



Siskind Susser, P.C. is an immigration law firm based in Memphis, Tennessee. We primarily handle employment and business immigration matters and we represent a broad range of employees and employers. We are one of the nation's larger

immigration practices and handle matters in all 50 states. We appreciate the opportunity to comment on the Department of Labor's proposed regulation regarding ending labor certification substitutions and related matters.

Contact Information: Greg Siskind, gsiskind@visalaw.com, 901-682-645, www.visalaw.com.

Fraud Prevention

The Department of Labor asserts that this regulation is needed because there are systematic problems of abuse by people gaming the labor certification program in order to get illegitimate applicants approved for permanent residency. A couple of prominent examples are cited by DOL in support of this assertion.

While we have no doubt that the cited examples are very serious, we would first question whether there really is evidence that they, in fact, are representative of a wider problem or are just isolated problems. The proposed rule does not provide any details regarding whether there is any indication that the examples cited are part of a trend. Some of the cited abuse is tied to the unusual period of time in early 2001 where Congress briefly reinstated Section 245i of the Immigration and Nationality Act. One could reasonably assume that the problems cited are tied to that particular unique period in recent immigration history. We would suggest at the outset that the DOL conduct a study of the problems cited or otherwise provide evidence that provides justification for these serious policy changes.

Second, the examples cited by DOL are already unlawful and punishable by fines and/or prison terms. The DOL fails to explain why current anti-fraud provisions in the law are inadequate to address any

perceived problems. If the penalties are not effective, then the DOL should explain why the better approach would not be to reevaluate our enforcement policies as opposed to changing the rules in such a way that legitimate business practices are not targeted.

Before imposing rules that could have a serious impact on employer using the labor certification system, the DOL owes it to the public to explain exactly how serious the problem is and why current tools available to the DOL are inadequate to address the situation. And perhaps other avenues should be explored that would more directly target wrongdoers. Such alternative solutions might include implementing harsher criminal penalties, imposing a fraud fee on labor certification cases (similar to the one imposed on H-1B visas) and using PERM's technology to better track patterns of fraud.

Substitutions

The new regulation seeks to completely ban the substitution of foreign nationals on pending labor certifications and labor certifications approved but not yet filed with USCIS. According to the DOL, substitutions were historically permitted because of the long processing times associated with labor certification processing. The DOL now says that PERM has largely reduced those processing times and reduced the legitimate need for substitution. DOL states that banning substitution is needed to weed out fraud in the system.

The proposed rule does not cite any evidence of just how many substitutions are actually made each year and how many have proven to be fraudulent. If there are serious problems with fraud, the DOL should quantify them so a fair determination can be made whether the risks associated with current substitution policies outweigh the benefits.

There are a number of legitimate business reasons for substitutions and it is not true, as asserted by DOL, that PERM has ended the legitimate use of the substitution option. First, just because PERM approvals arrive more quickly than labor certifications under the old system that does not mean that employers still are not forced to wait years for the arrival of a sponsored worker. The EB-3 green card category is now backlogged more than five years. Workers are often no longer available after such a long wait. It is not hard to envision an employer finally having a case reach the front of the visa queue only to find that the employee has accepted a position with another

company in another country. Without substitution, the employer could very well have to begin waiting in yet another five-plus year queue for a green card to become available after going through a second expensive labor certification process.

Furthermore, it is not true that slow labor certification approvals are a relic of history. There are still several hundred thousand cases in backlog reduction centers and those cases may still be years away from approval.

The DOL also expressed concern in the proposed rule that the "black market" for substitution in labor certification cases is made worse because crooked lawyers and agents can file cases without an employer even knowing. However, PERM addressed this concern by requiring an employer to actually set up a case in the DOL system rather than an agent or attorney. A labor certification must also be matched up with an I-140 and an employer must sign the I-140 and file it with a copy of the company's tax returns or other proprietary documents. The DOL should explain why this new requirement in the system is not adequate.

One also must ask the question of why the State Department and Department of Homeland Security cannot simply contact an employer before approving an immigrant visa or a substitution to ensure that the labor certification is actually the employer's and they are aware that a person is pursuing a green card based on a full-time offer to work for that employer? Similar to the way DOL emails the petitioner when a PERM application is filed to confirm they knew it was being filed.

Another issue is cost. Prior to filing a PERM application, particularly in the case of a "professional", the employer is required to recruit extensively for the position. This recruitment is very costly in terms of both money and time. Two newspaper ads in large cities such as NY and San Francisco cost in excess of \$1500. Add the cost of the 3 additional forms of recruitment and the time involved on the part of the employer's representative in answering inquiries and conducting interviews, and there is a substantial investment on the part of the employer in this process. Even if the PERM application is certified quickly why should the employer have to go through this process all over again if the employee is unable to fill the position? The employee's sudden unavailability does not do away with the employer's genuine need to fill the position permanently or with the unavailability of qualified US workers.

Finally, the labor certification process is predicated on the idea that an employer should be able to sponsor an immigrant when it can demonstrate that it has an opening for which no qualified US worker is available. The identity of a particular foreign worker is not particularly relevant except to the extent that the employer demonstrates that the alien has the qualifications necessary to perform the duties of the certified position. Substitution should have no bearing on the underlying policy objective of the labor certification process as long as an employer can demonstrate that the substituted worker met the qualifications required for the certified job at the time of the initial advertising. Filing a new labor certification will cost employers massively in terms of positions remaining unfilled for longer periods of time and in added legal and recruiting fees.

