




**U.S. Citizenship  
and Immigration  
Services**

HQ 70/6.2  
AD 07-26

SEP 14 2009

## Memorandum

TO: Field Leadership

FROM: Donald Neufeld   
Acting Associate Director, Domestic Operations

SUBJECT: Revisions to Adjudicator's Field Manual (AFM).  
Chapter 22.2(b) General Form I-140 Issues (AFM Update AD07-26)

### I. Purpose

This memorandum amends the Adjudicator's Field Manual, by providing or updating guidance on:

- The determination of whether a particular U.S. employer falls within the definition of INA section 203(b)(1)(B), thus allowing United States Citizenship and Immigration Services (USCIS) to grant, if otherwise approvable, a first preference (EB-1) petition filed by that employer on behalf of an outstanding professor or researcher in connection with an offer of permanent employment. See also 8 CFR 204.5(i)(3)(iii).
- Procedures for determining whether a labor certification has been filed with a Form I-140 petition during its validity period;
- A technical correction needed for the sample Notice of Posting in section 22.2(b)(4) of the AFM, which was published on September 12, 2006. The sample Notice of Posting did not indicate that the posting notice must contain the employer's name which is required for labor certifications filed with the Department of Labor (DOL) pursuant to 20 CFR 656.17 together with 20 CFR 656.10;

- Various issues relating to labor certification applications approved by DOL and filed in support of Form I-140 petitions.

## II. New Field Guidance

### A. **Qualifying U.S. Employers in connection with adjudication of Form I-140 Petitions for Outstanding Professors or Researchers under Section 203(b)(1)(B) of the Act**

USCIS regulations require an offer of employment as initial evidence in support of a first preference petition filed on behalf of an “E12” outstanding professor or researcher. See 8 CFR 204.5(i)(3)(iii). The offer of employment be in the form of a letter from the prospective U.S. employer to the beneficiary and the offer must state that the employer is offering the beneficiary employment in a tenured or tenure-track teaching position or a “permanent” research position in the alien’s academic field. See 8 CFR 204.5(i)(3)(iii)(A)-(C).

USCIS must determine, in connection with the filing of a first preference petition on behalf of an outstanding professor or researcher, whether a particular U.S. employer falls within the definition of INA section 203(b)(1)(B).<sup>1</sup> The statute requires that the beneficiary of an E12 petition must be seeking a position with a university, institution of higher education or a department, division, or institute of a private employer if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field. *Id.*; see also 8 CFR 204.5(i)(3)(iii).

In general, government agencies at the federal, state, or local level will not fit within the definition of 203(b)(1)(B) unless the government agency is shown to be a U.S. university or an institution of higher learning. Thus, USCIS may only approve an E12 petition in instances where the offer of permanent employment is from a government agency, if that agency can establish that it is a U.S. university or an institution of higher learning. Government agencies do not qualify as “private” employers.<sup>2</sup>

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<sup>1</sup> Section 203(b)(1)(B)(iii)(I)-(III) of the Immigration and Nationality Act (“INA”) defines employment for outstanding professors and researchers as:

- (I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area;
- (II) for a comparable position with a university or institution of higher education to conduct research in the area; or
- (III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

<sup>2</sup> USCIS must presume that the use of the word “private” in the statute is not superfluous and, thus, that it has some meaning. See *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209 (1997); *Bailey v. U.S.*, 516 U.S. 137, 145 (1995). Black’s Law Dictionary 1213 (7<sup>th</sup> ed. 1999) defines “private” as “[r]elating or belonging to an individual, as opposed to the public or the government.”

Note: Government agencies which do not fit the definition of 203(b)(1)(b), may have other available immigration avenues for offers of permanent employment to professors or researchers. For example, assuming all of the eligibility requirements for that visa preference category have been met, a government agency may request the E11, Alien of Extraordinary Ability visa preference classification pursuant to Section 203(b)(1)(A) of the INA.

