



## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

[CIS No. 2793-25; DHS Docket No. USCIS-2024-0018]

### Notice of DHS's Requirement of the Permanent Labor Certification Final Determination for Form I-140 Petitions

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** The Department of Homeland Security, U.S. Citizenship and Immigration Services, is announcing updated procedures for submitting a Form I-140, Immigrant Petition for Alien Workers, accompanied by a permanent labor certification approval, application for Schedule A designation, or National Interest Waiver request following the U.S. Department of Labor's implementation of the Foreign Labor Application Gateway system.

**DATES:** This notice is applicable [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]

**FOR FURTHER INFORMATION CONTACT:** Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone 240-721-3000 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:** The Immigration and Nationality Act (INA), as amended, established employment-based immigrant visa preference classifications. Specifically, section 203(b) of the INA, 8 U.S.C. 1153(b), makes immigrant visas available to noncitizens who qualify under the following classifications: individuals with extraordinary ability, outstanding

professors or researchers, and certain multinational executives and managers (EB-1) under section 203(b)(1) of the INA; individuals who are members of the professions with advanced degrees or of exceptional ability (EB-2) under section 203(b)(2) of the INA; and professionals, skilled workers, and other workers (EB-3) under section 203(b)(3) of the INA.

Sections 204(a)(1)(E) and (F) of the INA, 8 U.S.C. 1154(a)(1)(E) and (F), require individuals or employers to file petitions with DHS when seeking classification under section 203(b)(1), (2), or (3) of the INA. These petitions are filed using Form I-140, Immigrant Petition for Alien Workers.

### *Permanent Labor Certifications*

Section 212(a)(5)(A) of the INA, 8 U.S.C. 1182(a)(5)(A), states that any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and Secretary of Homeland Security that:

- there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor; and
- that the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

This provision also sets out special rules for certain members of the teaching profession and for individuals who have exceptional ability in the sciences or the arts. In addition, INA section 212(a)(5)(B), 8 U.S.C. 1182(a)(5)(B), provides separate rules for the admission of unqualified physicians.

Under INA section 212(a)(5)(D), 8 U.S.C. 1182(a)(5)(D), the grounds of inadmissibility in paragraphs (A) and (B) apply to intending immigrants seeking admission or adjustment of status under the EB-2 and EB-3 preference classifications. Accordingly, a Form I-140 petition filed

under the EB-2 and EB-3 preference classifications must be accompanied by an approved permanent labor certification, an application for Schedule A designation,<sup>1</sup> or a request for an exemption from the job offer/permanent labor certification requirement, if such an exemption would be in the national interest (National Interest Waiver).<sup>2</sup> Form I-140 petitions for shepherders filed under 20 CFR 656.16 also do not need to be filed with a DOL-approved permanent labor certification.

#### *The PERM Labor Certification Process Prior to the Foreign Labor Application Gateway System*

Before the implementation of the new Foreign Labor Application Gateway (FLAG) system on June 1, 2023, when DOL approved a permanent labor certification application, DOL sent an original approved Form ETA-9089, Application for Permanent Employment Certification, and final determination and letter to the employer, or to the employer's authorized attorney or agent, whichever is applicable. The employer was required to sign and retain a signed copy of the certified Form ETA-9089.<sup>3</sup> The employer or its authorized attorney or agent then had to file a Form I-140 petition with USCIS together with the original paper labor certification approval, any other supporting documentation, and the appropriate fees.

Petitioners filing Form I-140 petitions for Schedule A occupations or with National Interest Waiver requests had to submit an uncertified Form ETA-750B (now discontinued), or the Form ETA-9089. In addition, Schedule A employers were required to submit a prevailing wage determination (Form ETA-9141)<sup>4</sup> and evidence that a notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees.<sup>5</sup>

#### *Transition of PERM to the new Form ETA-9089 and Foreign Labor Application Gateway System*

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<sup>1</sup> 8 CFR 204.5(k)(4)(i), (l)(3)(i).

<sup>2</sup> 8 CFR 204.5(k)(4)(ii).

<sup>3</sup> 20 CFR 656.10(f).

<sup>4</sup> 20 CFR 656.15(b).

