

# One Minute Memo™



## DOL Tightens Rules on Green Card Labor Market Tests

On May 17, 2007, the U. S. Department of Labor (DOL) issued a final rule amending its labor certification regulations, with the goal of improving program integrity and reducing the incentives and opportunities for fraud and abuse. This new rule directly impacts the first stage of the three part green card process – the stage now known as PERM whereby the employer tests the labor market to prove that there are no U.S. workers who are qualified, willing, and able to perform the job that is the basis for the green card. The final rule is effective July 16, 2007 and imposes the following restrictions:

- (1) Eliminates the practice of labor certification “substitution” (involving the use of an approved labor certification for a foreign national other than the foreign national in whose name the labor certification was issued).
- (2) Requires that stage two of the green card process be filed within six months following the date of labor certification approval in order to use the labor certification.
- (3) Prohibits the foreign national from paying any attorney fees or costs associated with preparing, filing, and obtaining labor certification (including recruitment costs).

### *Effects of New Regulations*

#### 1. Bar of “Substitute” Labor Certifications

The rule ends the practice of labor certification substitution. Under the new rule, only the foreign national named on the labor certification may use the certification. As of July 16, 2007, the prohibition will apply to all labor certifications, whether pending or approved. Substitution was a viable practice for many employers – particularly those employers with a number of labor certifications that had been pending with DOL for so many years that the foreign nationals for whom the applications had originally been filed were no longer employed. In such cases, the employer could use the approved labor certification to file green card applications for newer employees, thereby saving recruitment costs and attorney fees. Employers should immediately evaluate any excess labor certification inventory on hand to determine whether any foreign national employees could benefit from substitution before it goes away on July 16.

## 2. Labor Certification Validity

The rule limits the validity of the approved labor certification to 180 calendar days following certification. Under the new rule, the second stage of the green card (Form I-140 Immigrant Visa Petition) must therefore be filed within the 180 calendar days or the labor certification will expire. For labor certifications approved prior to the July 16, 2007 effective date, the deadline is January 11, 2008 – 180 calendar days from the July 16, 2007 effective date of the rule. This new restriction will require employers and foreign nationals to be vigilant in collecting and preparing the green card paperwork (including confirmation of employment experience from prior employers, proof of the employer's financial ability to pay the wage, etc.) in order to meet the six-month filing deadline.

## 3. Payment of Costs Associated with Labor Certification

The rule prohibits the sponsoring employer from seeking payment of any fees associated with the labor certification from another party. This prohibition extends to payment by the foreign national of attorney fees, recruitment costs, or any other costs associated with the preparation and filing of the labor certification. The rule does allow the foreign national to pay attorney fees where the attorney is representing only the foreign national and not the sponsoring employer. In the overwhelming majority of cases, of course, the attorney represents both the sponsoring employer and the foreign national, with the result that in such cases the employer must bear all of the fees and

costs related to the labor certification. Notably, the DOL rule does not exempt from this prohibition any applications that are currently in the process of being prepared. Thus, to the extent that foreign nationals have assumed responsibility for labor certification costs and fees in cases that are in process, all fees and expenses to be paid by foreign nationals in such cases should be paid prior to July 16. Further, employers need to revise as necessary any green card policies to ensure that the policies are compliant with the DOL rule.

*If you have any questions concerning this One Minute Memo, please contact the Seyfarth Shaw LLP attorney with whom you work or any immigration attorney on our website at [www.seyfarth.com](http://www.seyfarth.com).*

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