**B. Approved Labor Certification Validity for Labor Certifications with an Ending Validity Date that Falls on a Saturday, Sunday or Federal Legal Holiday**

DOL has established a 180-day validity period for approved labor certifications. See 20 CFR 656.30(b). An approved labor certification must be filed in support of a Form I-140 petition during the labor certification's validity period. DOL has not published any guidance regarding the treatment of labor certifications that effectively have a validity period of less than 180 days due to an ending validity date that falls on a Saturday, Sunday, or a federal legal holiday. USCIS will accept the filing of I-140 petitions where the supporting labor certification validity period ends on a Saturday, Sunday or federal legal holiday on the next business day, i.e., the next day that is not a Saturday, Sunday or federal legal holiday. This action is most consistent with existing USCIS regulations, which allow cut-off dates for the filing of petitions and applications that fall on a Saturday, Sunday or federal legal holiday to be extended until the next business day. See 8 CFR 1.1(h). This procedure provides petitioning employers the benefit of the full 180 day validity period for approved labor certifications established by DOL.

**III. AFM Update**

Accordingly, the Adjudicator's Field Manual is revised as follows:

- 1. Chapter 22.2 (b)(3)(D) through (F) are revised to read as follows:

**Chapter 22.2 Employment-Based Petitions**

(D) Transition to the PERM Labor Certification System DOL's permanent labor certification system (PERM), implemented on March 28, 2005, effectively eliminated the old labor certification system whereby employers had an option of filing labor certification applications under supervised recruitment or reduction in recruitment rules. The PERM application Form ETA-9089, which can be filed electronically or by mail, replaced the Form ETA-750.

(E) Labor Certifications filed with DOL on or after March 28, 2005. The Application for Permanent Employment Certification (Form ETA-9089) replaced the Application for Alien Employment Certification (Form ETA-750) on March 28, 2005. (See 20 CFR 656.30(a) Form ETA-9089 details the specifics of the job offer and the alien beneficiary that were contained in the ETA-750 Part A and Part B. The ETA-9089 may be filed with DOL through the mail or it may be filed electronically. To be valid, the Form ETA-9089 must be signed by the alien beneficiary in Section L, the form preparer, if any, in Section M and the U.S.

employer in Section N. It must also contain the DOL certification stamp; and be signed and dated by the DOL certifying officer in Section O of the form.

**Exception:** Until June 1, 2008, employers filing applications on behalf of aliens to be employed as professional athletes on professional sports teams used special procedures that were put into place prior to the implementation of the PERM regulations. They filed their applications using the Form ETA-750 and must have filed the applications at DOL-ETA's national office in Washington, DC. DOL provided notice, that as of June 1, 2008, employers filing applications on behalf of aliens to be employed as professional athletes on professional sports teams must file applications directly with the Atlanta National Processing Center. (See DOL Federal Register notice, *Non-Electronic Filing of Applications for Permanent and Temporary Foreign Labor Certification*, March 5, 2008, (73 FR 11954).

U.S. employers commonly misperceive the scope and meaning of an approved labor certification. An approved labor certification is not evidence that DOL has certified that the alien beneficiary named on the labor certification qualifies for the position. Only USCIS has the authority to determine qualifications for nonimmigrant and immigrant classifications. An approved labor certification means that the petitioning employer made a good faith effort to test the labor market and demonstrated to DOL that there were no qualified, able, and available U.S. workers for the position.

You must determine whether the beneficiary has met the minimum education, training, and experience requirements of the labor certification at the time the application for labor certification was filed with DOL. You cannot approve a petition for a preference classification if the beneficiary was not fully qualified for the preference by the priority date of the labor certification (See *Matter of Katigbak* [REDACTED] *Matter of Wing's Tea House* [REDACTED]).

#### (F) Validity of Approved Labor Certifications

(i) DOL 180 Day Labor Certification Validity Period. DOL amended its regulations at 20 CFR part 656 on May 17, 2007, which took effect on July 16, 2007 (71 FR 27904). DOL established a 180 day validity period for individual labor certifications approved on or after July 16, 2007, as well as an implementation period for the imposition of a validity period on labor certifications that were approved prior to July 16, 2007. An approved labor certification must be submitted in support of a Form I-140 petition during the validity period of the labor certification. See 20 CFR 656.30(b).