A possible compromise solution would be to limit the period of time in which a substitution may be made IF a visa number is available. In such a case, a better case can be made that an employer should have to make up its mind on which applicant it will ultimately sponsor for permanent residency.

Limited Labor Certification Validity

Under the proposed DOL rule, once a labor certification is approved, an employer will have just 45 days from the date of certification to file an I-140 with USCIS. The 45 days is consistent with other 45 day deadlines built in to the labor certification process.

In the labor certification context, a 45 day rule is usually not a major issue because the amount of effort needed to submit a response is often minimal. For example, responding to a request for re-verification of the labor certification request from a Backlog Reduction Center is as simple as checking a box and signing a piece of paper.

But the filing of an I-140 is a complex legal process that involves gathering extensive supporting documentation and information. This is especially burdensome for smaller employers who often have only a limited number of people available to work on the matter. If, for example, a human resources professional is on family leave, a deadline could easily be missed and an employer would face the tremendous burden of having to start again.

In addition, the USCIS strongly discourages filing of the I-140 petition without an attached Adjustment of Status. Yet implementation of this

proposed regulation would force attorneys to ENCOURAGE employers to go against the requests of the USCIS and file the I-140 separately. Retrogression prevents filing of the I-485 application for individuals who are from countries where current visa numbers are not available. Given this contradiction between the DOL and the USCIS, it seems apparent that attorneys and employers are likely to be penalized at some stage in the process. And, of course, this again discourages employers from pursuing labor certification for qualified employees.

Furthermore, USCIS requires that very specific documentation including a tax return or audited financial statement be included with an I-140 at the time of filing. Currently USCIS officers have been instructed to deny without a Request for Evidence any I-140 filed without this most basic information. Sometimes it is necessary to wait more than 45 days to get the required documentation needed. It would be unfair for DOL to void a certified application just because the date of approval happened to fall early in the year and current financials were not immediately available.

If the DOL is insistent on imposing an expiration date on labor certifications, then the period should at least be something reasonable like at least one year.

Attorney fees

The proposed rule bans all payment of legal fees to an attorney by anyone other than the petitioning employer, thus drastically altering the attorney/client relationship. Both the employer and the alien attest to the accuracy of the labor certification application under penalty of perjury, and to deny either party their attorney of choice in the preparation and filing of this attestation is certainly a violation of this relationship.

Current rules encourage involvement from both the petitioning employer and the alien worker in completing the application process. An immigration attorney often represents both the employer and the alien in a labor certification application, owing responsibilities to each. If the alien feels that their own interests are not adequately represented, he or she may obtain separate counsel. Under the proposed rule, this type of arrangement would be prohibited unless the employer agrees to pay for both attorneys – something that is impossible for most employers to afford, and that would be anti-

business to require. This effectively eliminates the alien worker's right to choose their own counsel to represent the alien's own interests. Given the extremely dire consequences that an alien could face if a petition is mishandled, the ability to hire one's own counsel – separate from the employer's counsel – is important.

The proposed rule also significantly limits the alien's input as to the selection of which counsel will act as a dual representative. The alien worker is often much more diligent in learning about the immigration process and in obtaining the best-qualified immigration attorney to assist in the application. Small business employers, for example, will often defer to alien workers as to preference of counsel, allowing the alien to choose the attorney when the alien agrees to bear some or all of the legal expense. The rule would act to eliminate this practice, and further limit the alien's ability to choose effective counsel.

The proposed rule punishes small business, non-profit organizations, universities, public school systems, public hospitals, and government employers, many of whom routinely require workers to pay for their own legal fees. This is typically done for perfectly valid reasons, such as to keep hiring costs within budgetary restrictions. Under the proposed rule, the only option for these entities in most cases will be to not use an attorney at all, resulting in a lack of counsel for both the employer and the alien.

By placing the sole financial burden on the employer, many employers will now attempt to complete the labor certification process on their own and without the assistance of an attorney. This will undoubtedly result in an increase in erroneous applications that could be legally damaging to the employer and/or the alien worker, and will result in a considerable increase in DOL processing volume due to numerous re-filed applications.

The rule not only bars employees from paying attorney fees, but also third parties. There are many situations where third parties pay legal fees for legitimate business reasons. Two examples arise frequently in the health care sector. In nursing, staffing companies frequently build attorney fees into their placement contracts. The staffing companies typically have much more expertise regarding the immigration process than their health care employer clients and the staffing companies will play a key role in locating the attorney and working as a go-between the lawyer and the client. Health care employers often expect the lawyer fees to be a part of the fees being paid to the placement firm.

Another example involves physicians. A doctor may be paid by a physician group, but the local hospital stands to benefit just as much financially from the doctor moving to the city. It is very common for the hospital to hire and pay the attorney and manage the legal process.

This proposed rule creates substantial hurdles for both the employer and the alien to obtain legal counsel. The relationship between attorney and client is sacrosanct, and should not be subject to government interference unless a compelling and clearly proven public interest argument has been made. The DOL has made no sufficient argument to support this proposed interference.

The DOL has commented that it questions the legitimacy of a job offer and wage when an employer passes on the legal fees to the alien worker. The DOL ignores the fact that with most labor certification applications, the alien worker is already on the job and being paid the salary as noted in the application. Furthermore, employers under the proposed rule would be required to pay legal fees even when they are paying considerably more than the prevailing wage even if attorneys fees were subtracted. Either way, the DOL has made no argument that justifies violation of the attorney / client relationship.