer, attorney, or agent until the judicial process is completed. Further, the regulation provides that, unless the investigatory or prosecuting agency requests otherwise, the Department must provide written notification to the employer of the suspension in processing.

Provision of notice—One commenter objected that, under this section as proposed, no notice of an investigation was to be provided to the employer, attorney or agent. As noted above, the Final Rule does provide for limited notice to employers whose applications are impacted by an investigation of an agent or attorney. Our program experience has shown that notifying parties under investigation can impede the effectiveness and outcome of investigations that are initiated or ongoing, and the rule accordingly provides that an investigating or prosecuting agency, which is in the best position to judge the adverse impact of notice, can request that notification not be made.

Another commenter recommended that, when providing notice to employers not under investigation that processing of their applications has been suspended, the notice clarify for the employer receiving the notice that it is not under investigation. The Department will provide appropriate notice in cooperation with the investigatory and prosecuting agencies.

Notification by employer within 30 days when attorney or agent has committed fraud—In the case of a pending application involving a finding of fraud or willful misrepresentation by the employer's attorney or agent, § 656.31(e)(3) (§ 656.31(d)(3) in the NPRM) provides that the Department will notify the employer and allow 30 days for the employer to notify the Department, in writing, that the employer will withdraw the application, designate a new attorney or agent, or continue the application without representation. If the employer elects to continue representation by the attorney or agent, the Department shall suspend processing of affected applications.

One commenter maintained that 30 days was not a reasonable timeframe for notification. The commenter noted the decisions are complex, it takes time just to receive DOL's decisions, and time may be required to secure second opinions, decide whether to secure other representation, and provide the Department with a response.

We disagree. The 30 days required for notification is the same as the time provided for employers to submit requests for reconsideration pursuant to § 656.24(g) or review by the BALCA under § 656.26(a). Such requests for reconsideration or review involve making decisions similar to those involved in furnishing the notice required under the section now redesignated as § 656.31(e)(3). Like the § 656.31(e)(3) notice, the BALCA requests also require complex decisions to be made; time elapses between the mailing of the denial and its receipt by the employer; second opinions may be sought; a request for review must be prepared and submitted; and the employer may prepare a detailed brief of the matter. Accordingly, the Department has concluded 30 days is sufficient time for the employer to provide the notification required by § 656.31(e).

## 3. Determination of Fraud or Willful Misrepresentation

As proposed, § 656.31(d) (§ 656.31(c) in the NPRM) continues to provide the Certifying Officer will decide each application on its merits where the employer, attorney, or agent is acquitted of wrongdoing or if criminal charges

otherwise fail to result in a finding of fraud or willful misrepresentation. The Department did not receive comments on these provisions and, consequently, is implementing the language as noted above in this Final Rule. Where a court, DHS, DOS, or another body finds the employer, attorney, or agent did commit fraud or willful misrepresentation, redesignated § 656.31(e), as revised in the Final Rule, provides that any pending applications related to the employer, attorney, or agent will be decided on their respective merits and may be denied in accordance with § 656.24 and § 656.31(a).

## 4. Debarment Proceedings

Commenters generally expressed concern that, as proposed, the debarment provisions of § 656.31(f)(1) (§ 656.31(e)(1) in the NPRM) failed to set a materiality standard and, hence, left employers and attorneys open to consequences that were inconsistent with the individual's intent and disproportionate to the violation's impact or importance. With respect to the various grounds for debarment, generally, commenters stated concern that the rule would impose a severe penalty for relatively minor and likely inadvertent offenses.

After reviewing the comments, we have modified the proposed rule to add in this Final Rule an intent requirement ("willfully"). The Final Rule revises the provisions on failure to comply with the terms of the form, failure to comply with the audit process, and failure to comply with Certifying Officer-ordered supervised recruitment by adding a requirement that, for there to be a basis for debarment, there must be a pattern or practice of misconduct. As elsewhere in the Final Rule, the determination of when debarment is appropriate is made by the Administrator, Office of Foreign Labor Certification, a nomenclature change from the proposed rule, which named the Chief of the former Division.

Improper or prohibited—One commenter maintained the term "improper" is impermissibly vague in the portion of § 656.31(f)(1) (§ 656.31(e)(1) of the NPRM) that provides for debarment from the program based upon any action that was improper or prohibited at the time the action occurred. The term improper is a broad term and does not necessarily imply illegality or an action that was in violation of the permanent labor certification program regulations. Accordingly, the Department has removed the term from § 656.31(f)(1).

Time limits to pursue debarment—A commenter maintained most punitive laws include a statute of limitations,

beyond which violations cannot be prosecuted or pursued. Further, according to this commenter, statutes of limitations are promulgated because evidence and recollections fade with time. Conceivably, DOL could pursue debarment 20 years after an application is filed. In this connection, the commenter noted the H-1B program imposes a one-year time limit to lodge a complaint.

The Department has concluded it would be appropriate to include a provision limiting the time in which to initiate debarment actions against employers, attorneys or agents. We considered requiring initiation of an investigation any time within the five years the employer is required to retain copies of applications for permanent employment certification filed with the Department and all supporting documentation from the date of filing the labor certification application (see § 656.10(f) at 69 FR 77390 (Dec. 27, 2004)), or within a reasonable time thereafter. Since investigations can be time consuming, we have provided in § 656.31(f)(1) of this Final Rule that debarment actions must be formally initiated within six years of the original filing date of the labor certification application on which the debarment action is based. For purposes of a pattern or practice, the statute of limitations will start to run with the last or most recent application that demonstrates or constitutes the pattern.

**Mandatory and permanent debarment**—One commenter proposed that debarment be mandatory rather than permissive. After carefully considering this option, the Department has concluded it should retain discretion in the administration of the debarment provision. Debarment is a serious remedial measure not to be undertaken lightly. Discretion is also necessary to administer the debarment provision in the manner stated above and in the preamble to the proposed rule at 71 FR 7660 (Feb. 13, 2006). As a result, we conclude the debarment provision in the Final Rule should remain discretionary rather than mandatory.

The same commenter proposed that repeat offenders should be permanently debarred from the program following a second offense. The Department has concluded that we should gain operational experience with the debarment provision in this Final Rule before considering a provision to make debarment permanent following a second or later offense. Further, the Department is of the opinion that notice and comment rulemaking should be undertaken before promulgating a

regulation allowing for permanent debarment.

Requested changes to debarment proceedings—More than one commenter maintained debarment proceedings should include the right to specifically articulated charges; the right to request a hearing before an Administrative Law Judge (ALJ); the ability to present and confront witnesses; a transcript; and a stay of debarment upon timely appeal.

With respect to the request for clearly articulated charges, § 656.31(f)(2), as redesignated in this Final Rule, has been amended to provide that a notice of debarment must include a detailed explanation of how the employer, attorney, and/or agent has participated in or facilitated one or more of the bases for debarment listed in paragraphs (f)(1)(i) through (f)(1)(v) of § 656.31.

With respect to the right to request a hearing before an ALJ, this Final Rule provides, at § 656.26(a)(1), for the right to a review by the BALCA upon filing a written request with the Administrator, Office of Foreign Labor Certification, within 30 days of the date of the debarment. Section 656.27(e) authorizes the BALCA to hold hearings governed by the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, found at 29 CFR part 18, encompassing both the right to present evidence and confront witnesses. While historically the ALJs have held very few hearings in permanent labor certification cases, we assume the BALCA will order hearings in appropriate cases.

With respect to the ability to present and confront witnesses, the procedures outlined in 29 CFR part 18, which govern the Office of Administrative Law Judges and apply to the BALCA proceedings, establish the right to examine and cross-examine witnesses. 29 CFR 18.34. With respect to the right to a transcript, the BALCA procedures already provide for a hearing transcript. With respect to the right of a stay of debarment upon a timely appeal, the regulation at § 656.26(a) of this Final Rule has been amended to provide that debarment is stayed upon receipt of the request for review.

##### 5. Debarment of Attorneys and Agents

Many commenters maintained the Department lacks the statutory authority to debar attorneys or agents. They argued, for example, that INA section 212(a)(5) relates solely to the admissibility of an alien coming to work in the United States and does not grant authority to legislate a system of penalties against an employer or its attorney or agent. Further, commenters

suggested that, because the Congress did not explicitly establish debarment authority for the permanent labor certification program as it did in the H-1B and H-2A programs, the Department has no authority to create debarment mechanisms by this rule.

The Department has considered the comments and has decided to retain the proposed remedial measure of debarment for employers, attorneys and agents in the Final Rule. There is extensive case law establishing that Federal agencies have the authority to determine who can practice and participate in administrative proceedings before them. The general authority of an agency to prescribe its own rules of procedure is sufficient authority for an agency to determine who may practice and participate in administrative proceedings before it, even in the absence of an express statutory provision authorizing that agency to prescribe the qualifications of those individuals or entities. *Koden v. United States Department of Justice*, 546 F.2d 228, 232–233 (7th Cir. 1977) (citing *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926)). See also *Schwebel v. Orrick*, 153 F. Supp. 701, 704 (D.D.C. 1957) (“The Securities and Exchange Commission has implied authority under its general statutory power to make rules and regulations necessary for the execution of its functions[,] to establish qualifications for the attorneys practicing before it and to take disciplinary action against attorneys found guilty of unethical or improper professional conduct”). In addition, an agency with the power to determine who may practice before it also has the authority to debar or discipline such individuals for unprofessional conduct. See *Koden*, 546 F.2d at 233. Further, as the Department has the authority to prescribe regulations for the performance of its business (as is the case with all executive departments under 5 U.S.C. 301), it likewise has the authority to determine who may practice or participate in administrative proceedings before it and may debar or discipline those individuals engaging in unprofessional conduct. The Department has exercised such authority in the past in prescribing the qualifications, and procedures for denying the appearance, of attorneys and other representatives before the Department’s Office of Administrative Law Judges under 29 CFR 18.34(g). See also *Smiley v. Director, Office of Workers’ Compensation Programs*, 984 F.2d 278, 283 (9th Cir. 1993).

## 6. Debarment of Employers

At the time of the NPRM on the PERM program, some commenters recommended enhancing program integrity by establishing suspension and debarment procedures for employers that engage in fraudulent labor certification activities, prohibited transactions, or otherwise abuse the permanent certification process. In the NPRM to this rulemaking, the Department proposed establishing debarment procedures as an important part of efforts to avoid fraud, enhance and protect program integrity, and protect U.S. workers.

Many comments on the NPRM expressed support for the Department's effort to debar from the permanent alien labor certification program employers and others who defraud or abuse the system. However, similar to comments received on the debarment of attorneys and agents, some commenters questioned the Department's authority to debar employers.

The Department has carefully considered the comments on the proposal to debar employers and has determined that the availability of suspension of case processing and debarment mechanisms for employers, attorneys and agents is necessary to maintain program integrity. Therefore, these provisions are included in this Final Rule. The suspension and debarment of entities from participating in a Government program is an inherent part of an agency's responsibility to maintain the integrity of that program. As the Second Circuit found in *Janik Paving & Construction, Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987), the Department possesses an inherent authority to refuse to provide a benefit or lift a restriction for an employer that has acted contrary to the welfare of U.S. workers. In assessing DOL's authority to debar violators, the court found that "[t]he Secretary may \* \* \* make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions \* \* \* as [s]he may find necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Government business." *Id.* at 89. In that case, the implied authority to debar existed even though the statute in question "specifically provided civil and criminal sanctions for violations of overtime work requirements but failed to mention debarment." *Id.* The court held that debarment may be necessary to "effective enforcement of a statute."

In order to encourage compliance, the regulatory scheme for PERM relies on attestations, audits and, through this Final Rule, the remedial measures of suspension and debarment proceedings to assure compliance. Use of debarment as a mechanism to encourage compliance has been endorsed in the INA for a number of foreign labor certification and attestation programs, e.g., the H-1A, H-1B, H-1C, H-2A and D visa programs. INA sections 212(m)(2)(E)(iv) and (v), 212(n)(2)(C), 218(b)(2), and 258(c)(4)(B).

In those programs, the Congress has chosen to delineate and establish limits on the manner in which debarment is imposed. Consequently, the H-1A, H-1B, and H-1C programs, under section 212(m)(2)(E) and (n)(2)(D) of the INA, impose specific penalties on employers who willfully make a misrepresentation of a material fact in an application. See Immigration Act of 1990, Public Law 101-649, 104 Stat. 104-4978 (1990); Immigration Nursing Relief Act of 1989, Public Law 101-238, 103 Stat. 2099 (1989); Nursing Relief for Disadvantaged Areas Act of 1999, Public Law 106-95, 113 Stat. 1312 (1999); and Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005, Public Law 109-423, 120 Stat. 2900 (2006); see also INA section 258 (regarding penalties in the program for nonimmigrant maritime crewmembers performing longshore work). In each of these programs, Congress took for granted the Department's authority to debar, but acted to limit or expand that inherent authority to enforce compliance in the employment-based immigration programs under the Department's jurisdiction. In the case of the H-2A program, the Congress elevated existing practice to express statutory status. Immigration Reform and Control Act of 1986, Public Law 99-603, 100 Stat. 3359 (1986).

Beyond DOL's inherent authority to ensure compliance with the permanent alien labor certification program, there is an implied grant of statutory authority in section 122(b) of the Immigration Act of 1990, which requires the Secretary to accept reports from the public on violations of the terms and conditions of a permanent alien labor certification.<sup>4</sup> By specifically directing DOL to accept

<sup>4</sup>The Secretary of Labor shall provide, in the labor certification process under section 212(a)(5)(A) of [the Act] that—

(2) any person may submit documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working conditions, and information on the employer's failure to meet terms and conditions with respect to the employment of alien workers and co-workers). [Pub. L. 101-619, sec. 122(b), Nov. 29, 1990, 104 Stat. 4995.]

such reports, the Congress indicated its intent that DOL take action based on that information to address reported problems.

