9 FAM 40.51
NOTES

(CT:VISA-1070; 10-15-2008)
(Office of Origin: CA/VO/L/R)

9 FAM 40.51 N1 GENERAL INFORMATION

(CT:VISA-1070; 10-15-2008)

The Immigration Act of 1990 established five employment-based categories. The Department of Labor has responsibility for granting labor certifications for two of these categories - preference groups 2 and 3. Second *p*reference includes immigrants who are members of the professions holding advanced degrees and immigrants of exceptional ability in the sciences, arts, or business. Third preference includes professionals, skilled, and other unskilled workers.

9 FAM 40.51 N2 LABOR CERTIFICATION REQUIRED

(CT:VISA-1070; 10-15-2008)

In general, aliens in the second and third preferences must possess an individual labor certification, an application for Schedule A certification, or evidence that he or she qualifies for the Labor Market Information Pilot Program. However, in the case of a second preference applicant, the *Secretary of Homeland Security* may waive the job offer requirement, and thus a labor certification, for aliens of exceptional ability in the sciences, arts, professions*,* or business and for certain alien physicians *(*see 9 FAM 4*2*.32(b) N4*)* when it is deemed to be in the national interest.

9 FAM 40.51 N3 OBTAINING LABOR CERTIFICATIONS

(TL:VISA-3; 08-30-1987)

The Department of Labor attempts to minimize the operational impact of its statutory responsibilities through the use of "Schedules" for types of cases in which either a definite approval or a very probable disapproval will result, without having to undertake the individual analysis required in the great majority of cases.

9 FAM 40.51 N3.1 Schedule A Certifications

(CT:VISA-1070; 10-15-2008)

a. The Department of Labor's Schedule A (see 9 FAM 40.51 Exhibit I) sets forth occupational and professional groups in which there is a nation-wide shortage of workers willing, able, 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 and in which the employment of aliens will not, presumably, affect adversely the wages and working conditions of workers in the United States similarly employed.

b. An employer for an alien in an occupation which qualifies for Schedule A may file an application for certification with the appropriate *Department of Homeland Security (DHS)* office. Schedule A, as amended as a result of the Immigration Act of 1990, lists two such occupational groups as follows:

   (1) Group I - Physical Therapists and Nurses; and

   (2) Group II - Aliens of Exceptional Ability in Sciences or Arts.

c. Since the Immigration Act of 1990 requires all applicants for employment-based classification to be the beneficiary of a petition filed with *DHS, you (*consular officers) no longer have responsibility for determining whether an alien is within one of these occupational groups. *You must* refer aliens who may qualify under Schedule A to the appropriate *DHS* office.

9 FAM 40.51 N3.2 Individual Job Offer Certifications

(CT:VISA-1070; 10-15-2008)

An employer who wishes to file a labor certification for an alien who does not qualify for Schedule A certification *must* file, signed by hand and in duplicate, a Department of Labor Application for Alien Employment Certification form and any attachments required with the local Employment Service office (see *20 CFR 656.17 or 20 CFR 656.18*) serving the area where the alien proposes to be employed.

9 FAM 40.51 N3.3 Schedule B

(CT:VISA-1070; 10-15-2008)

a. Certification under INA 212(a)(5)(A) will not ordinarily be granted for aliens coming to engage in occupations listed on Schedule B. Schedule B (see 9 FAM 40.51 Exhibit II) lists categories of employment in which the

Department of Labor has found that generally there is no shortage of workers in the United States. If an employer wishes to employ an alien whose occupation is on Schedule B, the employer should petition the regional certifying officer for the geographic area in which the job opportunity is located for a Schedule B waiver.

b. If a labor certification is received at post for an alien who is seeking an occupation listed on Schedule B, *you should* assume that the certification by the Department of Labor is correct.

