

ALIEN LABOR CERTIFICATION QUESTIONS AND ANSWERS

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Part I - Case Processing

JOB ORDERS

1. What is the job order requirement for H-2B applications? Is a job order placed for 10 days only if there are registered applicants on file, or is a job order placed for 10 days for all applications even though there are no registered applicants on file?

ANSWER: A 10-day job order is required for all H-2B temporary labor certification applications. General Administration Letter 1-95 dated November 10, 1994, Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations, requires that:

The State Employment Service Agency (SESA) shall prepare a job order, using the information on the application, and place it into the regular ES system for 10 days. During this period, the SESA should refer qualified applicants who walk in and those in its active files.

2. Many States have centralized Alien Employment Certification Units. Can the employer file an F-1 student job order with the central office or must it be filed with the nearest local office?

ANSWER: An employer seeking to file an F-1 student job order should be instructed to place the order directly with the local office serving the area of intended employment. Alien Certification Units are not responsible for preparing, placing, and collecting referral activity on job orders placed under the F-1 Student program.

3. Should all labor certification job orders be put into interstate clearance?

ANSWER: No. SESAs determine whether or not a labor certification job order is placed into the interstate clearance system. Factors to consider include the nature of the occupation and whether applicants would relocate to fill such jobs.

4. How can States effectively process labor certification applications if they are prohibited from identifying job orders as labor certification orders? For example: If an order is not identified as a labor certification order, it may be closed before the required 30-day period. Identification of the order as a labor certification order ensures that all referrals on the order are included in the case file.

ANSWER: SESAs are required to place job orders into the regular Employment Service recruitment system and must assure that such orders do not contain symbols or words which identify the order as an alien certification order. SESA staff must refrain from discouraging U.S. workers who seek referral to employers on alien certification jobs. For reporting purposes, SESAs may identify job orders by a code, office or unit reporting number or staff person. However, phrases such as "alien order" or "labor certification order" which are readily identifiable by applicants are prohibited.

RESUME SCREENING AND REFERRAL

5. Why are State agencies required to screen U.S. applicants before referring them to the employer?

ANSWER: Screening resumes to ensure that U.S. applicants meet an employer's basic job requirements is defined as a major SESA responsibility in the Alien Certification Cost Reimbursable Grant Agreement. The screening of applicants prior to referral has always been a basic function of the regular employment service system under the Wagner Peyser Act and is an integral part of the recruitment process in alien labor certification programs.

6. When an employer lists several special requirements, such as several software programming languages, and the resume indicates that the U.S. applicant meets only 80% of those special requirements, should the resume be forwarded to the employer?

ANSWER: The SESA should refer an applicant's resume when it indicates that the applicant meets the broad range of experience, education and training required for the job, thus raising the reasonable possibility that he/she may meet the stated minimum job requirements. The employer has a duty to make further inquiry, by interview or by other means, into whether the applicant meets all of the actual requirements.

7. What is the policy with regard to resumes that are screened out and not forwarded to employers for consideration for the job opportunity? Are they returned to the applicants? Are the applicants informed that they were deemed not qualified for the job opportunity? Can those resumes be referred to other employers using the regular employment service system?

ANSWER: Resumes that are not forwarded to the employer should not be included in the case file that is forwarded to the Regional Certifying Officer (RCO) and need not be returned to the applicants. It is not necessary for SESAs to notify applicants that they were deemed unqualified for referral to the employer. The SESA can always copy such resumes for referral to other job opportunities for which the applicant may be qualified.

8. Can resumes received by SESAs in response to ads and job orders placed as a requirement of the labor certification process be forwarded directly to the employer rather than the attorney? Can applicants be requested to submit two copies?

ANSWER: When an attorney or agent represents the employer and/or alien, any notice or document required to be sent to either must be sent to their attorney or agent. See 20 CFR 656.20(b)(2) and page 32 of Technical Assistance Guide No. 656. If the employer is represented by an attorney who has filed a Notice of Appearance on INS Form G-28, the resumes must be forwarded to the attorney. SESAs may instruct employers to request in the ads that the applicant submit two copies of their resumes.

9. Why was the policy requiring employers to contact U.S. applicants within 14 days of receipt of the referral from the SESA established and how should States inform employers/attorneys of this policy?

ANSWER: Recent Board of Alien Labor Certification of Appeals (BALCA) decisions indicate that efforts by the employer to contact an applicant more than 14 days after receipt of a resume may not be a timely contact and may indicate a failure on the employer's part to recruit in good faith. When forwarding resumes to employers/attorneys, SESAs should advise that the applicants must be contacted within 14 days of receipt of the resumes. The fact that an employer took more than 14 days to contact an applicant is not an issue that should be addressed by the SESA. The case should be forwarded to the Regional Office for adjudication.

SPECIAL HANDLING CASES

10. To qualify for special handling does the position have to teach a "for credit" class?

ANSWER: No. To qualify for special handling, the position must be a college or university faculty member and must involve actual classroom teaching of a particular subject. If the SESA is unable to determine whether actual classroom

teaching is involved, the SESA should request a copy of the contract between the alien and the university which would describe the duties of the position.

11. Do all credits from an institution have to be transferrable to qualify for special handling? If one credit transfers do all positions qualify for special handling? Do credits have to be accepted by all colleges or if there is one obscure college that will accept a credit transfer in order to qualify as special handling?

ANSWER: The credits assigned to courses are not factors in determining whether a case should qualify for special handling. Regulations for the Labor Certification process provide for special handling of applications involving college and university teachers. In determining which type of schools may use the special handling procedures, the following definition should be used:

"College or University" means an educational institution: (A) which admits as regular students only individuals having a certificate or diploma of graduation from high school, or the recognized equivalent of such a certificate or diploma; (B) which is legally authorized by the Federal and/or State government(s) to provide a program of education beyond high school; and (C) which provides an educational program for which it awards a baccalaureate (Bachelor's) or higher degree, or provides a program which is acceptable for full credit for such a degree. This award includes those junior or community colleges which award associate degrees, but which teach courses which can be credited toward a baccalaureate degree at another college or university.

12. How do you know the faculty offer is tenure-track?

ANSWER: Whether or not a faculty position is a tenure-track position is not relevant in determining whether a case should qualify for special handling.

13. If an employer chooses to use the basic process instead of "special handling" for a college and university teaching position, can the employer still select the most qualified individual rather than any qualified individual?

ANSWER: Yes, provided the occupation is a faculty member, college or university as described in the Dictionary of Occupational Titles.

14. Is the SESA required to place a job order for applications involving special handling?

ANSWER: Job orders should not be placed in cases processed under special handling at 656.21a. If the employer chooses to process a job offer for a college or university faculty member under the basic process at 656.21, a job order must be placed in the regular ES system for 30 days.

15. How can a notice of intent to hire an alien be included in special handling cases when the university cannot possibly tell in advance who will be selected?

ANSWER: In special handling cases, the employer may post a notice of filing at the time recruitment is conducted, and state in the posting that the recruitment effort may result in the hiring of an alien for the position and that any person may file documentary evidence with the Certifying Officer or SESA. In the alternative, the employer may post the notice of filing after the recruitment process has been completed. Either manner of posting is acceptable.

16. Can "special handling" cases be withdrawn by the employer?

ANSWER: Yes, any application may be withdrawn prior to the issuance of a Notice of Findings.

17. Can the 45-day rule be used on "special handling" cases? If not, what is the best procedure to follow when issuing a correction letter to an employer?

ANSWER: Yes. SESAs may send a 45-day letter in special handling cases.

18. Does a position in a teaching hospital that supervises interns and residents and includes "teaching rounds" qualify for special handling?

ANSWER: No. Special handling cases must involve some actual classroom teaching. "Teaching rounds" does not constitute actual classroom teaching. Such jobs should be classified as physicians, not college or university teachers.

19. If the above position had to be readvertised, would the application be processed as a regular case? Must applicants be equally qualified?

ANSWER: If the job offer is not a college or university faculty member doing some actual classroom teaching, then the applications processed as a regular case requiring the employer to readvertise under the basic recruitment process. The employer may not reject qualified U.S. workers because the alien is better qualified.