Ensuring the integrity of a statutory program enacted to protect U.S. workers is an important part of the Department's mission. The Department was established, "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment [Act of Feb. 14, 1903, Pub. L. 62-426, sec. 1, 37 Stat. 736] \* \* \*." See also *Janik Paving & Construction, Inc. v. Brock*, *supra*.

In December 2004, DOL changed, by regulation, the operation of the permanent labor certification program. Under the current regulation at 20 CFR part 656, employers may attest to compliance with requirements to recruit U.S. workers rather than engaging in all cases in supervised, post-filing recruitment. Essential to maintaining the integrity of the new, streamlined process is a need to audit compliance, already included in the regulations, and a remedial measure for continued and serious non-compliance, which is included in this Final Rule. A system of attestation and audit, relying heavily on the veracity of employer submissions, requires a system for "effective enforcement," as described in the *Janik Paving* holding, *supra*.

For the above reasons, the remedial measure of debarment, modified as discussed above, is retained in this Final Rule as it applies to employers.

## 7. Provision of False or Inaccurate Information

Consistent with complaints about the other terms for debarment, many commenters expressed concern the rule would impose a severe penalty for providing false information that was, all things considered, minor, immaterial, or not meaningful. Numerous commenters submitted identical comments listing specific circumstances they believed could lead to unjustified debarment and unfair punishment of attorneys, including: (1) Typographical errors in the application regarding the alien's date of birth; (2) an inaccuracy in the foreign national's job history due to someone's faulty memory; (3) employer's relationship to the alien; or (4) an inadvertent mistake in the number of workers or the Federal Employer Identification Number (FEIN). Some commenters opined that attorneys should be allowed to rely on information provided by clients unless there is a clear indication of fraud, and that "no conduct of any attorney in any

setting is punishable without the elements of materiality and fraud.”

Some commenters raised due process concerns. One commenter believed that existing mechanisms, e.g., denial of an application or imposition of supervised recruitment (but in future filings), were more viable options than what the commenter interpreted as indefinite suspension.

The Department has concluded that § 656.31(f)(1)(ii) (§ 656.31(e)(1)(ii) in the NPRM) should be modified to address the commenters' concerns. Accordingly, the term “willful” has been added to this section so this Final Rule now applies to “the willful provision or willful assistance in the provision of false or inaccurate information in applying for permanent labor certification.” The Department wants to make clear it views debarment as an extraordinary remedy and does not intend to invoke it except under the most serious of circumstances.

Authority to prohibit false or inaccurate information on an *Application for Permanent Employment Certification*—Commenters further argued the Department lacks the authority to regulate the information provided on an *Application for Permanent Employment Certification*. One commenter insisted the Department lacked the authority to prohibit an employer from providing false information on an application. As stated above, the authority given to the Department under the INA to approve applications carries with it the authority to regulate the program, debar abusers, and prohibit false or inaccurate information.

#### 8. Failure To Comply With the Terms of the Labor Certification Application

Proposed § 656.31(f)(1)(iii) (§ 656.31(e)(1)(iii) in the NPRM) provided that failure to comply with the terms of the ETA 9089 or ETA 750 will be a factor in determining whether to issue a notice of debarment. Some commenters argued that such a rule would make the attorney the guarantor of the accuracy of the *Application for Permanent Employment Certification*. The Department disagrees. Section 656.3(f)(1) provides that a notice of debarment from the permanent labor certification program may be provided to an employer, attorney, agent, or any combination thereof. As stated in the preamble to the proposed rule the Department acknowledges that not all debarment triggers should be treated equally and will, therefore, take steps to ensure that any debarment is reasonable and proportionate to the improper activity.

Further, the attorney does not have to sign the application unless he or she is the “preparer” in Section M of the application. Presumably, the attorney will take reasonably prudent steps to apprise him or herself of the facts before signing the application. However, to allay any fears the regulated community may have concerning the Department's possible use of the debarment provision, the Department has added the requirement that there must be a pattern or practice with respect to failure to comply with the terms of the labor certification application (either Form ETA 9089 or Form ETA 750). A similar requirement for a pattern or practice has been added to § 656.31(f)(1)(iv), failure to comply in the audit process, and to § 656.31(f)(1)(v), failure to comply with the Certifying Officer-ordered supervised recruitment process.

Commenters asserted the provision discussing the failure to comply with the terms of the Form ETA 9089 or Form ETA 750 is vague or needs further clarification. We disagree. The terms and areas the Department is interested in are best represented in the certification sections of the two application forms, specifically, Section N, Employer Certifications, on the Form ETA 9089, and item 23, Employer Certifications, on the Form ETA 750. More detailed information on the employer certifications listed on the Form ETA 9089 in Section N of the application can be found in § 656.10(c) of the current regulation and in the preamble thereto at 69 FR 77389 (Dec. 27, 2004). Detailed information on the employer certifications listed in item 23, Form ETA 750, can be found in the former labor certification regulations at § 656.20 (2004), “General filing instructions” and in Technical Assistance Guide No. 656 Labor Certifications. These resources provide ample guidance to the information sought in these sections and no further clarification is required.

#### 9. Failure To Comply in the Audit or Supervised Recruitment Process

Some commenters sought clarification of the provisions at § 656.31(f)(1)(iv) and (v) (§ 656.31(e)(1)(iv) and (v) in the NPRM) that failure to comply with the audit and supervised recruitment processes may be a factor in issuing a debarment. Section 656.31(f)(1)(iv) and (v) will not normally apply to applications submitted under the former permanent labor certification regulations (20 CFR part 656 (2004)), because audit and supervised recruitment are not procedures currently in place under the backlog program. The Department has

determined that these debarment provisions are appropriate to apply to conduct under the streamlined PERM processes because that system depends on ensuring employers furnish the required documentation within the required timeframes, as required by §§ 656.20 and 656.21 (69 FR 77396 (Dec. 27, 2004)). Further, a repeated failure to comply with core program requirements signals not only disregard for the process, but an intentional abuse of valuable, limited administrative resources, a practice the Department cannot tolerate.

Some commenters provided scenarios in which an employer might fail to comply with audit or supervised recruitment requirements because the employer no longer wishes to go forward with the application, for example: (1) The employer has terminated the alien and, therefore, does not wish to respond to the audit request; (2) after an employer is requested to engage in supervised recruitment, its human resources office decides to terminate the application process; or (3) the employer decides to terminate the process after an audit when the employee resigns.

These comments do not warrant removal from this Final Rule of the (f)(1)(iv) and (f)(1)(v) bases for debarment. We recognize that there are legitimate reasons for terminating an application during the audit or supervised recruitment processes and do not intend that these reasons should provide a basis for debarment.<sup>5</sup> There are, however, cases in which the persistent failure to cooperate in the audit or supervised recruitment processes is evidence of an intent to avoid the discovery of serious violations of the regulations. Thus, the fact patterns these commenters cite must be considered individually as they arise. The existence of legitimate reasons to discontinue an application does not

<sup>5</sup> The Department reminds users of the labor certification program of the importance of the audit process to maintaining the integrity of PERM. As the Department stated in the 2004 preamble to the Final Permanent Labor Certification Regulation, we will “minimize” the impact of non-meritorious applications by adjusting the audit mechanism in the new system as needed. We have the authority under the regulations to increase the number of random audits or change the criteria for targeted audits. As we gain program experience, we will adjust the audit mechanism as necessary to maintain program integrity. We note that under § 656.21(a), the Certifying Officer has the authority to order supervised recruitment “when he or she determines it to be appropriate.” 69 FR 77329 (Dec. 27, 2004). It should also be noted that § 656.10(f) requires employers to maintain copies of applications and supporting documentation for up to five years from the date of the submission of the application.

moot the need for these debarment provisions.

#### F. Other Objections and Comments

Investigation of past substitution cases—Another commenter suggested that DOL investigate all past substitution cases with the help of USCIS. DOL does not have primary responsibility for investigation of past substitutions that were made after certification. The Department has participated in investigations and criminal prosecutions in appropriate cases involving substitution, and we will continue to work with DHS, DOL OIG, and DOJ when there are indications of possible fraud.

Adequacy of current fraud safeguards—According to one commenter, the PERM system's vulnerability to fraud provides insufficient justification for DOL's proposals as articulated in the proposed rule. A certain amount of fraud should be tolerated, the commenter insisted, citing Medicare, credit card systems, and the entire tax system as processes in which some level of fraud is simply accepted by society. This commenter invited DOL to ignore the PERM system's vulnerability to fraud as the price to be paid for offering what the commenter characterized as a "benefit" to all. Having acknowledged fraud exists, the commenter next pointed to the design of the PERM system itself as containing built-in fraud protection mechanisms. As examples, the commenter cited built-in safeguards to detect fraud prior to filing such as: Initial establishment of the PERM account; verification of employer's existence; establishment of PINs; and limiting changes to accounts and sub-accounts. Finally, the commenter viewed Federal prosecutions as significant in preventing fraud or abuse.

The Department declines the commenter's suggestion to simply acquiesce in a certain amount of fraud by those seeking certification. No regulatory scheme can eliminate all possibilities of fraud, but, as a matter of good government, the Department must make every reasonable effort to eliminate fraud. DOL takes its role and its statutory authority under the INA quite seriously and will continue to look for ways to eliminate fraud and the enticements to fraud in the permanent labor certification system. This Final Rule's elimination of substitution and of indefinite certification validity bolster fraud protection and reduce incentives and opportunities to commit fraud. The need to protect the system from fraud and eliminate vulnerabilities is clearly

within DOL's authority and furthers the INA's statutory purpose.

While fraud cases arising under the new PERM system were not described in the NPRM, this should not be taken as proof that fraud is not occurring under the system. The system is new and has not had the full opportunity for investigation and prosecution as has occurred under the previous regulation. In fact, the Department is aware of and has referred cases of possible fraud for investigation under the new PERM system. Further, we disagree that the issue of fraud in the permanent labor certification program lies solely in the Backlog Processing Centers or that the fraud detection examples provided by the Department indicate we are asserting that fraud cannot or will not occur under the new re-engineered PERM program. We disagree that not providing anecdotal evidence of fraud under the new PERM program is proof that no fraud is being conducted by some employers, agents or attorneys.

PERM introduced many important safeguards that will help deter and detect fraud. However, these protections are insufficient to eliminate the incidence and incentives for fraud in the permanent labor certification program. The existence of some anti-fraud measures does not preclude the agency from initiating and establishing additional fraud detection and avoidance mechanisms, particularly when considering the value of such mechanisms against their relatively small costs. Our Federal partner agencies have demonstrated through investigations and prosecutions that the level of fraud today is far more advanced and sophisticated than it was 10 years ago and that it continues to evolve and become even more sophisticated. It is incumbent upon the Department to remain aware of these trends and to strengthen the program to withstand the changing nature of fraud being committed against it. Because the Department has direct experience with how fraudulent behavior within the permanent labor certification process is pervasive throughout the process and detrimental to the purpose and intent of the process, we can assess what systems and/or procedures are adequately detecting fraud and where improvements are needed.

Many commenters stated that because we currently possess the authority to invalidate an application for labor certification up to five years after it has been certified, we already have sufficient safeguards in the permanent labor certification program. We respectfully disagree. The invalidation of an application is what happens to an

application once the Department has detected fraud and found the employer, agent or attorney willfully engaged in such fraudulent behavior. It remedies a particular instance of fraud, but it does not, in and of itself, deter or prevent the increasing fraud occurring in the program.

For the reasons stated throughout this preamble, the measures instituted by this Final Rule—eliminating substitution, limiting the validity period of a permanent labor certification, prohibiting sale of labor certifications, prohibiting employers from recouping recruitment costs and attorney fees from aliens, and prohibiting violators from using the permanent labor certification program—will deter and redress fraud and abuse in the permanent labor certification program. For the same reasons, the rule also clarifies the Department's authority to deny an *Application for Permanent Employment Certification* when we find an employer, agent or attorney has provided false information to us.

#### G. Comments Outside the Scope of the Rule

The Department received a number of comments not directly related to the issues raised by the NPRM. These comments generally addressed the following topic areas:

- Lack of consistency between agencies, especially related to the need for labor certifications in light of USCIS policies limiting the availability of National Interest Waivers when the need for the individual stems from a labor shortage.
- Suggestions of other measures the Department should consider related to the permanent labor certification program, including conducting more investigations of suspected fraud, eliminating the authority of agents to represent employers or aliens in labor certification cases, fixing problems in the PERM software, and revising current requirements for advertising.
- Descriptions of personal experiences with the immigration process generally provided as examples of fraud and abuse.
- Comments concerning delays in the processing centers and, specifically, delays resulting from the audit process.

We do not respond here to these issues individually, as they fall outside the scope of this rulemaking.

#### H. Other Amendments

In addition to the specific revisions described above, the Department has made other minor, technical, and editorial changes to the regulatory text, as appropriate.

#### IV. Required Administrative Information

##### A. Regulatory Flexibility Act

In crafting this Final Rule and reviewing public comments, the Department conferred with the Office of the Chief Counsel for Advocacy, Small Business Administration (SBA), as required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 609(b). This impact analysis reflects those consultations and generally incorporates the Chief Counsel's comments. Based on the analysis detailed below, the Department submits that this Final Rule will not have a significant economic impact on a substantial number of small entities.

In this rule, the Department takes measures to enhance program integrity and reduce the incentives and opportunities for fraud and abuse in the permanent employment of aliens in the United States. The rule's limitations on the acquisition and use of permanent labor certification applications and permanent labor certifications will have an economic effect on only those employers seeking DOL certification to hire foreign workers for permanent positions. The prohibition against substitution on the employer's permanent labor certification application and the validity period of 180 days on approved certifications each trigger a retest of the labor market (when original alien becomes unavailable a certification expires) to ensure that no U.S. workers are qualified and available to fill the job opportunity, carrying with it an economic cost. Employers' compliance with the procedures set forth in the Final Rule will not require completion of additional preprinted forms or the collection of information beyond that already required by Form ETA 9089, *Application for Permanent Employment Certification*.

