



CW-1 Temporary Labor Certification Stakeholder Webinar

March/April 2019

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Office of Foreign Labor Certification

- The Department of Labor's (Department) Office of Foreign Labor Certification (OFLC) administers the Department's CW-1 program.
 - OFLC's National Prevailing Wage Center (NPWC) issues prevailing wage determinations (PWD) for the CW-1 program.
 - OFLC's Chicago National Processing Center (Chicago NPC) adjudicates CW-1 applications and issues Temporary Labor Certifications (TLC) for the CW-1 program.

Topics

- Statutory and Regulatory Background
- CW-1 Program Requirements
- Prevailing Wage Determination
- CW-1 Temporary Labor Certification Application: Preparation and Submission
- Submission and Certification
- Post-Certification Activities
- Important Resources

Statutory and Regulatory Background

- The Northern Mariana Islands U.S. Workforce Act of 2018 (the Workforce Act) was signed into law on July 24, 2018 (PL. No. 115-218):
 - Encourages hiring of U.S. workers in the Commonwealth of the Northern Mariana Islands (CNMI or Commonwealth) workforce;
 - Ensures that no U.S. worker is placed at a competitive disadvantage compared to a non-U.S. worker or is displaced by a non-U.S. worker;
 - Requires obtaining a TLC from the Department confirming:
 - (1) **No sufficient U.S. workers in the CNMI** (able, willing, qualified, and available) at the time and place needed to perform the services or labor involved in the petition filed with the Department of Homeland Security (DHS); and
 - (2) The employment of nonimmigrant workers **will not adversely affect** the wages and working conditions of similarly employed U.S. workers.

Statutory and Regulatory Background (Cont.)

- Requires the Department to publish an Interim Final Rule (IFR) to implement new regulations governing the certification of temporary employment opportunities sought to be filled by nonimmigrant workers in the CNMI and the obligations applicable to employers of such workers under the Commonwealth-Only Transitional Worker program (CW-1 visa classification).
- The Department's IFR in the *Federal Register* promulgates CW-1 temporary labor certification regulations and invites the public to submit comments in connection with the rule.
- To be able to implement CW-1 program requirements and allow employers to request CW-1 temporary labor certifications, the Department has created:
 - **Form ETA 9141C Application for Prevailing Wage Determination**
 - **Form ETA 9142C CW-1 Application for Temporary Employment Certification**

CW-1 Program Requirements

- CW-1 Temporary Labor Certification:
 - Employers in the CNMI must establish that:
 - No U.S. worker is able, willing, qualified, and available to fill the job opportunity in the CNMI, and
 - The foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.

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CW-1 Program Requirements (Cont.)

- Worker Protections:
 - No U.S. worker should be placed at a **competitive disadvantage** compared to a non-U.S. worker **nor displaced** by a non-U.S. worker.
 - The **lay-off of any similarly employed U.S. worker**, in the occupation beginning 270 calendar days before the date of need through the end of the period of employment certified by DOL, is **prohibited**.
 - Job opportunity must be "**full-time**." (at least 35 hours per week)
 - **Paid wages** must be **final and unconditionally "free and clear"** as defined in the Department's Wage and Hour regulations and such payment must be no less frequent than **every 2 weeks**.
 - **No preferential treatment of CW-1 workers over U.S. workers.** Employers are required to offer and provide to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to CW-1 workers. Employers are not precluded from offering U.S. workers a higher wage rate, or more generous benefits or working conditions.

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CW-1 Program Requirements (Cont.)

- Worker Protections:
 - To ensure that U.S. workers are protected from the hiring of CW-1 workers, **U.S. workers in corresponding employment must be paid the same wages and benefits** as those received by CW-1 workers.
 - Corresponding employment means the employment of U.S. workers who by a CW-1 employer in any work included in the approved job offer, or in any work performed by the CW-1 workers.

CW-1 Program Requirements (Cont.)

- Employers are responsible for paying:
 - **Visa and related fees** for CW-1 workers;
 - **Inbound transportation and Subsistence costs** of CW-1 workers who complete 50% of the job order period; and,
 - **Outbound transportation and subsistence expenses** of workers who complete the entire job order period, to include U.S. workers in corresponding employment.

CW-1 Program Requirements (Cont.)

- **Transparency And Integrity:**

The regulations provide for transparency and program integrity (e.g. workers **must receive earning statements** on or before each payday, with hours worked and offered and deductions clearly specified; employers must provide **copies of the work contract in a language understood by the worker, no later than at the time the subsequent offer of employment is made**).

- **Sanctions And Penalties:**

The regulations establish a sanctions and penalties regime for employers that violate program requirements, such as **more intensive or assisted recruitment requirements, revocation** of a certified Application for Temporary Employment Certification, or **debarment** from all of OFLC's employment-based foreign labor programs for **up to 5 years**.

Foreign Labor Application Gateway (FLAG System)

- The Department has created the Foreign Labor Application Labor Gateway System (**FLAG System**). The FLAG System is a new electronic filing system for foreign labor applications.
- CW-1 employers, their agents and attorneys, will use the Department's FLAG System to create accounts, request CW-1 prevailing wage determinations, file CW-1 applications, submit documents related to their applications, view status, and access their applications.
- The **FLAG System** is at <https://flag.dol.gov>.