20. Is 95% of the prevailing wage allowed in a special handling cases?

ANSWER: Yes. The prevailing wage requirements at 656.40 also apply to occupations for special handling under 656.21a.

ADVERTISING REQUIREMENTS

21. The SESA sends a letter to the employer/attorney approving the advertisement and they have 45 days to notify us when the ad will run in order to simultaneously open the job order. The ad must begin running within the 45-day period, but some way to control things is needed. What is the recommended procedure?

ANSWER: After approving a draft of the advertisement, the SESA should issue advertising instructions to the employer which include the following information: (1) the job order dates (the job order should commence with the date of the letter and remain open for 30 consecutive days); (2) the advertisements must be placed in conjunction with the job order; otherwise, the application will be cancelled by the SESA and the employer will have to file a new application. In order to comply with 656.21(g) of the regulations and to minimize the possibility of U.S. workers being referred after the close of the recruitment period, employers should place advertisements within later than 2 weeks of the beginning date of the job order; and (3) the final results of recruitment must be provided no later than 75 days from the date of the letter to the employer; otherwise the filing date will be cancelled.

In the case of journal advertisements, the employer must contact the SESA and indicate the name of the journal and the date on which the ad will appear. The SESA should open a job order to run in conjunction with the journal ad. In situations where the employer's journal ad did not appear in the issue specified, the SESA should reopen or extend the job order until the journal ad appears in the next available issue.

22. What action should SESAs take in regard to applications and resumes received from U.S. workers after the recruitment period closes?

ANSWER: The regulations contemplate that the recruitment of U.S. workers will be conducted while the employer's application is being processed by the SESA. All applications and resumes of U.S. workers received by the SESA before the application is forwarded to the Regional Office for a

determination should be referred to the employer for consideration. The SESAs transmittal to the region should indicate whether results of outstanding referrals must be obtained before a decision is made on the application. After the case file has been sent to the Regional Office, applications and resumes received from qualified applicants should be retained by the SESA for a reasonable length of time for referral to other job opportunities for which the U.S. workers may be qualified.

23. Should the SESA send an application to the Regional Office to resolve wage disputes before advertising?

ANSWER: The employer should be advised in writing that its wage offer is below prevailing and given the opportunity to increase it. If the employer refuses to offer at least the prevailing wage that was determined by the SESA, the employer should be requested to submit evidence indicating why the prevailing wage determination is in error and why its wage offer meets or exceeds the prevailing wage. The employer should be advised that its application will be sent to the region without further processing for a determination. Such applications will be processed at the region in the order that they are received along with other applications.

24. Are photocopies of newspaper advertisements acceptable?

ANSWER: Original newspaper tear sheets are preferable to photocopies. However, photocopies are acceptable provided they are copies of the entire page and it does not appear that the date of publication has been altered. "Proof of publication" from the newspaper indicating the dates of publication is not sufficient.

25. May SESAs ask employers for copies of advertisements placed for the job in the past and, if appropriate, request that the alien certification advertisement be in the same format?

ANSWER: Except in reduction in recruitment requests, SESAs should not ask employers for copies of prior advertising. However, SESAs should assist employers in drafting ads and in identifying the appropriate placement of the ad in the publication.

26. May SESAs recommend changes in advertisements to ensure that advertisements appear under the appropriate header? For example, can the SESA instruct the employer that "service technician" must be advertised as an "automobile mechanic" or "analyst" as a "systems analyst?"

ANSWER: Yes. SESAs should instruct an employer as to the proper placement of the advertisement.

27. Should the header for an advertisement in an H-2B occupation be "temporary" or should the job be advertised under the occupation or industry?

ANSWER: H-2B advertisements may be run under either the occupation or industry header, whichever is more appropriate to the occupation. The text of the advertisement should indicate that the position is temporary. If the publication has a special section for temporary positions, the advertisement should appear in that section.

28. Can the SESA require the employer to follow a specified advertising format?

ANSWER: SESAs may not mandate a particular format, however, SESAs should assist employers in drafting an advertisement and suggest both the header and section in which the advertisement should appear.

29. Can advertising on Sunday be required?

ANSWER: SESAs may suggest that an employer advertise a position for 3 consecutive days, including a Sunday edition but may not require Sunday advertising under current regulations.

30. How does a SESA determine which publication is appropriate for advertising?

ANSWER: Some SESAs maintain logs on specific recruitment vehicles used by employers for certain job categories as a reference. A listing of suggested recruitment sources for many occupations has also been provided to SESAs. In addition, the National Trade and Professional Associations directory is an excellent resource for identifying publications which are appropriate to a particular occupation. This publication can be obtained from:

National Trade and Professional Associations
Columbia Books, Inc.
1212 New York Avenue, N.W., Suite 330
Washington, D.C. 20005

31. Can SESAs use an ID number rather than a job order number in the advertisement?

ANSWER: SESAs may continue to use job orders numbers as they have in the past or develop a separate system using ID numbers whichever is more efficient and appropriate for a specific SESA's operation.

32. When should a job opportunity be advertised in an ethnic publication?

ANSWER: SESAs should contact their Regional Office to determine under what circumstances an ethnic publication would bring the most responses from U.S. workers. The presence of a foreign language or other ethnic requirement alone may not be determinative.

33. What guidance should employers follow when placing advertisements in newspapers which do not give guidance on keywords or where to put ad?

ANSWER: The SESA should provide the necessary guidance to employers in this situation.

RECRUITMENT AND REJECTION OF U.S. WORKERS

34. The employer's application is cancelled for failure to respond to a 45-day letter. The employer refiles as a request for reduction in recruitment and the application is assigned a new local office receipt date. Can the employer use the prior SESA advertisements for the reduction in recruitment request?

ANSWER: Yes, provided the advertisements were placed within 6 months of the date the resubmitted application was filed with the local office. The SESA should insure that the results of recruitment are included with the request.

35. The SESA refers qualified U.S. workers to the employer, but the employer fails to submit a final recruitment report within 45 days, and the application is cancelled. The employer immediately files a new application without a request for reduction in recruitment. Should the SESA refer the applicants who previously applied for the position?

ANSWER: Yes. The SESA should refer all qualified applicants who previously applied for the job opportunity, in addition, to the applicants who respond to the new recruitment.

36. May an employer give U.S. applicants a written test of their knowledge of the occupation?

ANSWER: An employer may not give a written test to U.S. applicants unless it is the employer's normal practice to administer tests to all applicants prior to hire. Further, the employer must provide documentation to show that the alien took and passed a test prior to hire. The testing requirement must be included in the ETA-750, the job order, advertisement and posting. The employer may reject a U.S.

applicant who fails a test designed to determine whether the applicant has the proper experience for the job. However, the employer is not permitted to use a test to discriminate against U.S. workers.

37. Should the SESA terminate processing of an application when the employer rejects applicants for failing to meet requirements not stated on the ETA 750, Part A?

ANSWER: No. If it appears to the SESA, following receipt of the final results of recruitment and applicant follow-up, that U.S. workers were unlawfully rejected, the SESA should include comments to that effect on Form ETA 7147 when the case is transmitted to the region. The Certifying Officer will review the SESA's comments along with the case file and will issue a Notice of Findings if it appears that U.S. workers were unlawfully rejected.

38. Should the SESA cancel an application if an employer fails to provide recruitment results on a single applicant?

ANSWER: Once the SESA has issued a 45-day letter requesting that the employer provide the final results of recruitment, it is the employer's responsibility to provide a complete response. If the employer has not provided all results of recruitment, the application should be cancelled and returned to the employer.

39. May the attorney of record submit the final results of recruitment on behalf of the employer?

ANSWER: If the employer has signed the final recruitment report, an attorney filing Form G-28 on behalf of the employer may submit this document and any other documentation for the employer to the SESA. The attorney may not participate in the interview process, unless the attorney normally interviews job applicants for the employer.

40. Instead of specifying that employers contact workers within 2 weeks, why not simply require that workers be contacted "as soon as possible?"

ANSWER: By indicating a specific time frame (14 days), this requires the employer to make initial contact in order to setup an interview with U.S. applicants. Allowing employers to contact applicants "as soon as possible" would permit employers to wait until applicants may no longer be interested and available. Therefore, employers must make initial contact within 14 days of receipt of the resumes.