In Program Year (PY) 2005 (July 1, 2005—June 30, 2006), the Department received approximately 115,952 applications from employers seeking labor certification under the PERM program. Because the Final Rule would also impact permanent labor certification applications being processed and certifications issued through ETA's Backlog Processing Centers, the Department also included in its analysis 176,496 backlogged applications in process as of September 7, 2006.<sup>6</sup>

To conduct its analysis, the Department looked to the major industries that PERM program data showed had applied for permanent

labor certification in PY 2005, then applied a similar distribution (same industries and general percentages) to applications currently being processed through the Backlog Processing Centers.

Although some, but not all, employers will file multiple applications with the Department in a given year, the Department's analysis treated each application as a separate economic impact on the employer and, consequently, the estimated impacts of the Final Rule may be overstated. Based on anecdotal evidence, and in the absence of precise historical data to accurately track substitution requests, the analysis also assumed that 10 percent of all employer applications will request substitution of the alien on the permanent labor certification application prior to implementation of this Final Rule, even though the historical practice of alien substitution by employers participating in the Department's permanent labor certification process is far less. The analysis does not attempt to quantify lost productivity costs employers could potentially incur after the loss of an alien worker for whom a permanent labor certification application has been filed and for whom substitution is no longer permitted. In the Department's experience, such costs are believed to be negligible, since the overwhelming majority of applications filed are for nonimmigrants already working in the United States and in the position that is the subject of the application.

Under the Small Business Administration Act, a small business is one that is "independently owned and operated and which is not dominant in its field of operation." The definition of small business varies from industry to industry to the extent necessary to properly reflect industry size differences.

The Department conducted its size standard analysis based on 13 CFR part 121, which describes the SBA's size standards for businesses in various industries. To group employers by size, the Department relied on information submitted by each employer on the permanent labor certification application, which provides data on the total number of employees in the area of intended employment for each application. Because the Department does not collect information with respect to the annual receipts of employers, it used the average employment level of firms in each industry that predominates in the permanent labor certification program as the size standard for small businesses in each of those industries.

To estimate the cost of the Final Rule on small businesses, the Department calculated each employer would likely pay in the range of \$300 to \$1,500 to meet the advertising and recruitment requirements for a job opportunity, and take one hour to prepare the recruitment report required for each application. The cost range for advertising and recruitment is taken from a recent (September 2006) sample of newspapers in various urban and rural U.S. cities, and reflects approximate costs for placing two 10-line advertisements in those newspapers. The cost to prepare the recruitment report is based on the median hourly wage rate for a Human Resources Manager (\$36.52), as published by the U.S. Department of Labor's Occupational Information Network, O\*Net OnLine, and increased by a factor of 1.42 to account for employee benefits and other compensation.<sup>7</sup>

The Department determined the following industries predominate in the permanent labor certification program: (1) Professional, Scientific, and Technical Services; (2) Manufacturing; (3) Accommodation and Food Services; (4) Healthcare and Social Assistance; (5) Educational Services; and (6) Construction. The Department has reviewed the data from each of these industries as described below to determine there is no significant impact on small businesses.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 602,578 employer establishments were operating year-round in the Professional, Scientific, and Technical Services Industry, and 96.7 percent of those employed less than 50 employees. In PY 2005, 13,286 PERM applications were filed with the Department by employers who indicated they employed less than 50 workers in the area of intended employment for positions in this industry. We estimate approximately 20,223 of the backlogged applications currently in process were submitted by similarly sized employers in this industry sector. Assuming employers will attempt to substitute the alien on 10 percent of applications filed with the Department, we estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 3,351 at a cost range of \$1,346,597 to \$5,200,161.

The U.S. Census Bureau's 2002 Economic Census reported that

<sup>7</sup> The O\*Net OnLine summary information on Human Resources Manager positions may be found at <http://online.onetcenter.org/link/summary/11-3040.00>.

<sup>6</sup> Reserved.

approximately 350,828 employer establishments were operating in the Manufacturing Industry, and 98.9 percent of those employed less than 500 employees. In PY 2005, 9,342 PERM applications were filed with the Department by employers who indicated they employed less than 500 workers in the area of intended employment for positions in this industry. We estimate approximately 14,220 of the backlogged applications currently in process were submitted by similarly sized employers in this industry sector. Assuming employers will attempt to substitute the alien on 10 percent of applications filed with the Department, we estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 2,356 at a cost range of \$946,855 to \$3,656,473.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 456,856 employer establishments were operating year-round in the Accommodation and Food Services Industry, and 90.8 percent of those employed less than 50 employees. In PY 2005, 7,478 PERM applications were filed with the Department by employers who indicated they employed less than 50 workers in the area of intended employment for positions in this industry. We estimate approximately 11,383 of the backlogged applications currently in process were submitted by similarly sized employers in this industry sector. Assuming employers will attempt to substitute the alien on 10 percent of applications filed with the Department, we estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 1,886 at a cost range of \$757,930 to \$2,926,901.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 619,517 employer establishments were operating year-round in the Healthcare and Social Assistance Industry, and 93 percent of those employed less than 50 employees. In PY 2005, 4,216 PERM applications were filed with the Department by employers who indicated they employed less than 50 workers in the area of intended employment for positions in this industry. We estimate approximately 6,417 of the backlogged applications currently in process were submitted by similarly sized employers in this industry sector. Assuming employers will attempt to substitute the alien on 10 percent of applications filed with the Department, we estimate the annual number of employer applications in this industry that may be

impacted by the Final Rule is 1,063 at a cost range of \$427,311 to \$1,650,149.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 38,293 employer establishments were operating year-round in the Educational Services Industry, and 98.9 percent of those employed less than 100 employees. In PY 2005, 1,336 PERM applications were filed with the Department by employers who indicated they employed less than 100 workers in the area of intended employment for positions in this industry. We estimate approximately 2,034 of the backlogged applications currently in process were submitted by similarly sized employers in this industry sector. Assuming employers will attempt to substitute the alien on 10 percent of applications filed with the Department, we estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 337 at a cost range of \$135,410 to \$522,912.

The U.S. Census Bureau's 2002 Economic Census reported that approximately 710,307 employer establishments were operating in the Construction Industry, and 99.9 percent of those employed less than 500 employees. In PY 2005 PERM, 5,579 PERM applications were filed with the Department by employers who indicated they employed less than 500 workers in the area of intended employment for positions in this industry. We estimate approximately 8,492 of the backlogged applications currently in process were submitted by similarly sized employers in this industry sector. Assuming employers will attempt to substitute the alien on 10 percent of applications filed with the Department, we estimate the annual number of employer applications in this industry that may be impacted by the Final Rule is 1,407 at a cost range of \$565,457 to \$2,183,629.

Several commenters maintained the rule would have a significant impact on a substantial number of small entities. One commenter challenged the analysis used by the Department to support its statement that the rule's impact on small business will be immaterial. The commenter maintained that although less than one percent of all small businesses would be affected, the appropriate universe to consider would consist only of those small businesses that wish to hire a foreign worker using the labor certification process. According to the commenter, the rule would not affect those businesses that do not submit applications. The commenter also suggested other measures of materiality, including: (1)

Comparing the number of small businesses that have applied under the PERM and prior programs to the total number of businesses that have applied under those programs; and (2) comparing the number of labor certification applications filed by small businesses to the number filed by all businesses.

Several commenters focused on the impact on small businesses of the prohibitions on substitution and reimbursement as a subset of the costs incurred by small businesses in successfully obtaining labor certifications. One commenter described the steps employers take when submitting labor certification applications, including verifying the job skills and cultural fit of the worker, conducting labor market tests, and determining future needs based on demand. Another commenter described the requirement to advertise positions in print, along with other recruiting activities. One commenter estimated the cost for each application was approximately \$10,000, based on informal conversations with others. The same commenter said the costs for applications were at least \$1,000 each. Commenters claimed the costs to small businesses were substantial.

As described above, the Department's analysis focused only on those small businesses that filed or are likely to file applications for permanent labor certification, and accounts for costs of advertising and related recruitment activities. As stated in the section of the preamble addressing substitution, these are not costs unanticipated by the statute. Also, the Form ETA 9089 may be filed electronically and does not require a filing fee. The Department's analysis does not estimate reimbursement amounts, as the Department has always assumed an employer is not entitled to reimbursement; as explained in the section governing payments, above, the costs of labor certification are generally the employer's, and this rule simply codifies that responsibility. Our analysis leads us to conclude this rule's economic impact will not be significant.

#### *B. Unfunded Mandates Reform Act of 1995*

This Final Rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no action is necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

One commenter stated this rule would amount to an unfunded mandate because it would be difficult to enforce and would require ETA to employ a large police force to monitor compliance. The Department disagrees with this comment. We do not anticipate significant additional costs to State, local, or tribal governments as a result of this rule. Although we do not speak here to any budgetary implications of the rule, additional costs, if any, to ETA as a result of this regulation are strictly Federal and attendant to the Department's responsibility in administering the permanent labor certification program. The Unfunded Mandates Reform Act does not cover costs to Federal agencies.

### C. Executive Order 12866

This Final Rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined, based on its benefit-cost analysis<sup>8</sup> of the key provisions of the regulation, that the rule is not an "economically significant" regulatory action within the meaning of section 3(f)(1) of the Executive Order. This rule will not have an annual effect on the economy of \$100 million or more, nor will it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. We estimate the Final Rule's quantified benefits to be \$64.3 million per year and the quantified costs to be \$39.8 million per year. The Department made every effort, where feasible, to quantify and monetize the benefits and costs of this Final Rule. Where we could not quantify them—for example, due to data limitations—we described benefits and costs qualitatively. In such cases, the Department has provided a comprehensive qualitative discussion of the impacts of the rule. Finally, the Department has concluded, after consideration of both the quantitative and qualitative impacts of the rulemaking, that the benefits of the rule justify the costs.

Overall, the analysis estimated the benefits and costs associated with the Final Rule compared to the baseline, that is, the permanent labor certification

application process before implementation of the rule. For a proper evaluation of the benefits and costs of the rule and its alternatives, we explain how the actions the rule requires of workers, employers, government agencies, and others are linked to the expected benefits. We also identify expected undesirable side effects of the Final Rule and the alternatives considered.

Following OMB Circular A-4, this analysis focuses primarily on benefits and costs that accrue to citizens and permanent residents of the United States; it does not factor in benefits and costs to aliens who, for example, may be named on labor certification applications but are not yet U.S. citizens or lawful permanent residents. As explained in greater detail below, to the extent this Final Rule's economic costs or benefits are affected by the existence of foreign workers who are already here in the United States and part of the economy, the analysis considers those costs or benefits to be transfers between U.S. and foreign workers and not measurably impacting the rule's net economic impact.

In most cases, this benefit-cost analysis covers 10 years to ensure it captures all major benefits and costs with respect to key entities and programmatic activities. For purposes of this analysis, the 10-year period starts in the next fiscal year on October 1, 2007. The analysis does not include permanent labor certification applications filed under the regulation in effect prior to March 28, 2005 and pending at the Department's Backlog Processing Centers. As stated above, we expect to eliminate the backlog by September 30, 2007. In the unlikely event that the Department does not completely eliminate the backlog by September 30, 2007, the costs of the rulemaking may be slightly underestimated.

With respect to immigrant worker petitions currently pending and open to substitution at the Department of Homeland Security, the analysis assumes a one-time impact (rather than recurring impact over 10 years) until those applications are adjudicated. As this preamble states earlier in response to commenter concerns about application of the rule to pending applications, program users have had sufficient notice of the Department's intent to eliminate the practice of substitution; therefore, we believe that employers have had the opportunity to act on any substitution requests they know to be required but remain outstanding and not yet submitted to

DOL or DHS,<sup>9</sup> thus minimizing or eliminating impact of the prohibition on those employers for purposes of those applications.<sup>10</sup> Nonetheless, in acknowledgment of the multi-agency process required for employment-based immigration, the analysis makes a good faith attempt to quantify the most salient (potential) costs and benefits to employers with substitutable petitions currently pending at DHS, regardless of when filed. For purposes of a cost estimate, this analysis assumes that any employer who may find itself in need of substitution after the prohibition is in place could, in order to fill the vacancy, incur certain additional costs not required if substitution were still an option.

Because up-front, one-time costs associated with reading and understanding the Final Rule would not result in significant costs to employers or government agencies, we did not include them in our analysis. In addition, we assumed that annual costs would be the same each year. Following OMB guidance, we used discount rates of seven percent and three percent.

The Department separately analyzed the benefits and costs of the major provisions of the Final Rule. The Department's analysis (elimination of substitution, establishment of a validity period, etc.) and response to public comments are set forth below. The size of the net benefits, the absolute difference between the projected benefits and costs, indicates whether one policy is more efficient than another. We estimated that total 10-year discounted quantified and monetized benefits range from \$445.0 to \$540.4 million and the total 10-year discounted quantified and monetized cost ranges from \$279.5 to \$339.4 million for a net present value of the benefits of \$165.5 to \$201.0 million.

### 1. Employer Costs and Burden Generally

Some commenters maintained the proposed rule is a "significant" regulatory action within the meaning of Executive Order 12866 for several reasons, including its overall cost to

<sup>8</sup> The Department's analysis followed the guidelines provided by the Office of Management and Budget (OMB) in Circular A-4. This circular constitutes OMB's guidance to Federal agencies governing regulatory analysis pursuant to Executive Order 12866 and other statutes and authorities. It is available online at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>.