9 FAM 40.51 N3.3-1 Sheepherder Certification

(CT:VISA-1070; 10-15-2008)

Sheepherders are not considered to be included in the category of "Laborers, Farm" under Schedule B for whom certification will not ordinarily be granted. *An employer may apply for a labor certification to employ the alien (who has been employed legally as a nonimmigrant sheepherder in the United States for at least 33 of the preceding 36 months) as a sheepherder by filing a Form ETA-9089, Application for Permanent Employment Certification, directly with DHS, not with an office of the Department of Labor. (See 20 CFR 656.16.)*

9 FAM 40.51 N3.3-2 Certifications for Household Domestic Workers

(TL:VISA-42; 01-30-1991)

Household domestic workers with less than one year of paid experience are listed under Schedule B as non-certifiable because there is generally no shortage of such workers in the United States. However, employers who believe that domestic employees are in short supply in a particular area may apply for a Schedule B waiver provided for by the Department of Labor regulations which would allow an application to be processed much like any other.

9 FAM 40.51 N4 APPROVED LABOR CERTIFICATIONS

9 FAM 40.51 N4.1 Validity of Approved Labor Certifications

(CT:VISA-1070; 10-15-2008)

a. Department of Labor regulations (20 CFR 656.30(a)) provide that all labor certifications, unless invalidated by a *DHS* or consular officer upon a

determination of fraud or willful misrepresentation, are valid for an indefinite period and do not require re-certification. (See 9 FAM 40.51 N10 below for pertinent procedures.)

b. If the employer has withdrawn the offer of employment or the alien has decided not to accept the employment offered (see 9 FAM 40.51 N4.2 below); or if the alien's registration was terminated because the alien failed to apply for a visa within one year of notification of the availability of a visa (see INA 203(g) and 9 FAM 42.83, Related Statutory Provisions), *you must* return the petition to the approving office of *DHS* under cover of a memorandum explaining why the petition is being returned.

9 FAM 40.51 N4.2 Limitations on Labor Certifications

9 FAM 40.51 N4.2-1 Cases Involving Individual Job Offers

(CT:VISA-1070; 10-15-2008)

In all cases involving individual job offer certification, the alien or the alien's employer may act at any time to terminate the validity of the certification. If the employer withdraws the offer of employment or if the alien decides not to accept the employment, the validity of the certification is terminated. Such action could occur at any time after the certification is issued. In all cases, a job offer certification is valid only for the particular job, and the geographic location set forth by the prospective employer in *Form ETA-9089, Application for Permanent Employment Certification, or Form ETA-750, Application for Alien Employment Certification. (See 9 FAM 40.51 Exhibit IX, 9 FAM 40.51 Exhibit X, 9 FAM 40.51 Exhibit III, and 9 FAM 40.51 Exhibit IV.)*

9 FAM 40.51 N4.2-2 Schedule A Certifications

(CT:VISA-1070; 10-15-2008)

A labor certification for a Schedule A occupation *or sheepherders* is valid only for the occupation set forth on the *Form ETA-750, Application for Alien Employment Certification, or the Form ETA-9089, Application for Permanent Employment Certification, 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.

9 FAM 40.51 N4.2-3 Limitations on Pre-1977 Certifications

(CT:VISA-1070; 10-15-2008)

Public Law 94-571 contains a savings clause for aliens who filed for third

preference status prior to January 1, 1977, regardless of when their application was finally approved. *Public Law* 102-110 provided for the *up-grading* of former third preference applicants to employment-based second preference. Thus such aliens are exempt from the necessity of having a job offer in order to retain their eligibility for an immigrant visa *(IV)* under INA 203(b)(2).

