Presented:

The University of Texas School of Law
32ND ANNUAL CONFERENCE ON
IMMIGRATION & NATIONALITY LAW

October 22-24, 2008
San Antonio, Texas

LABOR CERTIFICATION: THE LAW

Eugene J. Flynn

Author contact information:

Eugene J. Flynn
EUGENE J. FLYNN, P.C.
Dallas, Texas

ejflynnlaw@gmail.com
214-821-1661

I. Introduction

The statutory basis for the Alien Labor Certification Procedure is found in § 212(a)(5)(A) of the Immigration and Nationality Act [INA], 8 USC § 1182(a)(5)(A). The regulations are found in 20 C.F.R. part 656.

The statue provides that various classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the United States. One of those classes is stated as follows:

212(a)(5)(A)

(i) In general.–

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

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

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

(ii) Certain aliens subject to special rule.–

For purposes of clause (i)(I), an alien described in this clause is an alien who–

(I) is a member of the teaching profession, or

(II) has exceptional ability in the sciences or the arts.

The statute specifically references in clause (D) the categories of immigrant to whom this ground of exclusion is to be applied as follows:

(D) Application of grounds.–

The grounds of inadmissibility of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 203(b).

INA § 212(a)(5)(D)

The referenced subparagraph (B) deals with certain physicians and is beyond the scope of this article.

As can be readily seen from the statute, only Employment Based (INA 203(b)) 2nd and 3rd preference aliens need to obtain labor certification. Individuals entering the United Sates as special immigrants, as immediate relatives, under the Family Preferences, under the Employment Based 1st, 4th, or 5th preferences, those granted asylum, cancellation of removal, registry or those who win the diversity lottery, need not obtain a labor certification.

The underlying purpose of the statue, as determined by the courts, is an accommodation between the legitimate needs of the employer and the protection of the U.S. labor. *See Pesikoof*

v. Secretary of Labor, 501 F. 2d 757, 756 (D.C. Cir. 1984), *cert. denied.* 419 U.S. 1038 (1974) and *Digitab, Inc. v Secretary of Labor*, 495 F.2d 323, 366 (1st Cir. 1974), *cert. denied.* 419 U.S. 840 (1974).

II. "Schedule A" Occupations

As you approach this tedious process of labor certification you may find the Department of Labor (DOL) has actually certified your client in advance. The DOL has a list of such categories of individuals designated as "Schedule A" which is found in 20 C.F.R. § 656.5.

Schedule A occupations are now only two groups. The first group includes professional nurses and physical therapists. The second group is made up of aliens of exceptional ability in the arts and sciences now including the performing arts, if the performing artist is one "whose work during the past 12 months did require, and whose intended work in the United States will require, exceptional ability." 20 C.F.R. § 656.5(b)(2). *See* 20 C.F.R.§ 656.15 for the documentation
requirements for these groups.

Formally physicians (or surgeons) were included in Schedule A. The Labor Department removed them from Schedule A. *See* 52 Fed. Reg. 50,593 (June 2, 1987). Managerial or executive intra-company transferees were removed 56 Fed. Reg. 54,920 (Oct. 23, 1991, *effective*, Nov. 22, 1991) and are now included under the Employment Based First Preference. Religious workers were also in Schedule A but were also removed 56 Fed. Reg. 54,920 (Oct. 23, 1991, *effective*, Nov. 22, 1991) and are now included under the Employment Based 4th Preference.

To achieve a Schedule A certification one must prepare form ETA Form 9089 with supporting documentation attached. Instead of submitting the form to the Department of Labor, you file it with form I-140 at the United States Citizenship and Immigration Services (USCIS) Service Center having jurisdiction over the place of intended employment. Note that the proper location for filing any particular form with the USCIS is constantly changing. It behooves one to check the USCIS web site when you are ready to file any form.

One should thoroughly review all of the various preference categories before settling for the often time consuming and mine field filled labyrinth of the labor certification process which could be a road to ruin.

III. The Basic Labor Certification Application Process

A. General Documentation

For those aliens who do not have the benefit of being pre-certified, one has to follow the basic labor certification application process. These requests are filed pursuant to 20 C.F.R. § 656.17. Under the procedure know as the Program Electronic Review Manager (PERM) the employer or its attorney, files the application for alien employment certification with the U.S. Department of Labor, either online at http://www.plc.doleta.gov/eta_start.cfm or by mail to the Atlanta National Processing Center. 73 FR 11954 (March 5, 2008). Mailing can create problems as

Title search: Labor Certification: The Law

First appeared as part of the conference materials for the
2008 Immigration and Nationality Law session
"A Primer on PERM"