<sup>9</sup> This Final Rule's prohibition on substitution does not cover substitution requests submitted by the rule's effective date. Separately, the rule establishes a 180-day validity period for labor certifications not filed with DHS. Although we anticipate there are employers who—prior to the effective date of the rule—may either request substitutions they already know to be required or seek to file old but unused labor certifications in support of I-140 petitions with DHS, this analysis does not quantify the number of employers or labor certifications in these categories. There is simply no information from which to draw conclusions, and any such estimate would be at best speculative.

<sup>10</sup> This analysis assumes one substitution over the life of a labor certification application.

employers and its potential impact on the U.S. economy. These commenters based their concerns on the process they say employers generally undertake in successfully applying for a certification and their estimate of costs incurred by employers in pursuing those applications. One commenter pointed out the certification application is only one of several steps in hiring a foreign worker. In addition, according to the commenter, the employer must verify the job skills and cultural fit of the worker, conduct a labor market test, and determine its hiring and training needs based on demand. Another commenter made similar points, noting that it engages in required print advertising and other recruiting activities at a cost of more than \$200,000 annually. It also reviews resumes, interviews candidates, and engages legal counsel to assist in preparing and reviewing materials required for the application. Although none of the commenters provided detailed figures for each of their activities, at least one commenter estimated, based largely on feedback it states it received from other companies, that the cost for each application was approximately \$10,000.

Several commenters made broad observations related to the general burdens that the proposed rule would impose. One commenter stated the proposed rule is burdensome because the labor certification process itself has numerous requirements and is difficult to understand. Two other commenters argued the proposed rule is likely to curb business growth, inhibit job creation, and encourage employers to move jobs and operations offshore. Another commenter stated its concern that the rule would punish nonprofit research institutions due to the costs of compliance. One commenter suggested the rule could result in a reduction of foreign workers, which in itself would have an impact on the economy because foreign workers themselves create demand in the economy for housing, food and other essentials. Finally, one commenter protested that the rule will impose significant additional costs on the many employers who are honest in their acquisition and use of certifications, based on the misdeeds of a small number of employers who have abused the process.

The Department agrees with the commenters that this rule is a significant regulatory action under EO 12866, and has been submitted to OMB for review. While the commenters express general concern over possible harm to employers, however, they failed to articulate how the rule itself will adversely affect the economy in a

material way within the meaning of Executive Order 12866. Moreover, the commenters made little effort to explain how costs associated with the rule could result in an annual effect on the economy of \$100 million or more. Instead, the commenters took issue with the individual, activity-based costs and economic impact of the labor certification process itself.

The Department readily acknowledges that employers incur various costs associated with the decision to hire alien workers. The labor certification process, by its very nature, imposes costs to employers to establish, to the Secretary of Labor's satisfaction, the unavailability of and no adverse impact on U.S. workers. Since the costs are standard to the labor certification process, we do not consider these costs as incremental to the rulemaking.

Further, as detailed in each of the sections below, the Department's analysis reveals the Final Rule's quantified and monetized benefits outweigh costs, and will impose no significant economic impact or material adverse effect within the meaning of Section 3(f)(1) of Executive Order 12866.

## 2. Ban on Alien Substitution

Before this Final Rule takes effect, employers may substitute a different alien on a permanent labor certification application if the original alien named on the certification application is no longer available. Under the Final Rule, employers may not substitute the alien named on the application. Separately, the rule prohibits employers from amending any information on the application once it is submitted to the Department. If an alien is no longer available for the job described on the application, an employer must conduct a new labor market test, and if this test indicates no qualified U.S. workers are available and the only qualified worker is an alien, then the employer must submit a new permanent labor certification application.

We estimate the 10-year discounted quantified and monetized benefits associated with this provision of the Final Rule will be between \$177.4 and \$215.5 million, and total quantified and monetized costs will be between \$147.0 and \$178.6 million. Thus, the quantified benefits exceed the quantified costs, and the net present value over a 10-year time horizon will range from \$30.4 to \$36.9 million.

### Benefits

The ban on alien substitution has several important benefits to society: improved program integrity, increased

employment opportunities for U.S. workers, cost-savings to employers in the form of reduced staff time and incidental costs, cost savings to State governments in the form of reduced unemployment insurance benefits, and cost savings to the Federal Government in the form of reduced staff time resulting from a reduction in processing substitution requests.

The current practice of allowing substitution of alien beneficiaries provides a strong incentive for the filing of fraudulent labor certification applications. If substitution is permitted, permanent labor certification applications or resulting certifications can be marketed to aliens who are willing to pay a considerable sum of money to be substituted for the named aliens on the applications or certifications. The substitution ban increases program integrity by reducing the incentives or opportunities for fraud through the lawful permanent resident process. Due to a lack of adequate data, however, we were not able to quantify or monetize this important benefit.

Banning substitution will deter unscrupulous employers, attorneys, or agents from filing permanent labor certification applications simply to sell them later for profit, and reduce the number of fraudulent applications received by the Department. We estimate the cost savings achieved from recovery of processing resources by multiplying the number of fraudulent substitutions (assume a subset of the total number of substitution requests received) by the average number of hours spent by our staff on each fraudulent substitution, by the average compensation of our staff reviewing fraudulent substitutions. We estimate the annual cost saving to the Department at \$2.8 million per year.<sup>11</sup> This analysis captures savings specifically linked to applications we estimate involve fraudulent substitutions, rather than all fraudulent applications (that is, applications employing fraud, regardless of type).

An important purpose of the substitution ban is to ensure that if an alien is no longer available, the employer will conduct a new labor market test to determine whether a suitable U.S. worker is available. Since labor market dynamics can change in a matter of months, it is possible that

<sup>11</sup> As described above, the Department estimated the annual number of substitutions to be approximately 11,595 and estimated that 10 percent of these substitutions are fraudulent. Average DOL staff time per fraudulent substitution is estimated at 40 hours and their average hourly salary (staff with pay grade GS 14, step 5) is \$42.24, which was increased by 1.42 to account for employee benefits.

when the alien on a permanent labor certification is no longer available, and the employer conducts new recruiting efforts, qualified U.S. workers will be identified. Some U.S. workers hired would have otherwise remained unemployed.

Without the ban on substitution and required labor market test, the employer may not be aware that U.S. workers became available since their original test of the labor market, and may have otherwise hired an alien.<sup>12</sup> Therefore, the second labor market test required by the Final Rule should result in increased employment opportunities for U.S. workers. We estimate the monetary value of this benefit by examining the compensation earned by U.S. workers that would not have otherwise been hired. To estimate this benefit, we accounted for the number of U.S. workers that would be favored by requiring employers to conduct new labor market tests and the compensation of these workers, which includes both their salaries and benefits, and reflects the decrease in time that those workers would have stayed unemployed. We estimate this benefit to be \$21.3 million per year.<sup>13</sup>

The analysis assumes the U.S. workers hired who were previously unemployed will no longer be required to seek unemployment insurance benefits. Therefore, other things being constant, as an added benefit we estimate the states will experience a reduction in unemployment insurance expenditures as a consequence of U.S. workers being hired after labor market tests are conducted. The Department, however, was not able to quantify this

important benefit for lack of adequate data.

Further, because the employer would have otherwise hired an alien if it had not conducted the labor market test, the employer will experience cost savings by not continuing with the permanent labor certification application process. We estimate this cost savings by calculating the monetary value of the decrease in employer staff time for preparing, filing, and tracking labor certification applications; preparing and maintaining the recruitment report and submitting the recruitment report (to comply with an audit, where requested). We estimate this cost savings by multiplying the staff time required to conduct such activities by the staff compensation, by the number of U.S. workers hired as a result of labor market tests. It is important to note that this cost savings to employers partially offsets the costs of compliance to employers discussed below. The cost of compliance to employers outweighs this partial cost-savings. We also account for the incidental costs (such as delivery, copying, and telephone charges) incurred by employers. We estimate the annual cost savings to employers to be \$1.2 million.<sup>14</sup>

In addition, we anticipate other cost savings or benefits associated with the ban on substitution will have a ripple effect through the publicly administered immigration system. We believe cost savings could be realized in the following areas: reduction in the Department of Labor's Office of Inspector General (OIG) staff time required to review or investigate potentially fraudulent substitutions; reduced DHS staff time to review I-140 immigrant petitions; reduced DHS staff time to review I-485 applications; a reduction in DOS staff time resulting from a need to conduct fewer interviews with aliens seeking permanent residence; and less DOJ staff time spent on investigation and prosecution of fraudulent substitutions. We believe that deterring and preventing substitution-related fraud will have an important and visible impact on other

Federal agencies involved in the immigration system. However, due to a lack of adequate data, we were not able to quantify or monetize these benefits to society.

### Costs

The ban on substitution does impose several costs to society: additional job advertising and recruitment by employers, increased employer staff time for filing labor certification applications, and increased staff time in State Workforce Agencies (SWAs) and the Department, all described in greater detail below. We estimate the 10-year discounted cost to society to be between \$147.0 and \$178.6 million.

If the employer's second labor market test indicates that no qualified U.S. workers are available, then the employer must submit a new permanent labor certification application with the name of the new alien. However, to fill the position, employers who otherwise might have substituted must test the market for U.S. workers and incur recruitment costs, independent of whether they eventually file a permanent labor certification application. To the extent an employer finds a qualified U.S. worker to fill the position, it is inappropriate to attribute those costs to the labor certification process, as in those cases the need for labor certification has been removed.

The main cost to employers associated with the substitution ban is the increase in employer staff time to prepare, file, and track labor certification applications. We estimate this cost by multiplying the number of substitutions leading to labor market tests not favoring U.S. workers by the number of employer staff hours to prepare, file, and track the labor certifications, by the compensation of the employer staff undertaking these activities.

Another cost to employers of the substitution ban results from the additional recruiting efforts, in particular job advertising, as well as the increased employer staff time to arrange for and track recruiting efforts and for receiving, compiling, interviewing, analyzing, and reporting the results of the recruitment.<sup>15</sup> The Department

<sup>12</sup> For purposes of this analysis, the Department assumed that U.S. workers favored by the new labor market tests were unemployed. However, a benefit to U.S. workers could still exist even if these workers were employed elsewhere: their departure from their old jobs would open up new employment opportunities for other U.S. workers and potentially result in higher wages being earned.

<sup>13</sup> The Department estimated that of the 115,952 PERM applications filed between July 1, 2005 and June 30, 2006, 10 percent requested a substitution. This is also the Department's estimate of percentage of substitution requests in cases filed under the preceding regulations. This analysis estimates 15 percent of labor market tests favor U.S. workers. The average annual wage on permanent labor certifications applications in the PERM database is \$69,000 per year. The average wage was increased by 1.42 to account for employee benefits (source: Bureau of Labor Statistics). DOL assumed that workers would have been unemployed for an additional 1.5 months. There may be some portion of these jobs filled by U.S. workers already employed. For these employees the range of benefits may, as a result of their being employed when taking the new opportunity, be less than the full salary and benefits accounted for in this range found in this analysis. This analysis does not quantify that lesser amount.

<sup>14</sup> The Department estimated that employers spend 10 staff hours on average preparing, filing, and tracking the labor certifications. As stated in the preamble to the PERM Final Rule, it takes on average one (1) hour for an employer to prepare a recruitment report for each application it files. We estimated that 10 percent of these applications are audited, which will require an additional hour for the employer to submit the report. We assumed that Human Resources Managers (or their equivalent) conduct this activity for the employer and that their median hourly wage is \$36.52, which we increased by 1.42 to account for employee benefits (source: Bureau of Labor Statistics). The Department estimated that employers spend \$100 in incidental costs per application.

<sup>15</sup> It is possible some employers would not have conducted any recruiting activities to locate a second applicant if substitution were allowed (e.g., if a qualified alien was already working for the employer under a temporary H1B visa). If an employer would normally hire another alien that is already employed by the employer, then most of the recruiting activities required by PERM would be additional cost. If the employer would normally conduct an extensive recruiting effort to find a new qualified employee, few of the PERM required recruiting activities would constitute an additional

included in its cost estimate the time spent to comply in excess of the time the employer would normally spend in recruiting efforts. We estimate the recruiting costs by examining what recruiting efforts were reported by employers filing PERM applications and by surveying local newspapers, websites, and SWAs to determine the costs associated with these activities.<sup>16</sup> We estimate the costs for filing applications and preparing recruitment reports by multiplying the staff time required to conduct such activities by the staff's compensation by the annual number of additional labor certification applications.<sup>17</sup> We estimated the total annual cost to employers to process and track labor certification applications and conduct additional recruitment efforts to be \$19.8 million per year.<sup>18</sup>

SWAs also experience an additional cost. The substitution ban may increase the number of applications filed by employers, which requires employers to place a job order with the SWA serving the area of intended employment for a period of 30 days. Employers must also obtain a prevailing wage determination from the SWA. SWAs will incur some additional costs associated with increased SWA staff time to process job orders and provide employers with prevailing wage determinations. We estimate this cost by multiplying the SWA staff time to process job orders and

cost. For the purposes of this analysis, DOL assumed that on average, an employer would place an ad in a Sunday paper and conduct other recruiting efforts, such as placing a notice on the organization's website or attending a job fair.

<sup>16</sup> The Department estimated that the cost of an advertisement in a Sunday paper is \$750. DOL also estimated it would take an employer 0.5 hours to place the advertisement with the Sunday paper and 0.5 hours to place a job order with the SWA. In addition, this analysis assumes an employer would spend 10 hours to arrange for and track recruiting efforts and an additional 10 hours for receiving, compiling, interviewing, analyzing, and reporting the results of the recruitment.

<sup>17</sup> According to the preamble to the PERM Final Rule, it takes on average one (1) hour for an employer to prepare a recruitment report for each application it files. DOL estimated that 10 percent of these applications are audited, which will require an additional hour for the employer to submit the report. DOL assumed that Human Resources Managers (or their equivalent) conduct this activity for the employer.