9 FAM 40.51 N4.3 Verifying Individual Job Offer Cases

9 FAM 40.51 N4.3-1 Alien on Arrival Destined to Certified Employment

(CT:VISA-1070; 10-15-2008)

In order to be admissible under INA 212(a)(5)(A):

(1) An alien for whom an individual offer of employment has been certified must still be destined to that specific employment when admission is sought at a port of entry *(POE);*

(2) *In order to ensure that the alien is* aware that admissibility is so conditioned, *you must, when* issuing immigrant visas to aliens with certified individual employment offers*,* require the alien to read and sign a statement and attach a copy of the statement shown in 9 FAM 40.51 *Exhibit VII*, to the immigrant visa (IV*).*

(3) The post *must* reproduce the statement locally and translate it as required. When a visa applicant informs the consular officer of a material change in plans *(*for example, a change of employer, type of work to be performed, or location of employment*)* the officer *must* require the alien to obtain certification for the new employment or otherwise satisfy certification requirements before a visa may be issued. If a material change of plans becomes known after a visa has been issued, *you must* withdraw the visa for possible revocation pursuant to 9 FAM 42.82*, Revocation of Visas,* and so inform the alien.

9 FAM 40.51 N4.3-2 Continuing Availability of Certified Employment

(CT:VISA-1070; 10-15-2008)

In certain cases involving labor certification, it may be necessary to confirm that the original offer of employment remains open to the alien. In any case in which *the instruction packet (formerly know as "Packet 3" (*see 9 FAM 42.63 PN5*))* is mailed to the alien more than nine months after the date of

certification of the job offer, *you must* ensure that *the alien receives* a copy of the notice shown in 9 FAM 40.51 Exhibit VII. This notice requires the alien to obtain from the employer in the United States a written statement that the employment offered to the alien is still available. Posts *should* reproduce the notice locally and translate it as required. When translated copies are reproduced, the English-language text *should* be reproduced as well, since aliens send the form to prospective employers.

9 FAM 40.51 N4.4 Commencement of Validity Period

(CT:VISA-1070; 10-15-2008)

The Department of Labor's regulations (see 20 CFR 656.30(a)*)* provide that:

(1) Labor certification involving job offers *must* be deemed validated as of the date the local employment service office date-stamped the application;

(2) *The validity date of* labor certifications for Schedule A occupations *or sheepherders is the date the application was dated by the Immigration Officer; and*

(3) The filing date, established under 20 CFR 656.17(c), of an approved labor certification may be used as priority date by the Department of Homeland Security (DHS) and the Department, as appropriate.

9 FAM 40.51 N4.5 Substitution of Beneficiary on Approved Labor Certification

(CT:VISA-1070; 10-15-2008)

If the *DHS* service center determines that a substituted alien meets the requirements set forth in the original certification as of the date it was filed with the state employment office and the Form I-140*,* Immigrant Petition for Alien Worker, is otherwise approved, the petition should be approved and processed like any other Form I-140 petition. The priority date *must* be the date on which the labor certification was filed with any office within the employment service system of the Department of Labor.

9 FAM 40.51 N4.6 Change in Petitioner's Name, Ownership, or Location

9 FAM 40.51 N4.6-1 When a New Petition is Required

(TL:VISA-313; 08-27-2001)

A new Form I-140, Immigrant Petition for Alien Worker, must be filed if:

(1) The petitioning employer:

(a) Has been bought out by, or merged into, another corporation;

(b) Has experienced a major organizational change; or

(c) Has changed its name;

(2) The assets of a corporate petitioner have been sold; or

(3) There is a change in the location of the business entity where the applicant will be employed.

9 FAM 40.51 N4.6-2 When there is No "Significant" Change in Ownership

(TL:VISA-313; 08-27-2001)

If, however, the petitioner is a sole proprietor or a partnership, and there is a change in the name of the business entity for which the applicant will work, without a significant change in the ownership of the business, no new petition is required provided the position described in the petition still exists.

9 FAM 40.51 N4.6-3 New Petition When Location of Employment Changes

(CT:VISA-1070; 10-15-2008)

A new petition is required in non-Schedule A cases where the petitioning employer has moved the location of the business to a different city or town. A non-*S*chedule A labor certification is valid only in the standard metropolitan statistical area which includes the place of employment shown on the Form ETA-750, Application for Alien Employment Certification*, or Form ETA-9089, Application for Permanent Employment Certification.* If the employer moves to a different location in the same standard metropolitan statistical area the certification remains valid. Nevertheless, *DHS* requires that a new Form I-140, Immigrant Petition for Alien Worker, be filed whenever there is a change of location in a non-*S*chedule A case.