Prevailing Wage – Wage Requirements

20 CFR 655.410

- **Wage Requirements for CW-1 Temporary Labor Certification:**
 - The Workforce Act mandates the Department use, or make available to employers, an **occupational wage survey conducted by the CNMI Governor** that meets the statistical standards established by the Department for determining prevailing wages (PWs) in the CNMI on an annual basis. The Workforce Act does not, however, require the CNMI Governor to conduct a wage survey.
 - The Workforce Act requires that the CNMI Governor's survey be conducted annually which is a more stringent requirement than for other foreign labor certification programs. As a result, the most recent survey the Department has received for other programs cannot be used for the CW-1 program. The Department, therefore, does not currently have a survey that meets the survey standard. The Department is working with the Governor's designated officials to provide technical assistance about the requirements for the wage survey in the IFR.
 - **In the absence of such an occupational wage survey for an occupation**, the Workforce Act requires that the PW for a CW-1 occupation be the **arithmetic mean** of the wages of workers similarly employed in the territory of **Guam**, based on the Occupational Employment Statistics (**OES**) Survey conducted by the Department's Bureau of Labor Statistics (BLS).
 - In no case may the prevailing wage be lower than the United States or CNMI minimum wage, whichever is highest.

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Prevailing Wage Determination

20 CFR 655.410

- **Obtaining A Prevailing Wage Determination (PWD) for the CW-1 Program:**
 - With the exception of emergency situations, employers must request and obtain a PWD from the NPWC **before** filing the Application for Temporary Employment Certification (Form ETA-9142C and appendices).
 - The Department **encourages** requests for PWDs be submitted **at least 90 calendar days before the date the PWD is needed**.
 - OFLC will annually (or as new surveys are reviewed) make available a listing of approved PWs in each occupational classification for which there is a survey wage based on the CNMI Governor's survey. OFLC is also making available a listing of the OES and OES-adjusted wages for CW-1 program use on its CW-1 page.

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Prevailing Wage Determination

20 CFR 655.410

To request a PWD:

- Employers must **electronically** file a **Form ETA 9141C** to request a PWD using the FLAG System at <https://flag.dol.gov>
 - **Two limited exceptions** to electronic filing:
 - Employers must file electronically **unless** the employer is unable to file electronically due to lack of internet access or physical disability.
 - Any mailed application must include a statement indicating the need to file by mail.
 - Mailed applications that do not include the statement will be returned without review.

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Prevailing Wage Determination

20 CFR 655.410

- The PW for each occupation based on a **wage survey conducted by the CNMI Governor** must meet the **same statistical standards** that are required of **employer-provided surveys** under the **H-2B program**.
- OFLC will work closely with the CNMI Governor's office (or delegated officials) to review the occupational wage survey, and assess whether the wage results meets statistical standards for determining PWs in the CNMI.
- If the wage survey does not meet statistical standards, OFLC will inform the CNMI Governor in writing of the reasons why the wage result cannot be used in determining the PW.
- **NO APPEAL of the survey decision is permitted if OFLC determines it does not meet statistical standards.** Instead, the CNMI Governor can submit corrections or provide additional wage results based on a new survey conducted for the occupational classification.

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Prevailing Wage Determination

20 CFR 655.410-411

- After reviewing the Form ETA-9141C, OFLC will issue a PWD in the following manner:
 - **Wage Survey conducted by the CNMI Governor:**
 - The survey reports an **arithmetic mean** of the wages paid to workers in the occupational classification approved by OFLC, thus that wage shall be the PW; if no survey wage for the occupation, then
 - The PW shall be the arithmetic mean of the wages paid to workers in the occupational classification as reported for Guam by the BLS OES Survey;
 - ** If a Guam-specific OES wage is not available, then OFLC will apply a scaling factor to the wage to account for the fact the wage uses data from geographical demarcations beyond Guam.
 - If the job duties disclosed on the Form ETA-9141C cover **more than one occupational classification**, the PW will be the **highest applicable wage among the assigned occupational classifications**.
 - OFLC will issue the PWD, indicate the source, validity period for use, and return the Form ETA-9141C with its endorsement to the employer.

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Obtaining Temporary Labor Certification: CW-1 Application for Temporary Employment Certification

How to obtain a TLC?

- **Only after obtaining a PWD** (except for emergency filings, as defined at 20 CFR 655.422)
- The employer electronically submits the **CW-1 Application for Temporary Employment Certification** filing (Form ETA-9142C with appropriate appendices) to the Chicago National Processing Center (Chicago NPC) for review.

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Obtaining Temporary Labor Certification: CW-1 Application for Temporary Employment Certification

20 CFR 655.420

To request a TLC:

- Employers will electronically file using the **FLAG** System at <https://flag.dol.gov>
- Employers must **electronically** file a **Form ETA 9142C** to request a TLC from the Chicago National Processing Center (Chicago NPC)
 - **Two limited exceptions** to electronic filing:
 - Employers must file electronically **unless** the employer is unable to file electronically due to lack of internet access or physical disability:
 - Any mailed application must include a statement indicating the need to file by mail.
 - Mailed applications that do not include the statement will be returned without review.

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CW-1 Application for Temporary Employment Certification

20 CFR 655.420

The CW-1 Application for Temporary Employment Certification includes:

Valid PWD Case Number	An NPWC issued PWD (required, *unless emergency procedures apply, in which case, employers submit the PWD request with the CW-1 application filing)
Form ETA-9142C	CW-1 Application for Temporary Employment Certification (required)
Form ETA-9142C Appendix A	Job Contractors (if applicable, then required)
Form ETA-9142C Appendix B	Additional Worksites (if applicable, then required)
Form ETA-9142C Appendix C	Assurances and Obligations (required, <u>with signatures</u>)

Supporting Documentation

❖ See also, requirements for emergency applications.