41. Why are we still doing "waivers" with our high unemployment rate?

ANSWER: The regulations allow for employers to request a Reduction in Recruitment (RIR) in cases where the employer has tested the labor market prior to filing an application and has been unable to find a qualified U.S. worker to fill the position. The approval or denial of a RIR is not tied to a general unemployment rate.

42. Should the Notice of Filing be posted for 10 consecutive business days or 10 consecutive days? The regulations state 10 consecutive days.

ANSWER: The Notice of Filing must be posted for 10 consecutive calendar days.

43. When must the Notice of Filing be posted in a Reduction in Recruitment case?

ANSWER: In a Reduction in Recruitment case, the employer may post the Notice of Filing at any time within the 6 months before the application is filed or after filing with the SESA. The SESA should obtain a copy of the posted notice prior to transmitting the application to the regional office.

45- DAY REQUIREMENT

44. What should the SESA do if an application is returned for failure to respond to a 45-day letter and the employer insists that he never received the letter?

ANSWER: If the SESA's letter has not been returned by the U.S. Postal Service, then the letter is deemed to have been delivered. However, SESAs may wish to avoid this problem by sending the original 45-day letter to the attorney of record with a copy to the employer, thereby reducing the likelihood of both letters being undelivered.

45. What action should the SESA take in the above question if the employer demands that the case be forwarded to the Regional Office?

ANSWER: If the employer demands that the application be forwarded to the Regional Office, the SESA must comply with this request and forward the case to the Certifying Officer. This policy applies not only to a response to a 45-day letter, but at any point in the processing of the case if the employer requests that the case be forwarded to the Certifying Officer. Cases forwarded to the Certifying

Officer will be placed in the same queue as new applications received by the Regional Office and will be handled according to date of receipt. Similarly, when the case is returned to the SESA by the Regional Office, it will be handled in accordance with the date it is received by the SESA.

46. In order to avoid lost resumes or 45-day letters, should SESAs send them by certified mail?

ANSWER: SESAs are not required to send 45-day letters by certified mail. For most cases, assurance of delivery can be achieved by sending a copy of the letter to the employer and to the attorney.

47. Should the SESA cancel an application on the 46th day if no response is received or should the employer be allowed a grace period?

ANSWER: An application should not be cancelled on the 46th day. SESAs should wait a reasonable period of time after the 45th day to allow sufficient time for mail delivery. Normally, this period would be from 5 to 7 days. SESAs should be aware that the postmark date is controlling and that there is no extension to the 45-day period.

48. Must the SESA actually return an application to the employer who misses the 45-day due date or can the SESA simply cross out the local office receipt date and write in the new one?

ANSWER: State Alien Labor Certification Activity Report indicates that when an application has been cancelled for failure to comply in a timely manner with the 45 day rule, or is withdrawn, all forms and supporting documents submitted by the employer shall be returned with a notice that the application will be treated as a new application and receive a new local office filing date if it is refiled. All recruitment must be repeated unless the employer requests a reduction in recruitment.

49. The draft of the new semi-annual report gave two criteria to address 45-day defaults--those that missed the 45 days and those that have been received with 60 days, i.e., 45 plus 15. Does this mean that the SESA must hold the application for an additional 15 days?

ANSWER: This language was in a previous "draft" of the semi-annual report. The final instructions state that the SESA shall cancel an application when information requested from the employer has not been mailed by the 45th day following the date of the request.

50. Is there a limit on the number of times a SESA may send a 45-day letter?

ANSWER: The regulations do not limit the number of times the SESA can send a 45-day letter. However, SESAs should make every effort to send one 45-day letter which addresses all issues, concerns and deficiencies. If it is absolutely necessary for the SESA to send a second 45-day letter to correct deficiencies, this may be done, but should be the exception and not the rule.

51. If the employer does not send all documentation requested in the 45-day letter, should the application be cancelled and returned to the employer or should the SESA issue another 45-day letter?

ANSWER: If the employer does not send all the documentation requested in the 45-day letter, the application should be returned to the employer with a letter stating that the application has been cancelled for failure to provide a complete response.

52. Is a 45-day letter appropriate to ask employer to withdraw a reduction in recruitment request? If not, how does the SESA get this in writing within a reasonable time?

ANSWER: No. The SESA may not issue a written request to an employer to withdraw a request for reduction in recruitment. SESAs may advise an employer informally that the request may not likely be granted and advise the employer of the basic processing requirements.

53. What should the SESA do if an application is cancelled because the employer did not respond in a timely manner to the 45-day rule and then refiles the application as a new case or as a request for reduction in recruitment?

ANSWER: The employer may refile a cancelled application using the same forms. The application may be filed with or without a request for reduction in recruitment. The employer may use the previous advertisements and results for a reduction in recruitment if the advertisements were placed within 6 months preceding the new filing date. If the reduction in recruitment is not requested, all of the recruitment required through the SESA must be repeated. In addition, the SESA should again refer any qualified applicants that were sent to the employer in the prior case. The SESA should assign the new application a new local office receipt date and should date stamp both forms.

DOT AND SVP ISSUES

54. How is the DOT code assigned when the job opportunity contains a combination of duties?

ANSWER: For job opportunities involving a combination of duties, the SESA should assign one DOT code using the following order of priority:

- highest paying occupation; or
- occupation with highest skill level (SVP); or
- occupation in which the majority of the time spent.

55. What is the time frame for the return of an Occupational Code Request? Past experience with direct requests is that they have been returned in 7 days. There is concern that the current procedure will cause delays.

ANSWER: Instructions for obtaining an interim DOT code are outlined in a Memorandum For All Regional Administrators dated March 31, 1993, Clarification Regarding the use of Interim DOT Codes. The response time is normally 3 weeks. The process was changed because employers who have unrestricted access to the OA Field Centers were starting to abuse the system by misrepresenting the true nature of the job in order to obtain an SVP level of 2 years or more in order to remove the job from the "other worker" preference category.

56. Why is the policy for counting the SVP for certain educational requirements different than what has apparently been utilized by some States, to date?

ANSWER: The criteria used to determine the amount of SVP time that can be credited toward an Associate, Bachelor's, Master's or Doctorate degree appears in Field Memorandum (FM) 48-94 dated May 16, 1994, Policy Guidance on Alien Labor Certification. The standard outlined in the FM should be followed by all States in order for the process to be uniform throughout the system:

DEGREE	SVP
General Associate's	0
Specific Associate's	2
Baccalaureate	2
Master's	(2+2)
Doctorate	7 (2+2+3)

57. Is there consideration being given to updating the Dictionary of Occupational Titles? Some titles listed in the current edition are outdated and some DOT titles, definitions or descriptions have changed.

ANSWER: The Department of Labor has established a work group for the purpose of developing a computerized DOT system. The revisions planned will result in the DOT being replaced by a new system called the O*Net. The O*Net will provide current, up-to-date information about the skills, knowledge and abilities required for work in today's economy. The first version of O*Net is planned to be available to users by the end of 1996. The O*Net represents a nationally orchestrated effort to put the power of new information technology into the hands of those who need it. The computerized system will provide detailed, accurate and current information about jobs and their requirements both present and future.

58. Should the SESA question an employer's job offer when requirements are below SVP or do not meet State licensing/certification requirements?

ANSWER: It is not necessary to question the employer's minimum requirements when they are below the SVP. If a State license or certification is required to perform the job, then the application form, newspaper advertisement and notice of filing must include: (1) the licensing or certification requirement or the ability to obtain the required license or certification; (2) a description of what the worker will be doing until the license or certification is obtained; and (3) the prevailing wage for the fully licensed or certified job.

59. What can the SESA do about the problem of "other workers" masquerading as skilled workers? No one is a sewing machine operator or landscape laborer any more. They are sample stitchers, tailors, and landscape gardeners with an SVP of six at least.

ANSWER: SESAs should review the application to assure that the employer's minimum requirements are not unduly restrictive and are those normally required to perform the job in the United States. The issue of whether the position truly exists or is overstated should be handled by the Certifying Officer in a Notice of Findings or by referral to the Immigration and Naturalization Service for investigation.