9 FAM 40.51 N4.6-4 Referring the Case for an Advisory Opinion

(CT:VISA-1070; 10-15-2008)

If *you have* difficulty determining whether there has been a "significant" change in ownership, the case should be referred to the Department*, Advisory Opinions Division* (CA/VO/L/A).

9 FAM 40.51 N5 EMPLOYMENT INTENT UPON ADMISSION

9 FAM 40.51 N5.1 Labor Certification Based on Job Offer

(CT:VISA-1070; 10-15-2008)

Any alien whose certification was based on an offer of employment must proceed immediately to the employment specified in the visa petition and/or job offer. An alien who is unable or unwilling to proceed to the specified employment is inadmissible under INA 212(a)(5)(A). In order that an alien may be aware that admissibility is conditioned on an intent to proceed to the specified employment, *you must* require the alien to read and sign a statement affirming such intention and attach the signed statement to the alien's visa. Posts shall reproduce the statement (see 9 FAM 40.51 Exhibit VII) locally and translate it as required.

9 FAM 40.51 N5.2 Alien Not Destined to Specified Employment or Seeking Work Outside Stated Profession

(CT:VISA-1070; 10-15-2008)

You should not issue a visa if there is reason to believe that the applicant is not destined to the employment specified in the job offer or does not intend to engage in work related to the profession concerned. *You should* tell the applicant what appropriate steps may be taken to qualify on the basis of the actual intended employment.

9 FAM 40.51 N5.3 Alien Appears Overqualified for Position

(CT:VISA-1070; 10-15-2008)

The mere belief that an alien will not accept a menial job because of his or her socio-economic status is not sufficient to justify the cancellation of Part B of a labor certification or a finding of *inadmissibility* under INA 212(a)(5)(A).

9 FAM 40.51 N6 CONSULAR OFFICER RESPONSIBILITY REGARDING CERTIFICATION

(CT:VISA-1070; 10-15-2008)

Certifications are made by the Department of Labor or DHS on the basis of documents submitted by the alien. The certifying office has no means of verifying that the alien does, in fact, possess the skills, training, experience, or other qualifications claimed in the documents. Therefore, if a consular officer, based upon the interview or an investigation, has reason to doubt whether the alien possesses such skills, training, experience, or other qualifications, *you* have responsibility to resolve such doubts. (See 9 FAM 40.51 N10 below.) The Department of Labor has stressed that experience gained with the certified employer should be considered without prejudice in assessing the alien's qualifications for the certified job.

9 FAM 40.51 N6.1 Authority for Denial Under INA 212(a)(5)(A)

(CT:VISA-1070; 10-15-2008)

a. Drawing upon the Board of Immigration Appeals (BIA) and the Board of Alien Labor Certification Appeals (BALCA) precedents, *we have* concluded that a "Totality of the Circumstances Test," rather than a "per se rule" should be used to determine whether an alien intends to comply with the labor certification. Before a consular officer may deny an applicant for lack of intent to accept employment, *you* should have objective reasons to believe the alien does not intend to accept the employment. These objective reasons should be evaluated using the "totality of circumstances" standard.

b. The factors listed below, although not exclusive, tend to indicate that an applicant will not accept the perspective employment:

   (1) Admission or statements that indicate that the applicant will not undertake the employment or will do so for only a brief time;

   (2) Evidence that the applicant has bought or leased housing in a distant or different location in the United States from where the prospective employment will be located;

   (3) Evidence that the applicant has bought a business in the United States or other evidence that the applicant intends to engage in some other full-time activity in the United States other than the prospective employment; or

   (4) Evidence that the applicant has never worked before, or has never worked in the same type of business as that of the prospective employment.

c. *You* should note that in the case of professionals, an applicant may legitimately intend to accept the employment even though

commencement may not be immediate. It may be necessary for the applicant to complete licensing procedures first. The applicant must intend to commence work in the foreseeable future.