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CW-1 Application for Temporary Employment Certification: Preparation and Submission

20 CFR 655.420

▪ Remember to:

- ✓ Obtain a PWD from the NPWC (except emergency situations)
- ✓ Complete Form ETA-9142C and appropriate appendices.
- ✓ Ensure all required fields on Form ETA-9142C (fields marked with an asterisk "*" on form) are completed prior to submission.
- ✓ Sign Form ETA-9142C, Appendix C - Assurances and Obligations
- ✓ For emergency filings, employers must follow emergency requirements.
- ✓ **Incomplete applications will be returned without review by the Chicago NPC.**

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CW-1 Application for Temporary Employment Certification

20 CFR 655.420

- **When to File a CW-1 Application for New Workers:**
 - **No more than 120 calendar days** before the employer's date of need.
 - For an employer needing workers to start on October 1, 2019, the employer cannot file its application prior to June 3, 2019 (12:00 AM Eastern).
- **When to File for CW-1 Extensions:**
 - **No more than 180 calendar days** before the date of need on which the CW-1 status expires.

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CW-1 Statutory Cap and TLC Processing

20 CFR 655.420

- Upon public notice from DHS/USCIS that it has received a sufficient number of CW-1 petitions to meet the CW-1 statutory cap, OFLC will **continue to process any TLC applications that are currently in process** with the Department **and return any additional CW-1 TLC applications submitted for the current fiscal year.**
- OFLC will provide notice that it will cease accepting CW-1 TLC applications for the current fiscal year on the OFLC website at www.foreignlaborcert.doleta.gov. The notice will be effective on the date of publication and will remain effective for the remainder of the fiscal year, unless USCIS and OFLC publish additional notice(s).
 - This announcement will not apply to applications which are not subject to the CW-1 cap.

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CW-1 Application for Temporary Employment Certification – Emergency Situations

20 CFR 655.422

Requirements for Emergency Situations:

- The CO **may** waive the requirement that the employer obtain a PWD prior to filing a CW-1 TLC application **for good and substantial cause.**
- The employer must **submit to the Chicago NPC:**
 - A **completed Form ETA-9141C** Application for Prevailing Wage Determination (the employer does not submit the form to the NPWC for an issued PWD); and
 - A **statement justifying the waiver request** (including detailed information supporting “good and substantial cause”).

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CW-1 Application for Temporary Employment Certification – Emergency Situations

20 CFR 655.422

- **Good and substantial cause** for emergency situations:
 - A substantial loss of U.S. workers could be attributed to acts of God, or similar unforeseeable man-made catastrophic events, unforeseen changes in market conditions, pandemic health issues, or similar conditions that are wholly outside of the employer’s control (e.g. hazardous materials emergency or government-controlled flooding).

- **The following do not constitute good and substantial cause:**
 - **Publication and Implementation of the CW-1 IFR;**
 - **The CW-1 visa cap;** and
 - A U.S. Citizenship and Immigration Services (USCIS) **petition denial.**

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CW-1 Application for Temporary Employment Certification

20 CFR 655.420

- **Places of Employment (or worksites)** → Limited to **locations in CNMI**

- **Period of Employment** → Generally limited to **up to 1 year**
 - For long-term CW-1 workers, may be up to 3 years.
 - Long-term CW-1 worker → A CW-1 worker admitted to the CNMI during fiscal year (FY) 2015, who was granted CW-1 nonimmigrant status during each of FYs 2016 through 2018, as defined by DHS.

- **Multiple positions**
 - All CW-1 workers must be covered by a TLC. Employers may apply for multiple workers on one CW-1 application. All CW-1 workers on an application must perform the same services or labor, under the same terms and conditions, in the same occupation for the period covered by the TLC.

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The Review Process

- The Chicago NPC reviews CW-1 applications for compliance with the regulations at **20 CFR 655, subpart E** (the IFR).
- After reviewing the CW-1 applications, the CO issues one of the following **first actions**:
 - Notice of Acceptance (**NOA**); or
 - Notice of Deficiency (**NOD**).

- **When is NOD issued?**
 - When the CW-1 application contains **errors or inaccuracies**; OR
 - Otherwise **does not meet the requirements** of the CW-1 program.
- **What is in the NOD?**
 - **Reason(s)** why the application is deficient;
 - Offers **10 business days** from the date of the NOD to submit a modified application; AND
 - States that **failure** to submit a **modified application** will result in **denial** of the application.

CW-1 Application for Temporary Employment Certification - Modified Application after NOD

20 CFR 655.432

Modified Application – Review Process

- The **CO will review** the modified application and:
 - Issue an additional **NOD; OR**
 - Issue a **NOA** directing the employer to recruit for U.S. workers.
- **Failure** to submit a timely modified application → **Denial**
- **Appeal of a Denial** → Same appeal process followed for non-modified applications

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CW-1 Application for Temporary Employment Certification - Notice of Acceptance (NOA)

20 CFR 655.433

- The CO issues a **NOA** when the CW-1 application **does not contain errors or inaccuracies** and meets the requirements of the CW-1 program.
- **The NOA:**
 - Directs employers to recruit U.S. workers;
 - Requires the employer's **recruitment to begin within 14 calendar days** from the NOA's date; and
 - Requires the employer to submit a **recruitment report** to the Chicago NPC by a date specified by the CO.