USCIS will reject Form I-140 petitions that require an approved labor certification if the labor certification has expired, or if the Form I-140 is filed without the approved labor certification. USCIS will deny a petition that was inadvertently accepted without a required, valid labor certification.

**Exception:** USCIS will continue to accept amended or duplicate Form I-140 petitions that are filed with a copy of a labor certification that is expired at the time the amended or duplicate Form I-140 petition is filed, **if the original labor certification was submitted in support of a previously filed petition during the labor certification's validity period.** These filings may occur when:

- A new petition is required due to a successor-in-interest employer change;
- The petitioning employer wishes to file a new petition subsequent to the denial, revocation or abandonment of the previously filed petition, and the labor certification was not invalidated due to material misrepresentation or fraud relating to the labor certification application<sup>3</sup>;
- An amended petition is filed to request a different visa classification than the visa classification requested in the previously filed petition, or;
- The previously filed Form I-140 petition has been determined to have been lost by USCIS or DOS.

In accordance with 8 C.F.R. § 103.1(f)(3)(iii)(B) (as in effect on February 28, 2003), petitioning employers may not file an appeal of USCIS's decision to deny a Form I-140 petition that is filed with an expired labor certification issued by DOL.

Validity of Labor Certifications that were Approved by DOL Prior to July 16, 2007: 20 CFR 656.30(b)(2) established an implementation period for the continued validity of labor certifications that were approved by DOL prior to July 16, 2007. The labor certifications had to have been submitted in support of an I-140 petition with USCIS by January 12, 2008.

Validity of Labor Certifications that were or are Approved by DOL On or After July 16, 2007: 20 CFR 656.30(b)(1) provides for a 180-day validity period for approved labor certifications. Petitioning employers have 180 calendar days after the date of the

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<sup>3</sup> See 20 CFR 656.31 for Form ETA-750s filed prior to March 28, 2005 or 20 CFR 656.30(d) for Form ETA-9089s filed on or after March 28, 2005.

approval of the labor certification application by DOL within which to submit the labor certification in support of a Form I-140 petition with USCIS.

**(ii) Labor Certification Validity for Labor Certifications with an Ending Validity Date that Falls on a Saturday, Sunday or Federal Legal Holiday.** An approved labor certification must be filed in support of a Form I-140 petition during the validity period established by DOL. The ending validity date of a labor certification may fall on a Saturday, Sunday, or a federal legal holiday. In those instances, a Form I-140 cannot be filed on the ending validity date of the labor certification (using USCIS' paper-based filing process) as USCIS does not accept the filing of paper-based petitions on those days. USCIS consulted with DOL and determined that DOL has no published guidance regarding the validity of labor certifications that expire on a Saturday, Sunday, or federal legal holiday. This action is most consistent with existing USCIS regulations, which allow cut-off dates for the filing of petitions and applications that fall on a Saturday, Sunday or federal legal holiday to be extended until the next business day. See 8 CFR 1.1(h). This procedure provides petitioning employers the benefit of the full 180 day validity period for approved labor certifications established by DOL.

**Note:** E-filed petitions are considered filed at the time that they are e-filed so are not affected by service center mailroom closures.

➤ 2. Chapter 22.2 (b)(4)(C)(3)(v) is revised to read as follows:

(v) **Sample Notice of Posting.**

There is no specific form that petitioning employers must use to comply with the notice of posting requirements for Schedule A petitions. The following is a **sample** notice of posting which petitioners may elect to use for their posting notices. USCIS worked with DOL to develop the sample as a customer service convenience. However, the sample notice that was initially published in this chapter on September 12, 2006 did not contain a field for the name of the petitioning organization as required by 20 CFR 656.17 and 20 CFR 656.10, for non-Schedule A posting notices. The current sample now contains a field for the employer's name, though it is not required to establish compliance with the notice of posting requirements for Schedule A petitions filed with USCIS.

Adjudicators should accept posting notices that are modeled after the sample, but should not require use of the sample. Petitioning employers may use other forms as long as they comply with the DOL regulations. Petitions already approved should not be reopened and revoked for failure to comply with posting requirements.

