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DOL RULE AGAINST SUBSTITUTIONS TAKES EFFECT ON JULY 16, 2007

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by
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The Department of Labor's (DOL) final rule to "enhance program integrity and reduce the incentives and opportunities for fraud and abuse related to the permanent employment of aliens in the United States" takes effect on July 16, 2007. *See* 72 Fed. Reg. 27,903-27,947 (May 17, 2007). The provisions apply to permanent labor certification applications and approved certifications filed under both the Program Electronic Review Management (PERM) program regulation, effective March 28, 2005, and previous regulations implementing the permanent labor certification program.

The rule's major provisions include:

A prohibition on the substitution of beneficiaries. Effective July 16, 2007, this prohibition will apply to all pending permanent labor certification applications and to approved permanent labor certifications. The prohibition does not affect substitutions approved by the DOL or Department of Homeland Security (DHS) before the effective date. It also does not affect substitution requests in progress as of the rule's effective date. The final rule also prohibits the sale, barter, and purchase of labor certification applications and approved labor certifications. The USCIS announced that it will accept substitution requests it receives until Monday, July 16, 2007.

> *Rationale:* The rule notes that the DOL for years has allowed employers to substitute a beneficiary named on a pending or approved labor certification with another prospective employee. Historically, this substitution practice was permitted as an accommodation to U.S.

employers because of the length of time it took to obtain a permanent labor certification or receive approval of the 1-140. Ongoing concerns about fraud and abuse have been heightened, the DOL said, by a number of recent criminal prosecutions by the Department of Justice (DOJ) as well as/recommendations from the DOJ and the DOL's Office of Inspector General, and public comments concerning fraud received in response to the May 6, 2002, PERM notice of proposed rulemaking. One attorney filed approximately 2,700 fraudulent applications with DOL for fees of up to $20,000 per application. Many of these applications were filed for the sole purpose of later being sold to workers who would be substituted for named beneficiaries on fine approved labor certifications.

One commenter asked that the rule be clarified to state that the prohibition against the sale, barter or purchase of labor certification applications does not apply to transfer stemming from legitimate corporate restructuring activities such as mergers, acquisitions, or spin offs. The DOL said it did not intend this provision to govern corporate restructuring or internal corporate accounting and finance practices that exist independently of the permanent labor certification program. The DOL has determined that further clarification on this question is not necessary.

The DOL said its premise is that substitution in general is no longer needed, both because the new, automated system has significantly reduced processing time and because the backlog of permanent labor certification applications filed before March 28, 2005, will be eliminated by September 30, 2007. The DOL, noting that the labor market changes rapidly, maintained that it is consistent with the DOL's obligation to protect the jobs, wages, and working conditions of U.S. workers to require that there be another labor market test whenever the job opportunity effectively changes through the unavailability of the original worker.

The DOL said it understands concerns that, as a result of this rule, H-1B nonimmigrants who, after five years of employment, are not yet the beneficiary of a permanent labor certification application might not be permitted by U.S. Citizenship and Immigration Services to further extend their H-1B status prior to obtaining permanent residence. Continuing substitution as an accommodation to "this small group of individuals, a group whose numbers and participation in the program are both speculative, is disproportionate to the adverse consequences of continuing

the substitution practice," the DOL said. The agency also noted that some commenters have suggested that because the American Competitiveness in the 21st Century Act (AC21) increased the portability of H-1B visas, allowing such nonimmigrants to change employers, substitution by these foreign workers should continue to be allowed. The DOL, however, said it sees no reason to permit one type of nonimmigrant to continue benefiting over other nonimmigrants from the practice of substitution.

Substitution has been a distinct benefit to employers and applicants in allowing them to retain an earlier priority date and apply the results of a completed labor market test. The DOL said it plans to work with the DOJ and DHS to explore appropriate circumstances under which substitution could be reinstated. "We anticipate that there may come a time when all affected agencies are satisfied that there are sufficient anti-fraud protections to alleviate the concerns motivating this rule," the DOL noted.

A 180-dav validity period for approved labor certifications. Employers will have 180 calendar days within which to file an approved permanent labor certification in support of an Immigrant Petition for Alien Worker (Form 1-140). All permanent labor certifications approved on or after the effective date will expire 180 calendar days after certification, unless filed before expiration in support of a Form 1-140 petition with DHS. Likewise, all certifications approved before the final rule's effective date will expire 180 calendar days after the effective date unless filed in support of a Form 1-140 petition with DHS before the expiration date.

Rationale: The DOL had considered making the validity period only 45 days, but determined that 180 calendar days provided additional time to accommodate possible delays while maintaining the integrity of the labor market test and the security of the labor certification. The DOL noted that requiring a retest of the market after the passage of 180 days is consistent with its mandate to protect the constantly shifting U.S. labor market.

Some commenters contended that the DOL's argument that a certification grows stale with the passage of time is disingenuous, given the extremely long processing times and resultant staleness of at least some information in applications submitted years earlier. The DOL noted, however, that the final rule addresses the question of validity post-certification. "While questions of wages and recruitment are adjudicated on an individual basis

> as applications come up for review in our Backlog Processing Centers — independent of how long each of those applications has been pending — the Department must determine how long it will stand behind those certifications once issued, and when it is appropriate to once again test the market," the DOL said, noting again that processing times and backlogs have been greatly reduced by PERM streamlining and the online system.