<sup>18</sup> As mentioned above, the Department estimated that employers spend 10 staff hours on average preparing, filing, and tracking the labor certifications. DOL assumed Human Resources Managers (or their equivalent) conduct this work for the employer and that the median hourly wage for Human Resource Managers is \$36.52, which DOL increased by 1.42 to account for employee benefits. This analysis assumes 85 percent of the required labor market tests favor aliens, and that employers request substitutions on 10 percent of the 115,952 applications submitted per year, resulting in approximately 9,856 additional permanent labor certification applications to be filed with DOL each year.

determine the prevailing wage by the compensation of the staff, by the annual number of substitution requests. We estimate the annual costs to SWAs to be \$0.5 million per year.<sup>19</sup>

The primary cost government-wide is the increased staff time to review additional labor certification applications, immigrant petitions, etc., that may be submitted when a legitimate change in the alien beneficiary is necessary. If employers must resubmit labor certification applications when the original alien becomes unavailable, then Department of Labor staff will spend that much more time reviewing applications. We estimate this cost to the Department by multiplying the time spent reviewing each application by the compensation of our analysts, by the increased number of applications.<sup>20</sup>

Another related cost to the Federal Government is the increased Departmental staff time to audit an increased number of recruitment reports. We estimate this cost by multiplying the time spent auditing each recruitment report by the average compensation of one of our analysts, by the increased number of recruitment reports that will be audited.<sup>21</sup> We estimated the total annual Departmental costs to be \$0.7 million per year.

In addition, the Department considered potential costs to employers associated with a later priority date and a longer wait for an alien who would otherwise be the beneficiary of a substitution. However, this analysis does not quantify such costs. As stated previously, to the extent such costs are quantifiable, they are potentially negligible since most substituted jobs are already held by the alien to be

<sup>19</sup> The Department estimated SWA staff spend one (1) hour on average to process job orders and determine the prevailing wage. We also estimated the hourly rate for SWA staff to be \$34.94 per hour, which was increased by 1.42 to account for employee benefits (source: Bureau of Labor Statistics).

<sup>20</sup> The Department estimated that 70 percent of applications are "clean" and do not raise any audit flags. "Clean" applications require 0.25 hours of DOL staff time. We assumed that the remaining applications raise audit flags and must be reviewed manually, requiring four (4) hours of DOL staff time. We estimated that the median hourly wage for DOL reviewers is \$30.06 (GS 12, step 5, which was increased by 1.42 to account for employee benefits (source: Bureau of Labor Statistics). As explained above, DOL assumed that approximately 9,856 additional permanent labor certification applications will be filed with DOL each year.

<sup>21</sup> The Department assumed auditors spend two (2) hours to audit recruitment reports. We assumed the median hourly wage for DOL auditors is \$30.06 (GS 12, step 5; source: DOL), which DOL increased by 1.42 to account for employee benefits (source: Bureau of Labor Statistics). As explained above, DOL assumed that approximately 9,856 additional permanent labor certification applications will be filed with DOL each year.

substituted. To the extent they stem from a longer wait, or backlogs at other Federal agencies, the number of factors bearing on such costs (variables determining time in respective queues, mitigating factors such as options for interim sources of labor, etc.), and the relative impact of each factor, are simply too speculative for the Department to be able to accurately measure.

#### *Impact of Prohibition Based on Availability of Alien*

As stated above, the analysis assumes 10% of employers may require substitution at the labor certification stage (11,595 applications). The analysis assumes all of those applications will require a second market test, 15% (1,739 applications) of which will favor U.S. workers. As stated, in that 15% of cases in which an employer finds a qualified U.S. worker, recruitment costs related to the labor certification process should not be attributed to this rulemaking. In the remaining 9,856 cases, the analysis already includes the costs of the second labor market test and other costs of the labor certification process, including average filing and application management expenditures (recruitment, staff time, etc.) for each employer.

As a refinement on this estimate, it is possible to make some broad assumptions about impact on different categories of employers holding those remaining 9,856 applications. We may assume, broadly and based on our programmatic experience, that approximately 80% of employers (7,885 applications) have replacements at the ready (at their own place of business or another U.S. establishment), and the remaining 20% (1,971 applications, or 1.7% of total applications processed in the system) must reach outside the country when the original alien becomes unavailable.<sup>22</sup>

As a general proposition, an employer who now has the option to substitute but would normally have another alien at the ready (thereby incurring no need to advertise) would incur additional recruitment costs after the substitution prohibition to meet the requirement for a second labor market test. An employer who can now substitute but must generally look outside the country to fill vacancies may not necessarily incur additional costs specifically for

<sup>22</sup> The Department's longstanding programmatic experience, both under the previous regulation and the more current PERM rule, is that a significant percentage of applications for permanent labor certification name aliens already here and participating in another visa program. Recent program data indicate approximately 80% name aliens on H-1B visas.

recruitment as a result of the prohibition (assuming even with substitution, there would be similar costs associated with foreign recruiters and locating another worker abroad). For both groups of employers—those with ready candidates and without—the analysis assumes expenses associated with beginning the process anew, and builds in costs in addition to recruitment. Accordingly, as described in the main costs discussion above, the analysis already accounts for an average cost across employers for labor certification expenses in the absence of substitution (e.g., preparation, filing and tracking of a second labor certification). To the extent that potentially there is greater incremental impact at the labor certification stage to employers who, in the event they must substitute, must seek workers outside the country—over and above the diverse costs already included and explained above—there is insufficient data to quantify it. Additional impact to these employers may be captured in the discussion below, covering substitutable petitions pending at DHS.

#### *Application of the Prohibition to Pending Applications*

As explained above, this analysis considers the additional, one-time impact of this rulemaking on employers with substitutable immigrant worker petitions currently pending at DHS. As DHS is a separate Federal agency, and as employer decisionmaking, unique case circumstances, and agency processing dynamics at the I-140 stage are not within either the Department of Labor's expertise or, even more importantly, its influence, this analysis can make only the broadest of assumptions. The Department cannot estimate with precision this rule's benefits or costs to those employers or to DHS program activities. However, these data limitations notwithstanding, we have included in this analysis an estimate of the potential impact on employers. Noting that the rule does not impact labor certifications already filed with DHS, the prohibition on substitution will impact DHS processing at least to some extent going forward.

The extensive benefits of the substitution prohibition described above apply equally to those labor certification applications currently in the immigrant petition backlog at DHS, and are also deemed part of this one-time impact. In addition to other benefits described above, DHS's workload would benefit from a reduction, as some of those abandoned immigrant petitions would not be replaced with foreign workers but with U.S. workers. Potential costs

specifically to employers with petitions pending with DHS are described in greater detail below. These benefits and costs are in addition to the overall regulatory impact estimates provided above.

As of April 2007, a total of approximately 70,000 immigrant petitions were pending at USCIS in immigrant preferences categories that were identified by DHS as dependent upon a labor certification. The Department assumed the same 10 percent substitution rate for labor certification applications now attached to a pending immigrant petition at DHS that would be prohibited from a future substitution. The analysis accordingly assumes all of the 7,000 applications identified will require a second test of the labor market. As above, the Department has assumed that 15% of these applications (1,050 applications) will favor U.S. workers, and thus recruitment costs are not attributable. The costs of the labor certification process leading to labor market tests not favoring U.S. workers, including average filing and application management expenditures (staff time as indicated by staff compensation, costs of additional recruitment, etc.) for each employer, are then attributed to the remaining 5,950 applications for a total of \$10.62 million. The Department is mindful that amount represents a one-time expense for a discrete group of applications and is, moreover, not discounted by the likelihood that some percentage of these applications that would otherwise be substituted would be too far into the adjudicatory process at DHS to be the subject of a future substitution.<sup>23</sup>

#### *Transfer*

To the extent the ban on substitution will have an economic impact on foreign labor—that impact could be a carve-out from the overall economic impact of the rule as measured in this analysis, and not an additive. The foreign worker who is substituted has by definition become unavailable for the position for reasons unrelated to this rulemaking, and therefore does not incur either a cost or benefit in this analysis. The vacancy created results in both costs and benefits for the employer, U.S. workers, and foreign workers. Costs are associated with recruitment; we assume the employer will take steps necessary to fill the vacancy, whether

with a foreign or U.S. worker. Benefits result from long-term stability and productivity gains to the employer from filling the vacancy, and pay and satisfaction to a new worker from a permanent position. The potential benefit to the employer—and the economy—from filling the vacancy would not change significantly whether the new worker is a U.S. or foreign worker; assuming a qualified individual fills the slot, the worker is meeting the same legitimate business need, and the employer incurs similar costs for comparable fringe benefits and compensation. The analysis already discusses the potential impact and assumptions associated with filling the vacancy with a U.S. worker. If, alternatively, the vacancy is filled with a second foreign worker—and to the extent foreign workers physically in the country and working are deemed part of the U.S. economy—the potential benefit to U.S. workers would be decreased by that number of slots and transferred to foreign workers who now enter the stream for permanent residency. So although total economic benefits do not change, their relative allocation does transfer between foreign and domestic workers, depending on who is awarded the permanent position. And in fact, non-material benefits to foreign workers may even be higher than to U.S. workers, were the analysis to factor in the positive impact that comes with a permanent residency-bound immigration track.

#### *Issues Raised by Public Comment*

Several commenters argued the rule's prohibition of substitution of alien beneficiaries will create significant economic impact. One commenter, presuming direct employer costs per application of \$10,000, stated the impact would be at least \$1 billion if employers could no longer substitute beneficiaries. Another commenter focused on the effect it believed the substitution prohibition could have on the recruitment of workers. Noting that backlogs have reached 4.5 to five years at times, the commenter claimed the application process, which he characterized as lengthy, makes it imperative that employers be permitted to use certifications that are "abandoned." One commenter stated the substitution prohibition would increase the likelihood that employers would take jobs offshore because they would be unable to recruit and obtain certification for foreign workers in a timely manner. The same commenter also suggested that a few plant closings or other business disruption could

<sup>23</sup> For example, no discounting has been applied to remove labor certification applications from the calculation that are part of a filing which includes an adjustment application and for which a visa is immediately available, which would greatly reduce the chances that a substitution to benefit another alien would follow.

easily result in an economic impact in excess of \$100 million.

One commenter focused on the costs and expenses of abandoning and reapplying for a labor certification due solely to the unavailability of a foreign worker. Noting the costs of advertising, market surveys, attorneys and recruitment, the commenter also pointed out the loss in productivity from delayed approval of applications, all of which it said results in thousands of dollars in employer expenses. The commenter argued that substitution is and should remain "perfectly legitimate" because it "mitigates the employer's investment risk in an employment-based immigration visa process that still takes (and will likely continue to take) many years to complete." In addition to claiming the economic impact was significant, the commenter asserted the rule's substitution prohibition was an attempt to eliminate an unknown, but likely insignificant, quantum of fraud. Finally, the commenter stated that the impact on high technology industry employers would be substantial because such employers must recruit foreign nationals, often from U.S. universities, given the limited supply of U.S. citizens available for technical positions.

The commenters have failed to explain how the elimination of the practice of substitution itself will result in material adverse impact, let alone economic impact exceeding \$100 million. While some commenters estimated the costs of obtaining a new certification at nearly \$10,000, the Department finds no support for that claim, and has estimated the costs as much lower as noted above.

As stated elsewhere, the INA's treatment of employment-based immigration is designed to protect the wages and working conditions of U.S. workers. The Department meets the requirements of the statute through the labor certification process. As the administrator of that process, the Department has an obvious interest in and responsibility to identify, address and eliminate fraud, which is what the Final Rule will accomplish. The Department's experience, as articulated and discussed herein, resulted in the PERM process, which increased fraud protection. The Department's experience also shows the practice of substitution leaves the process susceptible to fraud.

As discussed extensively throughout this Final Rule, the Department is concerned that various immigration practices, including the substitution of alien beneficiaries and the indefinite validity of permanent labor

certifications, were subject to a significant degree of fraud and abuse. The purpose of this Final Rule is to impose clear limitations on the acquisition and use of permanent labor certifications in order to reduce incentives and opportunities for fraud and abuse, and enhance the integrity of the permanent labor certification program to the benefit of the U.S. workforce.

The ban on substituting alien beneficiaries reduces the incentives and opportunities for fraud in important ways. First, absent this regulatory action, employers possess incomplete information about the current availability of qualified U.S. workers in the labor market. Because labor markets are inherently dynamic, even well informed employers may not keep abreast of changes in worker availability after their initial recruitment for a job opportunity. In addition, information may not always be accurate or widely available if it is costly to produce, analyze, or disseminate. Banning substitution "remedies" the problem of imperfect information, consistent with the statutory intent to protect U.S. workers, by requiring employers to go back to the labor market a second time when the original alien becomes unavailable. This measure improves employer decision-making with respect to filling critical job openings, and improves the probability that a qualified U.S. worker will be selected for the job.

Second, the ban on alien substitution significantly reduces the incidence of "overconsumption," where unscrupulous employers, attorneys, or agents submit large numbers of applications for processing and, once certified, sell the certification to a different alien at prices that grossly exceed marginal costs. This overconsumption is driven by the exchangeability of the alien name on the certification, which in turn increases the document's transferability. In the absence of this Final Rule, a certification that was granted to be used to benefit or name one alien and no one other than the parties originally named for purposes of filing with DHS (in economic terms, a "rivalrous and excludable good"), can be used by another alien simply by exchanging the name (in economic terms, a "rivalrous and non-excludable good").

These individuals or entities are not equating marginal social costs with marginal benefits, but rather marginal private costs with marginal benefits; hence, they overconsume from the permanent labor certification program. In other words, unscrupulous employers or attorneys have no incentive to

consider the marginal social costs of filing the next fraudulent labor certification applications as long as the marginal private benefits (i.e., revenue from selling the labor certifications to a different alien) continue to exceed the marginal private costs (i.e., costs to process and track the labor certification) of the transaction.

