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LIFE AFTER IMPLEMENTATION OF THE DOL "SUBSTITUTIONS" RULE

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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" took effect on July 16, 2007.[1] The new 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. On July 16, 2007, the DOL also issued a FAQ to clarify certain aspects of the rule.[2] This article will discuss the rule's major provisions.

I. Prohibition on the substitution of beneficiaries. Effective July 16, 2007 employers are no longer able to substitute a new beneficiary into a labor certification. This prohibition applies to all pending permanent labor certification applications and to approved permanent labor certifications.[3] 20 CFR § 656.30(c)(2) states that a labor certification is valid only for the particular job opportunity, the alien named on the original application and the area of employment stated on the application. 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 or requests for substitution received by July 16, 2007. The final rule also prohibits the "sale," "barter," and "purchase" of labor certification applications and approved labor certifications.[4] According to

the rule's preamble, this new provision does not effect issues related to corporate restructuring or internal corporate accounting and finance practices that exist independently of the permanent labor certification program.

> *Rationale:* For years the DOL has allowed employers to substitute a beneficiary named on a pending or approved labor certification with another prospective employee who met the minimum qualifications for the job offered as of the date of the original filing. 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. However the DOL now has concerns about fraud and abuse that have been heightened by a number of recent criminal prosecutions by the Department of Justice (DOJ) . In one case an attorney filed approximately 2,700 fraudulent applications with DOL for attorneys' 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.
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> T he DOL believes that substitution in general is no longer warranted, both because the new, automated PERM system has significantly reduced processing time and because the backlog of hundreds of thousands of permanent labor certification applications filed before March 28, 2005 have been recently eliminated. Further, the DOL maintains that the prohibition against substitution is consistent with its obligation to protect the jobs, wages, and working conditions of U.S. workers and that it is appropriate to require that there be another labor market test whenever the job opportunity effectively changes through the unavailability of the original worker.
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> Of course, the countervailing concern is 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 beyond the six-year limit) prior to obtaining permanent residence. In the past, s ubstitution 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 may work with the DOJ and DHS to explore appropriate circumstances under which substitution could be reinstated. We shall see.

II. A 180-dav validity period for approved labor certifications. Employers now have only 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.[5] Likewise, all certifications approved before the final rule's effective date will expire 180 calendar days after the effective date (i.e., January 11, 2008) unless filed in support of a Form 1-140 petition with DHS before the expiration date.[6]

> *Rationale:* Again, t he DOL believes 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.
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> Unfortunately, this leaves employers at the behest of DOL's ability to send promptly an approved labor certification application to the employer. The authors know of many instances where a certification has taken many months (in one instance nine months) to be sent from DOL to the employer. Procedures for handling situations where there is a delay in receipt of the certification are, as yet, unclear.

III. Employers must now pay the costs of labor certification. The new rule requires the employer to pay all fees and costs associated with preparing, filing, and obtaining certification.[7] At the outset, this means that the sponsored beneficiary for labor certification cannot pay the attorneys' fees after July 16, 2007. Nor can the beneficiary pay any of the costs associated with a labor certification application, such as advertising costs. The rule specifically prohibits monetary payments by the employee; wage concessions, including deductions from wages, salary, or benefits; kickbacks; "in-kind" payments; or provision of free labor by the employee.

Employer agreements, requiring employees who leave within a certain time period to pay reimbursement costs associated with the labor certification, are no longer enforceable, even the agreement was entered into prior to July 16,

2007. However, the FAQ clarifies that payment that have accrued prior to July 16, 2007 can still be recovered by the employer. Similarly, payments between attorneys and aliens that have accrued prior to July 16, 2007 may still be paid to the attorney. It is important, though, that I-23 on ETA 9089 ("Has the employer received payment of any kind for the submission of this application?") be answered in the affirmative even if the payment has only been sought and not been received at the time of filing on or after July 16, 2007. The FAQ further clarifies that a full explanation be provided describing the payment, who made the payment and also specifying that it was for an obligation that accrued prior to the effective date.

An exception to the rule is where an attorney represents solely the foreign national and the employer is represented by a separate independent attorney in the labor certification process. Note however that where there is no additional, independent counsel, the foreign national's attorney is considered to be implicitly representing the employer in a dual representation situation, and therefore cannot receive payment by the foreign national.

20 CFR § 656.12(b) 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. The FAQ clarifies that "attorneys may represent aliens in their own interests in the review of a labor certification (but not in the preparation, filing and obtaining of a labor certification, unless such representation is paid for by the employer), and may be paid by the alien for that activity."

Another exception is where a beneficiary's work will benefit a third party;[8] and the preamble 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 the VAMC can reimburse the university for part of the costs associated with the labor certification.