<sup>5</sup> 20 CFR 656.10(d)

On Oct. 25, 2022, DOL received approval from the Office of Information and Regulatory Affairs within the Office of Management and Budget for the use of the revised Form ETA-9089, Application for Permanent Employment Certification.<sup>6</sup> The revision significantly changed the application by creating a basic form as well as four appendices.<sup>7</sup> The revision also included a new Form ETA-9089 - Final Determination: Permanent Employment Labor Certification Approval (Final Determination) for when DOL approves the permanent labor certification application. An uncertified Final Determination form is also signed by Form I-140 petitioners for Schedule A applications and National Interest Waiver requests being submitted directly to USCIS.<sup>8</sup>

On April 11, 2023, DOL announced two webinars: one to provide an overview of the revised Form ETA-9089, and another to provide stakeholders with updates regarding the modernization of the PERM program and transition to the FLAG system.<sup>9</sup> On April 21, 2023, DOL announced that it would require the revised Form ETA-9089, Application for Permanent Employment Certification, in the FLAG system starting on May 16, 2023.<sup>10</sup> This date was later postponed to June 1, 2023.<sup>11</sup>

As a part of the PERM program modernization efforts, DOL modified how it collects certain information from employers. For example, and as explained in the instructions to the Form ETA-9089, DOL is no longer collecting information about the job opportunity that was previously

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<sup>6</sup> See Notice of Office of Management and Budget Action, Oct. 25, 2022, <https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=1205-0451#>.

<sup>7</sup> Form ETA-9089 - Appendix A: Foreign Worker Information; Form ETA-9089 - Appendix B: Additional Worksite Information; Form ETA-9089 - Appendix C: Supplemental Information; Form ETA-9089 – Appendix D: Special Recruitment for College and University Teachers. See <https://www.dol.gov/agencies/eta/foreign-labor/forms>.

<sup>8</sup> See “NOTE: Form ETA-9089, Final Determination is for completion and submission ONLY when submitting Form I-140 to USCIS in support of a Schedule A or National Interest Waiver. When submitting the form to USCIS, please sign and submit a fully executed copy of page 2 along with Form ETA-9089 and the appropriate appendices.” <https://www.dol.gov/agencies/eta/foreign-labor/forms> (last visited on Nov. 14, 2024).

<sup>9</sup> See April 11, 2023. OFLC Announces Technical Webinar on April 20, 2023, to Provide Stakeholders an Update to the Permanent Labor Certification (PERM) Program Modernization Process and April 11, 2023. OFLC Announces Webinar on April 19, 2023, to provide an overview of the Form ETA – 9089; <https://www.dol.gov/agencies/eta/foreign-labor/news> (last visited Nov. 14, 2024).

<sup>10</sup> See April 21, 2023. Office of Foreign Labor Certifications Announces Form ETA-9089 Case Creation and Case Submission in Foreign Labor Application Gateway, <https://www.dol.gov/agencies/eta/foreign-labor/news> (last visited Nov. 14, 2024).

<sup>11</sup> May 11, 2023, Office of Foreign Labor Certification Postpones Date for Submitting Revised PERM and CW-1 Forms in the Foreign Labor Application Gateway to June 1, 2023; and May 26, 2023, OFLC announces case submission for the Form ETA 9089 for PERM in FLAG on June 1, 2023, <https://www.dol.gov/agencies/eta/foreign-labor/news> (last visited Nov. 14, 2024).

included in section H on the prior version of Form ETA-9089 (which included information about the primary worksite, job title, education, and experience, as well as an open text box for providing additional information or facts about the case).<sup>12</sup> Instead, the DOL FLAG system is pulling that information from the electronically-processed Form ETA-9141, Application for Prevailing Wage Determination, into the Form ETA-9089.

Employers who file the new Form ETA-9089, including all applicable appendices, through the FLAG system and are granted a permanent labor certification, will receive a Final Determination electronically.<sup>13</sup>

In circumstances where the employer or, if applicable, its authorized attorney or agent, is not able to receive the approved permanent labor certification documents electronically, DOL will send a physical copy of the Form ETA-9089 and Final Determination to the appropriate address.

Instructions to the Form ETA-9089 require that the relevant parties sign Sections B, C, and D of the Final Determination resulting in certification immediately upon receipt from DOL before the Form I-140 petition can be filed with USCIS. The instructions also state that when DOL enables the electronic filing system to receive electronic signatures, the employer, foreign worker, attorney, agent, and preparer, as appropriate, will be required to sign the labor certification electronically before submission.<sup>14</sup>

With the exception of the few employers who still file their Forms ETA-9089 by mail, DOL will generally only provide the Final Determination to an employer electronically. With the publication of this notice, USCIS is announcing on its website that employers whose permanent labor certification applications were processed in FLAG must include a printed copy of the

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<sup>12</sup> See Section E Job Opportunity and Wage Information Note; current Form ETA-9089 - General Instructions, <https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/ETA-9089%20General%20Instructions%20-%20508%20Compliant%20-%20Expires%2010-31-2025.pdf> (last visited Nov. 14, 2024).