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**SAMPLE NOTICE OF FILING OF APPLICATION UNDER THE U.S. DEPARTMENT OF LABOR'S PERMANENT LABOR CERTIFICATION PROGRAM**

An application concerning the employment of one or more alien workers for the following permanent position will be filed with the Department of Labor (for non-schedule A positions) or with the Department of Homeland Security (for Schedule A positions). This Notice of Filing will be posted for 10 consecutive business days, ending between 30 and 180 days before filing the permanent labor certification application.

**EMPLOYER'S NAME:** \_\_\_\_\_

**POSITION TITLE:** \_\_\_\_\_

**POSITION DUTIES:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**RATE OF PAY:** \$ \_\_\_\_\_ per \_\_\_\_\_  
The employer will pay or exceed the prevailing wage, as determined by the U.S. Department of Labor

**LOCATION OF EMPLOYMENT:** \_\_\_\_\_

This notice is provided in compliance with 20 CFR 656.10(d). Any person may provide documentary evidence bearing on the application to the Certifying Officer of the U.S. Department of Labor holding jurisdiction over the location of the proposed employment. Contact information for these offices can be found on the Internet at <http://www.foreignlaborcert.doleta.gov/foreign/contacts.asp>.

This notice is being provided to workers in the place of intended employment by the following means:

Posting a clearly visible and unobstructed notice, for at least ten (10) consecutive business days, in conspicuous location(s) in the workplace, where the employer's U.S. workers can readily read the posted notice, including but not limited to locations in the immediate vicinity of the wage and hour notices.

**AND**

Publishing the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization.

**DATE POSTED:** \_\_\_\_\_

**DATE REMOVED:** \_\_\_\_\_

**LOCATIONS WHERE THE NOTICE WAS POSTED:** \_\_\_\_\_

**MEANS OF IN-HOUSE NOTICE, if applicable:** \_\_\_\_\_

**EXPLANATION OF ANY LACK OF IN-HOUSE NOTICE:** \_\_\_\_\_


\_\_\_\_\_  
\_\_\_\_\_

I attest, under penalty of perjury, that the above notice was provided as shown.

\_\_\_\_\_  
[PRINTED NAME AND TITLE]

\_\_\_\_\_  
[SIGNATURE]

**DATE:** \_\_\_\_\_

➤  3. Chapter 22.2 (b)(9) is revised to read as follows:

(9) Duplicate Labor Certification Requests for Labor Certifications Filed Prior to March 28, 2005: DOL will only provide duplicate labor certifications at the written request by USCIS for labor certifications filed prior to March 28, 2005. Adjudicators should only make the request to DOL if it is in conjunction with an I-140 petition filed with USCIS where the original labor certification has been irretrievably lost or destroyed. The duplicate labor certification must be retained as part of the record of the Form I-140 petition after it is received from DOL, and should not be forwarded to the petitioner or the petitioner's representative. (For example, an adjudicator would **not** make such a request to DOL if the petitioner's attorney requested a duplicate labor certification in general correspondence to USCIS, merely because he or she wants a copy for his or her records.) Also, an adjudicator should be aware of the possibility that the original was not, in fact, lost or destroyed, but rather used on behalf of another alien. If another alien has used or been substituted on a labor certification that the petitioner claims has been lost or denied, the request for a duplicate labor certification should be denied.


A request for duplicate Form ETA-750 labor certification should be emailed from USCIS to DOL and should include:

1. USCIS Requester Name;
2. USCIS Requester Address;
3. USCIS Receipt Number;
4. Employer Name;
5. Certification Date;
6. Attorney name;
7. Petitioner's name;




8. Beneficiary's name;
9. ETA case number;
10. Priority Date;
11. An annotation reflecting that the case was filed on Form ETA-750;
12. A print screen showing that the case has been certified.
13. As a courtesy to DOL, reason(s) for requesting that the Service Center secure a duplicate, approved labor certificate from DOL, e.g. "Case was certified, original approved labor certificate was never received in the mail."

