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AD07-20

Interoffice Memorandum

To: Regional Directors
Service Center Directors
District Directors
National Benefits Center Director
Chief, Service Center Operations
Chief, Field Operations

From: Donald Neufeld /s/
Acting Associate Director, Domestic Operations

Date: June 1, 2007

Re: Interim Guidance Regarding the Impact of the Department of Labor's (DOL) final rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests.

Revisions to Adjudicator's Field Manual (AFM):

Chapter 22.2(b) General Form I-140 Issues

(AFM Update AD07-20)

I. Purpose

This memorandum provides interim field guidance regarding the impact of the Department of Labor's (DOL) final rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, ("DOL final rule"), on determining labor certification validity and the prohibition of the filing of labor certification substitution requests that will take effect on July 16, 2007.

II. Background

A. DOL Final Rule

Section 203(b) of the Immigration and Nationality Act (Act), 8 U.S.C. 1153(b), establishes the categories of aliens who may be classified as employment-based immigrants and allocates the allowable number of visas in a given fiscal year among those categories. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. 1182(a)(5)(A)(i), conditions the issuance of employment visas by providing that no alien may be admitted to the United States for permanent employment unless the Secretary of Labor certifies that:

(I) there are not sufficient workers who are able, willing, qualified ... and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

To hire permanent alien workers, U.S. employers generally must engage in a multi-step process that involves USCIS, DOL and the Department of State (DOS). The first step often begins with the U.S. employer filing a labor certification application ETA Form 750, Application for Alien Employment Certification, or ETA Form 9089, Application for Permanent Employment Certification, with DOL. DOL has established procedures for obtaining labor certifications under 20 CFR part 656. This part was amended by the DOL Program Electronic Review Management System (PERM) final rule published December 27, 2004, which took effect on March 28, 2005 (69 FR 77326). PERM is an attestation based system for filing and processing of labor certification applications.

To obtain a labor certification, a U.S. employer must demonstrate to DOL, through a test of the labor market, that there are no able, willing, and qualified U.S. workers who are available to fill the proffered position in the geographic area where the job opportunity is located. The employer must also demonstrate that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. After a review, DOL may either approve or deny the labor certification application.

After receiving a labor certification, a U.S. employer must file a Form I-140, Immigrant Petition for Alien Worker, with USCIS for a prospective permanent alien to demonstrate that the alien and job requirements fit into a qualifying immigrant visa classification. The statutory classifications that generally require a labor certification are found in section 203(b)(2) (members of the professions holding advanced degrees or aliens of exceptional ability) and in section 203(b)(3) (skilled workers, professionals and other workers) of the Act.

USCIS reviews the approved labor certification in conjunction with the Form I-140 and other supporting documents to evaluate whether the position being offered to the alien worker is the same as the position specified on the labor certification and that the minimum level of education and work experience stated on the labor certification qualifies the position for the immigrant classification requested. In addition, the alien worker's education, training and work experience are evaluated by USCIS to determine whether the particular alien worker meets the job requirements specified on the labor certification. The date the labor certification application was filed with DOL is used to establish the priority in which an immigrant visa will be made available to the alien worker.

Upon the filing or approval of the Form I-140 by USCIS, the alien, if already in the United States, may be able to file a Form I-485, Application to Register Permanent Residence or Adjust Status, in order to obtain lawful permanent resident status provided his or her priority date is current. In the alternative, upon approval of the Form I-140, the alien may apply for an immigrant visa by filing an Application for Immigrant Visa and Alien Registration, Form DS-230, with DOS and gain lawful permanent resident status upon admission to the United States with an immigrant visa, provided his or her priority date is current.

Historically, USCIS and DOL have allowed U.S. employers to substitute an alien named on a pending or approved labor certification with another prospective alien employee while maintaining the previously established "priority date". Labor certification substitution could occur either while the labor certification application was pending at DOL or while a Form I-140, filed with an approved labor certification, was pending with USCIS.

DOL recently amended the administrative regulations at 20 CFR part 656 through a final rule-making published on May 17, 2007, which will take effect on July 16, 2007 (71 FR 27904) ("DOL final rule"). The DOL final rule includes several provisions that will significantly impact adjudication of Form I-140 petitions that require DOL-approved labor certifications as a supporting document. New 20 CFR 656.11 prohibits the alteration of any information contained in the labor certification after the labor certification application is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. New 20 CFR 656.30(b)(1) provides a 180-day validity period for approved labor certifications; employers will have 180 calendar days after the date of approval by DOL within which to file an approved permanent labor certification in support of a Form I-140 petition with USCIS. New 20 CFR 656.30(b)(2) establishes an implementation period for the continued validity of labor certifications that were or are approved by DOL prior to [insert effective date of the DOL final rule]; such labor certifications will have to be filed in support of an I-140 petition within 180 days after the effective date of the DOL final rule.