By eliminating alien substitution, this rule seeks to restore to certifications their rivalrous and excludable qualities, in that they may no longer be transferred, sold, bartered, or purchased; the employer, job opportunity, and alien beneficiary on the application are exclusive and cannot be transferred to a different alien beneficiary. By requiring appropriate, timely market tests; promoting better information on market conditions and worker availability; and restoring the exclusivity and integrity of labor certifications, we believe this regulatory action will more effectively align the marginal social costs of processing permanent labor certifications with the marginal benefits.

### 3. Validity Period

Permanent labor certifications have thus far been valid indefinitely, and employers have been free to submit a permanent labor certification to DHS at any time. At least one commenter argued that a 45-day proposed validity period such as that proposed in the NPRM would result in a significant impact. The Department disagrees with this conclusion. However, in response to other comments and our own analysis, we have lengthened the validity period to 180 days. Under this Final Rule, all permanent labor certifications will expire after 180 calendar days of certification unless filed in support of an I-140 immigrant petition with DHS.

The 180-day period in which a permanent labor certification can be filed in connection with the I-140 petition to the DHS effectively limits the time in which certifications may be marketed. The ban on substitution and the establishment of a finite validity period, when taken together, effectively reduce the likelihood of validating stale recruitment while simultaneously eliminating "rent-seeking" behavior on the part of unscrupulous employers, attorneys, and agents in selling these certifications to uninformed alien beneficiaries. We estimate the cost impact of a 180-day validity period will be insignificant because sufficient time is provided to put the certification to use, since it is granted to the employer under the presumption that there is a critical need for the foreign worker and no qualified U.S. workers are available.

This analysis does not quantify the marginal value of eliminating indefinite validity of labor certifications—that is, the value of establishing a limited validity period over and above the value gained from prohibiting substitution. The commoditization of labor certifications is a function of the availability of substitution and the absence of a finite expiration date. As this Final Rule eliminates both root causes, the analysis assumes most if not all quantifiable benefits are captured by the analysis above with respect to substitution.

The analysis does measure two major benefits associated with a defined validity period. First, a validity period ensures labor market information is current, the prevailing wage recorded on the permanent labor certification is current and accurate, and the bona fide job opportunity exists as it appeared on the original application. When a certification becomes invalid, an employer must conduct new recruiting efforts that may indicate qualified U.S. workers are available and open that job opportunity for their consideration. Second, a validity period will slow the “black market” in approved labor certifications.

As discussed in the benefit-cost analysis below, enforcing a validity period will increase costs for employers that do not file with DHS prior to the end of the validity period. In these cases, the employer must conduct a new labor market test and submit a new permanent labor certification application to the Department. The Department’s costs will also increase, since it will review additional applications that are submitted because the original certification expired.

The Department considered two periods of validity, 45 days and 180 days. Both alternatives are discussed further below.

### 3(A). Validity Period of 180 Days

We estimate that the 10-year discounted quantified benefits associated with this provision of the Final Rule will be between \$74.8 and \$90.9 million, and total quantified costs will be between \$132.4 and \$160.8 million. Thus, the net present value over a 10-year time horizon will range from –\$57.6 to –\$70 million. Due to a lack of adequate data, we were not able to quantify or monetize some important benefits of this provision of the Final Rule.

#### Benefits

The 180-day validity period has several important benefits to society: Increased employment opportunities for

U.S. workers, improved program integrity, and cost savings to the Federal Government resulting from positions filled with U.S. workers.

An important purpose of the 180-day validity is to ensure that the certified job opportunity still exists as described on the initial application. If an employer files with DHS 180 days or more after the certification was approved by the Department, the passage of time may have impacted worker availability for purposes of the job opportunity that is the subject of the certification. This provision requires employers to conduct new labor market tests and submit a new application to the Department once validity expires.

As with the benefits discussed under the substitution section, above, the Department estimates that without the 180-day validity period and required labor market test, the employer may not be aware that U.S. workers are available, and may have otherwise hired an alien.<sup>24</sup> Therefore, the second labor market test required by the Final Rule may favor and result in increased employment opportunities for U.S. workers. As under the substitution section above, we estimated the monetary value of this benefit by examining the compensation earned by U.S. workers that would not have otherwise been hired. To estimate this benefit, we accounted for the number of U.S. workers that would be favored by requiring employers to conduct new labor market tests and the compensation of these workers, which includes both their salaries and benefits, and reflects the decrease in time that the U.S. workers favored by the 180-day validity period stay unemployed. We estimate this benefit to be \$10.7 million per year.<sup>25</sup>

The 180-day validity period decreases the opportunity for fraud through the lawful permanent resident process. The current indefinite validity of approved permanent labor certifications has

<sup>24</sup> For purposes of this analysis, the Department assumed that U.S. workers favored by the new labor market tests were unemployed. However, a benefit to U.S. workers could still exist even if these workers were employed elsewhere; their departure from their old jobs would open up new employment opportunities for other U.S. workers and a move to a new job may imply a higher wage for the U.S. worker.

<sup>25</sup> The Department assumed that of the 115,952 PERM applications filed between July 1, 2005 and June 30, 2006, five (5) percent would expire prior to filing with DHS within 180 days. As before, we assumed 15 percent of the labor market tests favor U.S. workers. The average annual wage on permanent labor certifications applications in the PERM database is \$69,000. The average wage was increased by 1.42 to account for employee benefits (source: Bureau of Labor Statistics). We assumed workers would have been unemployed for an additional 1.5 months.

contributed, along with substitution, to the growth of a secondary market in approved labor certifications. A 180-day validity period promotes more security in the labor market test conducted, adding significant protections for U.S. workers in the strength of the tests regarding availability and adverse effects of the test on wages and working conditions of the affected U.S. worker population. Having a defined validity period in combination with the elimination of substitution does not lessen fraud as much as it enhances the validity of the labor market test that was done. Due to a lack of adequate data, however, we were not able to quantify or monetize this important benefit.

Enforcing a 180-day validity period will result in a small decrease in the number of applications dependent on a successful labor market test that are submitted to DHS and DOS. An employer that does not submit the permanent labor certification to DHS within 180 days will need to conduct a new labor market test and, if the test favors an alien, the employer must file a new application with the Department. If the test favors a U.S. worker, then the employer will not submit an application to the Department. Employers will submit fewer applications to DHS and DOS because after the original certifications expire, some of the new labor market tests will favor U.S. workers or may not be further pursued. In these cases, cost savings results from the reduced DHS staff time to review I–140 immigrant petitions and I–485 applications to adjust to permanent resident status. In addition, DOS will have fewer interviews to conduct with aliens seeking a lawful immigrant visa to obtain permanent residence. Because of data limitations, we are not able to provide a quantitative or monetary value of these benefits.<sup>26</sup>

#### Costs

The 180-day validity period imposes several costs to society: Additional job advertising and recruiting from employers, increased employer staff time for filing labor certification applications, and increased staff time at the Department. In addition, a 180-day validity period requires employers to conduct labor market tests that will favor U.S. workers in some cases, which

<sup>26</sup> The 180-day validity period will help deter unscrupulous employers, attorneys, or agents filing permanent labor certification applications with DOL because there will be fewer opportunities to profit off of fraudulent applications. In addition, Department of Justice staff time can be expected to be reduced from avoided investigation and prosecution of fraudulent applications for positions filled by U.S. workers.

results in a small reduction in revenue to DHS from I-140 petitions and I-485 applications and to DOS from immigrant visa applications. We estimate the 10-year discounted costs to society to range between \$132.4 and \$160.8 million.

As described above, approved permanent labor certifications will expire if employers do not file the labor certification in support of an immigrant petition with DHS within 180 calendar days of the date the Department grants certification. If the certification expires, the employer must conduct a new labor market test if it chooses to pursue the foreign labor option. If the test favors a U.S. worker, then the employer will hire a U.S. worker. If the labor market test indicates that no qualified U.S. workers are available, then the employer must resubmit a permanent labor certification application.

A significant cost to employers of the 180-day validity period is the increase in employer staff time to prepare, file, and track labor certification applications. We estimate this cost by multiplying the number of expired certifications leading to labor market tests not favoring U.S. workers by the number of employer staff hours to prepare, file, and track the labor certifications, by the compensation of the employer staff undertaking these activities.<sup>27</sup>

Another significant cost to employers of the 180-day validity period is the additional recruitment efforts, in particular job advertising, as well as the increased employer staff time to arrange for and track recruitment efforts and for receiving, compiling, interviewing, analyzing, and reporting the results of the recruitment. We estimate the costs for preparing recruitment reports by multiplying the staff time required to conduct such activities by the staff's compensation, by the annual number of additional labor certification applications.<sup>28</sup> We estimated the total

<sup>27</sup> As mentioned above, the Department estimated that employers spend 10 staff hours on average preparing, filing, and tracking the labor certifications. We assumed that Human Resource Managers (or their equivalent) conduct this activity for the employer and that their media hourly wage is \$36.52, which was increased by 1.42 to account for employee benefits (source: Bureau of Labor Statistics). We assumed that five (5) percent of all certifications will expire and that 85 percent of the required labor market tests favor aliens, resulting in an additional 4,928 permanent labor certification applications to be filed with DOL.

<sup>28</sup> The Department estimated the cost of a Sunday paper advertisement is \$750. We also estimated it would take an employer 0.5 hours to place the advertisement with the Sunday paper and 0.5 hours to place a job order with the SWA, and 1.5 hours to conduct additional recruiting, as required by PERM. In addition, DOL estimated that the

annual costs to employers for processing labor certifications and additional recruitment efforts to be \$18.5 million per year.

A small cost to the Federal Government resulting from the 180-day validity period is the increased time for Departmental staff time to review the relatively small number of applications that are resubmitted if the original certification expired and subsequent labor market tests favor an alien. If employers resubmit applications, then our staff must spend additional time reviewing an increased number of applications. We estimated this cost by multiplying the time spent reviewing each application by the compensation of a foreign labor certification analyst, by the increased number of applications.<sup>29</sup> We also factored in the potential increase in our staff time to audit additional recruitment reports. We estimated this cost by multiplying the time spent auditing each recruitment report by the average compensation of a DOL auditor by the increased number of recruitment reports that will be audited.<sup>30</sup> We estimated the total annual costs to the Federal government to be \$0.3 million per year.

Finally, DHS and DOS will experience small decreases in revenue

employer would spend 25 hours to arrange for and track recruiting efforts and for receiving, compiling, interviewing, analyzing, and reporting the results of the recruitment. According to the preamble to the PERM Final Rule, it takes an average of one (1) hour for an employer to prepare a recruitment report for each application it files. For purposes of this analysis, we estimated that 10 percent of these applications are audited, which will require an additional hour for the employer to submit the report. We assumed that Human Resources Managers (or their equivalent) conduct this work for the employer and that their median hourly wage is \$36.52, which was increased by 1.42 to account for benefits (source: Bureau of Labor Statistics). This analysis assumes five (5) percent of all certifications will expire and that 85 percent of the required labor market tests favor aliens, resulting in an additional 4,928 permanent labor certification applications to be filed with DOL.

<sup>29</sup> The Department estimated that 70 percent of applications are "clean" and do not raise any audit flags. "Clean" applications require 0.25 hours of our staff time. We assumed that the remaining applications raise audit flags and must be reviewed manually, requiring 4 hours of our staff time. We estimated that the median hourly wage for our staff analysts is \$30.06 (GS 12, step 5, which was escalated by 1.42 to account for employee benefits (source: Bureau of Labor Statistics)). As explained above, we estimated that approximately 4,928 additional permanent labor certification applications will be filed with the Department each year as a result of this provision.

<sup>30</sup> The Department assumed auditors spend two (2) hours to audit recruitment reports. We assumed the median hourly wage for DOL auditors is \$30.06 (GS 12, step 5), which was increased by 1.42 to account for employee benefits (source: Bureau of Labor Statistics). As explained above, we assumed approximately 4,928 additional permanent labor certification applications will be filed with DOL each year as a result of this provision.

from application fees. Since employers must conduct a labor market test after a certification expires and since some of the labor market tests will favor U.S. workers, there will be a slight decrease in the number of Forms I-140 and I-485 that would have been submitted to DHS and immigrant visa applications that would have been submitted to DOS. Because these forms have application fees, DHS and DOS will experience a small decrease in revenue.<sup>31</sup> Due to a lack of adequate data, we could not quantify or monetize these costs.

### 3(B). Validity Period of 45 Days

In the proposed rule, the Department proposed a validity period of 45 calendar days. In response to public comments regarding the hardships associated with a 45-day validity period, we increased the validity period to 180 calendar days. The most important benefit of the validity period is increased employment opportunities for U.S. workers, and the primary cost is to employers that must conduct new labor market tests and file new applications with the Department if approved certifications are not filed with DHS within the validity period and the labor market test favors an alien.

In the section below, the Department analyzed the major benefits and costs. We assumed that twice as many certifications would expire before reaching DHS with a 45-day validity period as compared to a 180-day validity period. We estimated the 10-year discounted benefits associated with a 45-day validity period to be between \$149.6 and \$181.7 million, and the total costs to be between \$264.9 and \$321.7 million. Thus, the net present value over a 10-year time horizon will range from -\$115.2 to -\$140.0 million.

### Benefits

We estimate the monetary value of this benefit by examining the compensation earned by U.S. workers that would not have otherwise been hired. To estimate this benefit, we account for the number of U.S. workers that would be favored by requiring employers to conduct new labor market tests and the compensation of these workers, which includes both their salaries and benefits and reflects the decrease in time that those workers stay unemployed. We estimate this benefit to be \$21.3 million per year.<sup>32</sup>

<sup>31</sup> At time of publication, the DHS form I-140 immigrant petition filing fee is \$195 and the immigrant visa application processing fee charged by DOS is \$335 per person.