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CW-1 Application for Temporary Employment Certification - Amendments to the Application

20 CFR 655.434

- Request **before the final determination, in writing**, to amend the application to:
 - **Increase the number of workers** requested without requiring additional recruitment; (unless unforeseen circumstances: by not more than 20%; 50% for employers requesting less than 10 workers)
 - **Make minor changes** to the **period of employment** up to 14 calendar days; and
 - **Other minor amendments.**

Note → Amendments after certification are not permitted.

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CW-1 Application for Temporary Employment Certification –Post Acceptance and NOA

20 CFR 655.440-446

Upon issuance of the NOA → Recruitment for U.S. Workers

Employers must follow NOA instructions to:

- Begin recruitment within 14 calendar days of the NOA.
- Place an advertisement of the job opportunity with the CNMI Department of Labor's job listing system for 21 consecutive days.
- Post notice at two locations at the place(s) of employment for 21 consecutive days.
- Additional recruitment as ordered by the CO.
- Contact former U.S. workers.
- If **interviews** are required, conduct those using a procedure at little or not cost to workers.
- **Consider and hire** all U.S. workers who applied, are qualified and available for the job opportunity.
- **Complete recruitment.**
- Prepare and submit the **recruitment report** to the Chicago NPC by the date specified in the NOA.

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Recruitment for U.S. workers:

- **Must not** contain terms and conditions of employment that are **less favorable** to U.S. workers than those offered to CW-1 workers.

- Must **comply** with job offer **assurances**.

Job Offer Assurances and Advertising Contents

The advertisement has required content, including:

- Employer's name and contact information;

- Indicate the job is a full-time position;

- Job title;

- Total number of job openings;

- Description of job opportunity with sufficient information to apprise applicants;
 - i.e. job duties, minimum education and experience requirements, work hours and days, anticipated start and end dates

- Specific place(s) of employment;

- Wage the employer is offering, intends to offer, or will provide to the CW-1 workers (must equal or exceed the highest of the prevailing wage, Federal minimum, or CNMI minimum wage);

Job Offer Assurances and Advertising Contents (cont'd)

20 CFR 655.441

- If applicable, indicate overtime availability and the wage offer(s);
- Frequency of pay;
- Specify deductions required by law (i.e. board, lodging, or facilities);
- Summary of the **three-fourths guarantee for reimbursement** (20 CFR 655.423(f));
- Indicate that transportation and subsistence will be provided while traveling from the worker's origin to the place of employment and return transportation and subsistence at the end of the job opportunity, as well as daily transportation to and from the place(s) of employment will be provided, **employers will pay the inbound transportation and subsistence costs of workers who complete 50 percent of the job order period**;
- If applicable, state that employer will provide the worker with all tools, supplies, and equipment necessary to perform the duties assigned;

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Job Offer Assurances and Advertising Contents (cont'd)

20 CFR 655.441

- If applicable, any board, lodging, or other facilities the employer will offer to workers or assist workers in securing;
- If applicable, state that on-the-job training will be provided to the worker; and
- Instruct applicants to apply for the job opportunity directly with the employer and provide:
 - At least two verifiable methods by which applicants may apply for the job opportunity, one of which must be electronic; and
 - The days and hours during which applicants may be interviewed.

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Recruitment- Advertisement

20 CFR 655.442

- Advertisement must be placed on the CNMI Department of Labor website for **21 consecutive calendar days**.
- Must **meet the requirements** specified in 20 CFR 655.441.
- The advertisement must be **documented with**:
 - **Printouts** of web pages;
 - **Verifiable evidence** from the CNMI Department of Labor containing advertisement content; and
 - **Dates of publication**.

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Recruitment- Contact with Former U.S. Workers

20 CFR 655.443

- Former U.S. workers, who were employed in that occupation at the place(s) of employment, must be contacted.
 - Except: U.S. workers dismissed for cause or who abandoned the place(s) of employment.
- Contact by mail or other effective means.
- The contact must:
 - Occur while the job offer is advertised with the CNMI Department of Labor; and
 - Include U.S. workers who were laid off within 270 calendar days before the date of need.

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Recruitment- Notice of Posting

20 CFR 655.444

- **A copy** of the *Application for Temporary Employment Certification* must be **posted**:
 - For **21 consecutive calendar days**;
 - In at least **two conspicuous locations** at the place(s) of employment or in some other manner that provides reasonable notification to all employees in the job classification and area; and
 - **Electronic posting** (i.e. internal or external website) is sufficient as long as it meets the requirements of 20 CFR 655.444.

*The employer must maintain **proof of posting**, including the location and timeframe for posting.

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Recruitment- Additional Employer-Conducted Recruitment

20 CFR 655.445

- At the **CO's discretion**, the employer may be required to conduct additional reasonable recruitment steps where it is determined that there is a likelihood that qualified U.S. workers will be available.
- The CO will instruct the number and nature of the additional recruitment efforts and the documentation that the employer must retain.
- Additional recruitment may include advertising the job opportunity:
 - On the employer's website or another website;
 - With community-based organizations, local unions, or trade unions;
 - Using a professional trade or ethnic publication.

