

One Minute Memo™



Closer to Reality: U.S. Department of Labor Rule Governing Alien Substitution, Attorney Fee Payments, and Labor Certification Validity

On April 27, 2007, the Office of Management and Budget concluded its review of the following proposed DOL regulations. These rules, if finalized, would:

- (1) bar the “substitution” of foreign nationals in labor certification proceedings;
- (2) bar the payment by the foreign national of the employer’s attorney’s fees and other labor certification costs;
- (3) limit the validity of a labor certification to a 45-day period; and
- (4) enhance penalties for violations of labor certification regulations.

With this review complete, the DOL has included the regulation in its catalog of regulations for final review. Although the DOL has neither published a final regulation nor established an effective date, it is expected that the DOL will do so soon.

Effects of Proposed Regulation

1. Bar of “Substitute” Labor Certifications

This portion of the regulation would end the practice of “substituting” one foreign national for another after the Labor Certification has been certified by the DOL. Under current regulations, if an employer receives a certified Labor Certification for one foreign national, another foreign national can benefit from the certified Labor Certification for his/her own green card processing, provided that the individual is employed in the same position and met the minimum job requirements as of the date the Labor Certification was initially filed. Under the new regulation, only the foreign national for whom the Labor Certification was filed could benefit from the certification.

2. Bar Payment of Fees by Foreign National

This part of the regulation would prohibit payment by the foreign national of attorney’s fees and other costs, such as advertisements, associated with the Labor Certification.

Current regulations do not preclude the foreign national from paying attorney's fees and related costs. Under the new regulation, the employer could not require the foreign national to pay any portion of these expenses whatsoever.

3. Labor Certification Validity

This section of the regulation would limit the validity of the certified Labor Certification to forty-five (45) days, meaning that a Form I-140, Immigrant Visa Petition must be filed using the certified Labor Certification within 45 days. If an I-140 petition were not filed within 45 days, the employer/foreign national would lose the ability to use that certified Labor Certification for continued green card processing. Under current regulations, the Labor Certification is valid indefinitely, so long as the same job is available in the area of intended employment; therefore, an I-140 petition can be filed using a certified Labor Certification at any time after certification. Under the new regulation, the foreign national and employer would need to work quickly to ensure filing of an I-140 petition within 45 days of certification.

4. Enhanced Penalties

This portion of the regulation calls for increased penalties for those employers who violate the Labor Certification regulations. The DOL has not provided more detail regarding this provision.

If you have questions or would like additional information, please contact the Seyfarth Shaw attorney with whom you work or any member of the Immigration Group listed on our website www.seyfarth.com.

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