Issued in Washington, D.C., on June 19, 1984, by the Commission.

Jane K. Stuckey,

Secretary of the Commission.

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DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 177

[T.D. 84-130]

Amorphous Silicas: Change of Tariff Classification

AGENCY: U.S. Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document gives notice that Customs is changing its current established and uniform practice of classifying imported synthetically produced amorphous silicas as "silica", free of duty. After reviewing comments received in response to the notice proposing this change, Customs will now classify that merchandise under the tariff provision for "other inorganic compounds", at the appropriate rate of duty.

EFFECTIVE DATE: This change of practice will be effective as to merchandise entered for consumption, or withdrawn from warehouse for consumption, on or after September 24, 1984.

FOR FURTHER INFORMATION CONTACT: John G. Hurley, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

Background

Pursuant to an established and uniform practice, based on Treasury Decision 68-29(14) and subsequent importations, Customs has classified highly dispersed, synthetically produced amorphous silicas, including silica gel, under the provision for silica, not specially provided for, in item 523.11, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202).

However, information has been developed by Customs to indicate that the merchandise in question, being synthetically produced, has significantly different physical and chemical properties from mineral silica and does not have the same use(s) as the natural substance. In addition, it appears that synthetic amorphous silicas are not used in the trade or commerce as substitutes for the mineral silica.

Change of Practice

On the basis of the above information, Customs has determined that the established and uniform practice of classifying synthetically produced amorphous silicas as (mineral) silica, in item 523.11, TSUS, is clearly wrong. It is Customs position that synthetic amorphous silicas, including the silica gel in question, a highly dispersed silica produced by the pyrogenic method from silicon tetrachloride, which is an anhydride of silicic acid, is properly classifiable under the provision for other inorganic compounds, in item 423.00, TSUS, and is dutiable. A notice proposing this change of practice was published in the **Federal Register** on April 29, 1983 (48 FR 19395).

Discussion of Comments

Four comments were received in response to the notice, all opposed. It was the commenters' contention that synthetic amorphous silicas, including silica gel, are a form of the mineral silica. Silica gel is said to be a polymerized colloidal silica. Synthetic amorphous silicas are said to be technically described as substantially dehydrated polymerized silica. It is argued that item 523.11, TSUS, silica, not specially provided for, is an *eo nomine* provision, and, therefore, includes the synthetic forms. In support of their position the commenters submitted several brochures in which synthetic amorphous silicas and silica gel were referred to as forms of silica.

A common definition of a synthetic mineral is a substance having the same chemical composition, crystalline form and other physical properties of the naturally occurring mineral. In other cases concerning the identification of the synthetic material as the natural for tariff purposes, the court has said that the term "rubber" as used in the tariff schedules includes rubber produced by artificial means, provided it is the same substance or possesses the essential characteristics and qualities of the material known as rubber. Synthetic rubber tires were known in the trade as rubber tires and there was no difference between the natural rubber tire and the synthetic rubber tire. *A. M. Deringer* v. *United States*, (C.D. 1882). The court also stated that synthetic diamond particles possess many of the chemical, mineralogical and physical properties of natural diamonds and are considered by scientists and the industrial diamond trade to be diamonds, and have the same end uses. *Christensen Diamond Product* v. *United States* (C.D. 2537).

Thus, the criteria to be met in order to identify the synthetic material as the natural for tariff purposes is whether the synthetic material has the same chemical, mineralogical and physical properties as the natural, considered by scientists and the trade to be the same, and has the same end uses.

In this case, as to the synthetic amorphous silicas, the physical and chemical properties are different from the mineral silica. The mineral is crystalline in structure, while the synthetic amorphous form is described as a form of dehydrated polymerized silica. While the mineral silica is an abrasive and toxic, the synthetic amorphous silicas are not abrasive and not toxic, to the extent that many forms are used in foods.

Thus, the principal thing that the mineral and synthetic amorphous silicas have in common is that they are called "silica," apparently because they contain the element silicon. However, the synthetic amorphous form is not a substitute for the mineral, since it is not used for the same purposes as is the mineral form. Although it may be referred to as silica, it is not identified with the mineral by technical experts.

Rather than being a synthetic form of the mineral, synthetic amorphous silicas are manufactured items which bear little similarity to the mineral, having separate and distinct properties and uses totally different from the mineral form.

Change of Practice

After careful analysis of the comments and further review of the matter, synthetically produced amorphous silicas, including "silica gel", will be classifiable under the provision for other inorganic compounds in item 423.00, TSUS, subject to the appropriate rate of duty.

This change of practice revokes T.D. 68-29(14) and any other existing Treasury or Customs Decisions, or other administrative rulings, to the extent that they are inconsistent with the new practice.

Drafting Information

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 177

Administrative practice and procedure, Customs duties and inspection, Government procurement.

Dated: June 19, 1984.

William von Raab,

Commissioner of Customs.

[FR Doc. 84-16821 Filed 6-22-84; 8:45 am]

BILLING CODE 4820-02-M

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 621

[General Administration Letters Nos. 5-84 and 10-84]

Procedures for Processing Applications for Certification of Temporary Employment in Nonagricultural Occupations in the United States

AGENCY: Employment and Training Administration, Labor.

ACTION: Rule-related notice.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (DOL) has issued two directives explaining the procedures for processing applications for certification of the temporary employment of nonimmigrant aliens in nonagricultural occupations in the United States. They are being published in the Federal Register for the information of the general public.

DATES: General Administration Letter (GAL) No. 5-84 was issued on December 1, 1983, and GAL No. 10-84 was issued on April 23, 1984.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas M. Bruening. Telephone: 202-376-6728.

SUPPLEMENTARY INFORMATION: Whether to grant or deny an employer's petition to import a nonimmigrant alien to the United States for the purpose of temporary employment is solely the decision of the Attorney General and his designee, the Commissioner of the Immigration and Naturalization Service (INS). 8 U.S.C. 1101(a)(15)(H)(ii) and 1184 (a) and (c). Pursuant to the requirement that the Attorney General consult with appropriate agencies of the government concerning the importation of nonimmigrant (so-called "H-2") workers, INS has determined that prior to granting or denying such petitions it first will request DOL to advise INS on the availability of qualified U.S. workers for the jobs offered to the H-2 aliens, and whether the wages and working conditions attached to such job offers will adversely affect similarly employed U.S. workers. 8 U.S.C. 1184(c); 8 CFR 214.2(h)(3)(i).

