

Employer Alert: Labor Certification Matters

An e-publication from
the Immigration
Practice Group at
Damon & Morey LLP

By
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Employer Immigration Alert

Damon & Morey
ATTORNEYS AT LAW LLP



Dear Client or Friend of the Firm,

This employer alert is being provided to you as a courtesy of Damon & Morey LLP. If you have hired, or intend to hire foreign nationals, this e-mail explains how proposed regulations will adversely affect your abilities to hire employees through the labor certification process.

The Department of Labor is proposing to eliminate substitutions of employees on labor certification applications, require that employers file immigrant petitions with USCIS within 45 days of approval of the labor certification or the application will be lost, require that employers rather than the employee pay all costs of the labor certification process, and impose new punishments for errors on the application, whether or not the error is intentional or even meaningful.

The Department claims that this is all intended to combat fraud in the process. But it already has built into the system a number of anti-fraud measures. These proposals will not combat fraud; they will only take away from employers the ability to use the applications in which they have already invested but have been negated by the Department's own slow processing. Comments on this proposal are due April 14, 2006. Let the Department know that this is not the right way to fight fraud.

If you are interested, please use the following letter as a guide and send it by mail or email to:

MR. JOHN R. BEVERLY, III
Administrator, Office of National Programs
Employment and Training Administration
U.S. Department of Labor
Frances Perkins Building
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Washington, DC 20210

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Please contact us should you have any questions or require any additional information.

Sincerely,

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SAMPLE LETTER

Dear Mr. Beverly,

Re: RIN 1205-AB42

We hereby submit our comments on the referenced proposed rule. Specifically, we are concerned about the provisions related to substitutions, validity period of labor certifications, payment of costs associated with labor certification applications, and penalties.

Substitutions

The explanatory section of the proposed regulation reflects a feeling on the part of the Department of Labor that substitutions are no longer necessary because the Department has improved its processing times and thus the long waits during which employment situations change no longer apply. This is simply incorrect.

The DOL has announced on its website that its target for clearing its backlog is September 30, 2007. This seems to be highly unrealistic given the more than a quarter-million applications still pending at the Backlog Elimination Centers (BECs) and the problems plaguing the BEC system. But even if the DOL somehow manages to meet its stated goal, it is entirely premature to declare that substitutions are no longer needed to accommodate long wait times. Even if those applications were all processed today, many of them have been in the system for five years or more, and there is still a long road ahead before completion of the permanent residence process. Along that road, much can and often does happen to alter the employment situation.

The beneficiary may have left the company's employ, or may have been promoted or transferred to another position. When a position has been filled by a foreign national, often there is something about the position that lends itself to foreign nationals--for example, either a particular expertise is found only in the international marketplace or there is a shortage of U.S. workers for that type of job. Thus, it is likely that the next candidate for the job will be a foreign national as well, and will also need a labor certification. Now that the DOL has made us wait multiple years while it tries to find a way to process its backlog, it is trying to remove the one mechanism that companies have to preserve the work and expense that has gone into this lengthy process. It is not the fault of the employer that the DOL has taken so egregiously long to process our applications, but it is the employer that the DOL now proposes to punish for the Department's tardiness.

While employers have been waiting for the DOL to address its unconscionable backlog, the quotas for employment-based immigrant visas have started to reach their limits. For years, the quotas were not reached because the DOL and INS/USCIS were so slow in processing applications and petitions. Then, as USCIS started to address its backlogs, the current quotas were reached. The quota numbers for the prior years of the government's tardiness are now lost--the agencies could not adjudicate enough to reach those numbers during those years even though there were more than enough applications on its shelves awaiting action.

Now, because of the loss to agency slowness of earlier years' numbers, immigrant visa availability has retrogressed. The final step in the process to obtain permanent residence--the adjustment of status application or the immigrant visa application--cannot be made until the beneficiary's priority date (the date on which the labor certification application was filed) is on or before the cut-off date assigned by the Department of State for the beneficiary's visa category.

At the current, slow rate of progression, it will be some ten years before a beneficiary will be eligible to file either an application for adjustment of status or a consular immigrant visa application.