Another provision of the DOL final rule is the prohibition in new 20 CFR 656.12 of the sale, barter or purchase of permanent labor certifications and applications. The DOL final rule requires employers to pay the costs of preparing, filing and obtaining labor certifications. An employer's transfer to the alien beneficiary of the employer's costs incurred in the labor certification or application process will be prohibited by DOL, though the DOL final rule does allow an alien may pay his or her own legitimate costs in the permanent labor certification process, including attorneys' fees for representation of the alien. The sale, barter or purchase prohibition does not extend to fees paid for the filing of Form I-140 petitions and other relating applications, such as Form I-485 adjustment applications that are filed with USCIS or after the approval of the labor certification application or for the payment of legal fees for representation in immigrant visa petition proceedings before USCIS.

III. Field Guidance

A. I-140 Labor Certification Substitution Petitions

1. Substitution Petitions filed prior to the effective date of the DOL Final Rule

USCIS will continue to accept Form I-140 petitions that request labor certification substitution that are filed prior to July 16, 2007. Form I-140 petitions that request labor certification substitution that are filed prior to July 16, 2007 will be adjudicated to completion according to the procedures outlined in the March 1996 DOL Delegation Memorandum of Understanding¹, to include the adjudication of any relating motions to reopen or reconsider, or an appeal (Form I-290B) by the Administrative Appeals Office (AAO).

USCIS will continue to reject all Form I-140 petitions that require an approved labor certification that are filed without the original labor certification, unless the original labor certification was previously filed in support of another Form I-140 petition or a duplicate labor certification is being requested by the petitioning employer.

2. Substitution Petitions filed on or after the effective date of the DOL Final Rule

USCIS will reject all Form I-140 petitions requesting labor certification substitution that are filed on or after the effective date of the DOL final rule in accordance with new 20 CFR 656.11. Such petitions that are accepted by USCIS in error will be denied based on the fact that the petition was filed without a valid approved labor certification that identified the alien beneficiary on the Form I-140 petition as the alien named on the labor certification at the time that it was approved by DOL². In accordance with 8 CFR 103.1(f)(3)(iii)(B), petitioning employers may not file an appeal of USCIS' decision to deny a Form I-140 petition that is filed without an approved labor certification issued by DOL that is in the name of an alien other than the alien named in the Form I-140 petition.

B. Approved Labor Certification Validity

Approved labor certifications carried no expiration date and were valid indefinitely prior to the effective date of the DOL final rule. DOL has established an implementation period for the imposition of a validity period on labor certifications that were or are approved prior to the effective date of the rule, and a validity period for labor certifications that are approved on or after the effective date of the rule. An approved labor certification must be filed in support of a Form I-140 petition during the validity period established by DOL.

USCIS will reject Form I-140 petitions that require an approved labor certification that are filed with a supporting approved labor certification that has expired. Such petitions that are accepted by USCIS in error will be denied based on the fact that the petition was filed without a valid approved labor certification.

Exception: USCIS will continue to accept amended or duplicate Form I-140 petitions that are filed with a copy of a labor certification that is expired at the time the amended or duplicate Form I-140 petition is filed, if the original approved labor certification was filed in support of a

¹ See March 7, 1996 Memorandum of Understanding between the former Immigration and Naturalization Service (INS) and Employment and Training Administration (signed by Louis D. Crocetti, Jr., Associate Commissioner, Examinations, and Raymond Uhalde, Deputy Assistant Secretary for Employment and Training).

² Please note that some petitioning employers may have requested labor certification substitution during the labor certification application process with DOL. Labor certification substitution requests that are granted by DOL on or before the approval of the labor certification application do not impact the validity of the labor certification. Such an approved labor certification may be accepted in support of the Form I-140 petition filed on or after the effective date of the DOL final rule.

previously filed petition during the labor certification's validity period. Such filings may occur when a new petition is required due to successor-in-interest, where the petitioning employer wishes to file a new petition subsequent to the denial, revocation or abandonment of the previously filed petition and the labor certification was not invalidated due to material misrepresentation or fraud relating to the labor certification application³, in the instances where the amended petition is requesting a different visa classification than the visa classification requested in the previously filed petition, or when the previously filed Form I-140 petition has been determined to have been lost by USCIS or DOS.