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Recruitment Report

20 CFR 655.446

- Employers must prepare, sign, and date a recruitment report no fewer than **2 calendar days after the last date of the advertisement**. The recruitment report must contain:
 - The name of each recruitment activity or source;
 - The name and contact information of each U.S. worker who applied or was referred, whether the job was offered to the U.S. worker, and whether the worker accepted or declined;
 - Confirmation of the advertisement with the CNMI Department of Labor;
 - Confirmation that former U.S. employees were contacted, including the means and dates of contact;
 - Confirmation the employer posted notice of the job opportunity;

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Recruitment Report (Cont.)

20 CFR 655.446

- If directed by the CO, confirmation that additional recruitment was conducted; and
- For each U.S. worker that was not hired, the lawful job-related reason(s) for not hiring the U.S. worker.
- Failure to provide the recruitment report will lead to denial.
- The employer must retain the recruitment report as required in 20 CFR 655.456.

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TLC Determinations

20 CFR 655.450

- Criteria for Certification
- Certification – Approval/Denial
- Partial Certification
- Validity
- Scope
- Document Retention

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Certification

20 CFR 655.451

- The CO will certify the application **only if** the employer has **met all the certification criteria**.
- **Criteria for Certification:**
 - The employer has complied with all of the necessary requirements (e.g. advertising; notice of posting; additional employer-conducted recruitment; contact with former U.S. workers; etc.) under the CW-1 Program.
 - To determine that there are insufficient U.S. workers in the CNMI to fill the employer's job opportunity, the CO will count as available any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, but who was rejected by the employer for other than a lawful job-related reason.

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Certification or Denial

20 CFR 655.452-453

■ **Certification:**

Certified → The CO will **electronically** send a Final Determination notice and a copy of the certified application to the employer and a copy, if applicable, to the employer's agent or attorney.

- For employers permitted to **file by mail**, the CO will send the Final Determination notice and a copy of the certified application by **first class mail**. The CO will **electronically send the certified application**, including approved modifications, on behalf of the employer, **directly to USCIS**.
- The employer must retain a copy of the certified application, including the original signed Appendix C.

■ **Denial:**

Denied → The CO will electronically send a Final Determination notice to the employer and a copy, if applicable, to the employer's agent or attorney.

- **Applications filed by mail** → The CO will send the Final Determination notice and a copy of the certified application by first class mail.
- **Final Determination notice** → Will state reasons for denial, including relevant regulatory standards; offer opportunity to request administrative review by the Board of Alien Labor Certification Appeals (BALCA) and explain that failure to request such review will result on the denial becoming final; there will be no reconsideration or other appeal short of a request for administrative review.

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Certification – Partial Certification

20 CFR 655.454

■ Partial Certification is a certification.

- However, it **reduces either the period of need or the number of CW-1 workers or both**, based upon information the CO receives during the course of processing the application.
 - The number of workers certified will be reduced by one for each U.S. worker who is able, willing, and qualified, and who will be available at the time and place needed and who has not been rejected for lawful, job-related reasons, to perform the labor or services.
- If a partial certification is issued, the CO will send a **Final Determination notice** approving partial certification, instead of full certification, using the procedures for issuing a certification.
- **The Final Determination notice will:** State the reason(s) the period of employment and/or the number of CW-1 workers requested has been reduced, citing the relevant regulatory standards; offer opportunity to request administrative review by BALCA and explain that failure to request such review will result on the partial certification becoming final; there will be no reconsideration or other appeal short of a request for administrative review.

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Certification - Validity

20 CFR 655.455

- **Validity Period** → Valid only for the period of employment as approved on the certification, which expires after the last day of authorized employment, including any approved extensions thereof.
- **Scope** → A certification is valid **only for the number of CW-1 positions, the places of employment located in the CNMI, the job classification and specific services or labor to be performed, and the employer(s) specified on the approved application**, including any approved modifications.
 - **NOTE:** The certification **may not be transferred** from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

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Certification – Document Retention

20 CFR 655.456

- **Who is required to retain documents?**
 - All CW-1 employers are required to retain the required documents and records that establish compliance with the CW-1 program.
- **The Period of Retention is 3 years from (whichever is later) the date:**
 - **The certification expires;** or
 - The **Final Determination**, if the application is denied; or
 - The Department's receipt of a request for **withdrawal** of an application.

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Certification – Document Retention

20 CFR 655.456

- What should be retained?
 - Proof of recruitment efforts, including:
 - Job order placed with the CNMI Department of Labor;
 - Proof of contact with former U.S. workers, including documents showing that job offer was extended to them, as well as proof a worker's refusal or lawful, job-related rejection of the worker.
 - Internal posted notice;
 - Additional employer-conducted recruitment when required by the CO.

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Certification – Document Retention

20 CFR 655.456

- Documentation supporting the information submitted in the recruitment report (e.g. evidence of non-applicability of contact with former workers; resumes, contact information of former U.S. workers).
- Records of each worker's earnings, hours offered and worked, location(s) where work is performed, and other information.
- If applicable, records of reimbursement of transportation and subsistence costs incurred by the workers.
- Copies of written contracts with third parties demonstrating compliance with the prohibitions against seeking or receiving payments or other compensation of any kind from prospective workers.
- Proof of contact with U.S. workers who applied for the job opportunity in the application, including, but not limited to, documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons.