Pursuant to the INS regulations, DOL has published regulations at 20 CFR Part 621 for the certification of temporary employment of nonimmigrant aliens in nonagricultural employment in the United States. The Employment and Training Administration (ETA) of DOL administers those regulations and has issued two directives to ETA regional offices and State employment security agencies outlining general processing standards for temporary alien nonagricultural labor certification applications. General Administration Letter (GAL) No. 5-84 (December 1, 1983) sets forth procedures for temporary alien labor certification applications for employment in the entertainment industry. GAL No. 10-84 (April 23, 1984) sets forth the procedures for processing applications for temporary alien labor certifications in other nonagricultural occupations.

GAL Nos. 5-84 and 10-84 are reprinted below for the information of the general public.

Signed at Washington, D.C., this 19th day of June, 1984.

Patrick J. O'Keefe,

Deputy Assistant Secretary for Employment and Training.

Dated: December 1, 1983.

Directive: General Administration Letter No. 5-84

To: All State Employment Security Agencies

From: Royal S. Dellinger, Acting Assistant Secretary of Labor

Subject: Procedures for Temporary Labor Certifications in the Entertainment Industry

1. *Purpose.* To transmit subject procedure.

2. *Reference.* 20 CFR Parts 621 and 655.

3. *Background.* On May 6, 1983, all regions were provided interim processing and recruitment procedures for temporary applications in the entertainment industry. The attached procedures replace those interim procedures.

4. *Action Required.* Administrators are requested to:

a. Provide attached procedures to appropriate staff.

b. Instruct staff to provide application forms and advise employers of procedures for filing temporary labor certification applications in the entertainment industry.

5. *Inquires.* Direct questions to the appropriate regional office.

6. *Attachments.*

a. Procedures for temporary labor certification in the entertainment industry.

b. List of responsible regional and State Job Service Offices.

c. Map of OSEs and areas covered.

d. List of unions in the entertainment industry.

Expiration date: December 31, 1984.

Procedures for Temporary Labor Certifications in the Entertainment Industry

I. Background.

The Department has been addressing the issue of nonimmigrant aliens coming to the United States for temporary employment in the entertainment industry while high levels of unemployment among U.S. workers in the industry still persist.

The following procedures completely centralize temporary labor certification authority in the entertainment industry in three regions; clarify processing requirements; and ensure uniformity among the responsible regions.

II. Operating Guidelines

A. Decisions on applications by employers seeking temporary admission of nonimmigrant aliens for temporary employment in entertainment occupations require special considerations, such as:

1. An assessment of requirements of the role or the act to be performed.

2. The need to keep the unity of a group or company and support personnel.

3. The role of labor unions in this highly unionized field and their impact on employment opportunities.

4. The willingness of available U.S. workers to fulfill the employer's prescribed itinerary.

B. Based on factors, such as the need to develop expertise, the concentration of activities for requests for aliens in entertainment, and the proximity to sources that know about the availability of U.S. performers in various entertainment fields, regional certifying officers in New York City, Dallas, and San Francisco are designated as the appropriate officials for issuing determinations on applications for temporary employment of aliens in the entertainment industry.

C. Offices of the State job services in New York City, Austin and Los Angeles are designated as Offices Specializing in Entertainment (OSEs). These offices shall receive temporary applications in the entertainment industry directly from employers within their jurisdiction for processing. Permanent applications in the entertainment industry, however, are processed by each State agency and the 10 regional offices.

The jurisdictional breakdown is as follows (Also see attached map):

Region	OSE	States served by
New York	New York City	Region I.
	Alien Employment Certification Office.	Region II.
		Region III.
		Region IV.
Dallas	Texas Employment Commission.	Region V.
		Region VI.
	Austin Alien Labor Certification Unit.	Region VII.
San Francisco	Los Angeles Alien Certification Office.	Region VIII.
		Region IX.
		Region X.

D. Canadian musicians who enter the U.S. to perform within a 50-mile area adjacent to the Canadian border for a period of 30 days or less are precertified and not subject to these procedures.

E. Pub. L. 97–271 limits temporary employment of entertainers in the Virgin Islands to periods not to exceed 45 days. Therefore, the period of labor certification for such applications may not exceed 45 days.

F. Occupations in the entertainment industry shall include performers and all technical and support personnel involved with a performance.

G. When a job offer contains requirements or conditions which preclude effective recruitment of U.S. workers, i.e., there is no employer in the U.S., the OSE shall disregard recruitment procedures below and shall immediately send the application to the certifying officer for determination.

III. Procedures

A. Temporary Labor Certification Applications for Aliens in the entertainment industry shall be filed by employers with the OSE serving the area of intended employment (see map of OSE jurisdictions). Note: When the job opportunity requires the work to be performed in more than one OSE jurisdiction, the application should be filed with the OSE having jurisdiction over the area where the employment will begin.

B. To allow for enough recruitment of U.S. workers and to give OSEs and regional offices enough processing time, employers should be advised to file their applications at least 45 calendar days before the labor certification is needed. The Department of Labor cannot assure a timely determination if the employers provides less time.

C. When filed, the temporary application should include:

1. A completed ETA–750, Part A, the offer of employment portion of the application for Alien Employment Certification form signed by the employer.

2. An itinerary of locations and duration of work in each location when there is more than one worksite.

3. Documentation of the employer's efforts, if any, to recruit U.S. workers, and the results.

D. The OSE shall review the application for completeness and determine the prevailing wage, guided by standards in regulations at 20 CFR Part 656.40. The wage survey should be done by telephone contact with unions, associations, or any other appropriate sources and the prevailing wage should be computed on a daily or weekly basis.