9 FAM 40.51 N6.2 When to Cancel a Labor Certification

(CT:VISA-1070; 10-15-2008)

You should only cancel a labor certification when the totality of circumstances shows evidence that the employer was involved in fraud or material misrepresentation in obtaining the labor certification. This may include cases in which it appears that no bona fide job offer opportunity for U.S. workers exists because the alien will be self-employed or self-petitioned. The Board of Alien Labor Certification Appeals has ruled the factors to consider in determining whether an alien has sought self-employment or self-certification is as follows:

(1) Whether the applicant is in a position to control or influence hiring decisions regarding the job for which labor certification is sought;

(2) Whether the alien is related to corporate directors, officers or employees;

(3) Whether the alien was an incorporator or founder of the company;

(4) Whether the alien is involved in the management of the company;

(5) Whether the alien is one of a small number of employees;

(6) Whether the alien has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application;

(7) Whether the alien is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue operation without the alien; or

(8) Whether the business was established for the sole purpose of obtaining certification for the alien.

9 FAM 40.51 N7 WORK EXPERIENCE

9 FAM 40.51 N7.1 Requirements for Labor Certification Approval

(CT:VISA-1070; 10-15-2008)

In cases where work experience was required for the approval of the labor certification, the experience must have been gained prior to filing the labor certification. If *you have* reason to believe that an alien had the required experience at the time the labor certification was filed, even if that experience was not indicated at the time of the filing, *you may* consider the labor certification to have been properly approved.

9 FAM 40.51 N7.2 Experience Gained While in Unlawful Status

(TL:VISA-42; 01-30-1991)

There is no law or regulation which precludes experience gained by an alien while in unlawful status from being applied to fulfill job requirements for certification provided the experience was gained prior to filing the labor certification.

9 FAM 40.51 N8 LABOR CERTIFICATION INDICATES HIGHER WAGE THAN ALIEN CURRENTLY EARNING

(TL:VISA-42; 01-30-1991)

In a situation where an alien is already working for the employer who filed the labor certification, and the alien is currently earning a salary lower than the labor certification indicates the alien will be paid, the Department of Labor has determined that the higher wage need not be paid until the alien immigrates to the United States.

9 FAM 40.51 N9 ENGLISH PROFICIENCY

(CT:VISA-1070; 10-15-2008)

Proficiency in English is not essential to certification under Schedule A or in job offer cases, except for graduates of medical schools. *You must* evaluate the importance of English proficiency, particularly for secretaries, stenographers, and teachers, in relation to the public charge provisions in INA 212(a)(4). Proficiency in English is essential if an employer specifies on Part A of Form ETA-750, Application for Alien Employment Certification, that knowledge of English is required for satisfactory job performance, or in the case of a graduate of a medical school.

9 FAM 40.51 N10 MISREPRESENTATIONS IN LABOR CERTIFICATION CASES

(CT:VISA-1070; 10-15-2008)

a. Certification and employer's statements are assumed to be valid in the absence of any evidence to the contrary, and *you* should not interpret their role as a requirement to readjudicate each and every petition. Examples of indicators which could justify further scrutiny, however, would include:

   (1) A known high frequency of fraud in cases of a particular profession within the consular district;

   (2) Inconsistencies between the applicant's general demeanor and the claimed profession; or

   (3) Obvious discrepancies among the petition's supporting documentation which warrant investigation by the anti-fraud unit.

b. If the consular officer determines that the certification was obtained by fraud or misrepresentation of a material fact on the part of the alien and/or the employer, the consular officer has the authority to:

   (1) Invalidate the labor certification;

   (2) Cancel any priority date obtained therefrom; and

   (3) Refuse the visa application under INA 212(a)(5)(A).

c. Invalidation of the labor certification automatically revokes the petition in accordance with the *DHS* regulations at 8 CFR 205.2(c), and the Department of Labor, 20 CFR Part 656.30 or Part 656.31.