60. How should the SESA respond when employers/attorneys often suggest inappropriate occupational titles and codes with SVPs higher than the job offer just so the alien can qualify as a skilled worker and get a visa faster. For example, an engineering code may be suggested for a drafting position because engineers have the higher SVP. Sometimes the

suggested occupations have one or two general duties that are similar to the job offer.

ANSWER: SESAs should assign the DOT title and code based upon the job duties described on the application form. Disputes should be resolved by consulting the Certifying Officer.

61. Experience required at item 14 is often stated as 2 years in the job offered or the same amount in a related occupation. Should the time required in the related occupation be more than that required in the job offered, especially in those instances where the related position is a lesser skilled job than the job offered?

ANSWER: This is not a situation that can be handled by "rule of thumb." The answer in a given case would depend upon all the relevant facts including the occupations and the skill levels required. In most instances, the determination of the appropriate experience requirements shown on an application for a related occupation should be evaluated by the Certifying Officer.

62. Employers sometimes use words and phrases such as "must be able to," "proficient in," "capable of," etc., in response to Item 15 of Form ETA 750, Part A. These responses are subjective in nature and can only be measured by actual work performance. May SESAs require employers to quantify all such job requirements?

ANSWER: SESAs should encourage employers to quantify all requirements. Without measurable job requirements it is difficult for SESAs to screen potential job applicants for referral to the employer. In general, the experience and other special requirements indicated in Item 15 of Form ETA 750, Part A, should be quantified. SESAs should return applications containing subjective requirements with a request to specifically state the requirement in terms of months, years, etc. Some requirements may be difficult to quantify, however, and a less specific response may be acceptable in these cases, such as, "able to communicate in Spanish." If the Certifying Officer is concerned that subjective terms will be applied in a restrictive manner, then the Certifying Officer can address that issue when the Certifying Officer reviews the employer's reasons for rejecting U.S. workers. Any vagueness in the subjective terms can be construed against an employer's attempt to disqualify a U.S. applicant.

63. Please clarify the SVP for a Bachelor's degree.

ANSWER: As stated in Field Memorandum 48-94, the amount of SVP to be credited for a Bachelor's degree is 2 years

(corresponding to the last 2 years of the average 4-year college curriculum). The first 2 years of most baccalaureate programs are general in nature and are not specifically directed to a particular career or discipline.

64. Is the DOT available on computer?

ANSWER: The DOT can be accessed through the use of a PC and modem. Utah's Department of Employment Security has the DOT on their bulletin board which can be accessed by dialing 1-800-828-5912.

Any States which desire to purchase "EZ D.O.T." software may contact CAPCO located in Spokane, Washington at 1-800-541-5006.

In addition, the DOT is accessible and searchable by keyword on the information highway via the Region VIII Economic Data Service Bulletin Board System (BBS). The new occupational database being developed will likely be provided by BBS probably with Internet system.

65. Have Alien Labor Certification staff responsible for assigning DOT codes received DOT training?

ANSWER: Many States provide DOT training for all Employment Service interviewers. If there are States which do not provide DOT training for their ES interviewers, training can be arranged by contacting one of the Occupational Analysis Field Centers. SESAs should assure that Alien Labor Certification staff receive this training.

APPLICANT FOLLOW-UP

66. At what point in the process should the SESA send out follow-up letters to U.S. applicants?

ANSWER: SESAs should mail out applicant follow-up letters immediately following receipt of the employer's final recruitment report. SESAs may, at their discretion, share the employer's reasons for rejection with the U.S. applicant in their follow-up letters. Providing an applicant with the opportunity to respond to an employer's reasons for rejection can be an effective tool in evaluating whether the applicant was rejected for lawful, job-related reasons.

67. Should responses to questionnaires received from applicants be made a part of the file which is sent to the Certifying Officer or should the SESA summarize the applicant's response regarding the results of the interview?

ANSWER: SESAs should provide the Certifying Officer with the applicant's full response to the follow-up letter. All responses should be made a part of the case file transmitted to the Regional Office.

68. If an applicant reports in a follow up letter that "the employer told me the job was already filled," will the Certifying Officer deny the case?

ANSWER: In such circumstances, the regulations require that the Certifying Officer issue a Notice of Findings citing 20 CFR 656.20(c)(8) advising the employer that the job opportunity is not clearly open to any qualified U.S. worker. The employer must be provided with the opportunity to rebut the finding within 35 days in accordance with 20 CFR 656.25.

SCHEDULE B

69. Is Schedule B an all-inclusive list of occupations and DOTs or just a guide?

ANSWER: Descriptions of Schedule B occupations are general in nature. The descriptions are for the purposes of Schedule B only and may cover more than one similar job defined in the DOT. Some of the occupations are described in sufficiently broad terms to include several DOT job titles, such as Sewing Machine Operators and Assemblers. Others may include only one DOT title, such as Short Order Cook or Receptionist. See TAG on page 21.

70. If an alien household domestic service worker has over 3 months but less than 12 months experience and employer submits a request for a Schedule B waiver, is it permissible for employer to require 3 months experience on the job offer?

ANSWER: The employer's job requirements may not exceed the SVP for any occupation. According to the DOT, the SVP for a Houseworker, General, is 30 days to 3 months of combined education, training and experience. Therefore, the employer's requirements for a houseworker may not exceed 3 months. The regulations also require aliens who will be employed as live-in houseworkers to separately document 1-full year of prior paid domestic work experience. The purpose of this requirement is to ensure that the alien has an attachment to the occupation. This documentation requirement has no relationship to the employer's job requirements.

ENFORCEMENT ISSUES

71. Who is responsible for investigating whether the wage stated on Form ETA 750 is paid to the alien? Also, who checks working conditions and whether the applicable taxes are paid on these folks?

ANSWER: Unlike the temporary attestation programs, the statute does provide for enforcement of the terms and conditions of the labor certification after an alien becomes a permanent resident. Permanent Resident Aliens (PRAs) generally have the same rights as U.S. workers. The employer's guarantee to pay the prevailing wage is operative from the time a petition to adjust to permanent residence status is approved, or from the time the alien enters the United States to take up the certified employment pursuant to the issuance of a visa by an American Consulate. PRAs can seek alternative employment and change employers if the terms and conditions of employment are not satisfactory or less than prevailing in the labor market, consider civil action if the employer does not live up to the employment contract, and/or lodge a complaint with the appropriate government agency. Compliance with various employment-related statutes and tax laws is the responsibility of the various agencies that administer the relevant law(s). Workplace safety issues, for example, would be the responsibility of OSHA, failure to withhold unemployment insurance contributions, income tax payments and social security payments would be within the jurisdiction of the appropriate agencies responsible for administering the various tax laws involved.

72. A SESA employee has knowledge of local attorneys who file Labor Condition Applications without obtaining a prevailing wage determination through the SESA because they do not want to wait. They are not using better sources than the SESA. They are just counting on no one checking on them, and no one has. How about some enforcement that would guarantee that the wage structures are not being damaged?

ANSWER: The H-1B regulations contain provisions which permit the employer to determine the prevailing wage by a number of sources outside the SESA. If the SESA becomes aware of a specific case in which the employer has not utilized one of these sources, the SESA may file a complaint with the Wage and Hour Division pursuant to the regulations at 20 CFR 655.800.

73. When an employer is operating a business but is not paying taxes for his/her employees, may the SESA cancel the case, report the employer to appropriate enforcement agency or simply ignore it?

ANSWER: The regulations do not authorize the SESA to terminate processing of an application because the employer may be in violation of employment-related laws. Such applications may be annotated by the SESA when they are forwarded to the Certifying Officer. SESAs may also notify the appropriate governmental agency of the suspected violation.

H-2B Applications

74. Why is Part B of the ETA 750 Form not required for an H-2B application? Without a B Form, there is no way to determine whether the alien meets the employer's stated job requirements.

ANSWER: A temporary labor certification may be used for multiple job openings. The alien beneficiary does not need to be identified at the time the labor certification application is filed. Consequently, Part B is not required. During the visa issuance process, INS is responsible for determining whether the alien beneficiary(ies) meet the designated job requirements.