E. The employer must specify a wage which meets or exceeds the daily or weekly rate and covers each day of the work week that the alien is in the United States for the duration of the employment regardless of hours worked.

F. The employer shall advertise the job opportunity before or after filing the application in a national publication that is likely to bring responses from U.S. workers. The advertisement shall:

1. Identify the employer's name, address, and the location of the employment, if other than the employer's location;

2. Describe the job opportunity in detail,

3. State the rate of pay, which shall not be below the prevailing wage for the occupation;

4. Offer prevailing working conditions.

5. State the employer's minimum job requirements;

6. Offer wages, terms, and conditions of employment which are no less favorable than those offered to the alien.

G. The OSE shall write to the appropriate national union(s) (listing enclosed) for availability information and confirmation of the prevailing wage. The following procedures and conditions shall apply to union contacts:

1. The letter to the union shall not identify the employer, but shall describe the type of establishment, the job duties, location and dates of employment, hours of work, wages, and working conditions.

2. From the date the letter to the union is mailed, 10 working days should be allowed to receive a written response. If no response is received after 10 working days, the union should be contacted by telephone to verify if the request was received. If there is availability, 5 additional work days should be allowed for a written response before making a determination based on available information in the application file.

3. Acceptable availability information from unions shall include names, addresses, and telephone numbers of U.S. workers who meet the employer's requirements for the job opportunity.

4. If the union(s) provide names of qualified U.S. workers, the OSE shall refer the list to the employer for direct contact with the applicants.

5. The name of the union, the union representative contacted, and the date of contact must be included on the transmittal form to the regional office for each application.

H. The employer may be required to recruit through other sources which are appropriate for the occupation and customary in the industry, such as talent agencies, agents, and casting directors.

I. A recruitment or information source which asserts the availability of qualified U.S. workers must provide specific information on the U.S. workers, including their names, addresses, and telephone numbers so that the employer may contact them.

J. If the certifying officer finds that the employer has adequately recruited U.S. workers in the previous six weeks before filing the application, the prescribed recruitment through the OSE may be waived. The employer may make a written request for a waiver of recruitment through the OSE. The OSE will send the request along with the application to the certifying officer for evaluation.

K. The employer must provide the OSE a copy of the advertisement showing the name of the publication and the dates published and written results of all recruitment which must:

1. Identify each recruitment source by name;

2. State the name, address, and telephone number of each U.S. worker who applied for the job; and

3. Explain the lawful job-related reasons for not hiring each U.S. worker.

L. When recruitment through all sources is completed, the OSE shall send the application, together with all pertinent information, to the appropriate regional certifying officer in New York, Dallas, or San Francisco.

IV. Determinations

A. The certifying officer shall consider circumstances unique to the entertainment industry and determine whether to grant or to deny the temporary labor certification, or to issue a notice that the required determination cannot be made based on whether or not:

1. U.S. workers are available for the temporary employment opportunity:

a. The certifying officer, in judging if a U.S. worker is available for the temporary employment opportunity, shall determine from documented results of the employer and local office recruitment efforts if there are other

appropriate sources of workers, where the employer should have recruited or may recruit U.S. workers. If further recruitment is required, the application should be returned to the OSE with specific instructions for the additional recruitment.

b. To determine if a U.S. worker is available, the certifying officer shall consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expense, or at the employer's expense if the prevailing practice among employers who employ workers in the occupation is to pay such relocation expenses.

c. To determine if U.S. workers are available for job opportunities that will be performed in more than one location, workers must be available in each location on dates specified by the employer.

2. The employment of the alien will adversely affect wages and working conditions of U.S. workers similarly employed. To determine this, the certifying officer shall consider such things as labor market information, special circumstances of the industry, organization, and/or occupation, the prevailing wage rate for the occupation in the area of intended employment, and prevailing working conditions, such as hours in the occupation.

3. The job opportunity contains requirements or conditions which preclude consideration of U.S. workers or which otherwise prevent their effective recruitment, e.g., there is no employer in the U.S. Such applications shall be denied on the basis that U.S. workers are generally available for employment in the entertainment industry and it was not shown that the employer made reasonable efforts to obtain U.S. workers for the job. Under these circumstances, the Department must assume that U.S. workers are available.

B. Dates on the temporary labor certification shall be the beginning and ending dates of the actual employment not to exceed 12 months, and the date certification was granted. The beginning date of certified employment may not be earlier than the date certification was granted.

C. A denial of certification or a notice that certification cannot be made shall not be reviewed by the Department of Labor, but may be appealed to the Immigration and Naturalization Service (INS). The petitioner may attach the decision to the nonimmigrant visa petition and present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor were observed. The INS will consider all such evidence in adjudicating the petition.

TEMPORARY LABOR CERTIFICATION APPLICATIONS IN THE ENTERTAINMENT INDUSTRY

Regional offices that make determinations	Offices specializing in entertainment (OSE)	States served
Bette Roy, Certifying Officer, Labor Certification Unit, Employment and Training Administration, 1515 Broadway, New York, New York 10036, Tel: (FTS) 265-3265, (212) 944-3265 (outside).	Joanne Palmeiri, Supervisor, Alien Employment Certification Office, N.Y. State Department of Labor, 2 World Trade Center, Rm. 51-75, New York, New York 10047, Tel: (212) 488-2394.	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, Alabama, Florida, Georgia, Kentucky, New York, New Jersey, Puerto Rico, Virgin Islands, South Carolina, Tennessee, Mississippi, North Carolina, Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia.
Max Loveland, Certifying Officer, U.S. Department of Labor, ETA, 555 Griffin Square Building, Griffin and Young Streets, Dallas, Texas 75202, Tel: (FTS) 729-4975, (214) 767-4975 (outside).	Richard Hatton, Supervisor, Alien Labor Certification Unit, Texas Employment Commission, TEC Building, Austin, Texas 78778, Tel: (512) 397-4814.	Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin, Arkansas, Louisiana, New Mexico, Oklahoma, Texas, Iowa, Kansas, Missouri, Nebraska.
Certifying Officer, Labor Certification Unit, Employment and Training Administration, 450 Golden Gate Avenue, San Francisco, California 94102, Tel: (FTS) 556-5994, (415) 556-5994 (outside).	Manager, Los Angeles Alien Certification Office, California Employment Development Department, 156 West 14th Street, Los Angeles, California 90015, Tel: (213) 744-2105, 744-2085.	Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming, Arizona, California, Guam, Hawaii, Nevada, Alaska, Idaho, Oregon, Washington.

