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## Significant Changes to the Labor Certification Process to Take Effect July 16, 2007

2007-06-04

Amended regulations intended to eliminate fraud and the improper sale, barter or purchase of labor certifications become effective July 16, 2007. The regulations govern all approved certifications, whether filed under PERM or prior labor certification program regulations. The US Department of Labor (DOL) expects the new regulations to enhance program integrity and reduce opportunities for abuse by employers. A summary of key changes affecting employers follows.

### **Employers May Not Substitute a Beneficiary on a Pending or Approved Labor Certification**

The current regulations permit an employer to reuse an approved labor certification that it had obtained on behalf of one employee for the benefit of a different qualified employee. Such substitution of beneficiaries is prohibited under the new regulations, which state that a labor certification only will be valid for one specific employee in one particular position. Substitution is prohibited at both the labor certification application and immigrant visa petition filing stages. The DOL believes that the new regulations' prohibition of beneficiary substitution will curb the filing of fraudulent labor certifications and other perceived abuses.

### **Employers Must Pay All Costs of the Labor Certification Process**

The amended regulations require employers to bear all costs of the labor certification process for employees. Employers may no longer require employees to sign payback agreements where the employee agrees to reimburse the employer for certification costs. Additionally, employers may not accept any payment as an incentive or inducement for filing an application. The amended regulations also bar employers from reducing a foreign national's wages, salary or benefits to recoup expenses incurred in the labor certification process. Foreign nationals may pay the attorney's fees for their own attorney's assistance with the labor certification process, provided that the employer bear all attorney's fees for any attorney who represents **both** the employee and the employer. By requiring employers to pay all costs of their employees' labor certification processing, the DOL aims to discourage employers from filing applications for employees they intend to retain only for short periods of time. Employers should review their policies to make sure they comply with the new requirements and seek legal assistance in drafting new policies.

## **Employers Must File Immigrant Visa Petitions within 180 Days of Labor Certification Approval**

Under the amended regulations, a labor certification becomes invalid if it is not filed with the US Citizenship and Immigration Services as part of an immigrant visa petition within 180 days from the date of approval of the labor certification. Employers with labor certifications approved anytime before July 16, 2007, must file the immigrant visa petition within 180 days from July 16, 2007. An employer that wishes to continue employing an employee, but that does not meet the immigrant visa petition filing deadline for that employee, must again conduct the required recruiting activities and file a new application.

## **Employers May Not Sell, Barter or Purchase Labor Certifications**

The amended regulations specifically prohibit the use of labor certifications as articles of commerce, whether bought, sold or bartered. However, this rule does not apply to payments made to purchase a business; the purchaser of a business is considered the successor in interest to the prior employer and may assume labor certifications being processed on behalf of employees of the purchased business.

## **Employers to be Subject to Harsher Sanctions for Employer Violations**

Under the amended regulations, the DOL may prohibit an employer or its agents or attorneys from filing labor certifications on behalf of employees for three years if they are found to have (1) willfully provided false or inaccurate information in the labor certification process; (2) violated the rules governing payment of attorney's fees and other labor certification costs; or (3) engaged in a pattern or practice of noncompliance with the terms of the labor certification, the audit process or the supervised recruitment process. The DOL must initiate such a debarment action within six years of the labor certification filing date.

## **Employers May Not Modify Labor Certification Applications or Include New Evidence in Requests for Reconsideration**

The amended regulations prohibit modifications to permanent labor certification applications that have been filed with the DOL, and also ratifies the DOL's current practice of refusing to accept modifications or amendments to PERM labor certification applications. The amended regulations also prevent employers filing requests for reconsideration from submitting evidence not in existence when the applications were filed. However, employers may submit evidence that existed on the application filing date that the employer had previously failed to submit.

## **How Should Employers Respond to the Amended Regulations?**

Employers should review their policies on payment or reimbursement of legal fees, advertising costs and other expenses incurred in the labor certification process for compliance with the amended regulations and may seek legal assistance for the review and redrafting process. Additionally, employers must file an immigrant visa petition before January 12, 2008, for each labor certification application approved prior to July 16, 2007.

For more information regarding these amended regulations governing the labor certification

process or any other immigration and employment issue, please contact the authors listed above.