75. Why is a Notice of Filing not required for H-2B applications?

ANSWER: The posting of a Notice of Filing is statutory in origin and has been incorporated into our regulations for the permanent program. There is no corresponding statutory requirement for the H-2B program. Requirements for the permanent program are not automatically transferrable to the temporary labor certification program. Such a change to the temporary process would have to be published as a proposed rule making in the Federal Register so that the public can have the opportunity to comment.

DOCUMENTATION

76. Can the SESA require true and correct copies of supporting documentation? If not, does the employer have to provide a statement indicating that they are aware that they may have to present the original at a later date?

ANSWER: Documents in support of information contained on Part B of the Application for Alien Employment Certification are not required. Since INS is the sole agency responsible for determining whether the alien possesses the required

qualifications, there is generally no need for supporting documentation until a petition is filed with INS. Similarly, the employer is not required to provide a statement that they are aware that original documents may have to be presented at a later date since such a statement has no relevance to the labor certification process. SESAs should not request copies of professional licenses or other documents and credentials listed as requirements on Part A. It is sufficient if the alien indicates the possession of such a license or other document on Part B of the application form.

77. If the employer requires an M.S. degree and specific course work, and the alien has an M.S. from a U.S. university and a B.S. (with a transcript) from a foreign university, is a U.S. equivalency required for course work and can the employer use a course name from a foreign transcript?

ANSWER: INS, not DOL, is responsible for determining whether the alien is qualified for a particular job opportunity. Therefore, it is inappropriate for the SESA to require the alien and/or employer to submit documentation proving that the alien's course work is equivalent to course work in the United States. However, an employer's requirements for foreign degrees or foreign course work may be unduly restrictive. SESAs should keep in mind that such requirements must be deleted or supported by evidence of business necessity.

FORMS

78. Is item 20 on Part A of the ETA 750 (live at work) "applicable to all occupations? The instructions to Part A state that the item is "to be completed for DOMESTIC positions only." Is a written contract required for all live-in occupations?

ANSWER: Item 20 of Part A relates only to live-in household domestic service workers and requests information about the nature of the employer's household. SESAs should keep in mind that, while only applications for live-in household domestic services require a written contract; all applications with a live-in requirement must be supported by evidence of business necessity.

79. When is an application considered an application? Can a filing date be assigned even though the ETA 750A or B is not signed.

ANSWER: The regulations require the SESA to date stamp the application upon receipt. The local office receipt date is retained throughout the processing of the application by the SESA and the Regional Office. The original local office receipt date may be changed, however, if the employer fails to provide information requested by the SESA within 45 days.

80. Is Form ETA 750 going to be revised soon?

ANSWER: At present, there are no plans to revise the ETA 750 Forms.

CONTACTS WITH ATTORNEYS

81. How do the SESAs respond to attorneys who quote Board of Alien Labor Certification Appeals (BALCA) decisions in response to requests for documentation and/or clarifications? Examples are business necessity for special requirements and experience exceeding the SVP for the job offer and related occupation.

ANSWER: Certifying Officers have been instructed not to cite BALCA decisions in their determinations. Similarly, the SESAs should not cite, nor should they respond to citations involving BALCA decisions.

82. Are SESAs required to communicate orally with the attorney and not the employer if the attorney has filed Form G-28 representing the employer?

ANSWER: According to the regulations, whenever a notice or other document is required to be sent to an employer or alien, the document must be sent to their attorney or attorneys filing Form G-28. Documents normally forwarded to an employer, including the resumes of U.S. workers applying for the position, must be forwarded to the employer's attorney if that attorney has filed the required notice of appearance. This rule does not apply to oral communications with employers. Therefore, SESAs may communicate orally directly with employers, even if the attorney has filed Form G-28. Similarly, SESAs should continue to refer applicants who apply for the job opportunity in person to the employer and not to the attorney.

MISCELLANEOUS

83. When the alien is working for the employer in a different position, can the experience in the prior job be counted towards filling the experience requirements in the new job?

ANSWER: The regulations at 20 CFR 656.21(b)(5) prohibit counting the experience the alien gained with the employer as qualifying experience in jobs similar to the one involved in the labor certification application, unless the employer can show that it is not feasible to hire workers with less training or experience.

84. Can Regions provide the SESAs information on what happens to cases?

ANSWER: Regions are responsible for providing copies of actions taken on cases to the appropriate SESA office(s). The Certifying Officer should be informed if this is not being done.

85. When is the current TAG going to be updated and released? Is there currently a reference guide that can be utilized in lieu of the TAG or in addition to the TAG?

ANSWER: Technical Assistance Guide (TAG) No. 656 will be updated after the permanent labor certifications are revised. The current TAG is supplemented from time to time by field issuances, i.e., Field Memoranda, General Administration Letters, and Employment Service Program Letters.

86. Is it possible to obtain a copy of the guidelines utilized by Certifying Officers when they review labor certification applications?

ANSWER: Certifying Officers use the applicable Federal regulations, TAG, GALs, and policy issuances in reviewing applications. These issuances are all readily available to SESA staff.

87. Some Regions are requiring SESAs to take action when NOFs are issued. Other Regions issue a NOF and ask the employer to "indicate a willingness to readvertise the job." Upon receipt of the rebuttal, the Certifying Officers remands the case back to the SESA to take action. What procedure is correct?

ANSWER: Certifying Officers have the option to use either procedure.

88. Flexiplace work arrangements are sometimes reflected in our applications for labor certification. The alien works in the field or from home and communicates electronically with the employer who may be in another State or distant part of the country. How is jurisdiction determined in such cases?

ANSWER: Employers may file applications for job openings which can be performed at any location within the U.S. In such instances, the application should be filed with the SESA having jurisdiction over the employer's headquarters or principal place of business. Recruitment should be conducted nationally or in the area of employment, however, the employer must indicate that the job opportunity can be performed at any location within the U.S. or indicate the specific locations of employment.

89. With job opportunities shrinking for Registered Nurses in anticipation of health care reform, and cost cutting going on in general, isn't it time to consider taking nurses off Schedule A?

ANSWER: Revisions to Schedule A will be considered in revisions to the permanent regulations. The labor market for nurses will be considered at that time.

90. Can SESAs be involved in the rebuttal process? The SESA does the initial research and follow up and may have valuable input.

ANSWER: The regulations at 20 CFR 656.25(d) provide that a rebuttal to a Notice of Findings may be filed by the employer, and by the alien, but only if the employer has also filed a rebuttal. There are no provisions in the regulations for the SESAs to file rebuttal evidence. SESAs may be involved in the rebuttal process if additional recruitment is required by the Certifying Officer. SESAs also have the opportunity to provide pertinent information on the application in the State Agency Transmittal Form ETA 7147 at any time prior to a final determination on the application.

91. Where is the status of the proposal to merge the agencies working with immigration matters? Will DOL, INS, et al., really ever become one, separate agency within the government? If so, when?

ANSWER: The proposal for merging immigration-related agencies within DOL was not adopted by the new Administration. There are no proposals for merging ETA immigration functions with other agencies performing immigration-related work.

92. What is status of the LMI pilot program for DOL to determine ten (10) shortage/surplus occupations?

ANSWER: The requirement for an LMI pilot project expired on September 30, 1994. It was not reinstated by Congress. Congress removed the requirement for the LMI pilot program from the statute in Public Law 103-416 (October 25, 1994).



Part II - Prevailing Wage

Davis Bacon Act and Service Contract Act

1. What if the job opportunity is in an occupation in the area of intended employment subject to wage determinations under both the Davis Bacon Act and the McNamara-O'Hara Service Contract Act?

ANSWER: If an occupation in an area of intended employment is subject to wage determinations under both the Davis Bacon Act and the McNamara-O'Hara Service Contract Act, the applicable Act's rate would be determined by such factors as whether or not the alien beneficiary will be performing routine maintenance work as opposed to performing duties involved in the alteration, relocation, or rearrangement of architectural and structural components of a facility. The most important factor, perhaps, is whether the work/activity is part of a construction project. These distinctions will not always be easy to make in practice, in view of the limited information that will accompany a request for a prevailing wage determination. When necessary, the Certifying Officer should request assistance from the local Wage and Hour Office.