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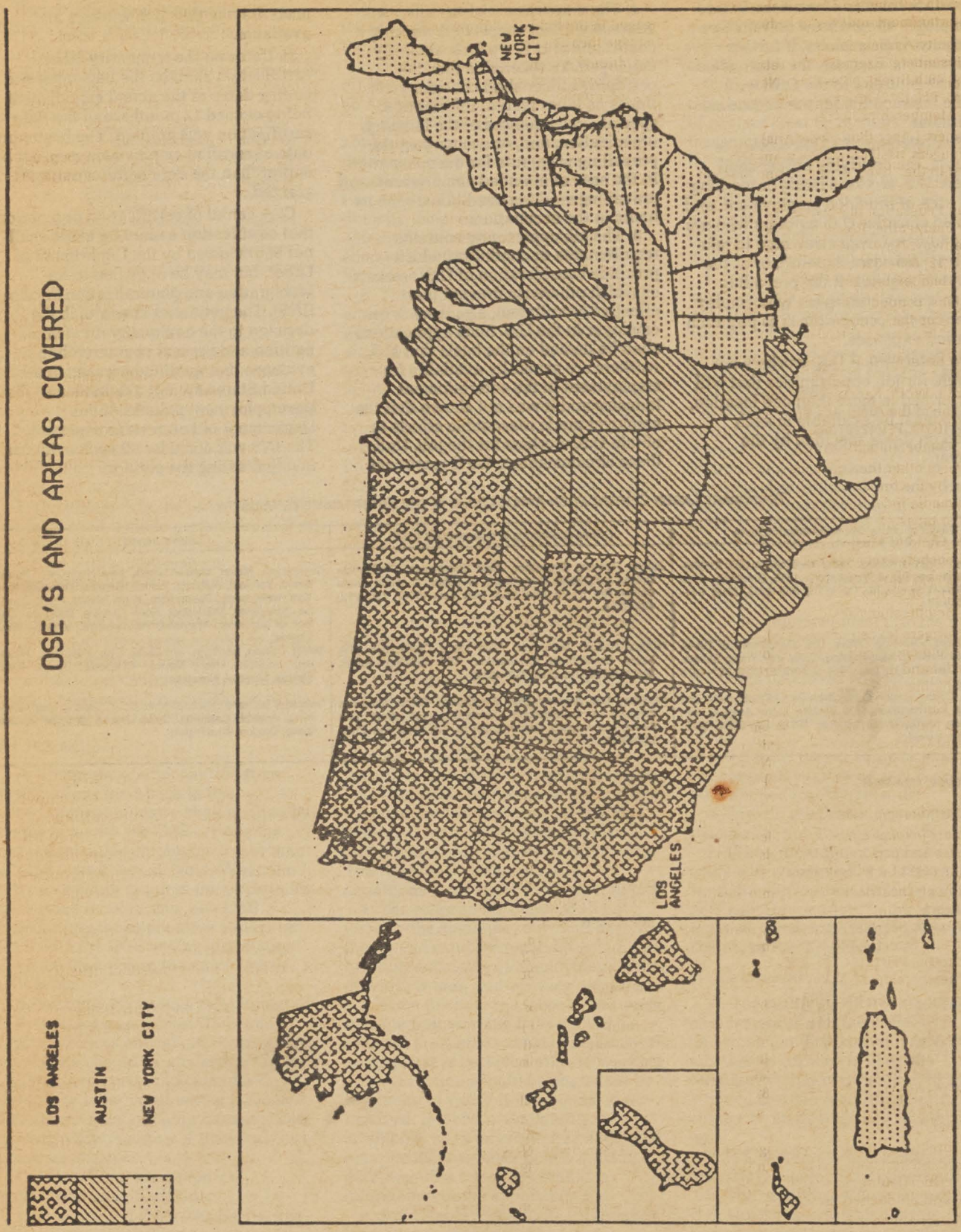

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Unions With Substantial Membership in the Arts, Entertainment and Media Industry

Actors Equity Association
Alan Eisenberg, Executive Secretary, 165 West 46th Street, New York, New York 10036, PH: (212) 869–8530
Approx. Membership: 30,000

Performers (other than musicians), stagemanagers, assistant stage managers employed in the "live", dramatic and musical theater.

American Federation of Musicians
Victor Fuentealba, President, 1500 Broadway, New York, New York 10036, PH: (212) 869–1330
Approx. Membership: 299,133

Musicians, conductors, music librarians, arrangers, copyists, singers (night club and cabarets).

American Federation of Television and Radio Artists
Sanford I. Wolff, Executive Secretary, 1350 Avenue of the Americas, New York, New York 10019, PH: (212) 265–700
Approx. Membership: 51,000

Performers other than musicians who are employed by the broadcasting, cable and/or recorded media including disc and videoaudio tapes.

American Guild of Musical Artists
Gene Boucher, Executive Secretary, 1841 Broadway, New York, New York 10023, PH: (212) 265–3687
Approx. Membership: 5,000

All performers (except musicians), stage managers and choreographers employed in opera, ballet and dance, also, concert (solo) artists including musicians.

American Guild of Variety Artists
Alan Jan Nelson, Executive President, Vincent Griesi, Asst. to the President, Comptroller, 184 Fifth Avenue, New York, New York 10010, PH: (212) 675–1003
Approx. Membership: 4,865

Performers (except musicians) in ice shows and circuses and performing in hotels and cabarets as part of a variety show.

Association of Theatrical Press Agents and Managers
Dick Weaver, Secretary-Treasurer, 165 West 46th Street, #1200, New York, New York 10036, PH: (212) 719–3666
Approx. Membership: 600

Theatre and concert hall managers, company managers and press agents.