Even apart from the BEC backlog and retrogression issues, the problem with slow adjudications for recently-filed applications cannot be declared solved unless and until PERM is fixed. In its rulemaking, the DOL forecasted that PERM applications would be processed within 45 to 60 days of filing. However, in employers' experience, many PERM applications have been pending for more than six months, and many more have been pending more than 90 days. Also, as the system has started to generate decisions, far too often those decisions are denials issued in error or as the result of trivial typographical errors or different understandings of the meaning of the questions. Resolving these errors has required considerable waiting times as the applications work their way through a reconsideration/appeal process that the DOL is only now beginning to put into place.

Allowing substitution is more than a mere accommodation by DOL; it is a necessity given the lengthy delays that are common throughout the process. Substitution allows an employer that has made a substantial investment in recruiting and complying with DOL requirements to make use of that investment on behalf of a new beneficiary who meets the requirements of the position and who is in all relevant respects indistinguishable from the original beneficiary. While we understand the Department's concerns about fraud, it should be remembered that all government processes are vulnerable to fraud. You don't throw out the process--you fix it. The DOL has made strides in that direction through the processes built into its PERM and BEC systems. It should concentrate on building and improving those systems, rather than eliminating a process made necessary by its own inability to effectively process applications.

45-Day Validity Period

The Department's proposal to introduce a 45-day validity period for approved labor certification applications is completely unworkable.

Filing an I-140 form is not just a matter of quickly filling out a form. It takes considerable time to obtain accurate information and to acquire and prepare the necessary supporting documentation. Certain corporate documents to evidence employer viability, such as licenses, charters of incorporation, organizational charts, tax returns and other financial documents, must be filed with the I-140 form and thus must be gathered. Ability to pay the offered wage must be explained, evidence of the beneficiary's past experience must be gathered, and an evaluation of the employee's credentials often must be commissioned. These are just a few of the steps necessary to file an I-140 petition.

This preparation takes time and costs money. Given the costs associated with such preparation, it is not practical or reasonable to require us to incur these expenses and to devote time and resources to the preparation of an I-140 petition without first knowing whether the first hurdle in the case--labor certification--has been overcome.

Other factors also make the 45-day period unrealistic. The parties that need to sign the forms are not always readily available. For example, the human resources director might be away on a business trip or on leave. The beneficiary might be on vacation, or, not uncommonly, still residing abroad. The attorney could be away on vacation. Coordinating and obtaining signatures of these individuals takes time.

On top of the problems and issues that would prevent filing an immigrant petition within 45 days of labor certification, there is the delay caused by the DOL itself in getting the approved labor certification into our hands. From the time an application is designated as approved on the PERM online system, one to three weeks is the typical time frame before we receive the certified ETA 9089 in the mail. And, it sometimes can take even longer if there are delays in the DOL mailing room (which are not uncommon). If, as the proposed rule is written, the 45-day period runs from the date of approval, in many cases, the labor certification will not have been even received before the 45 days are up.

The supplemental information section of the proposed rule indicates that one of the reasons for imposing a 45-day limit on validity is concern that a job opportunity may change or become stale. This concern is ironic given that it has been government processing delays rather than the deliberate delay of employers that have aged the applications. Hundreds of thousands of labor certification applications have been pending for years. And while the DOL has, for the most part, established a faster processing record under PERM, numerous cases still take well beyond the DOL stated goal of 45 to 60 days. Moreover, processing of the I-140 immigrant visa petition and adjustment of status application with USCIS easily takes 12 to 18 months, and processing an immigrant visa application with a consular post normally takes no less than six months. What can cause even greater delay is the long wait as a result of visa retrogression discussed above.

A 45-day limit on the validity of a labor certification would be an unreasonable and unjustified burden. While we believe that there should be no expiration at all for a certified application, we would suggest in the alternative that one year is more reasonable and practical. This would provide sufficient time to gather documentation, and would cover the delays resulting from the unexpected problems that can arise when processing paperwork in a company. And, this time frame is not without precedent. Under section 203(g) of the Immigration Act, registration of aliens for purposes of immigrant visa issuance expires after one year.

