<u>HOW A PRIOR LABOR CERTIFICATION CAN BE USED FOR FUTURE IMMIGRATION BENEFITS</u>

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I frequently meet with foreign nationals who are the beneficiaries of labor certification cases filed several years ago (either ETA Form 750 or ETA Form 9089). Many of these labor certifications were filed on or before April 30, 2001 (the magical date for Section 245(i) purposes).

Many of these foreign nationals are no longer being sponsored by the employer who filed the labor certification on their behalf. This can happen for a variety of reasons – such as, the employer got tired of waiting for the foreign national to get legal work authorization and found another qualified worker for the position, the foreign national being sponsored no longer wants to work for the employer or has moved away from the place of employment, or the employer has gone out business. For whatever reason, it is not uncommon for the labor certification sponsorship to have ended over the course of time.

Despite the fact that the beneficiary of a previous labor certification is no longer being sponsored by the employer who filed the labor certification, there is still some significant benefits that can be obtained by the filing of the prior labor certification.

<u>Section 245(i)</u>

A labor certification on behalf of a particular foreign national can be used by that particular foreign national to qualify him or her under Section 245(i) of the Immigration and Nationality Act. In order to qualify the foreign national under INA Section 245(i), the labor certification must have been properly filed with the Department of Labor on or before April 30, 2001 and must have been "approvable when filed".

According to immigration regulations and USCIS policy, "approvable when filed" means that the labor certification was the application was properly filed, meritorious in fact and non-frivolous. Unless the filing was fraudulent, when a labor certification is properly filed and accepted by the U.S. Department of Labor, USCIS considers the labor certification to have been "approvable when filed".

In such a case, the foreign national for whom the labor certification was filed is considered to be "grandfathered" or covered under Section 245(i) if he or she meets the physical presence requirements of Section 245(i). In certain cases, the spouse and

unmarried minor children of the labor certification beneficiary can also be covered under Section 245(i).

Section 245(i) is important for those foreign nationals who have a basis for filing for a green card but who entered the United States illegally or who have been out of status for a certain period of time.

The bottom line is that a labor certification that was properly filed on or before April 30, 2001 and that was “approvable when filed” may qualify a foreign national (and even certain family members) under section 245(i) even if that labor certification has been denied or withdrawn or is not being pursued. Thus, even if the foreign national is not going to apply for the green card based on the prior labor certification, there can be other benefits, such as Section 245(i) benefits, based on that labor certification.

Since this is a complicated area of the law, an indvidiual trying to determine if he or she is grandfathered under Section 2459(i) based on a prior labor certification should contact an experienced immigration attorney.

Retaining the Priority Date & Shortening The Green Card Wait

In many cases, a prior labor certification has been approved and a Form I-140 Petition based on the approved labor certification has been filed and approved. Once an I-140 Petition is approved, the case is assigned a “priority date” which is the dated of the labor certification filing with the Department of Labor.

For example, let’s assume a labor certification case was filed on April 30, 2001 and later approved. After labor certification approval, assume the employer files a Form I-140 Petition on behalf of the labor certification beneficiary and after the labor certification approval a Form I-140 Petition was filed and approved. Now, let’s assume the employer goes out of business or for some other reason the foreign national will not pursue the green card based on that Labor Certification / I-140 Petition. While this is unfortunate for the foreign national, there still my be some good use of that labor certification case.

There is a provision in the Immigration and nationality Act that states that the priority date from the I-140 Petition approval (that was filed based on the labor certification approval) can be retained in a subsequent I-140 Petition. This may benefit a foreging national who is the beneficiary of a subsequent labor certification.

Here’s how it works:

- Assume the first labor certification was filed on April 30, 2001 and was later approved. After approval, the employer filed an I-140 Petition that was also approved. At the time the I-140 Petition is approved, the priority date is locked in at April 30, 2001 (the date the labor certification was filed with the Department of Labor). For some reason, that case dies or will no longer be used by the beneficiary in order to obtain his green card.

- Now, assume that 6 years later (in year 2007) the foreign national is again the beneficiary of a labor certification filed in 2007. That second labor certification gets approved and the employer files an I-140 Petition based on the second labor certification. If approved, that case would have a priority date from year 2007. However, under the immigration laws, the foreign national can use the priority date from the first I-140 Petition approval (in our example, April 30, 2001).

- In this example, the foreign national effectively reduces his waiting time for the green card by several years based on using the earlier priority date.

To summarize, in order to use a previous or earlier priority date, the following facts must apply:

1. There is a prior approved Form I-140 Petition on behalf of the foreign national (in either the EB-1, EB-2 or EB-3 preference categories). An approved labor certification is not enough since an approved labor certification is not an immigrant visa petition.

2. There is a subsequent Form I-140 Petition filed and approved on behalf of the same foreign national. It does not matter that the employer is different, that it is for a different job or even for a different employment-based immigrant visa category (as long as it is still in the EB-1, EB-2 or EB-3 employment-based immigrant visa category).

Conclusion

If you are the beneficiary of an approved labor certification, you may be able to use it to your benefit even if you will no longer apply for a green card based on that approved labor certification. You may be able to use that labor certification for Section 245(i) purposes or you may be able to retain and use the priority date from a previous I-140 Petition in a subsequent green card case.

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