Director's Guild of America
Michael Franklin, Executive Secretary, 7950 Sunset Blvd., Hollywood, California 90046, PH: (213) 656–1220 (212) 581–0370 (New York Office)
Approx. Membership: 6,500

In film, directors, production managers, and first and second assistant directors. In tape, directors, associate directors, stage managers, and production assistants.

Hebrew Actors Union
Jack Rechtzeit, President, 31 E. 7th Street, New York, New York 10003, PH: (212) 674–1923
Approx. Membership: 200

Performers (except musicians) who are engaged in the field of Hebrew or Yiddish language theatre.

International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada
Walter F. Diehl, President, 1515 Broadway, New York, New York 10036, PH: (212) 730–1770
Approx. Membership: 65,000

All craft and technical occupations associated with motion picture production, television broadcasting, sound and video recording, cable, legitimate theatre and audio visual materials.

International Brotherhood of Electrical Workers
Jack Kain, Director, Broadcasting & Recording Dept., 1125 15th Street, NW., Washington, D.C. 20005, PH: (202) 833–7000
Approx. Membership: 1,041,408

Technical and craft personnel employed in broadcasting, television, cable operations, sound and video recording, and program production.

Italian Actors Union
Sal Carollo, Executive Secretary, 1540 Broadway, New York, New York 10036, PH: (212) 765–0800
Approx. Membership: 43

Performers (except musicians) who are engaged in the field of Italian language theater.

National Association of Broadcast Employees and Technicians
Edward Lynch, President, 7101 Wisconsin Avenue, N.W., Bethesda, Maryland 20814, PH: (301) 657–8420
Approx. Membership: 9,900

Technical and craft personnel employed in broadcasting, telecasting, recording, filming and allied industries.

Screen Actors Guild
Ken Orsatti, National Executive Secretary, 7750 Sunset Blvd., Hollywood, California 90046, PH: (213) 876–3030
Approx. Membership: 47,123

Performers (other than musicians) employed in the production of motion pictures, television, videotape or video disc.

Screen Extras Guild
Leonard Chassman, National Executive Secretary, 3629 Chauenga Blvd., West, Hollywod, California 90029, PH (213) 851–4301
Approx. Membership: 4,800

Performers (except musicians) employed in the production of motion pictures, television, videotape or video disc as "extras" (non-speaking).

Society of Stage Directors and Choreographers
A Harrison Cramer, Executive Secretary, 1501 Broadway, New York, New York 10036, PH: (212) 391–1070
Approx. Membership: 950

Directors and Choreographers in the professional theatre.

United Scenic Artists
John VanEyck, Bus. Rep., 1540 Broadway, New York, New York 10036, PH: (212) 575–5120
Approx. Membership: 1,200

Professional scenic designers, scenic artists, costume and lighting designers, diarama and display workers, and mural artists employed by television, theatre, commercial producers, and motion picture studios.

Writers Guild of America, West
Naomi Gurian, Exec. Director, 8955 Beverly Blvd., Los Angeles, California 90048, PH: (213) 550–1000
Approx. Membership: 5,900

Writers in the fields of motion pictures, television, and radio in areas west of the Mississippi.

Writers Guild, East
Leonard Wasser, Exec. Dir., 55 West 5th Street, New York, New York 10019, PH: (212) 245–6180
Approx. Membership: 2,400

Writers in the field of motion picture, television and radio in areas east of the Mississippi.

Dated: April 23, 1984.

Directive: General Administration Letter No. 10–84
To: All State Employment Security Agencies
From: Bert Lewis, Administrator for Regional Management
Subject: Procedures for Temporary Labor Certifications in Nonagricultural Occupations

1. *Purpose.* To transmit procedures for processing temporary labor certification applications in nonagricultural occupations.

2. *References.* 20 CFR Parts 621, 652 and 655.

3. *Background.* The attached procedures are designed to clarify processing requirements and to achieve uniform processing for applications under 20 CFR Part 621. They help to fill in the broad outline in those regulations and to direct agency staff to appropriate labor certification and Job Service policies.

4. *Action Required.* Administrators are requested to:

a. Provide attached procedures to appropriate staff.

b. Instruct staff to follow these procedures in processing temporary labor certification requests in nonagricultural occupations, except those in the entertainment industry and professional team sports.

c. Advise staff that attached procedures remain in effect after the expiration of this transmittal memorandum.

5. *Inquiries.* Direct questions to the appropriate regional office.

6. *Attachments*

a. Procedures for temporary labor certifications in nonagricultural occupations.

b. Final determination Form, ETA 7145T

Rescissions: GAL 23–82.

Expiration date: April 30, 1985.

Procedures for Temporary Labor Certifications in Nonagricultural Occupations

I. Background

The regulations at 20 CFR Part 621 govern the labor certification process for the temporary employment of nonimmigrant aliens in the United States in occupations other than in agriculture and logging. Occupations on Guam are treated separately under other regulations. The policies in Part 655—Labor Certification Process for the Temporary Employment of Aliens in the United States, and Part 652—Establishment and Functioning of State Employment Services are followed in processing and making determinations on temporary nonagricultural applications.

This document replaces all previous instructions and outlines general processing standards for temporary nonagricultural applications, except for professional athletes in team sports and employment in the entertainment industry.

Professional sports applications are processed by the National Office according to policies and procedures which evolved from negotiations with the INS, major and minor leagues, player organizations, and exports in the industry. Procedures for temporary applications in the entertainment industry are included in General Administration Letter No. 5–84.

II. Guidelines for Determining the Temporary or Permanent Nature of a Job Offer

To determine an alien's eligibility for admission on an H–2 visa, INS requires a Department of Labor certification based on adverse effect as well as availability *before* they rule on the temporary or permanent nature of the employment.

Because the availability test of U.S. workers in a given occupation can vary considerably depending on whether a job is permanent or temporary, the Department of Labor must consider whether in its judgment the job offered to an alien is, in fact, temporary or not. The guidelines below will help staff make this judgment:

A. Tests for determining the temporary or permanent nature of the employment are related to the job and job duties to be performed—not the person who will perform the duties; in other words, whether specific duties which the alien(s) will perform are needed for a temporary period or on a continuing basis—regardless of who will perform them.