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Certification – Document Retention

20 CFR 655.456

- Written notice notifying OFLC that a CW-1 worker or worker in corresponding employment has separated from employment before the end date of employment specified in the application.
- A copy of the PWD, and TLC application (all accompanying appendices), including any modifications, amendments, or extensions, must be signed by the employer as directed by the CO and retained.

NOTE: The employer must make available to the Department, DHS or to any Federal Government Official performing an investigation, inspection, audit, or law enforcement function all documents and records required to be retained under the regulations for purposes of copying, transcribing, or inspecting them.

Post Certification Activities

20 CFR 655.460-463

- Extensions
- Administrative Review
- Withdrawal
- Public Disclosure

Post Certification Activities - Extensions

20 CFR 655.460

- **Basis for extending the period of employment:**
 - Weather conditions
 - Other factors beyond the control of the employer
 - E.g. unforeseen changes in market conditions

- **The extension must be:**
 - In writing;
 - Submitted electronically unless OFLC has allowed the employer to file/submit the application by mail; and
 - Provide supporting documentation

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Post Certification Activities - Extensions

20 CFR 655.460

- The CO will notify the employer of the decision **in writing**.

- The employer **may appeal** a denial.

- Obligations during the period of extension:
 - All **assurances and obligations** under the certification **continue to apply**.

 - The employer must immediately **provide** CW-1 workers and workers in corresponding employment with a **copy of an approved extension**.

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Post Certification Activities – Adm. Review

20 CFR 655.461

How to Request Administrative Review?

File an appeal with BALCA

The request must:

- Be received by BALCA and the CO within **10 business days** from the date of determination;
- Clearly **identify the particular determination** for which review is sought;
- Include a **copy of the CO's determination**;
- Set forth the particular **grounds for the request**; and
- Contain **only evidence that was actually before the CO** at the time the determination was made.

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Post Certification Activities – Adm. Review

20 CFR 655.461

What follows?

- The CO will provide a copy of the **Appeal File to BALCA**, the employer, and Associate Solicitor for Employment and Training at the Department.
- The **Chief Administrative Law Judge (Chief ALJ) will immediately assign** either a single member or a three-member panel of BALCA to consider a particular case.
- If the employer wishes to submit a **brief on appeal**, it must do so as part of its request for review.
- Within **7 business days of receipt of the Appeal File**, counsel for the CO may submit a brief in support of the CO's decision, and if applicable, in response to the employer's brief.

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Post Certification Activities – Adm. Review

20 CFR 655.461

- **Standard of Review:** BALCA must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.
- **Scope of Review:** BALCA will **affirm, reverse, or modify** the CO's determination, **or remand** to the CO for further action. BALCA will consider the documents in the Appeal File, the request for review, and any legal briefs submitted. It may not consider evidence not before the CO at the time of determination, even if such evidence is in the Appeal File, request for review, or legal briefs.
- **Decision:** BALCA must specify the reasons for the action taken and provide its decision to the employer, the CO, and counsel for the CO **within 7 business days** of the submission of the CO's brief **or 10 business days** after receipt of the Appeal File, whichever is later, using a method normally assuring next-day delivery.

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Post Certification Activities – Withdrawal

20 CFR 655.462

- The employer **may withdraw** the application **after** it has been **submitted** to the center for processing, **including after** the CO has granted **certification**.
- A **request to withdraw** must be **in writing**, identifying the application, and filed with the center.
- **After withdrawal**, the employer is still **obligated to comply** with the terms and conditions of employment stated in the application, and work contract, with respect to all workers recruited and hired. The employer must also comply with document retention requirements.

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Post Certification Activities – Public Disclosure

20 CFR 655.463

The Department will maintain an **electronic file accessible to the public with CW-1 application disclosure information**. The data will include information from the application such as the employer, number of workers requested, the date filed, the date decided, and the final disposition.

Post Certification Activities – Integrity Measures

20 CFR 655.470-473

- Audits
- Assisted Recruitment
- Revocation
- Debarment

Post Certification Activities – Integrity Measures

20 CFR 655.470

Audits

- **Discretionary** action by the CO.
- The CO will send a **letter to the employer**, and if applicable, to its attorney or agent, which will:
 - **Specify the documents** that must be submitted in response;
 - Include the **date** (no more than **30 calendar days** from the date in the letter) by which documents must be received by the CO; and
 - Advise that **failure to comply** with the audit process may result in: assisted recruitment or revocation.

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Post Certification Activities – Integrity Measures

20 CFR 655.470

Audits (cont.)

- **Supplemental information request**

During audit examination, the CO may request supplemental information and/or documentation from the employer to complete the audit. If circumstances warrant, the CO can issue **one or more requests for supplemental information**.

- **Potential referrals**

In addition to audits, assisted recruitment, revocation and debarment actions, the CO may decide to provide the audit findings and underlying documentation to DHS or other appropriate enforcement agencies. The CO may refer any findings establishing that an employer discouraged a qualified U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against a qualified U.S. worker, to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

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Post Certification Activities – Integrity Measures

20 CFR 655.471

Assisted Recruitment

- The CO determines that a violation has occurred which does not warrant debarment.
- The **CO will notify, in writing**, the employer (and attorney or agent, if applicable) that assisted recruitment (AR) will be required for a period of up to **2 years** from the date the notice is issued.
- The **notice** will:
 - Include the **reasons for imposing additional requirements**;
 - State that the **employer's agreement to accept the conditions** will constitute their inclusion as *bona fide* conditions and terms of an application; and
 - Offer the employer an **opportunity to request an administrative review**.