A requirement that employers pay the costs of labor certification, including preparing, filing and obtaining certification. Under this provision, the sponsored beneficiary for labor certification cannot pay the attorneys' fees from July 16, 2007 onwards. Nor can the beneficiary pay any of the costs associated with a labor certification application, such as advertisements. The rule also states, "An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except that were the same attorney represents both the alien and the employer, such costs shall be borne by the employer." This should not be viewed as a green light for the attorney to only consider himself/herself to be representing the alien. Unless the employer has its own independent attorney representing it specifically on the labor certification, the alien cannot pay the fee towards the attorney, who in a dual representation situation, will also be implicitly representing the employer. For purposes of this rule, payments include, but is not limited to monetary payments; wage concessions, including deductions from wages, salary, or benefits, kickbacks, bribes, or tributes; in kind payments; and free labor.

One exception is with respect to the beneficiary's work benefiting third parties, and the rule provides the example of a physician whose work is split between a VA Medical Center and a university. In such an instance, a third party, such as VAMC can reimburse the university for part of the costs associated with the labor certification.

The rule does not prohibit the foreign national beneficiary from paying fees associated with the subsequent employment petition (Form I-140) and the adjustment of status application (Form I-485).

It is also likely that employer "claw back" agreements, requiring employees who leave within a certain time period, to pay reimbursement costs associated with the labor certification will also be retroactively unenforceable from July 16, 2007 onwards.

> *Rationale:* The DOL reasoned that a prohibition against the transfer of labor certification costs from sponsoring employers to beneficiaries keeps legitimate business costs with the employer, minimizes improper financial involvement by beneficiaries in the labor certification process, and strengthens the enforceability of the bona fide job opportunity requirement.

The establishment of procedures for debarment from the permanent labor certification program. The DOL may debar an employer, attorney or agent for up to three years based on certain enumerated actions such as fraud, willful provision of false statements, or a pattern or practice of noncompliance with PERM requirements, regardless of whether the labor certification application involved was filed under the previous or current regulation. The rule extends from 90 to 180 days the period during which the DOL may suspend processing of applications under criminal investigation. The rule adds an intent requirement ("willful") to the false information section; to be actionable, the employer must willfully provide false or inaccurate information to the DOL. The rule expands the existing provision for a right to review the DOL's denial of an application or revocation of a certification, to encompass a right to review of a debarment action. The request for review would be made to, and in appropriate cases a concomitant hearing would be held by, the Board of Alien Labor Certification Appeals (BALCA).

> *Rationale:* Given the breadth and increased sophistication of the immigration fraud that has been identified in the recent past, the DOL said it requires the added flexibility provided by the final rule to respond to potential improprieties in permanent labor certification filings. The DOL noted that the technological enhancements to the PERM system make it difficult to have inadvertent errors or omissions, and those few that will be made despite these enhancements still may not rise to the level of a false statement. The DOL said that this provision is not designed to impose penalties for innocent errors not in the control of the submitter but is applicable to any material inaccuracy. Although a false statement may not rise to the level of fraud, the statement may involve information or subject matter that is material to the application, the DOL noted.
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> With respect to the various grounds for debarment, generally, commenters expressed concerns that the rule could impose a severe penalty for relatively minor and likely inadvertent offenses. After reviewing the

comments, the DOL modified the proposed rule to add in the final rule the "willful" intent requirement. The final rule also revises the provisions on failure to comply with the terms of the form, failure to comply with the audit process, and failure to comply with Certifying Officer (CO)-ordered supervised recruitment by adding a requirement that, for there to be a basis for debarment, there must be a pattern or practice of misconduct.

Clarification of the DOL's "no modifications" policy for applications filed on or after March 28, 2005, under the PERM process. The rule finalizes with minor changes a provision in the proposed rule prohibiting modifications to permanent labor certification applications once such applications are filed with the DOL.

Rationale: The DOL said it has implemented technological changes in the PERM program to alert applicants to technical grounds for deniability, thus eliminating the need for many modifications. To comport with this clarification while ensuring due process, the DOL said, the final rule more precisely defines what evidence may be submitted with an employer's request for reconsideration.

The DOL noted that the online application system, which features various prompts and pop-up alerts to notify the applicant of needed corrections, allows the user to proofread, revise, and save the application before submission. In the event of an inadvertent error noticed after submission, or any other need to refile, the DOL stated that an employer can withdraw an application, make the corrections and file again immediately. Similarly, if an employer receives a denial under the new system, it can choose to correct the application and file again immediately if it does not seek reconsideration or appeal.

The DOL said it recognizes that there will be situations where it may be appropriate to consider information not previously in the CO's physical possession in order to provide appropriate evaluation of the employer's request for reconsideration. A new provision describes the evidence that can be submitted with a motion to reconsider and clarifies the interplay with the no-modification provision. Specifically, the provision limits evidence submitted at reconsideration to documentation that the DOL received from the employer in response to a request from the CO to the employer; or documentation that the employer did not have an

opportunity to present to the CO, but that existed at the time the application was filed, and that was maintained by the employer to support the application. It also provides that the DOL will not grant motions to reconsider where the deficiency that caused denial resulted from the applicant's disregard of an online system prompt or other direct instruction.

DOL FAQ on Substitution Final Rule

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