The duplicate certification email request to DOL should be sent to Melissa Rosa-MacLean at [Rosa-MacLean.Melissa@dol.gov](mailto:Rosa-MacLean.Melissa@dol.gov) with a cc: to Mada Henderson at [Henderson.Mada@dol.gov](mailto:Henderson.Mada@dol.gov) . The email must contain the petitioner's name and beneficiary's name in the subject line.

-  4. Chapter 22.2 (b)(9) is revised to read as follows:

(10) Duplicate Labor Certification Requests for Labor Certifications Filed On or After March 28, 2005:


DOL will provide duplicate labor certifications for labor certifications filed on or after March 28, 2005, at the request of a Consular officer or USCIS adjudicator, an alien, employer, or an alien's or employer's attorney or agent. The request must include documentary evidence that a visa application or visa petition has been filed, and must include the U.S. Consular Office or USCIS case tracking number that is associated with the visa application or visa petition. DOL will only send the duplicate labor certification to a Consular officer or USCIS adjudicator, regardless of who makes the request. (See ) An adjudicator should only make the request to DOL if it is in conjunction with an I-140 petition filed with USCIS where the original labor certification has been irretrievably lost or destroyed. The duplicate labor certification must be retained as part of the record of the Form I-140 petition after it is received from DOL, and should not be forwarded to the petitioner or the petitioner's representative. (For example, an adjudicator would **not** make such a request to DOL if the petitioner's attorney requested a duplicate labor certification in general correspondence to USCIS, merely because he or she wants a copy for his or her records.) Also, an adjudicator should be aware of the possibility that the original was not, in fact, lost or destroyed, but rather used on behalf of another alien. If another alien has used or been substituted on a labor certification that the petitioner claims has been lost or denied, the request for a duplicate labor certification should be denied.

A request for duplicate Form ETA-9089 labor certification should be emailed from USCIS to DOL and should include:

1. USCIS Requester Name;

2. USCIS Requester Address;
3. USCIS Receipt Number;
4. Employer Name;
5. Certification Date;
6. Attorney name;
7. Petitioner's name;
8. Beneficiary's name;
9. ETA case number;
10. Priority Date;
11. An annotation reflecting that the case was filed on Form ETA-9089;
12. A print screen showing that the case has been certified.
13. As a courtesy to DOL, reason(s) for requesting that the Service Center secure a duplicate, approved labor certificate from DOL, e.g. "Case was certified, original approved labor certificate was never received in the mail."

The duplicate certification email request to DOL should be sent to Melissa Rosa-MacLean at [Rosa-MacLean.Melissa@dol.gov](mailto:Rosa-MacLean.Melissa@dol.gov) with a cc: to Mada Henderson at [Henderson.Mada@dol.gov](mailto:Henderson.Mada@dol.gov). The email must contain the petitioner's name and beneficiary's name in the subject line.

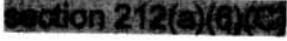
-  5. Chapter 22.2 (b)(11) is revised to read as follows:

(11) Invalidation or Revocation of a Labor Certification.

(A) Labor Certification Invalidation

DOL regulations at  provide:

(d) After issuance labor certifications are subject to invalidation by the DHS [USCIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Office of Foreign Labor Certification (OFLC), the CO or the Chief of the Office of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

The DOL does not invalidate labor certifications. However, USCIS (or DOS) may invalidate a labor certification if fraud or willful misrepresentation is discovered. The term "fraud or willful misrepresentation" has the same meaning here as it does in  of the Act. If an adjudicator invalidates the labor

certification under this provision, the adjudicator should then deny the corresponding I-140 petition due to the lack of a valid labor certification.