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Post Certification Activities – Integrity Measures

20 CFR 655.471

Assisted Recruitment

- The AR will be **in addition to any recruitment required** of the employer and may consist of, but is not limited to, requiring the employer to **comply with one or more of the following**:
 - Draft advertisement to CO for review and approval;
 - Designate sources where employer must recruit for U.S. workers in the CNMI, and direct the employer to advertise through such sources;
 - Extend length of advertisements;
 - Notify CO when advertisements are placed;
 - Perform additional assisted recruitment;
 - Provide proof of publication of all advertisements, documentation of all U.S. workers who applied, and proof of contact with all referrals and past U.S. workers; and/or
 - Provide any additional documentation verifying that the employer conducted assisted recruitment steps directed by the CO.

Note → Material failure to comply with requirements ordered by the CO will result in a denial of the application and debarment.

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Post Certification Activities – Integrity Measures

20 CFR 655.472

Revocation

- The OFLC Administrator may revoke an approved TLC, if the OFLC Administrator finds:
 - The issuance of the TLC was not justified due to **fraud or misrepresentation of a material fact** in the application process;
 - The employer **substantially failed to comply** with any of the terms or conditions of the approved TLC. A substantial failure is a significant deviation from the terms and conditions of the approved certification and is further defined in § 655.473(d); or
 - The employer **impeded the audit process**, or impeded any Federal Government Official performing an **investigation, inspection, audit, or law enforcement function**.

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Post Certification Activities – Integrity Measures

20 CFR 655.472

Revocation Procedures:

- **A Notice of Revocation** is sent to the employer (and its attorney or agent, if applicable), with grounds of revocation, informing about right to submit rebuttal evidence or request administrative review by BALCA.
- **Rebuttal evidence** must be submitted within 10 business days from the date of the notice; otherwise, the notice will become the final agency action and will take effect at the end of the 10 business day period.

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Post Certification Activities – Integrity Measures

20 CFR 655.472

Revocation (Cont.)

- **Request for review:** An employer may appeal a revocation or a final determination of the OFLC Administrator to BALCA after the review of rebuttal evidence. **BALCA's decision is the final agency action.**
- **Stay:** The timely submission of rebuttal evidence or a request for administrative review will stay the revocation pending the outcome of the proceeding.
- **Decision:** If the TLC is revoked, the OFLC Administrator will provide copies of final revocation decisions to DHS and Department of State (DOS) promptly.
- **Employer's obligations** - If an employer's TLC is revoked, the employer is responsible for:
 - Reimbursement of actual inbound transportation and other expenses;
 - The workers' outbound transportation expenses;
 - Payment to the workers of the amount due under the three-fourths guarantee; and
 - Any other wages, benefits, and working conditions due or owing to the workers under 20 CFR 655, subpart E.

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Post Certification Activities - Integrity Measures

20 CFR 655.473

Debarment:

- OFLC may debar an employer, agent, attorney, or any successor in interest to that employer, agent, or attorney, from participating in the CW-1 program for up to 5 years per individual violation if the OFLC Administrator finds there was **a violation of a material term or condition of the Application for PWD or Application for Temporary Employment Certification**. OFLC will promptly provide copies of final debarment decisions to DHS and DOS.
- **Debarment from the CW-1 program applies to all of the Department's employer based foreign labor programs.** The debarred employer, or a debarred agent or attorney, or any successor in interest to any debarred employer, agent, or attorney, will be **disqualified from filing any labor certification applications or labor condition applications with the Department subject to the term limits**. If such an application is filed, it will be denied without review.

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Post Certification Activities - Integrity Measures

20 CFR 655.473

Debarment violations (Cont.)

- What's a violation in the context of Debarment?
 - (1) **One or more acts of commission or omission** on the part of the employer or the employer's agent or attorney that involve:
 - (i) Failure to pay or provide the required wages, benefits, or working conditions to the employer's CW-1 workers and/or workers in corresponding employment;
 - (ii) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;
 - (iii) Failure to comply with the employer's obligations to recruit U.S. workers;
 - (iv) Improper layoff or displacement of U.S. workers or workers in corresponding employment;
 - (v) Failure to comply with the NOD process, as set forth in § 655.431, or the assisted recruitment process, as set forth in § 655.471, of 20 CFR 655, subpart E;

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Post Certification Activities - Integrity Measures

20 CFR 655.473

Debarment violations (Cont.)

- (vi) Impeding the audit process, or impeding any Federal Government Official performing an investigation, inspection, audit, or law enforcement function;
- (vii) Employing a CW-1 worker outside of the Commonwealth, in an activity/activities not listed in the work contract, or outside the validity period of employment of the work contract, including any approved extension thereof;
- (viii) A violation of the requirements of § 655.423(n) or (o);
- (ix) A violation of any of the provisions listed in § 655.423(q); or
- (x) Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

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Post Certification Activities - Integrity Measures

Debarment (Cont.)

- What's a violation in the context of Debarment? (Cont.)
 - (2) **Fraud** involving the Application for Prevailing Wage Determination or the Application for Temporary Employment Certification; or
 - (3) A **material misrepresentation of fact** during the course of processing the Application for Temporary Employment Certification.

Remember → One violation is sufficient to prompt a Debarment action.