Costs of Labor Certifications

The Department proposes to enter into the business of dictating private employment terms by banning employees from paying any of the costs of the labor certification process. Apart from being an undue interference with private contract, this proposal ignores the realities of the very process that the DOL dictates.

In many instances, the foreign national is already in the employ of the company at the time the labor certification process is started, having been hired under a status like H-1B or a DHS-issued work authorization card. The employer's regular recruitment, which of course the company paid for, happened when that initial hire took place. Then, upon hire, the need to obtain permanent residence for the employee became known. This need is personal to the employee--under the law, it is needed to overcome a ground of inadmissibility for the individual.

Not all employees have this need. Many (indeed most) are already U.S. citizens or permanent residents. Even among those who are not, they may be married to a U.S. citizen or otherwise able to obtain residence through other means. Thus, assistance in obtaining permanent residence is not a benefit that is offered to all employees. A significant portion of the cost of obtaining permanent residence is attorneys' fees. It is the rare employer that provides personal legal services as a benefit to employees. Whether to provide this benefit to these specific employees is a matter that should be left to the employer and employee to decide. The government has no role in this decision.

The DOL is wrong to call these expenses employer expenses. While the employer has an interest in the process, it is the employee with the greater interest once the point has been reached that a labor certification application will be filed. The legal advice on how to handle the process, the conduct of a recruitment that meets DOL regulations (no employer would run its own recruitment that way), and the other associated costs should be a matter of private negotiation, not regulation.

In some instances, the result of this negotiation is that the company will pay the cost of the labor certification with the understanding that the employee will stay on for a certain amount of time. The employee agrees to reimburse the employer if he leaves before that time. This is to protect the company's investment. Yet, the DOL rule would prohibit even this common practice.

Penalties

The Department of Labor proposes to debar employers for up to three years for any "improper or prohibited" action, upon a finding that it has participated in or facilitated a broad array of activities. We question whether the DOL has the authority to impose this penalty. If Congress wanted to impose a system of debarment, it knows how to do so: it legislated debarment in the H-1B and H-2A programs. It has never granted similar authority for debarment in the permanent labor certification program.

Even if the Department has the authority to impose this penalty, it needs to do so in a way that is reasonable. In the H-1B and H-2A programs, Congress specified clear and fair standards, and required opportunity for due process before sanctions could be imposed. In the H-2A program, the employer must have violated a "material term or condition of the labor certification...." In the H-1B program, debarment occurs only for a "substantial failure" to meet a condition of the labor certification or a "misrepresentation of material fact in an application." Both legislative provisions specify that debarment occurs only after notice and opportunity for a hearing.

By contrast, the DOL proposal would impose this severe penalty for any error: an employer could be debarred for provision of any false or inaccurate information no matter how minor or immaterial, any failure to comply with the terms of the application whether meaningful or not, or any failure to comply with an audit or supervised recruitment no matter how meaningless the failing. This is all without regard to materiality, substantiality, knowledge or willfulness. The debarment provisions would punish an employer for such things as a typographical error in the application regarding the alien's date of birth; an application with an inaccuracy in the foreign national's job history (not properly recalling the exact day, he/she commenced employment with an employer ten years ago); or an inadvertent mistake in the number of employees, relationship to alien, or federal employer identification number.

As distinguished from the due process provided by Congress in, for example, the H-1B context, the DOL proposal allows virtually no notice or opportunity for a hearing before debarment is ordered. Congress mandated for the H-1B process that there be "notice and opportunity for a hearing," and the DOL implemented that mandate by providing in its regulations an opportunity to request a hearing before an Administrative Law Judge if the Administrator issues negative findings. If the ALJ finds against the employer, opportunity for appeal is available.

The proposed rule provides no such procedural protections. As the rule is written, the Chief of the Foreign Labor Certification Division would issue a Notice of Debarment without opportunity for, and the subject of this Notice would have one, very limited opportunity to appeal. This is inadequate as a form of notice and hearing.

Conclusion

Unlike its carefully considered and reasoned PERM regulation, this proposed rule is poorly conceived and completely unreasonable. The Department is urged to abandon this effort and look to the systems designed for PERM and the BECs to address the important issue of fraud.