The work must be above and beyond the employer's normal level of operation and not expected to become a part of the employer's future operations. Staff can consider the employer's "peakload" requirements, when temporary additions to permanent staff in an occupation are required due to seasonal or short-term demand, e.g., in resort establishments.

B. Answers to the following questions will help to determine the temporary or permanent nature of the job offered the alien(s):

1. Is the job included in the employer's regular business operation? If yes, are duties to be performed significantly different from the normal or regular operation? Is the equipment similar? Is the work of the same general skill and knowledge level?

2. Is the period for which the alien is requested reasonable in terms of the job to be done?

3. Are the number of aliens requested reasonable in terms of the job to be done and the time requested? Sometimes employers give "ball park" estimates which can be made more precise to avoid situations which would lead to less than full-time employment for U.S. workers and aliens alike.

4. Is this a request for an extension or does the employer often or repeatedly request temporary aliens? If yes, refer to item F.

5. Is there another way that the employer might reasonably be expected to meet his/her needs?

C. Temporary employment should not be confused with part-time employment which does not qualify for temporary labor certification. Part-time concerns work hours, days, and weeks less than those normal for the occupation in the employment area.

D. INS has the ultimate authority to reject the Department of Labor's advice on temporary alien employment. However, if the Department of Labor is convinced that a job is not temporary and INS plans to or does admit the aliens as nonimmigrants, DOL will still not issue a certification.

E. If the Department of Labor learns that an employer for whom a permanent certification was issued, also applies for a temporary certification for the same job (generally because of visa problems), a notice should be issued to the employer that certification cannot be made and an appropriate explanation of the reasons.

F. Some employers request extensions, sometimes several, for jobs represented as temporary. Others repeatedly request approval to bring in temporary workers. In such cases, State agencies and regional offices will assure that the employer is not evading its responsibility to obtain an adequate domestic work force; or—as stated earlier—an effort to substitute nonimmigrants when visa quotas cause delays in admitting immigrants. To help staff decide, they should consider the following:

1. Were previous extensions granted, and if so does the period covered exceed reasonable grounds for temporary work?

2. What reason does the employer give for incorrect time estimate(s)?

3. Has the availability picture or the prevailing wage changed?

4. Depending on the skill level and training time for the occupation and the industry practice on training, is it possible to train available workers?

5. If it is a higher skilled job, what, consistent with industry practice, is being done to upgrade current employed lower skilled workers and fill in behind them from the local work force?

6. What, consistent with industry practice, is being done to cross-train the present work force to handle peak demands?

7. If an apprenticable trade is involved, does the employer have, consistent with industry practice, the accepted ratio of apprentices to journeymen?

G. Repeated applications from the same employer should be subject to very close scrutiny and satisfactory answers to the same type of questioning as listed above. Also, the employer should be asked to document or explain in writing what is being done to overcome reliance on alien workers before a new certification is issued.

H. If a job for which a temporary alien worker is sought is not *truly* temporary in nature, decline to issue a certification even though U.S. workers are not available and wages being offered are prevailing.

III. Filing Instructions

A. An employer who wants to use foreign workers for temporary employment must file a temporary labor certification application (OMB Approval No. 1205–0015) with a local office of the State job service.

B. Every temporary application should include:

1. ETA 750, Part A, the offer of employment portion of the Application for Alien Employment Certification form signed by the employer. Note: Part B, Statement of Qualifications of Alien is not required.

2. Documentation clearly showing the employer's efforts to recruit U.S. workers.

3. A statement explaining why the job opportunity cannot be performed by a permanent worker on a continuing basis.

C. To allow for enough recruitment of U.S. workers and enough processing time by State and regional offices, the local office shall advise employers to file requests for temporary labor certification at least 45 days before the labor certification is needed in order to receive a timely determination.

D. Unless the Certifying Officer specifies otherwise, the local office should return to employers' requests for temporary labor certification filed more than 120 days before the worker is needed and advise them to refile the application no more than 120 days before the worker is needed. This is necessary since the supply and availability of temporary U.S. workers change over short periods of time and an adequate test of the labor market cannot be made for a longer period.

E. More than one alien may be requested on an application if they are to do the same type of services in the same occupation, in the same area of employment during the same period. However, the number requested may not exceed the actual number of job openings.

F. If the employer's agent files the application, the employer must sign the statement on the Application for Alien Employment Certification which authorizes the agent to act on the employer's behalf. The employer is fully responsible for the accuracy of all representations made by the agent on the employer's behalf. An attorney must file a Notice of Appearance (Form G–28) naming the attorney's client(s).

G. Requests for temporary labor certification may be filed for employment up to, but not exceeding 12 months. If the original intended duration of the temporary employment requires nonimmigrant aliens for a finite period not exceeding 3 years, or if unforeseen circumstances require an extension of an approved certification, a new application must be submitted each period beyond 1 year. This allows the Department of Labor to make a current determination of the availability of and adverse effect on U.S. workers. The period (including extensions) for which a particular job may be certified for temporary alien(s) employment may not exceed 3 consecutive years, except for recurring peakload or seasonal employment.

H. When the job opportunity requires the work to be done in more than one area of employment, the application must include the itinerary or locations and duration of work in each location. Such applications will be filed with the local State Job Service office having jurisdiction over the area where the employment will begin.

IV. State Job Service Processing

A. Upon receiving a request for temporary labor certification, the local office shall review the job offer for completeness. A job offer containing a wage below the prevailing wage for such employment in the local area is inappropriate and would adversely affect the wages of similarly employed U.S. workers. The local office shall determine the prevailing wage, guided by the regulations at 20 CFR 656.40.

B. If qualified U.S workers are registered with the local office, a job order should be prepared, using the information on the application, and placed into the regular ES system for 10 days. During this period, the local office should refer qualified applicants who walk-in and those in its active files.