Post Certification Activities - Integrity Measures

20 CFR 655.473

Debarment (Cont.)

- What is a “substantial violation”?
 - To determine that a substantial violation has occurred, certain factors, such as those listed below, must be considered:
 - Previous history of violation(s) under the CW-1 program;
 - The number of CW-1 workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);
 - The gravity of the violation(s); or
 - The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s).

Post Certification Activities - Integrity Measures

20 CFR 655.473

Debarment Procedure

- Notice of Debarment
- Rebuttal
- Request for Review

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Post Certification Activities - Integrity Measures

20 CFR 655.473

- **Notice of Debarment:**
 - OFLC will issue a Notice of Debarment stating the reason(s) for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and informing the party subject to the notice of its right to **submit** rebuttal evidence, **or to request administrative review of the decision by BALCA.**
 - If the party does not file **rebuttal evidence** or a request for review **within 30 calendar days of the date of the Notice of Debarment**, the notice is the final agency action and the debarment will take effect on the date specified in the notice or if no date is specified, at the end of 30 calendar days.
 - The timely filing of rebuttal evidence or a request for review stays the debarment pending the outcome of the appeal.

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Post Certification Activities - Integrity Measures

20 CFR 655.473

▪ Debarment Rebuttal:

- The party may submit evidence to rebut the grounds stated in the notice **within 30 calendar days of the date the notice is issued.**
- If rebuttal evidence is timely filed, OFLC will issue a **Final Determination** on the debarment **within 30 calendar days of receiving the rebuttal evidence.**
- If OFLC upholds the debarment, it will inform the party of its **right to request administrative review of the debarment by BALCA.**
- The appeal must occur within 30 calendar days after the date of the Final Determination, or the Final Determination will be the final agency order and the debarment will take effect on the date specified in the Final Determination, or at the end of 30 calendar days.

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Post Certification Activities - Integrity Measures

20 CFR 655.473

▪ Request for Administrative Review (Debarment Appeal):

- Must be submitted within 30 calendar days of:
 - The date of the Notice of Debarment; or
 - The date of the Final Determination by the OFLC Administrator after review of rebuttal evidence submitted.
- Must be sent in writing to the Chief ALJ, United States Department of Labor, with a simultaneous copy served on the OFLC Administrator.
- The request must clearly identify the particular debarment determination for which review is sought; and must set forth the particular grounds for the request. If no timely request for review is filed, the debarment will take effect on the date specified in the Notice of Debarment or Final Determination, or if no date is specified, 30 calendar days from the date the Notice of Debarment or Final Determination is issued.

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Post Certification Activities - Integrity Measures

20 CFR 655.473

- Request for Administrative Review (Debarment Appeal) (Cont.):
 - Upon receipt of a request for review, the OFLC Administrator will promptly send a certified copy of the ETA case file to the Chief ALJ by means normally assuring expedited delivery. The Chief ALJ will immediately assign an ALJ to conduct the review.
 - Statements, briefs, and other submissions of the parties must contain only legal argument and only such evidence that was within the record upon which the debarment was based, including any rebuttal evidence submitted pursuant to paragraph (f)(2) of this section.

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Post Certification Activities - Integrity Measures

20 CFR 655.473

Review of the Debarment Appeal by the ALJ

- The ALJ must:
 - Afford all parties 30 calendar days to submit or decline to submit any appropriate Statement of Position or legal brief.
 - Review the debarment determination on the basis of the record upon which the decision was made, the request for review, and any Statements of Position or legal briefs submitted.
- The ALJ's final decision:
 - Must affirm, reverse, or modify the OFLC Administrator's determination; be provided to the parties by first class mail.
 - Is the final agency action, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

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Post Certification Activities - Integrity Measures

20 CFR 655.473

- **Review of Debarment Appeal by the ARB:**
 - A party has 30 calendar days (from the decision of the ALJ), to petition the ARB to review a ALJ decision.
 - Copies of the petition must be served on all parties and on the ALJ.
 - The ARB will decide whether to accept the petition within 30 calendar days of receipt.
 - If the **ARB declines** to accept the petition, or if the ARB does not issue a notice accepting a petition within 30 calendar days after the receipt of a timely filing of the petition, the decision of the ALJ is the final agency action.
 - If a **petition for review is accepted**, the decision of the ALJ will be stayed unless and until the ARB issues an order affirming the decision.
 - The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding.

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Post Certification Activities - Integrity Measures

20 CFR 655.473

- Upon receipt of the ARB's notice to accept the petition, the Office of Administrative Law Judges will promptly forward a copy of the complete appeal record to the ARB.
- Where the ARB has determined to review the decision and order, the ARB will notify each party of the issue(s) raised, the form in which submissions must be made (e.g., briefs or oral argument), and the time within which the presentation must be submitted.
- **ARB Decision:** The ARB's final decision **must be issued within 90 calendar days from the notice granting the petition** and served upon all parties and the ALJ.

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Important Resources

OFLC website for PWD and TLC information:

> www.foreignlaborcert.doleta.gov

Electronic filing of PWD and TLC:

> FLAG System <https://flag.dol.gov>

NPWC's PWD Help Desk:

> FLC.PWD@dol.gov, (202) 693-8200

Chicago NPC's TLC Help Desk:

> TLC.Chicago@dol.gov, (312) 886-8000

❖ **For CW-1 petitions**, contact **USCIS** at www.uscis.gov or (800) 375-5283