In accordance with 8 CFR 103.1(f)(3)(iii)(B), petitioning employers may not file an appeal of USCIS' decision to deny a Form I-140 petition that filed with an expired approved labor certification issued by DOL.

1. Implementation Period for the Continued Validity of Labor Certifications that were or are Approved by DOL prior to [insert effective date of the DOL final rule]

New 20 CFR 656.30(b)(2) establishes an implementation period for the continued validity of labor certifications that were or are approved by DOL prior to [insert effective date of the DOL final rule]; such labor certifications will have to be filed in support of an I-140 petition within 180 calendar days after the effective date of the DOL final rule in order to be valid.

2. Validity of Labor Certifications that are Approved by DOL after [insert effective date of the DOL final rule]

New 20 CFR 656.30(b)(1) provides a 180-day validity period for approved labor certifications. Petitioning employers will have 180 calendar days after the date of approval by DOL within which to file an approved permanent labor certification in support of a Form I-140 petition with USCIS.

IV. Questions

Questions regarding this memorandum should be directed through channels to Alexandra Haskell in the Business and Trade Branch of Service Center Operations.

V. AFM Update

Accordingly, the Adjudicator's Field Manual is revised as follows:

- 1. Chapter 22.2 (b) is revised to read:

Chapter 22.2 Employment-Based Petitions

In an employment-based immigrant visa petition, an employer must demonstrate to USCIS that the alien beneficiary is a foreign national qualified for the immigrant

³ See 20 CFR 656.31 for Form ETA-750s filed prior to March 28, 2005 or 20 CFR 656.30(d) for Form ETA-9089s filed on or after March 28, 2005.

classification sought. If the immigrant petition is based on an underlying certified labor certification application, then the immigrant petition must be filed during the validity period of the labor certification established by the Department of Labor (DOL). The employer must demonstrate that the alien beneficiary is qualified for the position certified by DOL. However, as discussed in more detail later in this Chapter, there are several immigrant classifications that do not require the employer to first obtain labor certification. In addition, in certain classifications, the alien beneficiary is able to self-petition for the classification sought. Below is a discussion of the initial steps that should be taken when adjudicating all employment-based immigrant petitions. A more detailed discussion of the specific immigrant classifications follows.

(b) General Adjudication Issues.

(3) Labor Certifications.

(f) Validity of Approved Labor Certifications

DOL has amended the administrative regulations at 20 CFR part 656 through a final rule-making published May 17, 2007, effective on July 16, 2007 (71 FR 27904)]. DOL established through this final rule-making a validity period for individual labor certifications approved by DOL on or after July 16, 2007, as well as an implementation period for the imposition of a validity period on labor certifications that were approved prior to July 16, 2007. An approved labor certification must be filed in support of a Form I-140 petition during the validity period established by DOL. See 20 CFR 656.30(b).

USCIS will reject Form I-140 petitions that require an approved labor certification that are filed with a supporting approved labor certification that has expired. Such petitions that are accepted by USCIS in error will be denied based on the fact that the petition was filed without a valid approved labor certification.

Exception: USCIS will continue to accept amended or duplicate Form I-140 petitions that are filed with a copy of a labor certification that is expired at the time the amended or duplicate Form I-140 petition is filed, if the original approved labor certification was filed in support of a previously filed petition during the labor certification's validity period. Such filings may occur when a new petition is required due to successor-in-interest, where the petitioning employer wishes to file a new petition subsequent to the denial, revocation or abandonment of the previously filed petition and the labor certification was not invalidated due to material

misrepresentation or fraud relating to the labor certification application⁴, in the instances where the amended petition is requesting a different visa classification than the visa classification requested in the previously filed petition, or when the previously filed Form I-140 petition has been determined to have been lost by USCIS or DOS.

In accordance with 8 CFR 103.1(f)(3)(iii)(B), petitioning employers may not file an appeal of USCIS' decision to deny a Form I-140 petition that is filed with an expired approved labor certification issued by DOL.

Validity of Labor Certifications that are Approved by DOL Prior to July 16, 2007: 20 CFR 656.30(b)(2) established an implementation period for the continued validity of labor certifications that were or are approved by DOL prior to July 16, 2007; such labor certifications have to be filed in support of an I-140 petition with USCIS on or before January 12, 2008, (within 180 calendar days after the effective date of the DOL final rule in order to be valid.)