**Note 1:** An adjudicator does not need to issue a separate notice of invalidation of the labor certification. Rather, the inclusion of the reasons for invalidation in the denial of the I-140 petition is sufficient. In other words, an adjudicator must explain what fraud or willful misrepresentation of a material fact is contained in the labor certification that would warrant the invalidation of the labor certification. The adjudicator should annotate the labor certification "INVALIDATED BY USCIS - SEE DECISION DATED [insert date of I-140 decision]" and forward "for your information" copies of the I-140 denial notice and the annotated invalidated labor certification to:

Office of Foreign Labor Certification  
200 Constitution Avenue, N.W., Room C-4312,  
Washington, DC 20210:


**Note 2:** Although an adjudicator cannot invalidate a labor certification due to inaccuracies which do not rise to the level of fraud or willful misrepresentation, before approving an I-140 petition, the adjudicator must be satisfied that all of the information contained in the petition (which includes the supporting labor certification) is true. If the adjudicator finds that the labor certification contains significant inaccuracies, the petition may be denied due to the petitioner's failure to meet his or her burden of proof, even absent clear evidence of fraud or willful misrepresentation. The adjudicator should explain the reasons for denial in the denial order.

**(B) Revocation of a Labor Certification.**

The DOL regulation at 20 CFR 656.32 provides for the revocation of approved labor certifications by DOL if a subsequent finding is made that the certification was not justified. In such instances, DOL provides notice to the employer in the form of a Notice of Intent to Revoke an approved labor certification that contains a detailed statement of the grounds for the revocation and the time period allowed for the employer's rebuttal. The employer may submit evidence in rebuttal within 30 days of receipt of the notice. If rebuttal evidence is not filed by the employer, the Notice of Intent to Revoke becomes the final decision of the DOL Secretary. If the employer files rebuttal evidence and DOL determines the certification should nonetheless be revoked, the employer may file an appeal under 20 CFR 656.26 within 30 days of the date of the adverse determination. If the labor certification is revoked, DOL will also send a copy of the notification to USCIS and the Department of State.

Adjudicators must bear in mind that the labor certifications remain valid until they are actually revoked (or invalidated, as discussed above). Adjudicators should provide notice to the petitioner in the form of an Intent to Deny or Intent to

Revoke if there is documentation in the I-140 petition that the underlying labor certification has been revoked in order to provide the petitioner with an opportunity to supplement the petition with a valid labor certification. If the rebuttal evidence provided in response to the Intent notice does not include a valid labor certification, then the I-140 petition must be denied or revoked.

➤  6. Chapter 22.2 (i)(2)(B) is revised to read as follows:


**A. Qualifying U.S. Employers in connection with adjudication of Form I-140 Petitions for Outstanding Professors or Researchers (“E12”) under Section 203(b)(1)(B) of the Act**

Although a labor certification is not required for the E12 classification, 8 CFR 204.5(i)(3)(iii) requires that the petitioner provide an offer of employment as initial evidence in support of a first preference petition filed on behalf of an outstanding professor or researcher. The offer of employment shall be in the form of a letter from the prospective U.S. employer to the beneficiary and the offer must state that the employer is offering the beneficiary employment in a tenured or tenure-track teaching position or a “permanent” research position in the alien’s academic field. See 8 CFR 204.5(i)(3)(iii)(A)-(C).

Pursuant to section 203(b)(1)(B) of the Act, the alien beneficiary of a E12 petition must be seeking to work for a university, institution of higher education or a department, division, or institute of a private employer if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field. *Id.* See also 8 CFR 204.5(i)(3)(iii), which mirrors the language in the Act.

In general, government agencies at the federal, state, or local level will not fit within the definition of 203(b)(1)(B) unless the government agency is shown to be a U.S. university or an institution of higher learning. Thus, USCIS may only approve an E12 petition in instances where the offer of permanent employment is from a government agency, if that agency can establish that it is a U.S. university or an institution of higher learning. Government agencies do not qualify as “private” employers.

Government agencies which do not fit the definition of 203(b)(1)(b), may have other available immigration avenues for offers of permanent employment to professors or researchers. For example, assuming all of the eligibility requirements for that visa preference category have been met, a government agency may request the E11, Alien of Extraordinary Ability visa preference classification pursuant to Section 203(b)(1)(A) of the INA.

➤  7. Chapter 22.2 (j)(3) is revised to read as follows:

(3) E21 Professional Athletes.