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

Rationale: The DOL reasoned that a prohibition against the transfer of labor certification costs from sponsoring employers to beneficiaries keeps what it considers to be "legitimate business costs" with the employer. In addition, the DOL believes that the employer payment minimizes improper financial involvement by beneficiaries in the labor certification process, and strengthens the enforceability of the bona fide job opportunity requirement.The DOL also disregarded comments that such a prohibition would interefere in the attorney-client relationship. The logic of this reasoning is questionable, however, given that if the employer pays the fees and costs for the labor certification, the employer has a greater interest in obtaining a certified application.

There is no doubt that this provision was intended to, and will, reduce the number of labor certification applications filed for permanent residency. Employers will be hard-pressed to outlay thousands of dollars to sponsor an employee when there is no ability to have the money paid back in the event the employee decides to leave the employer after obtaining permanent residence.

IV. New procedures for debarment from the permanent labor certification program. The DOL may now debar an employer, attorney, or agent for up to three years based on certain enumerated actions including fraud, willful provision of false statements, or a pattern or practice of noncompliance with PERM requirements.[9] The rule reminds practitioners and employers that there are additional criminal penalties, as well, including fines and imprisonment for up to five years for false statements on the application. The penalties apply regardless of whether the labor certification application involved was filed under previous or current regulations. The rule extends from 90 to 180 days or more 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. A 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 immigration fraud that the DOL has identified in the recent past, the government believes that these provisions add flexibility to respond to potential improprieties in permanent labor certification filings.

In the rule's preamble, the DOL notes that this provision is not designed to impose penalties for innocent errors not in the control of the submitter but, rather, applies to material inaccuracies. T he "willful" intent requirement should avoid liability for relatively minor and inadvertent offenses.

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.

V. Clarification of the DOL's "no modifications" policy for applications filed under the PERM process. Modifications to permanent labor certification applications are no longer permitted after the applications are filed with the DOL.[10]

Rationale: Because of technological changes that were implemented in the PERM program to alert applicants to technical grounds for deniability, DOL believes that post-submission modifications are no longer necessary. For example, the online application system now features various prompts and pop-up alerts to notify the applicant of needed corrections. It also allows the user to proofread, revise, and save the application before submission.[11] In the event of an inadvertent error noticed after submission, or any other need to refile, an employer may 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. This, of course, assumes that the recruitment is still valid at the time of resubmission.

For requests for reconsideration, evidence is now limited 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.[12] This cautions us to create and maintain all evidence that an employer may want to provide in a request for reconsideration at time of originally filing.

VI. Conclusion

The new DOL rule governing labor certifications encompasses a wide breadth of issues in labor certification cases. It is critically important for practitioners to be familiar with the rules prior to launching a labor certification case. In addition, practitioners should counsel all clients, whether employer or employee, on the new rules and how they effect labor certification processing.

This is an updated version of DOL RULE AGAINST SUBSTITUTION TAKES EFFECT ON July 16, 2007.

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[1] 72 Fed. Reg. 27,903-27,947 (May 17, 2007).

[2] FAQs on Final Rule to Reduce Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity of May 17, 2007, *published* on AILA Infonet at AILA Doc. No. 07071675 (posted July 16, 2007), and also available at http://www.foreignlaborcert.doleta.gov/pdf/fraud_faqs_07-13-07.pdf. *See also* Memo, Donald Nuefeld, Acting Assocate Director, Domestics Operations, USCIS, HQ 70/6.2, June 1, 2007, published on AILA Infonet at AILA Doc. No. 07071230 (posted July 12, 2007).

[3] 20 CFR § 656.11(a).

[4] 20 CFR § 656.3 defines these terms as follows: "Barter" means the transfer of ownership of a labor certification application or certification from one person to another by voluntary act or agreement in exchange for a commodity, service, property or other valuable consideration; "Purchase" means the transfer of ownership of a labor certification application or certification from one person to another by voluntary act and agreement, based on a valuable consideration; and "Sale" means an agreement between two parties, called, respectively, the seller (or vendor) and the buyer (or purchaser) by which the seller, in consideration of the payment or promise of payment of a certain price in money terms, transfers ownership of a labor certification application or certification to the buyer.

[5] 20 CFR § 656.30 (b)(1).

[6] 20 CFR § 656.30(b)(2).

[7] 20 CFR § 656.12(b).

[8] 20 CFR § 656.12(c).

[9] 20 CFR § 656.31(f).

[10] 20 CFR § 656.11(b).

[11] 20 CFR § 656.24(g)(2).

[12] This provision will not be applicable where the deficiency that caused the denial resulted from the applicant's disregard of a system prompt or other direct instruction. 20 CFR § 656.24(g)(3).