Area of Intended Employment

2. What is meant by the "area of intended employment"?

ANSWER: The term area of intended employment is defined at § 656.2 of the labor certification regulations as:

. . . the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within the normal commuting distance of the place of intended employment.

A determination of the normal commuting distance is not necessary for places of employment within an MSA since any place within an MSA is deemed to be within normal commuting distance. Although not specifically mentioned in the definition of "area of intended employment," any place within a Primary Metropolitan Statistical Area (PMSA) is also deemed to be within normal commuting distance of the place of intended employment. If the place of employment is

made based on the SESA's knowledge of commuting practices in the area.

3. Is there a definition or "rule of thumb" to determine the "normal commuting distance"?

ANSWER: The term "normal commuting distance" is not defined in the regulations. The normal commuting distance can vary greatly depending on local conditions. Such factors as population density, highway infrastructure, and topography, all play an interdependent role in determining the normal commuting distance. In practice the SESA and/or Certifying Officer must make a determination on a case-by-case basis of what is the normal commuting distance for the place of employment involved in the employer's job offer.

4. In those situations where MSAs or PMSAs cross State boundaries, how are States within an MSA supposed to coordinate their efforts to obtain wage data needed to make prevailing wage determinations?

ANSWER: The most practical and cost-effective approach is to encourage the SESAs within an MSA or PMSA to work together to conduct surveys and share information. The SESAs could divide up the occupations, and each SESA would survey a sample of employers throughout the metropolitan area for the occupations for which it is responsible. If this approach is used, SESAs would, of course, have to survey employers outside of their State and share their findings with all of the States within the MSA or PMSA.

5. How do you expand in rural areas to get a good sample? This is a problem in rural areas due to the limited number of employers and positions.

ANSWER: The methodology for expanding the geographic area to obtain an adequate sample when such is required under the regulations is the same for rural as for urban areas. Of course, due to the lesser concentration of employers and relevant occupations in rural areas, it may be necessary to cover a considerably larger geographic area to obtain an adequate sample in a predominantly rural area as compared to a predominantly urban area.

6. What is the definition of a Consolidated Metropolitan Statistical Area (CMSA)?

ANSWER: OMB defines a CMSA as a level A (population of 1 million or more) MSA in which two or more primary metropolitan statistical areas (PMSA) are identified. If no PMSAs are defined, the Level A area remains a MSA.

Additional information on the standards used in designating MSAs, PMAs and CMSAs can be found in the Revised Standards for Determining Metropolitan Areas in the 1990's published by the Office of Management and Budget in the Federal Register on March 30, 1990 (55 FR 12154).

7. Can counties be used as the geographic basis for making prevailing wage determinations instead of "area of intended employment?"

ANSWER: No. The regulations do not permit any exception to using a geographic area narrower or broader than the "area of intended employment" as the basis for making a prevailing wage determination. See the response to question No. 3 for the definition of "area of intended employment."

Similar Levels of Skill

8. When can you include in a SESA conducted survey an occupation other than the one for which the employer is requesting a prevailing wage determination?

ANSWER: You may survey a different occupation in the area of intended employment which has a similar level of skill, if the SESA determines that the employer requesting the wage determination is the only employer with jobs in the occupation in the area of intended employment. The only other circumstance would be the situation in which the other area employers who employ workers in the occupation did not participate in the wage survey conducted by the SESA.

9. If the employer making a prevailing wage request is the only employer that employs workers in the occupation, does the SESA have to survey other jobs requiring a similar level of skills before surveying employers outside the area of intended employment?

ANSWER: No. The SESA has the option to survey other employers that employ workers with similar level of skills or to survey employers outside the "area of intended employment." The SESA should use the option which, in its judgment, yields the most accurate prevailing wage. It should also be noted that the option to survey workers with similar levels of skills or to expand the geographic area can also be used if an adequate number of employers in the area of intended employment do not respond to develop reliable prevailing wage information.

10. How are SESA's to determine which jobs require a substantially similar level of skill?

ANSWER: In determining which occupations require levels of skills similar to those involved in the employer's job offer, information contained in the Dictionary of Occupational Titles, the Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles, and, in particular, the Guide to Occupational Exploration (GOE) code can be very helpful. It is recommended that you identify occupations within the same GOE subgroup as the employer's job offer as the first order of inquiry. Then within the relevant GOE code, the SESA should first consider those occupations which are within the same 3-digit DOT group as the employers and are assigned the same SVP code as the occupation involved in the employer's job offer.

11. If an employer makes a request for an occupation for which the SESA does not have a prevailing wage determination, but does have a wage determination for another occupation with a similar level of skill, can that prevailing wage determination be used in responding to the prevailing wage request?

ANSWER: Such a prevailing wage determination could only be used if the employer making the wage request was the only employer employing workers in the occupation the area of intended employment, or the other employers in the area did not respond to a survey conducted by the SESA.

12. Should experience requirements be considered in determining the prevailing wage for a labor certification application?

ANSWER: The experience requirements would be relevant to determining whether the employer's job opportunity is for an entry or experienced level worker. General Administration Letter No. 4-95 requires that "(a)t a minimum" SESAs make a distinction based on whether or not the employer's job offer is entry level or at the experienced level.

Separate Wage Systems

13. What is the effect of the Hathaway decision by the Board of Alien Labor Certification Appeals (BALCA)?

ANSWER: In Hathaway Children Services (91-INA-388, February 4, 1994, en banc), BALCA explicitly overturned its decision in Tuskegee University (87-INA-561, February 23, 1988, en banc), which the employer in Hathaway argued was precedent for the proposition that ability to pay should be a factor in determining which U.S. workers were "similarly employed" for the purpose of determining prevailing wages.

As the result of Hathaway it has been determined that the language on pages 122 and 123 of Technical Assistance Guide No. 656 Labor Certifications (TAG) which indicates that an employer may challenge a finding as to the prevailing wage for an occupation, such as school teaching, on the basis that there are separate prevailing wages applicable to employment in public and private schools, is not supportable by the regulation at section 656.40. As stated by the Board of Alien Labor Certification Appeals (BALCA) in Hathaway Children's Service 91-INA-388, February 4, 1994, in relevant part, "(t)he underlying purpose of establishing a prevailing wage is to establish a minimum level of wages for workers employed in jobs requiring similar skills and knowledge levels in a particular locality." Factors going to the nature of the employer, such as whether the employer is public or private, profit or nonprofit, academic or nonacademic, large or small, charitable, a religious institution, a job contractor, or a failing or prosperous firm, do not, bear a significant way on the skills and knowledge levels required and, therefore, are not relevant to determining the prevailing wage for an occupation under the regulations at 20 CFR 656.40. A representative number of different types of employers should be included in a prevailing wage survey.

14. Do prevailing wage determinations for faculty members have to include both public and private educational institutions since private colleges frequently pay substantially higher wages than State colleges and universities?

ANSWER: It follows from the decision that both private and public educational institutions would have to be included in a prevailing wage survey conducted by the SESA.

15. Can research associates and post doctoral positions be found in private industry?

ANSWER: Job titles, such as "research associate" and "post doctoral fellow" are some times found in the private business sector. However, all such jobs are classified according to the particular occupation and speciality. For example, a research associate who studies physical principles of living cells and organisms would be classified as a biophysicist.

16. In determining prevailing wages for faculty members, should the disciplines; e.g., medicine, psychology, engineering, involved in employer job offers be considered in determining which U.S. workers are "similarly employed"?

ANSWER: With respect to college and university faculty members, the discipline and the rank involved in the employer's job offer should be considered. ETA will develop

a master list of disciplines which can be used for this purpose. Within each discipline, a rate for each rank or level; i.e., Professor, Associate Professor, Assistant Professor, and instructor or lecturer must be determined.

17. Is a Federal, State or local civil service wage schedule controlling for wage determination purposes?

ANSWER: No. In determining the prevailing wage, wages paid by the government sector and private sector in the area of intended employment must be included in any SESA conducted survey to determine the prevailing wage. If a Federal, State or local civil service rate is below the prevailing wage as determined by § 656.40, the government entities must offer the required wage in order to obtain a labor certification.

