

PERM FAQs

Fraud Rule -- Round 2

Q. What recourse does the employer have in the event a labor certification filed after July 16, 2007 is denied?

A. If a labor certification is denied, the employer may make a request for reconsideration, in writing and within 30 days of the date of the determination, to the Certifying Officer who made the determination. For any application filed after July 16, 2007, the Certifying Officer will not reconsider a determination where the deficiency that caused the denial resulted from the employer's disregard of a system prompt (for on-line applications) or other direct instructions accompanying the ETA Form 9089 or previously provided by the Certifying Officer.

Additionally, pursuant to 20 CFR 656.24(g)(2), a request for reconsideration for any application filed after July 16, 2007 may only include documentation previously received from the employer in response to a request from the Certifying Officer or documentation that the employer did not have the opportunity to present previously to the Certifying Officer, but that existed at the time the application was filed, and was maintained by the employer to support the application. Where the documentation submitted is deemed not to satisfactorily cure the deficiency or where no documentation is provided, no further opportunity to present such documentation will be provided, i.e., no solicitation of such documentation will be made and the Certifying Officer will make a determination based solely on the information and documentation provided by the employer in its request.

Q. What if the employer's Certification contains an error?

A. Pursuant to 20 CFR 656.11(b), requests for modifications to Applications for Permanent Employment Labor Certifications (ETA Form 9089) will not be accepted for any application submitted after July 16, 2007. If an employer receives a certification of an application which contains incorrect information due to an error made by the employer on the filed ETA Form 9089, the employer may request to withdraw the current certified application, and thereafter submit a new amended application for the same employer, position, and foreign worker, provided such request meets all regulatory requirements, including recruitment timeframes.

If an employer receives a certification of an application which contains incorrect information due to Department of Labor data-entry error(s), the employer may file a Request for Reconsideration, in writing and within 30 days of the date of the certification, including any necessary documentary evidence, to the Certifying

Officer at the National Processing Center (NPC) that issued the certification. Pursuant to 20 CFR 656.24, the Certifying Officer will only consider documentation that existed at the time the application was filed and was maintained by the employer in support of the application.

Q. Are applications submitted for Schedule A occupations subject to 20 CFR 656.11(a), which prohibits substitution of an alien beneficiary on an application for permanent labor certification?

A. Per 20 CFR 656.11(a), substitution of an alien beneficiary on any application for permanent labor certification “is prohibited for any request to substitute submitted after July 16, 2007.” Furthermore, § 656.30(c)(1) explicitly limits the use of a permanent labor certification for a Schedule A occupation to “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.” (Emphasis added.)

Therefore, substitution of an alien beneficiary on a Schedule A labor certification is prohibited.

Q. Are applications submitted for Schedule A occupations subject to 20 CFR 656.12(b), which prohibits employers from seeking or receiving payment for activity related to obtaining permanent labor certification?

A. Per 20 CFR 656.12(b), an employer may not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, except from a party with a legitimate, pre-existing business relationship with the employer, if the work to be performed by the alien beneficiary will benefit that party. This prohibition applies to applications filed under current regulations or under regulations in effect prior to March 28, 2005.

The introductory paragraph in § 656.12 states this provision applies to applications filed under 20 CFR part 656, and to any certifications resulting from those applications. While the Department of Labor has delegated to U.S. Citizenship and Immigration Services (USCIS) the adjudicative authority for Schedule A labor certification applications, the regulations at 20 CFR part 656 govern such adjudication.

Section 656.10(a)(3) provides general instructions on the labor certification process and states, “An employer seeking labor certification for an occupation listed on Schedule A must apply for a labor certification under this section and § 656.15.” Section 656.15 provides specific instructions for Schedule A labor certification applications. Section 656.12(b) applies to all labor certification applications filed under part 656, including Schedule A labor certification applications.

Therefore, an employer filing a labor certification application for a Schedule A job opportunity is prohibited from seeking or receiving payment for any activity related to obtaining permanent labor certification, except from a party with a legitimate, pre-existing business relationship with the employer, if the work to be performed by the alien beneficiary will benefit that party. "Payment" includes, but is not limited to, monetary payments; deductions from wages or benefits; kickbacks, bribes, or tributes; goods, services, or in kind payments; and free labor. "Activity related to obtaining permanent labor certification" includes, but is not limited to, recruitment costs and attorneys' fees, and includes payments made as an incentive to filing or as reimbursement for costs incurred in preparing or filing an application. An alien may pay his/her own costs, including attorneys' fees for representation of the alien, except when the same attorney represents both the alien and the employer. In such instances, the employer must pay the alien's attorneys' fees.

Q. Are applications submitted for Schedule A occupations subject to 20 CFR 656.30(b), which creates a validity period for approved permanent labor certifications?

A. Pursuant to 20 CFR 656.30(b), an approved labor certification granted on or after July 16, 2007, expires if not filed in support of a Form I-140 petition submitted to the Department of Homeland Security within 180 days of its approval. An approved labor certification granted before July 16, 2007, expires if not filed in support of a form I-140 petition submitted to the Department of Homeland Security within 180 days of July 16, 2007.

There is no exception in 20 CFR part 656 for Schedule A labor certifications. However, U.S. Citizenship and Immigration Services regulations at 8 CFR 204.5(a)(2) stipulate that a Form I-140 petition filed for a Schedule A occupation must be accompanied by "an application for Schedule A designation" (i.e., an application for permanent labor certification for a Schedule A occupation). Because such an application will always be filed with a Form I-140 petition, it will always be filed within 180 days of its approval. As such, it is impossible such an application will expire.