C. The employer shall advertise the job opportunity, before or after filing the application, in a newspaper of general circulation for 3 consecutive days or in a professional, trade, or ethnic publication, whichever is most appropriate for the occupation and most likely to bring responses from U.S. workers. The advertisement shall:

1. Identify the employer's name, address, and location of the employment (except ads for aerospace engineers which shall be placed over the name of the local Job Service office) if other than the employer's location;

2. Describe the job opportunity with particularity;

3. State the rate of pay, which shall not be below the prevailing wage for the occupation;

4. Offer prevailing working conditions;

5. State the employer's minimum job requirements;

6. Offer wages, terms, and conditions of employment which are not less favorable than those offered to the alien.

D. The employer shall document that unions and other recruitment sources, appropriate for the occupation and customary in the industry, were unable to refer qualified U.S. workers.

E. The employer must provide the local office a copy of the advertisement showing the name of the publication and the dates published and written results of all recruitment which must:

1. Identify each recruitment source by name;

2. State the name, address, and telephone number and provide resumes (if submitted to the employer) of each U.S. worker who applied for the job; and

3. Explain the lawful job-related reasons for not hiring each U.S. worker.

F. After the recruitment period, the local office shall send the application, results of recruitment, prevailing wage findings, and other appropriate information to the State office for additional data and comments and transmission to the regional office.

V. Temporary Labor Certification Determinations

A. The certifying officer shall determine whether to grant or to deny the temporary labor certification, or to issue a notice that the required determination cannot be made based on whether or not:

1. U.S. workers are available for the temporary employment opportunity:

a. The certifying officer, in judging if a U.S. worker is available for the temporary employment opportunity, shall determine from documented results of the employer and local office recruitment efforts if there are other appropriate sources of workers, where the employer shall have recruited or may recruit U.S. workers. If further recruitment is required, the application should be returned to the State Job Service Office with specific instructions for the additional recruitment.

b. To determine if a U.S. worker is available, the certifying officer shall consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expense, or at the employer's expense, if the prevailing practice among employers who employ workers in the occupation is to pay such relocation expenses.

c. The certifying officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, can perform the duties involved in the occupation as customarily performed by other U.S. workers similarly employed and is willing to accept the specific job opportunity.

d. To determine if U.S. workers are available for job opportunities that will be performed in more than one location, workers must be available in each location on dates specified by the employer.

2. The employment of the alien will adversely affect wages and working conditions of U.S. workers similarly employed. To determine this, the certifying officer shall consider such things as labor market information, special circumstances of the industry, organization, and/or occupation, the

prevailing wage rate for the occupation in the area of intended employment, and prevailing working conditions, such as hours in the occupation.

3. The job opportunity contains requirement on conditions which preclude consideration of U.S. workers or which otherwise prevent their effective recruitment, such as:

a. The employment opportunity is represented as temporary and the Department of Labor believes it can and should be offered to U.S. workers on a permanent basis.

b. The job opportunity is vacant because the former occupant is on strike or locked out in the course of a labor dispute involving a work stoppage or the job is at issue in a labor dispute involving a work stoppage.

c. The job opportunity's terms, conditions, and/or occupational environment are contrary to Federal, State, or local law.

d. The employer has no location within the United States to which U.S. workers can be referred and hired for employment.

e. The employer will not pay a wage or salary for the job to be performed.

f. The job's requirements are unduly restrictive.

g. The employer refuses to recruit U.S. workers according to DOL policies and procedures.

Such applications shall be denied on the basis that U.S. workers may be available for employment in the occupation and it was not shown that the employer made reasonable efforts to obtain U.S. workers for the job.

B. A temporary labor certification may be issued for the duration of the temporary employment opportunity, not to exceed twelve (12) months. If the temporary job opportunity extends beyond 12 months, the employer must file a new application; however, temporary certifications may not be granted for the same job opportunity for a total period (including extensions) of more than 3 years, except in applications for recurring seasonal employment.

C. Dates on the temporary labor certification shall be the beginning and ending dates of certified employment and the date certification was granted. The beginning date of certified employment may not be earlier than the date certification was granted.

VI. Document Transmittal

A. After making a temporary labor certification determination, the certifying officer shall notify the employer, in writing, of the determination.

B. If the labor certification is granted, the certifying officer shall send the certified application containing the official temporary labor certification stamp, supporting documents, and completed Temporary Determination Form to the employer or, if appropriate, the employer's agent or attorney. The Temporary Determination Form shall indicate that the employer should submit all documents together with the employer's petition to the appropriate INS office.

C. If the labor certification is denied or a notice is issued that certification cannot be made, the certifying officer shall return one copy of the Application for Alien Employment Certification form, supporting documents, and completed Temporary Determination Form to the employer, or, if appropriate, to the employer's agent or attorney. The Temporary Determination Form shall indicate specific bases on which the decision was made not to issue a temporary labor certification, and shall advise the employer of the right to appeal to the INS.

VII. Appeal of a Denial or Notice That a Certification Cannot Be Made

A. The granting or denial of a temporary labor certification by the certifying officer, or a finding that a certification cannot be made, is the final decision of the Secretary of Labor. Administrative appeal is made to INS, as set forth below.

B. Under the Act and regulations of the Immigration and Naturalization Service, the Department of Labor's role is only advisory. The Attorney General has the sole authority for the final approval or denial of a petition for temporary alien employment. The employer can submit countervailing evidence to the Immigration and Naturalization Service, according to 8 CFR 214.2(h)(3)(i), that qualified persons in the United States are not available, that wages and working conditions of U.S. workers will not be adversely affected, and that the Department of Labor's employment policies were observed.

VIII. Validity of Temporary Labor Certifications

A. A temporary labor certification is valid only for the number of alien workers, the occupation, the area of employment, the specific activity, the period of time, and the employer specified in the certification.

B. A temporary labor certification is limited to one employer's specific job opportunity; it may not be transferred from one employer to another.