18. What influence should the possibility of litigation have over how prevailing wage surveys and determinations are made; e.g., geographic area, size of firm, industries covered?

ANSWER: Prevailing wage surveys and determinations should be conducted as carefully and thoroughly as possible in accordance with Department of Labor guidelines and policies. The Department is prepared to defend surveys conducted in accordance with the guidelines and policies it promulgates.

Entry and Experienced Wage Levels

19. How are the entry and experienced levels defined?

The terms are defined as:

Entry Level: Beginning level employees who have a basic understanding of the occupation through education or experience. They perform routine to moderately complex tasks that require limited exercise of judgement and provide experience and familiarization with the employer's methods, practices and programs. They may assist experienced staff and perform higher level work for training and development purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Work is closely monitored and reviewed for accuracy.

Experienced Level: Fully competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques.

Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. They may supervise or provide direction to entry level staff. These employees receive only technical guidance and their work is reviewed for application of sound judgement and effectiveness in meeting the establishment's procedures and expectations. All employees who do not qualify as experienced workers in accordance with this definition should be counted as "entry level" workers.

20. Should job opportunities where the normal entry requirement is a baccalaureate, but the employer requires a Masters or Doctorate without any experience be classified as entry or experienced?

ANSWER: If a baccalaureate degree is normally required for entry into the occupation, the wage rate for a job offer in that occupation requiring an advanced degree should be the rate for experienced workers.

21. Why are only two skill levels used in making prevailing wage determinations?

ANSWER: The Department believes that the use of two skill levels in determining prevailing wages is adequate to prevent adverse effect on the wages and working conditions of U.S. workers and comports with the practice of employers to pay entry level workers less than experienced workers. Resource considerations were the major factors in our decision to limit prevailing wage determinations based on SESA conducted surveys to two skill levels. The more skill levels included in surveys, the more they cost to conduct.

22. Is there a standard experience or training time to determine entry and experienced skill levels?

ANSWER: No. The experience and/or training requirements to qualify for various skill levels differs greatly by occupation. For example, to become an "experienced" short order cook takes less time than it does to become an "experienced" French chef.

23. How are "mid-level" jobs to be handled by SESAs in conducting prevailing wage surveys?

ANSWER: All employees within the scope of a prevailing wage survey are to be classified as either "entry" or "experienced" level workers. The guidelines for conducting prevailing wage surveys and the definitions of "entry" and "experienced" levels provide that all employees who do not qualify as experienced workers should be counted as entry level workers.

24. Should entry and experienced levels be used when determining prevailing wages for nonimmigrant nurses?

ANSWER: Yes. It should also be recognized, however, that wage data will have to be collected for entry and experienced level nurses for each category of "similarly employed" nurse included in the SESA wage survey. The definition of the term "similarly employed" in the H-1A nursing regulations allows SESAs greater flexibility in making prevailing wage determinations than in conducting wage surveys for the other nonagricultural immigration program. In the H-1A nursing regulations "similarly employed" is defined to mean "employed by the same type of facility (acute care or long-term care) and working under like conditions, such as the same shift, on the same days of the week and in the same specialty area."

25. If we gather data on entry and experienced levels, is it possible that the SESA would give an employer the same wage for an individual with 2 years of experience as one with 6 years of experience?

ANSWER: Yes, but the worker's experience does not necessarily correlate with the skills required to perform the employer's job opportunity. It should also be noted that the SVP will still be used by SESAs and Certifying Officers in processing permanent and temporary labor certification applications to evaluate the reasonableness of job requirements entered in item 14 of Part A of the ETA 750.

26. How would the prevailing wage be determined in the example below?

Example: Six prevailing wage requests submitted by an employer. Job descriptions are identical for all six, but requirements differ on each request as follows: (1) BS and 0 years of experience, (2) BS and 1-2 years experience, (3) BS and 3-4 years of experience, (4) BS and 5-6 years of experience, (5) BS and 7-8 years of experience and (6) BS and 9-10 years of experience.

ANSWER: Whenever a SESA conducts a survey in an occupation, two rates should be determined -- one for the entry level and one for the experienced level -- using the definitions in GAL No. 4-95, Interim Prevailing Wage Policy for Nonagricultural Immigration Programs.

When an employer requests a wage determination in that occupation, the SESA must review the employer's job duties and requirements for the job and determine if the entry level or the experienced rate applies.

In the example cited, the information provided by the employer appears to reflect qualifications and tenure of individuals in a job rather than the requirements for satisfactory proficiency in the job. As requirements for the job change, so would the job duties to coincide with the changed requirements. For example, a job which requires a minimum of a B.S. degree and 7-8 years of experience for proficiency would not logically have the same job duties as a job which requires a B.S. degree and 0 years of experience for proficiency.

27. Will the ETA 750A be revised because of the use of entry and experienced levels in determining prevailing wages?

ANSWER: There are no plans to revise the ETA 750 at this time. The information required by item 14 (minimum requirements) is necessary to determine the appropriate level for the employer's job.

Prevailing Wage Determinations

28. How long do SESAs have to respond to requests for prevailing wages?

Responses to wage determination requests that can be satisfied by using existing SESA conducted surveys or published surveys should be sent to the employer or its representative within 2 weeks of receipt of the request. If the SESA must conduct an unscheduled prevailing wage survey to provide the requester with a determination, it should provide the results of such a determination within 45 days, or notify the requester of the amount of time that will be required.

29. Should SESAs conduct new surveys every 2 years?

ANSWER: Yes. SESAs should conduct surveys biannually on occupations which are likely to be the subject of prevailing wage requests. Unscheduled surveys also have a validity period of 2 years. The validity period should be specified on each survey.

30. Are H-1B prevailing wage requests supposed to be processed before all other prevailing wage requests to facilitate a rapid turn around?

ANSWER: Prevailing wage requests should be processed in the order in which they are received. The same time frames for responding apply regardless of the program under which the employer will file an application.

31. Why is it required that all prevailing wage requests to be used by employers in filing labor certification applications, LCAs, and attestations, be filed with and responded to by the organizational component responsible for processing labor certification applications?

ANSWER: This process is required in order to avoid duplication and achieve consistency in the way wage surveys are conducted and determinations are issued by SESAs for immigration purposes. Since the implementation of the attestation like programs, prevailing wage issues have become increasingly important, and involve issues that are frequently litigated. Regulatory requirements, such as the "safe harbor" provision in the H-1B LCA regulations have greatly heightened the visibility of prevailing wage issues and the need for standardized procedures in providing prevailing wage information to employers.

32. Do SESAs have to respond only to prevailing wage requests filed by employers that wish to file LCAs for H-1B workers?

ANSWER: The labor certification unit should respond to all written requests for prevailing wage determinations for immigration program purposes. The requests must include the employer's name, address, contact person and telephone number, job duties and job requirements. There is no requirement that the employer inform the SESA under which immigration program it plans to file an application to employ alien workers.

33. Can SESA's use employer conducted wage surveys to make prevailing wage determinations?

ANSWER: The SESA can consider wage data furnished by the employer; e.g., results of a survey conducted by the employer that is more comprehensive than the SESA's. If, after validating the employer's survey, the SESA decides to substitute the rate from the employer's survey results, that rate must be used for subsequent requests for wage determinations in that occupation from other employers during the SESA's use of the survey.

34. Does the National Office plan to issue a standardized form for employers to use in requesting prevailing wage determinations from SESAs?

ANSWER: At this time, the National Office does not plan to issue a standardized form for employers to use in requesting prevailing wage determinations from SESAs.

35. How can we expedite the time it takes to make a prevailing wage determination once a request is made?

ANSWER: Suggested measures include assigning dedicated staff to specialize in determining prevailing wages and conducting wage surveys and developing computerized data bases to access prevailing wage information. Several SESAs; e.g., Massachusetts and Nevada, have developed user-friendly software for this purpose which they are willing to share with other SESAs. Doing advance surveys in frequently requested occupations will expedite the process.

36. After receiving a prevailing wage determination from the SESA, within what period of time do employers have to file a labor certification application or attestation based on the SESA determination.

