

**DEPARTMENT OF LABOR EXPECTED TO ELIMINATE
LABOR CERTIFICATION SUBSTITUTION**



by

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The Department of Labor is expected to publish a new rule within the coming days or weeks ahead which will dramatically impact the current labor certifications system. The new rule, which was first proposed in February 2006 will (if published):

- eliminate the current practice of substitution of alien beneficiaries;
- require that an immigrant petition be filed based on approved labor certification within 45 days of the labor certification approval;
- prohibit many types of payments made to employers as part of the labor certification process; and
- prohibit the payment of the employer's attorney fees by any third party except for the employer.

The Department of Labor plans on adopting this rule in an effort to reduce the potential for fraud in the labor certification process. In past years, there have been a number of criminal convictions involving individuals who have filed fraudulent labor certification applications.

This proposed regulation will become final and effective upon publication of the final version of the rule in the Federal Register. That is expected any day now!

An End to Substitution

As the initial step in filing a labor certification case, an employer typically files a labor certification application on behalf of a designated alien beneficiary. The current practice allows employers to substitute a new or different alien beneficiary during the labor certification process and even at the immigrant visa state (I-140 Petition) stage. The individual being substituted into the labor certification case can benefit substantially by reducing the amount of time he must wait for an immigrant visa since, in many cases, the labor certification was filed years earlier on behalf of another person. This process has been commonplace in a variety of businesses, including chicken factory cases.

The proposed rule will end this process. Once the labor certification is filed on behalf of a designated alien, no new alien will be allowed to be substituted in place of the original alien beneficiary. If an employer wishes to change the beneficiary, the labor certification

process must be started over from scratch on behalf of the new beneficiary. It is important to note that this proposed rule, once it becomes effective, will not affect substitutions approved prior to the effective date of the new rule.

45-Day Filing Period for Approved Labor Certifications

Under the current policy, an approved labor certification is valid indefinitely (assuming it is not revoked by the employer or determined to be fraudulent). This means that a labor certification approved years ago does not expire.

Under the proposed rule, once a labor certification is approved, it must be filed with the United States Citizenship and Immigration Services (USCIS) in connection with a Form I-140 Petition within 45 days of the labor certification approval. If it is not filed during that 45-day period, the labor certification will be void and cannot be used at a later date. This filing deadline will hold true even if the priority date is not yet current. This means that the employer must act quickly and be prepared to file a Form I-140 Petition in the event the labor certification case is approved. Note that in filing a Form I-140 Petition based on an approved labor certification most employers are required to demonstrate an ability to pay the listed wage in the labor certification case and that the designated alien beneficiary meets the minimum requirements of the job. In light of the short time period, it is recommended that employers and alien beneficiaries be sure that they have the required tax documentation and proof of experience as soon as possible once a labor certification is approved.

Note that for labor certifications that are approved prior to the effective date of the new rule, those cases must be filed within 45 days of the rule's effective date.

Payment of Various Fees Prohibited

The proposed rule will prohibit the sale of approved labor certifications or any other payments to an employer in connection with the filing of a labor certification case. As part of this prohibition, the proposed rule will not allow the alien beneficiary to pay the attorney's fees of the employer associated with the labor certification process. The labor certification views the attorney's fees association with the preparation and filing of a labor certification to be an employer cost and, as such, should be paid by the employer and not the alien.

Conclusion

The proposed rule was first proposed back in February 2006. At that time, the Department of Labor solicited comments from the general public as to this proposed rule. After more than a year, it is believed that this proposed rule will soon become a final rule. The proposed rule will become final once it is published in the Federal Register. It is also believed that the majority of the proposals (as outlined and described above) will be included in the final version of the rule. Our law firm will update our website at www.longchangonline.com once the rule becomes final.

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