9 FAM 40.51 N10.1 Misrepresentation by the Employee

(CT:VISA-1070; 10-15-2008)

Since misrepresentation by the employee would constitute concealment of an independent ground of *inadmissibility (*i.e., INA 212(a)(5)(A)*), a material misrepresentation by the employee's qualifications for the position would make* Part B of the Labor Certification invalid. Part A is still considered valid and the employer may find someone else who is willing to perform the job. Such a determination by the consular officer might also result in a finding of INA 212(a)(6)(C) *inadmissibility* which would not require concurrence by the Department. *(*See 9 FAM 40.63 Notes.*)*

9 FAM 40.51 N10.2 Misrepresentation by the

Employer

(TL:VISA-234; 02-02-2001)

A misrepresentation by the employer alone would not make the applicant ineligible under INA 212(a)(6)(C). However, if the employer is not a U.S. citizen, it might bring the employer within the purview of INA 212(a)(6)(E).

9 FAM 40.51 N10.3 Cancellation of Entire Certification

(TL:VISA-313; 08-27-2001)

The entire labor certification should be canceled only when the totality of the circumstances indicates that the employer was involved in fraud or material misrepresentation. This may include cases in which it appears that no bona fide job opportunity for U.S. workers exists because the applicant will be self-employed or self-petitioned. Thus, there would be no bona fide job opportunity available. The Board of Alien Labor Certification Appeals has ruled that the following factors should be considered in determining whether an alien has sought self-employment certification:

(1) Whether the applicant is in a position to control or influence hiring decisions regarding the job for which the labor certification is sought;

(2) Whether the alien is related to corporate directors, officers, or employees;

(3) Whether the alien was an incorporator or founder of the company;

(4) Whether the alien is involved in the management of the company;

(5) Whether the alien is one of a small number of employees;

(6) Whether the alien has qualifications for the job that are identical to specialized or unusual job duties and requirements stated on the application;

(7) Whether the alien is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue operation without the alien; or

(8) Whether the business was established for the sole purpose of obtaining labor certification for the alien.

9 FAM 40.51 N10.4 Requesting Advisory Opinions

(CT:VISA-1070; 10-15-2008)

In all cases where the consular officer believes the certification should be invalidated, *you should* request an advisory opinion *(AO)* from the CA/VO/L/A. The request must detail the basis for the doubts.

9 FAM 40.51 N11 DEFINING FULL-TIME EMPLOYMENT

(TL:VISA-42; 01-30-1991)

Generally, full-time employment consists of 35 to 40 hours of work a week. The controlling principle, however, is what is prevailing for the occupation. Airline pilots, for example, may work considerably less than 40 hours a week, but this would probably be considered full-time employment.

9 FAM 40.51 N12 REQUESTS FOR EMPLOYMENT INFORMATION

(CT:VISA-1070; 10-15-2008)

a. The Department of Labor and its regional and State offices are not equipped to provide information on job openings for prospective immigrants.

b. The U.S. Employment Service is a domestic service only and cannot assist people abroad in locating employment in this country. Therefore, *you* and other employees engaged in visa work *must* not suggest to visa applicants that they write to such agencies requesting advice and assistance in finding prospective employment and must, as necessary, advise them against such action.

9 FAM 40.51 N13 SPOUSE OR CHILD OF PRINCIPAL ALIEN EXEMPT FROM LABOR CERTIFICATION

(TL:VISA-46; 08-26-1991)

The spouse or child of an alien who is not ineligible under INA 212(a)(5)(A) does not need a certification regardless of sex, dependency, or future employment plans. Although only one spouse needs a certification or must be in a status which renders INA 212(a)(5)(A) inapplicable, the other spouse and the children would be exempt from the certification requirement only if accompanying or following to join the principal alien. They could not be exempt for the purpose of preceding the principal alien.