<sup>32</sup> The Department estimated of the 115,952 PERM applications filed between July 1, 2005 and

### Costs

The Department assumed that twice as many applications would expire under a 45-day validity period as compared to the 180-day validity period. The Department estimated the costs for a 45-day validity period by assuming the cost per application would be the same but the number of applications submitted by employers would double. We estimate the annual cost to employers to be \$37 million per year. This cost includes additional job advertising, and employer staff time to arrange for and track recruiting efforts, prepare and file certification applications, and prepare and maintain recruitment reports.

The 45-day validity period imposes a cost to the Department resulting from the need for increased foreign labor certification staff time to review additional applications resulting from expired applications. We estimated this cost to be \$0.7 million per year. Also, if employers rush to file the I-140 to satisfy a 45-day rule, this will slow processing at DHS and increase the number of requests for additional evidence issued by that agency. However, due to a lack of adequate data, we were unable to quantify or monetize this cost.

#### 4. Prohibition on the Sale, Barter, or Purchase of Applications for Permanent Labor Certification and of Approved Permanent Labor Certifications, and on Related Payments

The Department is prohibiting improper commerce and certain payments related to permanent labor certification applications and certifications. We estimate that the 10-year discounted benefits associated with this provision of the Final Rule will be between \$16.9 and \$20.5 million. Due to a lack of adequate data, we were unable to specifically quantify the costs to this provision of the Final Rule.

### Benefits

The prohibition on the sale, barter, or purchase of applications or certifications has several important benefits to society: Improved program integrity, a small cost savings to employers in the form of increased staff time to clear up their names when they are unknowingly used for fraudulent

applications, and cost savings to the Federal Government in the form of reduced staff time resulting from the reduction in fraudulent applications. We estimate the cost savings to be \$2.4 million per year.

On the "black market," employers or agents agree to broker applications for permanent labor certification on behalf of aliens in exchange for payment. Such payments are not compatible with the purposes of the permanent labor certification program and may indicate a lack of a bona fide job opportunity that is and has been truly open to U.S. workers. The Department is instituting this ban because allowing the sale of a government benefit to continue is simply bad government. Due to a lack of adequate data, we were not able to quantify or monetize the benefits to society of increased program integrity as a result of this provision of the Final Rule.

The Department of Justice, DHS and DOL OIG spend a significant amount of time and resources to investigate fraudulent applications. Some of these applications are submitted by unscrupulous attorneys or agents filing on behalf of an alien, although the business named on the application did not provide authorization and may not even have been aware that its name was being used. When the Federal Government determines the application is fraudulent, the employer is often placed in an uncomfortable, precarious position and required to explain to the Department that it did not authorize the use of its name in the application.

We estimate this cost savings by calculating the monetary value of the increase in employer staff time to discuss the findings and write an explanation to the Department. We estimate this cost savings by multiplying the staff time required to conduct such activities by the staff compensation, by the number of fraudulent applications submitted to the Department. We estimate the annual cost savings to employers to be \$2.4 million per year.<sup>33</sup>

Enforcing a prohibition on the sale, barter, or purchase of applications of permanent labor certifications or

approved permanent labor certifications will deter unscrupulous attorneys, employers, and agents from submitting fraudulent applications. Thus, all else being equal, the prohibition will result in fewer applications that are submitted to the Department, DHS, and DOS. Cost savings result from reduced OIG staff time to review and audit permanent labor certification applications and reduced DHS staff time to review I-140 and I-485 applications. In addition, DOS will have fewer interviews to conduct with aliens seeking permanent residence. Finally, DOJ staff time can be expected to be reduced from avoided investigation and prosecution of fraudulent applications (for example, under existing racketeering laws). Because of data limitations, we were not able to quantify or monetize this important benefit.

### Costs

The prohibition of the sale, barter, or purchase of permanent labor applications and certifications imposes several costs to the Federal Government in terms of increased DOJ staff time to prosecute unscrupulous agents, attorneys, or employers that submit fraudulent applications, and a small reduction in revenue to DHS from I-140 petitions and I-485 applications and to DOS from immigrant visa applications. Due to a lack of adequate data, we were unable to quantify the costs to this provision of the Final Rule.

The main cost to the Federal Government is the increased DOJ staff time to investigate and prosecute unscrupulous agents, attorneys, or employers suspected of violating this prohibition. In addition, DHS and DOS will experience small decreases in revenue from application fees. Since unscrupulous agents, employers, and attorneys will no longer submit fraudulent applications to the Department, there will be a slight decrease in the number of I-140 petitions and I-485 applications that would have been submitted to DHS and an immigrant visa application that would have been submitted to DOS. Because both these forms have application fees, DHS and DOS will experience small decreases in revenue.<sup>34</sup>

<sup>34</sup> The DHS form I-140 application fee is \$195 per application and the immigrant visa application processing fee is \$335 per person. The Department did not monetize the total estimated reduction in revenue to DHS and DOS due to data limitations. In addition, the costs may be offset by the cost savings, since staff at DHS and DOS will spend less time processing applications.

June 30, 2006, 10 percent would expire prior to filing with DHS. In addition, we estimated 15 percent of labor market tests favor U.S. workers. The average annual wage on permanent labor certifications applications in the PERM database is \$69,000, which was increased by 1.42 to account for employee benefits (source: Bureau of Labor Statistics). We assumed workers would have been unemployed for an additional 1.5 months.

<sup>33</sup> The Department estimated that 10 percent of applications are fraudulent and that half of these fraudulent applications involve businesses whose names are used without authorization. We also estimated that a Human Resources Manager or their equivalent staff spends on average eight (8) hours to discuss the findings and write a letter to DOL. This analysis assumes Human Resources Managers (or their equivalent) conduct this work for the employer and that their median hourly wage is \$36.52, which we increased by 1.42 to account for employee benefits (source: Bureau of Labor Statistics).

### Issues Raised by Public Comment

At least two commenters stated that a large financial impact would result from the proposed rule's prohibition on payment or reimbursement of the employer's attorneys' fees or other employer costs. One of those commenting reported that it "heard [f]rom several large companies and universities" that the application process may cost as much as \$15,000 to \$20,000, including attorneys' fees, although it conceded that the numbers were informal and not based on systematic research.

The Department has considered comments from several sources regarding the prohibition on payment or reimbursement by alien workers of the employer's expenses. We believe there are compelling reasons to maintain in substantial part the prohibitions proposed in the NPRM, including the prohibition against employers seeking reimbursement of employers' attorneys' fees. The Department has detailed these reasons above. We reiterate, in addition, that assistance of counsel is at the employer's option, and not a requirement of the program.

The ban on sale, barter, purchase and certain payments related to permanent labor certifications is also justified for its social purpose, which is to prevent labor certifications from becoming a commodity that can be sold by unscrupulous employers, attorneys, and agents to aliens seeking a "green card." The public disclosure that permanent labor certifications cannot be sold, bartered, or purchased reduces information asymmetry in the sense that alien beneficiaries are now informed that they should no longer be purchasing these certifications under any circumstances.

### 5. Debarment

The Department may suspend processing of any permanent labor certification application if an employer, attorney, or agent connected to that application is involved in either possible fraud or willful misrepresentation or is named in a criminal indictment or information related to the permanent labor certification program. The Department has instituted a public debarment mechanism to effectively deter individuals or entities from engaging in fraudulent permanent labor certification activities or prohibited transactions, and provide employers who seek assistance from attorneys or agents with better information about which individuals or entities have committed fraud or abuse. In addition, this regulatory action will

increase government efficiency in processing legitimate permanent labor certification applications as debarred employers, attorneys, or agents are prevented from participating in the program for a specified period of time (i.e., up to three years).

We estimate that the 10-year discounted benefits associated with this provision of the Final Rule ranges from \$175.9 to \$213.6 million. Due to a lack of adequate data, we were unable to quantify the costs to this provision of the Final Rule.

### Benefits

The debarment provision has several important benefits to society, including improved program integrity and cost savings to the Federal Government in the form of reduced staff time resulting from the reduction in fraudulent applications.

We are implementing this provision to promote the program's integrity and to assist the Department in obtaining compliance with existing program requirements and this rulemaking. Given the breadth and increased sophistication of the immigration fraud that has been identified in the recent past, the Department added this provision to attain the necessary flexibility to respond to potential improprieties in labor certification filings.

Debarment of unscrupulous employers, attorneys, or agents who willfully or repeatedly violate program requirements will prevent such conduct in the future. To the extent that these provisions deter, prevent, or forestall inaccurate, inappropriate, or fraudulent applications, debarment will reduce the number of applications received by the Department, all other factors being constant. We estimate this cost savings by multiplying the number of fraudulent applications submitted by the average number of hours spent by foreign labor certification staff on each fraudulent application, by the average compensation of staff reviewing fraudulent applications. We estimate the annual cost savings to the Federal Government associated with debarment to be \$25 million per year.<sup>35</sup>

<sup>35</sup> The benefits estimated by the section of this analysis covering the elimination of substitution assume only the fraud associated with substitution and thereby eliminated by prohibiting the practice. The benefits estimated by this section—covering the institution of debarment—considers the benefits of eliminating non-substitution fraud as well as the benefits from the substitution analysis. The Department estimated that 10 percent of applications are fraudulent and would not be filed because the employer or attorney/agent would be debarred from filing applications. We estimated the cost savings by multiplying the number of

In addition, the Department anticipates that there will be other cost savings associated with the debarment provision but, because of data limitations, no quantitative or monetary values could be provided. One portion of cost savings results from reduced DHS staff time to review I-140 petitions and I-485 applications. In addition, DOS will have fewer interviews to conduct with aliens seeking lawful residence.

### Costs

The debarment provision imposes a small cost to the Federal Government in the form of reduced revenue to DHS and DOS related to fewer I-140 petitions and I-485 applications and immigrant visa applications. We were unable to monetize these costs because of inadequate data.

The cost to the Department associated with debarment can be expected to be low, since we have experience creating and implementing electronic tracking systems to prevent debarred individuals from filing applications with the Department. For example, the Department's H-1B Labor Condition Application (LCA) System already includes a "debarment" table that is automatically updated with the names of debarred individuals. LCAs filed by individuals on the list are electronically flagged, and there is minimal staff time associated with this process. Although the Department does not possess data to estimate this cost, we do not believe that enforcing the debarment provisions in this rule will require a significant amount of resources.

Finally, DHS and DOS will experience small decreases in revenue from application fees. Debarred individuals will not be able to submit applications to the Department, and thus will be unable to proceed to the next steps of the process in DHS and DOS. Because these forms have application fees, DHS and DOS will experience a small decrease in revenue.<sup>36</sup> The Department does not have sufficient data to estimate this cost.

fraudulent applications that were not fraudulent substitutions by the average review time per fraudulent application (40 hours). This estimate does not include cost savings from the decrease in fraudulent substitutions to avoid double counting the cost savings that are already accounted for in the first provision of this rule, the ban on substitution. The average compensation of DOL staff reviewing the fraudulent applications (staff with pay grade GS 14, step 5) is \$42.24, which was increased by 1.42 to account for employee benefits.

<sup>36</sup> The DHS Form I-140 immigrant petition filing fee is \$195, and the Form I-485 filing fee is \$395. The immigrant visa application processing fee charged by DOS is \$335 per person.

*D. Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The standards for determining whether a rule is a major rule as defined by section 804 of SBREFA are similar to those used to determine whether a rule is an "economically significant rule under Executive Order 12866." Because we certified that this is not a major rule under Executive Order 12866, we also certify it is not a major rule under SBREFA. The rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

One commenter took the position that the rule would constitute a "major rule" within the meaning of SBREFA. The commenter assumed that employers must spend approximately \$10,000 for each new application that must be submitted in light of the substitution prohibition. Based on that analysis, and noting that as many 100,000 applications are filed each year, the commenter argues that the impact could amount to \$1 billion.

While we are aware of and sensitive to the costs employers incur as part of the labor certification process, our regulatory analysis, as detailed above, indicates the rule will not have a significant economic effect. Separately, as pointed out earlier in this preamble, the costs borne by employers are not unanticipated by the statute. Therefore, under SBREFA, the rule is not "major."

*E. Executive Order 13132*

This Final Rule will not have a substantial direct effect on the states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, we have determined this rule does not have sufficient federalism implications to warrant the preparation of a summary impact statement. The Department received no comments that addressed Executive Order 13132.

*F. Executive Order 12988*

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988. The

Department received no comments regarding this Executive Order.

*G. Paperwork Reduction Act*

The collection of information under part 656 is currently approved under OMB control number 1205-0015. This Final Rule does not include a substantive or material modification of that collection of information, because it will not add to or change paperwork requirements for employers applying for permanent labor certification. The only consequence of this amendment eliminating the current practice allowing substitution of alien beneficiaries on applications and approved permanent labor certifications is to require those relatively few employers that could have availed themselves of the substitution practice to file new applications on behalf of alien beneficiaries. The Department does not anticipate any paperwork burden resulting from the creation of a 180-day validity period for approved certifications, the prohibition on sale, purchase, and barter of applications and labor certifications and on related payments, the ban on changes to applications filed under the new streamlined permanent labor certification procedures, nor the additional enforcement mechanisms in this Final Rule. The Department anticipates an insignificant increase in volume of permanent labor certification applications filed as a result of either employers withdrawing and then filing a corrected application or employers allowing a certification to expire and then filing a new application. In either situation, employers could avoid the need to file additional applications by proofreading and complying with regulatory requirements. The Department did not receive comments related to this section.

*H. Assessment of Federal Regulations and Policies on Families*

This Final Rule does not affect family well-being. The Department did not receive any comments related to this section.