<sup>13</sup> Employers may obtain a copy of the final decisions from the Historical table in the My Cases tab of their FLAG account. See DOL's Frequently Asked Questions; <https://flag.dol.gov/support/FAQ#cases> (last visited Nov. 14, 2024), under the question, "How can I find a copy of my issued application?"

<sup>14</sup> See <https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/ETA-9089%20General%20Instructions%20-%20508%20Compliant%20-%20Expires%2010-31-2025.pdf> (last visited Nov. 14, 2024).

electronic Final Determination with their Form I-140, and that USCIS will consider this printed copy as an original, approved labor certification.<sup>15</sup>

USCIS is formally announcing through this notice that for Form I-140 petitions that must be accompanied by a DOL-approved labor certification, a printed copy of the Final Determination, completed and electronically signed by DOL, and signed by the foreign worker, employer, and the employer's attorney or agent, if applicable, must be submitted with a Form I-140 petition. This printed copy of the two-page determination satisfies the DHS regulatory requirement that petitioners submit an individual labor certification. 8 CFR 204.5(a)(2). As discussed above, this change in USCIS procedure aligns with DOL's change in its procedures, as DOL has transitioned to a new electronic filing and application processing environment. This means that DOL generally no longer provides the employer and, if applicable, the employer's authorized attorney or agent, with a paper copy of a certified Form ETA-9089. This change in process is also appropriate since in most circumstances, USCIS will no longer need to reference a paper copy of a certified Form ETA-9089 (and its appendices) because USCIS and DOL have in place an information sharing process that allows USCIS to validate substantive elements of the approved permanent labor certification and prevailing wage determination based on case information DOL supplies directly to USCIS.<sup>16</sup>

There may be limited circumstances when DOL is able to adjudicate a permanent labor certification electronically but is unable to send an electronic certification to an employer (or its authorized agent, if applicable). In those rare instances, DOL will mail a paper copy of the electronic certification to the employer (and/or its authorized agent, if applicable). The electronic certification will not be printed on blue security paper. As with electronically issued certifications, the paper-based and signed final determination satisfies the DHS regulatory requirement that

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<sup>15</sup> See USCIS Updates Filing Procedures for Form I-140, available at <https://www.uscis.gov/news/alerts>.

<sup>16</sup> See <https://www.dhs.gov/publication/dhs-uscis-pia-044-validation-instrument-business-enterprises> (last visited November 14, 2024).

petitioners submit an individual labor certification. DOL does not anticipate circumstances where it would need to revert to a paper-based adjudication process.

Additionally, USCIS notes that the submission of a printed copy of the electronic ETA-9089 Final Determination does not preclude USCIS from issuing a request for evidence or a notice of intent to deny in certain warranted circumstances, including but not limited to, when the electronic systems are unavailable for validation, or the Final Determination document is substantively inconsistent with the information provided by DOL in FLAG regarding that labor certification determination. In those instances, USCIS will request that a petitioner (or its authorized agent, if applicable) submit documentation, including but not limited to a copy or copies of the complete certified Form ETA-9089 and all applicable appendices.

Form I-140 petitions for Schedule A occupations must contain a completed, uncertified Form ETA-9089, including all applicable appendices, a signed Final Determination, and a valid prevailing wage determination tracking number in Section E, Item 1 of the Form ETA-9089. This tracking number will allow USCIS to associate the uncertified Form ETA-9089 with the corresponding prevailing wage determination issued by DOL. In circumstances of system outage, scheduled maintenance, or other event preventing the electronic issuance of prevailing wage determinations and transmission of prevailing wage determination data from DOL to USCIS, USCIS may request that the employer or the employer's authorized representative submit a copy of the prevailing wage determination (Form ETA-9141).

Form I-140 petitions for shepherders under 20 CFR 656.16 will need to contain a completed, uncertified Form ETA-9089, including all applicable appendices, a signed Final Determination, and the valid prevailing wage determination tracking number for the corresponding DOL-issued Form ETA-9141.

Finally, a Form I-140 petition with a National Interest Waiver request will need to contain a copy of the Form ETA-9089, Appendix A, and a signed Final Determination.

**Ur M. Jaddou,**  
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*Department of Homeland Security.*

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