

DOL Publishes Rule on Labor Cert Substitution, Expiration, and Other Issues

May 18, 2007

On May 17, 2007, the Department of Labor (DOL) published a final rule on substitutions and other labor certification issues that will become effective on July 16, 2007.

End to Labor Certification Substitution

The final rule will prohibit the practice of substituting a new beneficiary on a labor certification. These regulatory changes do not affect substitutions already approved by the DOL or requests in progress prior to the new rule's effective date.¹ To date, there is no companion regulation for the U.S. Citizenship and Immigration Services (USCIS), the agency charged with adjudicating I-140 petitions (Immigrant Visa Petitions) based on substitute labor certifications.

All I-140 petitions using a substitute beneficiary on an approved labor certification must be filed before July 16, 2007. In addition, USCIS has announced that effective May 18, 2007, it will terminate Premium Processing service for all I-140 petitions seeking labor certification substitution prior to July 16, 2007.

Labor Certification Expiration After 180 Days

All I-140s based on approved labor certifications must be filed within 180 days of the labor certification approval. All currently approved labor certification applications must have an I-140 petition filed by January 11, 2008, or they will expire.

The new rule provides a 180-day validity period for approved labor certifications. All permanent labor certifications approved on or after the effective date of July 16, 2007, will expire 180 calendar days after certification, whether the original application was filed under the PERM or pre-PERM regulations, unless the employer uses the approved labor certification prior to expiration in support of an I-140 petition with USCIS. Likewise, all labor certifications approved prior to July 16, 2007 will expire in 180 calendar days, unless filed in support of an I-140 petition with USCIS prior to the expiration date. Therefore, all currently approved labor certification applications must be filed in support of an I-140 petition by January 11, 2008.

Other Issues

The new rule requires employers to pay all costs of preparing, filing, and obtaining labor certification. Employers will no longer be permitted to transfer to the foreign national beneficiary any of the employer's costs incurred in the labor certification or application process. The rule also prohibits the sale, barter, and purchase of applications and approved labor certifications.

The rule reinforces existing law pertaining to the submission of fraudulent or false information, clarifies current DOL procedures for responding to incidents of possible fraud, and institutes several enforcement mechanisms. On or after the effective date of the rule, July 16, 2007, the DOL may debar an employer, attorney, or agent for certain actions such as fraud, willful provision of false statements, or a pattern or practice of noncompliance with labor certification regulations.

¹ One regulatory section (20 CFR § 656.30(c)(2)) is inconsistent with the rule's preamble, as it provides that a labor certification is valid only for the foreign national named on the original application unless a substitution was approved prior to the rule's effective date, which would seem to exclude substitution requests that are pending as of the effective date.

The provisions in this rule apply to permanent labor certification applications and approved certifications filed under both the PERM program regulations effective March 28, 2005, and prior regulations implementing the permanent labor certification program.

How This Affects You

Employers and foreign national beneficiaries will no longer be allowed to benefit from the use of an approved, but previously unused, labor certification application by substituting a different foreign national at the time of filing the I-140 petition. The DOL has suggested that if appropriate monitoring and enforcement mechanisms can be put in place, it will review the possibility of reinstating labor certification substitutions.

Employers will be required to file an I-140 petition based on an approved labor certification application within 180 days of certification. Prior to this new rule, there was no deadline for filing an I-140 petition based on an approved labor certification application.

Employers may no longer pass the costs and fees related to the labor certification process on to the foreign national beneficiary. For many employers that have green card reimbursement policies, these policies may have to be revised to ensure that the employer does not propose to recoup the cost of the labor certification from the employee.

If you have any questions about any of the issues raised in this Morgan Lewis Resources Immigration Alert, please contact:

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