

9 FAM 40.51 LABOR CERTIFICATION

(CT:VISA-1316; 09-23-2009)
(Office of Origin: CA/VO/L/R)

9 FAM 40.51 RELATED STATUTORY PROVISIONS

(CT:VISA-1316; 09-23-2009)

See INA 212(a)(5)(A) (8 U.S.C. 1182(a)(5)(A)) and INA 212(d)(3)(A) and (B) (8 U.S.C. 1182(d)(3)(A) and (B))

INA 212(a)(5)(A)

- (5) Labor Certification and *Qualifications for Certain Immigrants.*-
 - (A) Labor *Certification*
 - (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.

(iii) *Professional Athletes*

(I) In General

A certification made under clause (i) with respect to a professional athlete shall remain valid with respect to the athlete after the athlete changes employer, if the new employer is a team in the same sport as the team which employed the athlete when the athlete first applied for certification.

(II) Definition

For purposes of subclause (I), the term "professional athlete" means an individual who is employed as an athlete by-

(aa) 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

(bb) any minor league team that is affiliated with such an association.

(iv) Long Delayed Adjustment Applicant

A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

INA 212(d)(3)(A)

d. Temporary Admission of Nonimmigrants

(3)(A) Except as provided in this subsection, an alien

(i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) of this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily

despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or

- (ii) who is inadmissible under subsection (a) of this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General. The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph.

9 FAM 40.51 RELATED REGULATORY PROVISIONS

(CT:VISA-967; 06-11-2008)

See 22 CFR 40.51

40.51 Labor certification.

- (a) *INA 212(a)(5) applicable only to certain immigrant aliens.* INA 212(a)(5)(A) applies only to immigrant aliens described in INA 203(b)(2) or (3) who are seeking to enter the United States for the purpose of engaging in gainful employment.
- (b) *Determination of need for alien's labor skills.* An alien within one of the classes to which INA 212(a)(5) applies as described in §40.51(a) who seeks to enter the United States for the purpose of engaging in gainful employment, shall be ineligible under INA 212(a)(5)(A) to receive a visa unless the Secretary of Labor has certified to the Secretary of Homeland Security and the Secretary of State, that
 - (1) There are not sufficient workers in the United States who are able, willing, qualified, (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts) and available at the time of application for a visa and at the place to which the alien is destined to perform such skilled or unskilled labor, and
 - (2) The employment of such alien will not adversely affect the wages

and working conditions of the workers in the United States similarly employed.

- (c) Labor certification not required in certain cases. A spouse or child accompanying or following to join an alien spouse or parent who is a beneficiary of a petition approved pursuant to INA 203(b)(2) or (3) is not considered to be within the purview of INA 212(a)(5).

(56 FR 30422, July 2, 1991, as amended at 61 FR 1835, Jan. 24, 1996)