ANSWER: The SESA's response to the employer should specify in bold letters that the rate is valid for filing applications and attestations for 90 days from the date of the response. It should also be noted that this requirement is now included in regulations for the H-1A registered nurse program and the H-1B program for specialty workers.

Published Wage Surveys

37. Can we use published surveys that show the arithmetic mean for an occupation for only one industry?

ANSWER: Yes. A valid published survey that shows the arithmetic mean for only a single industry may be used in arriving at the prevailing wage determination if such a survey is the only one available for the occupational classification relevant to the employers prevailing wage request.

38. Can published surveys that present data for more than two skill levels be used to make prevailing wage determinations?

ANSWER: Yes. ETA recognizes that published surveys may present arithmetic means (prevailing wages) for a variety of skill levels that do not conform to the definition of entry and experienced levels to be used by SESAs in conducting prevailing wage surveys. Such surveys may be used if they

otherwise meet the criteria for a valid survey. In such instances the SESA's should use the arithmetic mean published in the survey that most closely conforms to the employer's actual experience requirements.

39. It has been the practice of some SESAs to use published surveys that cover a geographic area that does not conform to the "area of intended employment" as defined in the regulations in lieu of conducting prevailing wage surveys. Is this practice still acceptable?

ANSWER: Published surveys should cover a geographic area that conforms to the "area of intended employment as defined at § 656.2.

40. What if the survey publishes averages but not weighted averages?

ANSWER: If the survey does not publish the arithmetic mean as defined at 20 CFR 656.40 it cannot be used. Generally this will require computing a weighted average. The most common exception to this would be in the situation where each employer surveyed employs only one worker in the occupation.

41. What is the acceptable minimum sample size for using a published survey?

ANSWER: The criteria for evaluating the sample size used by a published survey are the same as those used in designing a sample for a SESA conducted scheduled or unscheduled survey.

42. Are there any circumstances in which published surveys that present the arithmetic mean for an occupation on a national basis are acceptable?

ANSWER: Generally no. One possible circumstance would be in the case of occupations that are so specialized and/or include such a small number of workers that the use of a national survey would be the only feasible way to obtain prevailing wage data.

43. Wage determinations obtained from publications are not routinely duplicated for employers/attorneys because of copyright laws. This is a problem for prevailing wage unit staff and for employers/attorneys. Attorneys insist they have a right to see these surveys but are not willing to purchase the survey for their own use. How can this be resolved?

ANSWER: Whether or not photocopying pages of surveys to provide to employers regarding prevailing wage determinations constitutes "fair use" under the copyright laws is a question that has to be decided by each of the

State agencies. At a minimum, States should provide employers with the name of the survey and page where the prevailing wage information can be found. Also SESAs in response to questions from employers can release general information concerning the characteristics of the survey, such as sample size, number of respondents, number of workers in the occupation, geographic coverage, etc.

Further, if the prevailing wage issue is litigated, e.g., reaches hearing stage under ES complaint system, suit ultimately filed in Federal/District Court, etc., limited copying and release of pages of the survey would probably constitute fair use. The Regional Office would also be able to request a copy of the survey relied upon by the SESA if necessary to resolve a matter reaching its jurisdiction as a result of the employer pursuing all of its administrative remedies under the ES complaint system.

Certifying Officers have the authority to request relevant pages of published surveys relied upon by SESA's, if necessary to evaluate prevailing wage information, or to respond to an employer's challenge to a wage determination in the course of adjudicating a labor certification case.

44. The contract under which some surveys purchased by SESAs and employers have confidentiality provisions which prohibit the name of the survey to be cited. Can such surveys be used by employers or SESAs?

ANSWER: Such surveys cannot be used by SESAs or employers. Both SESAs and employers are entitled to know the source of any prevailing wage information to properly evaluate it.

45. How should SESAs determine which survey to use when there are two or more published wage surveys available that present prevailing wage information for an occupation? Should SESA's, for example, use the survey that presents the higher or lower wage, combine data from the two surveys to obtain a more supportable prevailing wage?

ANSWER: The survey should be used that appears to be the most methodologically sound. A judgment should be made by considering such factors as the proportion of the universe covered, number of industries surveyed, currency of data, geographic area covered, sample design, etc. In no case should the SESA combine data from two surveys.

46. How should SESAs relate ranges of wages to skill levels contained in some published surveys? Would the first 25% be entry level? How about higher skill levels?

ANSWER: Only the arithmetic mean may be used. If the survey gives only pay ranges, it is an unacceptable survey. In an

acceptable published survey, the skill level which most closely matches the employers job offer should be used.

SESA Conducted Surveys

47. Do SESA conducted surveys have to be conducted by mail or can they be conducted by telephone?

ANSWER: Surveys can be done by telephone if the same sampling techniques for conducting a mail survey are used. Additionally, the person(s) conducting the survey should use a standard list of questions and a record should be kept of each employer's response.

48. Do you have to compute a weighted average (arithmetic mean) when conducting a survey? If yes, what wage data can you use if no published survey exist and employers will not provide the data?

ANSWER: A weighted average generally must be computed to obtain a valid arithmetic mean required by the regulations at § 20 CFR 656.40. If employers in the area of intended employment do not respond to a survey of a particular occupation, the SESA must either survey other employers of occupations in the area that require similar skills, or expand the geographic scope of the survey to include employers that employ workers in the subject occupation.

49. What is the minimum acceptable sample size for SESA surveys?

ANSWER: There is no rule of thumb. A valid sampling methodology should be used in drawing a sample of the universe for both scheduled and unscheduled SESA surveys.

50. Is there a policy regarding the number of responses we need from employers in conducting surveys to determine prevailing wages? At times 3 responses is sufficient, other times 7 or 8 responses are not enough.

ANSWER: What constitutes an adequate response rate depends upon the characteristics of the population surveyed; e.g., number of employers, workers, standard deviation, etc.

51. When should the SESA conduct a survey instead of using a published survey?

ANSWER: The use of published wage surveys in making wage determinations is encouraged. Published surveys conducted by public or private agencies may be used if:
(1) they provide an arithmetic mean of wages for workers

in the occupational category in the area of intended employment; (2) they have been published within the last 24 months; (3) the data upon which the surveys were based were collected within 24 months of the surveys' publication date; and (4) the publication date is for the most current edition of the survey. The statistical methodology followed in conducting the published wage survey should be reviewed to determine that it will provide reliable results before it is used. In using published wage surveys, measures of central tendency other than the arithmetic mean, such as the median and mode, cannot be used as the basis for a prevailing wage determination.

52. If a survey has to be conducted, should the employer requesting a prevailing wage determination for the occupation involved be eliminated from the population before the sample is drawn?

ANSWER: The employer requesting a prevailing wage determination should not be removed from the universe before a sample is drawn if it currently employs workers in the occupation for which a prevailing wage is requested.

53. LMI units are concerned about bombarding employers with survey requests. Will a directive be issued indicating what type of LMI survey data is acceptable for prevailing wage purposes?

ANSWER: We do not plan to send anything out concerning LMI data. The adequacy of LMI surveys should be assessed under the criteria and guidance contained in the attachment to GAL No. 4-95, Interim Prevailing Wage Policy for Nonagricultural Immigration Programs. SESAs should, of course, schedule and design surveys to minimize the number of times employers have to be contacted to obtain wage data.

54. Can the telephone yellow pages be used to identify employers to be surveyed?

ANSWER: Telephone yellow pages can be used to supplement information on employers contained in ES 202 data. A sample for a prevailing wage survey should not be based solely on a list of employers obtained from the "yellow pages."

55. Should self-employed persons be included in wage surveys?

ANSWER: Self-employed individuals should not be included in wage surveys. Prevailing wages are based on wages paid to employees in an employer/employee relationship.

56. What does BLS do with OES wage data?

ANSWER: Currently, BLS makes limited use of OES wage data. BLS does not provide any funding to States that participate in the OES wage program. BLS limits its role to providing technical support; e.g, sample and survey design, editing instructing, etc. The program is operational in 15 States and these States use the data for a variety of purposes, which may include a basis for determining prevailing wages. Employers also use OES wage data to compare the wages they pay to the wages prevailing in a given labor market.