Some E21 petitions are filed on behalf of professional athletes and are supported by a certified [REDACTED] or Form ETA-9089, requesting that the athlete be classified as an alien of exceptional ability in the arts. (Prior to June 1, 2008, labor certification applications for professional athletes, unlike most other types of labor certification applications, were filed with DOL using the Form ETA-750 and were processed at the national office for OFLC in Washington, DC.) DOL provided notice on March 5, 2008, 73 FR 11954, that as of June 1, 2008, employers filing such applications on behalf of aliens to be employed as professional athletes on professional sports teams will file PERM applications under special procedures for professional athletes directly with the Atlanta National Processing Center.

The precedent decision of [REDACTED] ( [REDACTED] ), held that a professional golfer could, if he was otherwise qualified, qualify as an alien of exceptional ability in the arts under [REDACTED] 203(b)(2) of the INA. This holding has been interpreted to apply to E21 petitions filed on behalf of any athlete. However, the fact that the beneficiary has signed a contract to play for a major league team may not be sufficient to establish exceptional ability as a professional athlete.

The following are some general guidelines regarding the adjudication of E21 petitions filed on behalf of professional athletes, and are based on the standards governing the validity of labor certifications found in [REDACTED].

(A) In General. A petition for classification of a professional athlete under [REDACTED], as well as the underlying labor certification filed on the alien's behalf, remains valid even if the athlete changes employers, as long as the new employer is a team in the same sport as the team which was the employer who filed the petition. See 212(a)(5)(A)(iv) of the INA.

(B) Definition. - For purposes of paragraph (A), the term "professional athlete" means an individual who is employed as an athlete by -


(1) a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed \$10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) any minor league team that is affiliated with such an association. See section 212(a)(5)(A)(iii).

The petitioner must provide, as initial evidence, documentation, described in [REDACTED] demonstrating that the alien qualifies as an alien of exceptional ability. This regulation sets forth the minimum evidence that must be presented in support of the petition. Submission of evidence may not necessarily establish that the alien is qualified for the classification. An adjudicator must assess the quality of such evidence, in addition to the quantity of the evidence presented, in determining whether the petitioner has met its burden.

Note: An approved labor certification submitted on behalf of a professional athlete does not prove that the alien qualifies as an athlete of exceptional ability as defined in [REDACTED]. Adjudicators should look for evidence of exceptional ability beyond the mere existence of a contract with a major league team or an approved labor certification. Many athletes, for example, enjoy substantial signing bonuses, but may not, thereafter, prove to be of "major league," let alone "exceptional" caliber. Similarly, the fact that an alien played for a portion of a season for a major league team does not automatically establish that the alien will continue to play at a major league level. It would be incongruous to grant an immigrant visa petition on behalf of a major league player on the basis of section 203(b)(2) of the Act if the alien is unlikely to continue to perform the duties specified in the underlying petition for a reasonable period following a grant of lawful permanent resident status.

Further, an approved labor certification submitted on behalf of the alien does not bind USCIS to a determination that the alien is of exceptional ability. Notwithstanding the grant of a labor certification, the alien may, for any number of reasons, be unable to fulfill the underlying purpose of the Form I-140, Immigrant Petition for Alien Worker. For example, the alien could be cut from the major league roster, may announce his permanent retirement as a player in the sport, or suffer from a career-ending injury prior to adjudication of the petition, thereby removing the job offer that formed the basis of the I-140 and resulting in a denial of the petition.

 8. The AFM Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read:

AD-07-26  
[INSERT  
SIGNATURE  
DATE OF THIS  
MEMO]

Chapter 22

This memorandum revises Chapter 22 of the *Adjudicator's Field Manual (AFM)* by amending section 22.2.

#### IV. Use

This memorandum is intended solely for the instruction and guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does not, and may not be

relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

## **V. Questions**

Questions regarding this memorandum should be directed through channels to Alexandra Haskell in the Business and Trade Branch of Service Center Operations.

### Distribution List:

- Regional Directors
- Service Center Directors
- District Directors
- Field Office Directors
- National Benefits Center Director
- Chief, Service Center Operations
- Chief, Field Operations