IX. Applications Requiring Special Processing

A. *Aerospace Engineers*

1. Take a job order on all aerospace engineer certification requests.

2. Ensure that the employer advertises in a newspaper or appropriate engineering publication. Advertisements shall describe wages, terms, and conditions of employment, and shall not identify the employer, but shall direct applicants to send resumes to the local Job Service for referral to the employer. Results of ads must be documented. Advertising copy should indicate the same wages, education, working conditions, and location of work as that in the application for alien employment and on the order taken by the local office.

3. Require employers to offer laid-off engineers reemployment before applying for labor certification.

4. Ensure that all ETA 750, Part A from contract engineering firms identify the user aerospace company and specify where the alien will work.

Certification requests for temporary engineer jobs from contract engineering firms may be accepted without aliens' names. The application, however, must be accompanied by a letter from the user aerospace company. The letter will authorize a request for an unnamed alien, state the number and type of employees required, and specify where the alien will work.

5. Ensure that a copy of the contract for negotiation with alien accompanies all contract engineering firm certification requests.

6. Place into interstate clearance all alien certification job orders for aerospace engineers and related occupations.

Use procedures for placing alien certification job orders in nonagricultural interstate clearance.

7. Process the application according to Parts II, III and IV of these procedures, as appropriate.

B. Construction Workers

1. *General.* a. Unions representing construction workers in the same or substantially equivalent job classification as those for which labor certification is requested shall be contacted to determine availability of U.S. workers when local offices receive requests for 10 or more workers in the same occupation for the same employer at any one time or within a 6-month period.

The Human Resources Development Institute (HRDI) is the employment and training arm of the AFL–CIO; it serves as a centralized liaison between the Department of Labor and individual

unions in providing labor market information in skilled trades in order to make an informed labor certification determination.

2. *Procedures.* a. The local office should process the application according to Parts II, III and IV of these procedures.

b. The local office shall advise the employer to obtain, from the union local, a letter describing the availability of qualified U.S. workers for the position offered to aliens.

c. Before making a determination, certifying officers should contact, in writing the Executive Director, Human Resources Development, 815 16th Street, NW., Washington, D.C. 20006, and send the following information for each application:

(1) Name and address of company requesting certification;

(2) Location of work site;

(3) Local number and name of the union, if known;

(4) Dates of any prior certifications requested by company;

(5) Total number of aliens requested;

(6) Duration of employment of aliens;

(7) Job classification, special qualifications and wage offered;

(8) Assistance offered to aliens (subsistence, housing, other); and

(9) Reasons for requesting alien labor.

If HRDI knows of available U.S. workers, they will provide this information to the certifying officer, along with the name of the appropriate local for the employer to contact. If no response is received within three weeks of the request, a determination will be made on information in the file.

C. Machinists and Aerospace Workers

1. The local office should process the application according to Parts II, III and IV of these procedures.

2. Before making a determination, the certifying officer should send to the Executive Director of the International Association of Machinists and Aerospace Workers, Machinists Building, Room 911, 1200 Connecticut Avenue, NW., Washington, D.C. 20036, the following information for each application:

a. Name and address of company requesting certification;

b. Location of work site;

c. Local number of IAM union, if known;

d. Total number of aliens requested;

e. Duration of employment of alien;

f. Job classification, including information on wages and special qualifications;

g. Assistance offered to aliens (subsistence, housing, other); and

h. Reason for requesting alien labor.

If the IAM knows of qualified U.S. workers, available for the position, they will give the certifying officer the name of the appropriate local for the employer to contact. If the IAM does not respond within 3 weeks, a determination should be made from the information provided by the local office.

U.S. DEPARTMENT OF LABOR

Employment and Training Administration

Final Determination

No. of Aliens and Occupation _____

_____

Period of Certification

From: _____

To: _____

The Department of Labor has made a determination on your temporary application for alien employment certification pursuant to Title 20, Code of Federal Regulations, Part 621. Final action has been taken as follows:

☐ 1. Form ETA 750 has been certified and is enclosed with the supporting documents. All enclosures should be submitted to the Immigration and Naturalization Service District Office for consideration with your petition (Form I–129B).

☐ 2. Form ETA 750 has not been certified and is being returned. A certification cannot be issued as required by Immigration and Naturalization Service regulations at 8 CFR 214.2(h)(3)(i) on the basis of information available for the following reasons (See details below):

☐ a. There are qualified U.S. workers who are available for the job.

☐ b. The employment of aliens would have an adverse effect on wages and/or working conditions of U.S. workers similarly employed.

☐ c. A certification cannot be made under Department of Labor policies and procedures.

Details:

Certifying Officer

cc: State ES Agency

A denial of certification or a notice that certification cannot be made is not reviewable by the Department of Labor, but may be appealed to the Immigration and Naturalization Service (INS). The petitioner may attach the decision to the nonimmigrant visa petition and present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor have been observed. The INS will consider all such evidence in adjudicating the petition.

[FR Doc. 84–16865 Filed 6–22–84; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 430, 436, and 442

[Docket No. 84N–0162]

Antibiotic Drugs; Ceforanide for Injection

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the antibiotic drug regulations to provide for the inclusion of accepted standards for a new antibiotic drug, ceforanide for injection. The manufacturer has supplied sufficient data and information to establish its safety and efficacy.

DATES: Effective June 25, 1984; comments, notice of participation, and request for hearing by July 25, 1984; data, information, and analyses to justify a hearing by August 24, 1984.

ADDRESS: Written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Joan M. Eckert, Center for Drugs and Biologics (formerly National Center for Drugs and Biologics (HFN–140)) (HFN–815), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4290.

SUPPLEMENTARY INFORMATION: FDA has evaluated data submitted in accordance with regulations promulgated under section 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357), as amended, with respect to a request for approval of a new antibiotic drug, ceforanide for injection. The agency has concluded that the data supplied by the manufacturer concerning this antibiotic drug are adequate to establish its safety and efficacy when used as directed in the labeling and that the regulations should be amended in Parts 430, 436, and 442 (21 CFR Parts 430, 436, and 442) to provide for the inclusion of accepted standards for the product.

The agency has determined pursuant to 21 CFR 25.24(b)(22) (proposed December 11, 1979; 44 FR 71742) that this action is of a type that does not individually or culmulatively have a significant impact on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.