Validity of Labor Certifications that are Approved by DOL On or After July 16, 2007: 20 CFR 656.30(b)(1) provides for a 180-day validity period for approved labor certifications. Petitioning employers have 180 calendar days after the date of the approval of the labor certification application by DOL within which to file the labor certification in support of a Form I-140 petition with USCIS.

(6) Labor Certification Substitution Changes.

NOTE: DOL has amended the administrative regulations at 20 CFR part 656 through a final rule-making published May 17, 2007, effective on July 16, 2007 (71 FR 27904). DOL has, through this final rule making at 20 CFR 656.11, prohibited the alteration of any information contained in the labor certification after the labor certification application is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications.

Substitution Petitions filed on or after July 16, 2007: USCIS will reject all Form I-140 petitions requesting labor certification substitution that are filed on or after July 16, 2007 pursuant to 20 CFR 656.11. Such petitions that are accepted by USCIS in error will be denied based on the fact that the petition was filed without a valid approved labor certification that identified the alien beneficiary on the Form I-140 petition as the alien named on the labor certification at the time that it was approved by DOL.

Please Note: Some petitioning employers may have requested labor certification substitution during the labor certification application process with DOL. Labor certification substitution requests that are granted by DOL on or before the approval

⁴ See 20 CFR 656.31 for Form ETA-750s filed prior to March 28, 2005 or 20 CFR 656.30(d) for Form ETA-9089s filed on or after March 28, 2005.

of the labor certification application do not impact the validity of the labor certification. Such an approved labor certification may be accepted in support of the Form I-140 petition filed on or after the effective date of the DOL final rule, provided the labor certification is otherwise filed within the applicable time period.

In accordance with 8 CFR 103.1(f)(3)(iii)(B), petitioning employers may not file an appeal of USCIS' decision to deny a Form I-140 petition that is filed with an approved labor certification issued by DOL in the name of an alien other than the alien named in the Form I-140 petition.

Substitution Petitions filed prior to July 16, 2007:

Historically, USCIS and DOL have allowed U.S. employers to substitute an alien named on a pending or approved labor certification with another prospective alien employee while maintaining the previously established "priority date". Labor certification substitution could occur either while the labor certification application was pending at DOL or while a Form I-140, filed with an approved labor certification, was pending with USCIS.

USCIS will continue to accept Form I-140 petitions that request labor certification substitution that are filed prior to July 16, 2007. Form I-140 petitions that request labor certification substitution that are filed prior to July 16, 2007 will be adjudicated to completion following the procedures outlined in this section, to include the adjudication of any relating motions to reopen or reconsider, or an appeal (Form I-290B) by the Administrative Appeals Office (AAO). (See the March 7, 1996, Memorandum of Understanding between the former Immigration and Naturalization Service (INS) and Employment and Training Administration.)

In such substitution filings, the petitioning employer files an immigrant petition on behalf of the new employee based on the approved labor certification, seeking to retain the priority date of the original labor certification filing. The priority date for a petition that is supported by a labor certification substitution is the earliest date the certification was accepted for processing by the DOL. Labor certifications substitutions were allowed only if the original beneficiary named on the approved labor certification, or any previously substituted alien, had not obtained an employment-based immigrant visa (or adjustment of status) based on that labor certification application.

The substituted beneficiary must have met all of the minimum education, training, or experience requirements as stated in the original individual labor certification at the earliest time the original labor certification application was submitted to the state employment office or to DOL.

For individual labor certifications filed with the Department of Labor prior to March 28, 2005, a new Form ETA-50, Part B signed by the substituted alien must be included with the petition. For individual labor certifications filed with the Department of Labor on or after March 28, 2005, a new Form ETA-9089 signed by the substituted alien

must be included with the petition.

Additionally a written notice of withdrawal of any pending or approved Form I-140 initially submitted for the original beneficiary or any previously substituted alien must be included, as well as a photocopy of the Form I-797 receipt and/or approval notice, if available.

2. The AFM Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read:

AD07-20

Chapter 22

[INSERT

SIGNATURE

DATE OF THIS

MEMO]

This memorandum revises Chapter 22 of the *Adjudicator's Field Manual (AFM)* by amending section 22.2 regarding procedures that address the impact of the Department of Labor's (DOL) Final Rule on determining labor certification validity and the prohibition of labor certification substitution requests.