*I. Administrative Procedure Act (APA)*

The Department has made this regulation available for notice and comment and, consequently, has complied with the relevant provisions of the Administrative Procedure Act.

*J. Catalog of Federal Domestic Assistance Number*

This program is listed in the *Catalog of Federal Domestic Assistance* at Number 17.203, "Certification for Immigrant Workers."

**List of Subjects in 20 CFR Part 656**

Administrative practice and procedure, Aliens, Employment, Employment and training, Enforcement, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

■ Accordingly, for the reasons stated in the preamble, part 656 of Chapter V, Title 20, Code of Federal Regulations, is amended as follows:

**PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES**

■ 1. The authority citation for part 656 is revised to read as follows:

**Authority:** 8 U.S.C. 1182(a)(5)(A), 1189(p)(1); section 122, Pub. L. 101-649, 109 Stat. 4978; and Title IV, Pub. L. 105-277, 112 Stat. 2681.

■ 2. Amend § 656.3 to add the following definitions:

**§ 656.3 Definitions, for purposes of this part, of terms used in this part.**

\* \* \* \* \*

*Barter, for purposes of an Application for Permanent Employment Certification (Form ETA 9089) or an Application for Alien Labor Certification (Form ETA 750), means the transfer of ownership of a labor certification application or certification from one person to another by voluntary act or agreement in exchange for a commodity, service, property or other valuable consideration.*

\* \* \* \* \*

*Purchase, for purposes of an Application for Permanent Employment Certification (Form ETA 9089) or an Application for Alien Labor Certification (Form ETA 750), means the transfer of ownership of a labor certification application or certification from one person to another by voluntary act and agreement, based on a valuable consideration.*

*Sale, for purposes of an Application for Permanent Employment Certification (Form ETA 9089) or an Application for Alien Labor Certification (Form ETA 750), means an agreement between two parties, called, respectively, the seller (or vendor) and the buyer (or purchaser) by which the seller, in consideration of the payment or promise of payment of a certain price in money terms, transfers ownership of a labor certification application or certification to the buyer.*

\* \* \* \* \*

■ 3. Add § 656.11 to read as follows:

**§ 656.11 Substitutions and modifications to applications.**

(a) Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

(b) Requests for modifications to an application will not be accepted for applications submitted after July 16, 2007.

■ 4. Add § 656.12 to read as follows:

**§ 656.12 Improper commerce and payment.**

The following provision applies to applications filed under both this part and 20 CFR part 656 in effect prior to March 28, 2005, and to any certification resulting from those applications:

(a) Applications for permanent labor certification and approved labor certifications are not articles of commerce. They shall not be offered for sale, barter or purchase by individuals or entities. Any evidence that an application for permanent labor certification or an approved labor certification has been sold, bartered, or purchased shall be grounds for investigation under this part and may be grounds for denial under § 656.24, revocation under § 656.32, debarment under § 656.31(f), or any combination thereof.

(b) An employer must not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application, except when work to be performed by the alien in connection with the job opportunity would benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer. For purposes of this paragraph (b), payment includes, but is not limited to, monetary payments; wage concessions, including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor.

(c) Evidence that an employer has sought or received payment from any source in connection with an application for permanent labor certification or an approved labor certification, except for a third party to whose benefit work to be performed in connection with the job opportunity would accrue, based on that person's or entity's established business relationship with the employer, shall be grounds for investigation under this part or any appropriate Government agency's procedures, and may be grounds for denial under § 656.32, revocation under § 656.32, debarment under § 656.31(f), or any combination thereof.

■ 5. Amend § 656.24 by revising paragraph (g) to read as follows:

**§ 656.24 Labor certification determinations.**

\* \* \* \* \*

(g)(1) The employer may request reconsideration within 30 days from the date of issuance of the denial.

(2) For applications submitted after July 16, 2007, a request for reconsideration may include only:

(i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or

(ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of § 656.10(f).

(3) Paragraphs (g)(1) and (2) of this section notwithstanding, the Certifying Officer will not grant any request for reconsideration where the deficiency that caused denial resulted from the applicant's disregard of a system prompt or other direct instruction.

(4) The Certifying Officer may, in his or her discretion, reconsider the determination or treat it as a request for review under § 656.26(a).

■ 6. Amend § 656.26 by revising paragraph (a) and adding a new paragraph (c), to read as follows:

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

(a) *Request for review.* (1) If a labor certification is denied, if a labor certification is revoked pursuant to § 656.32, or if a debarment is issued under § 656.31(f), a request for review of the denial, revocation, or debarment may be made to the Board of Alien

Labor Certification Appeals by the employer or debarred person or entity by making a request for such an administrative review in accordance with the procedures provided in paragraph (a) of this section. In the case of a finding of debarment, receipt by the Department of a request for review, if made in accordance with this section, shall stay the debarment until such time as the review has been completed and a decision rendered thereon.

(2) A request for review of a denial or revocation:

(i) Must be sent within 30 days of the date of the determination to the Certifying Officer who denied the application or revoked the certification;

(ii) Must clearly identify the particular labor certification determination for which review is sought;

(iii) Must set forth the particular grounds for the request; and

(iv) Must include a copy of the Final Determination.

(3) A request for review of debarment:

(i) Must be sent to the Administrator, Office of Foreign Labor Certification, within 30 days of the date of the debarment determination;

(ii) Must clearly identify the particular debarment determination for which review is sought;

(iii) Must set forth the particular grounds for the request; and

(iv) Must include a copy of the Notice of Debarment.

(4)(i) With respect to a denial of the request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based.

(ii) With respect to a revocation or a debarment determination, the BALCA proceeding may be de novo.

\* \* \* \* \*

(c) *Debarment Appeal File.* Upon the receipt of a request for review of debarment, the Administrator, Office of Foreign Labor Certification, immediately must assemble an indexed Appeal File:

(1) The Appeal File must be in chronological order, must have the index on top followed by the most recent document, and must have consecutively numbered pages. The Appeal File must contain the request for review, the complete application file(s), and copies of all written materials, such as pertinent parts and pages of surveys and/or reports or documents received from any court, DHS, or the Department of State, upon which the debarment was based.

(2) The Administrator, Office of Foreign Labor Certification, must send the Appeal File to the Board of Alien Labor Certification Appeals, Office of Administrative Law Judges, 800 K St., NW., Suite 400-N, Washington, DC 20001-8002.

(3) The Administrator, Office of Foreign Labor Certification, must send a copy of the Appeal File to the debarred person or entity. The debarred person or entity may furnish or suggest directly to the Board of Alien Labor Certification Appeals the addition of any documentation that is not in the Appeal File. The debarred person or entity must submit such documentation in writing, and must send a copy to the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210.

■ 7. Amend § 656.30 by: revising paragraphs (a), (b), and (c); and adding a new paragraph (e)(3), to read as follows:

**§ 656.30 Validity of and invalidation of labor certifications.**

(a) *Priority Date.* (1) The filing date for a Schedule A occupation or shepherders is the date the application was dated by the Immigration Officer.

(2) The filing date, established under § 656.17(c), of an approved labor certification may be used as a priority date by the Department of Homeland Security and the Department of State, as appropriate.

(b) *Expiration of labor certifications.* For certifications resulting from applications filed under this part and 20 CFR part 656 in effect prior to March 28, 2005, the following applies:

(1) An approved permanent labor certification granted on or after July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of the date the Department of Labor granted the certification.

(2) An approved permanent labor certification granted before July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of July 16, 2007.

(c) *Scope of validity.* For certifications resulting from applications filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, the following applies:

(1) A permanent labor certification for a Schedule A occupation or shepherders is valid only for the occupation set forth on the *Application for Alien Employment Certification*

(Form ETA 750) or the *Application for Permanent Employment Certification* (Form ETA 9089) and only for the alien named on the original application, unless a substitution was approved prior to July 16, 2007. The certification is valid throughout the United States unless the certification contains a geographic limitation.

(2) A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the *Application for Alien Employment Certification* (Form ETA 750) or the *Application for Permanent Employment Certification* (Form ETA 9089).

\* \* \* \* \*

(e) \* \* \*  
(3) A duplicate labor certification shall be issued by the Certifying Officer with the same filing and expiration dates, as described in paragraphs (a) and (b) of this section, as the original approved labor certification.

■ 8. Revise § 656.31 to read as follows:

**§ 656.31 Labor certification applications involving fraud, willful misrepresentation, or violations of this part.**

The following provisions apply to applications filed under both this part and 20 CFR part 656 in effect prior to March 28, 2005, and to any certifications resulting from those applications.

(a) *Denial.* A Certifying Officer may deny any application for permanent labor certification if the officer finds the application contains false statements, is fraudulent, or was otherwise submitted in violation of the Department's permanent labor certification regulations.

(b) *Possible fraud or willful misrepresentation.* (1) If the Department learns an employer, attorney, or agent is involved in possible fraud or willful misrepresentation in connection with the permanent labor certification program, the Department will refer the matter to the Department of Justice, Department of Homeland Security, or other government entity, as appropriate, for investigation, and send a copy of the referral to the Department of Labor's Office of Inspector General (OIG). In these cases, or if the Department learns an employer, attorney, or agent is under investigation by the Department of Justice, Department of Homeland Security, or other government entity for possible fraud or willful misrepresentation in connection with the permanent labor certification program, the Department may suspend

processing of any permanent labor certification application involving such employer, attorney, or agent until completion of any investigation and/or judicial proceedings. Unless the investigatory agency, in writing, requests the Department to do otherwise, the Department shall provide written notification to the employer of the suspension in processing.

(2) A suspension pursuant to paragraph (b)(1) of this section may last initially for up to 180 days. No later than 180 days after the suspension began, if no criminal indictment or information has been issued, or judicial proceedings have not been concluded, the National Certifying Officer may resume processing some or all of the applications, or may extend the suspension in processing until completion of any investigation and/or judicial proceedings.

(c) *Criminal indictment or information.* If the Department learns that an employer, attorney, or agent is named in a criminal indictment or information in connection with the permanent labor certification program, the processing of applications related to that employer, attorney, or agent may be suspended until the judicial process is completed. Unless the investigatory or prosecutorial agency, in writing, requests the Department to do otherwise, the Department shall provide written notification to the employer of the suspension in processing.

(d) *No finding of fraud or willful misrepresentation.* If an employer, attorney, or agent is acquitted of fraud or willful misrepresentation charges, or if such criminal charges are withdrawn or otherwise fail to result in a finding of fraud or willful misrepresentation, the Certifying Officer shall decide each pending permanent labor certification application related to that employer, attorney, or agent on the merits of the application.

(e) *Finding of fraud or willful misrepresentation.* If an employer, attorney, or agent is found to have committed fraud or willful misrepresentation involving the permanent labor certification program, whether by a court, the Department of State or DHS, as referenced in § 656.30(d), or through other proceedings:

(1) Any suspension of processing of pending applications related to that employer, attorney, or agent will terminate.

(2) The Certifying Officer will decide each such application on its merits, and may deny any such application as provided in § 656.24 and in paragraph (a) of this section.

(3) In the case of a pending application involving an attorney or agent found to have committed fraud or willful misrepresentation, DOL will notify the employer associated with that application of the finding and require the employer to notify DOL in writing, within 30 days of the notification, whether the employer will withdraw the application, designate a new attorney or agent, or continue the application without representation. Failure of the employer to respond within 30 days of the notification will result in a denial. If the employer elects to continue representation by the attorney or agent, DOL will suspend processing of affected applications while debarment proceedings are conducted under paragraph (f) of this section.

(f) *Debarment.* (1) No later than six years after the date of filing of the labor certification application that is the basis for the finding, or, if such basis requires a pattern or practice as provided in paragraphs (f)(1)(iii), (iv), and (v) of this section, no later than six years after the date of filing of the last labor certification application which constitutes a part of the pattern or practice, the Administrator, Office of Foreign Labor Certification, may issue to an employer, attorney, agent, or any combination thereof a Notice of Debarment from the permanent labor certification program for a reasonable

period of no more than three years, based upon any action that was prohibited at the time the action occurred, upon determining the employer, attorney, or agent has participated in or facilitated one or more of the following:

(i) The sale, barter, or purchase of permanent labor applications or certifications, or any other action prohibited under § 656.12;

(ii) The willful provision or willful assistance in the provision of false or inaccurate information in applying for permanent labor certification;

(iii) A pattern or practice of a failure to comply with the terms of the Form ETA 9089 or Form ETA 750;

(iv) A pattern or practice of failure to comply in the audit process pursuant to § 656.20;

(v) A pattern or practice of failure to comply in the supervised recruitment process pursuant to § 656.21; or

(vi) Conduct resulting in a determination by a court, DHS or the Department of State of fraud or willful misrepresentation involving a permanent labor certification application, as referenced in § 656.31(e).

(2) The Notice of Debarment shall be in writing; shall state the reason for the debarment finding, including a detailed explanation of how the employer, attorney or agent has participated in or facilitated one or more of the actions

listed in paragraphs (f)(1)(i) through (v) of this section; shall state the start date and term of the debarment; and shall identify appeal opportunities under § 656.26. The debarment shall take effect on the start date identified in the Notice of Debarment unless a request for review is filed within the time permitted by § 656.26. DOL will notify DHS and the Department of State regarding any Notice of Debarment.

(g) *False Statements.* To knowingly and willfully furnish any false information in the preparation of the *Application for Permanent Employment Certification* (Form ETA 9089) or the *Application for Alien Employment Certification* (Form ETA 750) and any supporting documentation, or to aid, abet, or counsel another to do so is a Federal offense, punishable by fine or imprisonment up to five years, or both under 18 U.S.C. 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S.C. 1546 and 1621.

Signed in Washington, DC, this 1st day of May, 2007.

**Emily Stover DeRocco,**

*Assistant Secretary, Employment and Training Administration.*

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