

FAQs on Final Rule to Reduce the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity of May 17, 2007

On May 17, 2007, the Employment and Training Administration issued a Final Rule to clarify and augment its regulations on the permanent labor certification program, including the processing of cases backlogged under the prior regulation. 20 CFR part 656; 72 Fed. Reg. 29704 (May 17, 2007).

Prohibition on Substitution

What is the effective date for the prohibition on substitution?

Section 656.11(a) of 20 CFR part 656 prohibits any request to change the identity of an alien beneficiary on any application for permanent labor certification that is submitted after July 16, 2007.

What is the scope of validity of a permanent labor certification for which a substitution request has been made?

As revised, §656.30(c)(2) states that a permanent labor certification is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the application (either Form ETA 750 or Form ETA 9089). As the Department made clear in the Supplementary Information that accompanied the Final Rule, 'approved' for purposes of the substitution request means approved by DOL at the DOL stage in processing such a request. Pursuant to §656.11(a), the Department will consider a request for substitution made prior to July 16, 2007, even if it does not make a determination or complete action on that request until after the Final Rule's effective date.

Prohibition on Improper Payments and Transactions

How does the Department define "sale, barter, or purchase" of a labor certification?

No application for labor certification or approved labor certification may be sold, bartered, or purchased as of July 16, 2007. A "sale" means an agreement between a seller and a buyer to transfer ownership of a labor certification in consideration of monetary payment or promise of monetary payment. "Barter" means the transfer of ownership of a labor certification from one person to another by voluntary act or agreement in exchange for a commodity, service, property, or other valuable consideration. "Purchase" means the voluntary agreement to transfer ownership of a labor certification from one person to another based on valuable consideration. The Final Rule adds these definitions to §656.3.

How does the Department define prohibited payments for “activity related to obtaining permanent labor certification?”

Pursuant to §656.12(b), an employer may not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, except from a party with a legitimate, pre-existing business relationship with the employer, and when the work to be performed by the alien beneficiary will benefit that party. “Payment” includes, but is not limited to, monetary payments; deductions from wages or benefits; kickbacks, bribes, or tributes; goods, services, or other “in kind” payments; and free labor. This includes the prohibition against the alien paying the employer’s attorneys’ fees in connection with the labor certification application.

What are activities relating to obtaining permanent labor certification?

“Activity related to obtaining permanent labor certification,” for purposes of §656.12(b), includes, but is not limited to, recruitment activity, the use of legal services, and any other action associated with the preparation, filing, or pursuit of an application. This section prohibits any such payment. An alien may pay his/her own costs, including attorneys’ fees for representation of the alien, except that when the same attorney represents both the alien and the employer, all costs related to preparing, filing, and obtaining the permanent labor certification must be borne by the employer

Does the rule prohibit reimbursement agreements?

The regulation prohibits payment by the alien beneficiary or others of employer-incurred costs related to labor certification, including attorneys’ fees. If, for example, a reimbursement agreement would require the employee to reimburse the employer for some or all of the attorneys’ fees it incurred associated with preparing, filing and obtaining the labor certification, such reimbursement agreement would violate the Final Rule.

What should employers do who have entered into contracts where payments from aliens are either owed after July 16, or owed prior to July 16 but not paid until after July 16?

Section 656.12(b) prohibits an employer from seeking or receiving payment of any kind for activity related to obtaining permanent labor certification, including the employer’s attorneys’ fees. If the payment obligation, however, accrued *prior to* July 16, the employer has the right to seek the payment after the effective date.

For applications filed on or after July 16, 2007, an employer who has *sought* this type of payment from the alien beneficiary of the application must answer “yes” to Question I-23 on ETA Form 9089 (“Has the employer received payment of any kind for the submission of this application?”), even if the employer has not yet *received*

payment from the alien. Employers should describe the payment and from whom, and when appropriate clarify on the application, for the record, that the payment was for an obligation that accrued prior to the effective date of this provision (ie, July 16, 2007). Employers answering “yes” to Question I-23 must be prepared, if requested by the Certifying Officer, to explain and support the details of such payment.

What should attorneys do who have entered into contracts where payments from aliens for labor certification preparation and filing are either owed after July 16, or owed prior to July 16 but not paid until after July 16?

Both because the Final Rule governs the payment or reimbursement of an employer’s attorneys’ fees, and because an attorney is the employer’s legal representative (and so stands in the place of the employer), the rule prohibits payments to an attorney for the employer’s legal fees when such payments would not be permissible directly to the employer. If the payment obligation accrued, however, prior to July 16, the attorney has the right to seek the payment after the effective date and should note on the application, for the record, when the obligation accrued.

For applications filed on or after July 16, 2007, if an attorney or firm completing the application represents the employer, or the employer and alien jointly, and has either *sought* or *received* a payment from the alien beneficiary that is directly related to the employer’s labor certification costs as outlined in the regulation, the attorney must answer “yes” to Question I-23.

Attorneys answering “yes” to Question I-23 must be prepared to explain and support the details of such payments. The attorney should describe the payment, explain that the payment was to the attorney and from whom, and when appropriate clarify on the application, for the record, that the payment was for an obligation that accrued prior to the effective date of this provision (ie, July 16, 2007).

Do the regulations require attorneys to modify contracts for dual representation entered into before July 16, 2007?

The regulations state that an employer may not seek or receive payment from the employee (or a third party except in specific circumstances) after July 16 2007. Attorneys may represent employers in the preparation, filing and obtaining of a labor certification and may be paid for that activity by the employer. Attorneys may represent aliens in their own interests in the review of a labor certification (but not in the preparation, filing and obtaining of a labor certification, unless such representation is paid for by the employer), and may be paid by the alien for that activity. To the extent, however, that a contract exists between the attorney and the employee, which calls for the receipt on or after July 16 of payment for services rendered on or after July 16 in connection with the preparation, filing or obtaining of a labor certification, such services are to be paid for, under the regulation, by the employer.

Do the regulations permit counsel for the alien to voluntarily represent the employers on a pro bono basis?

No. But for the attorney's representation of the alien, the attorney would not be furnishing such services to the employer. This is prohibited by the regulations.

Debarment

When may the Department debar an employer, attorney, or agent?

Pursuant to §656.31(f), the Department may debar an employer, attorney, and/or agent from the permanent labor certification program for up to three years, when it determines such employer, attorney, and/or agent has facilitated or participated in one or more of the following actions, if such action was prohibited at the time it occurred:

- Sale, barter, or purchase of an application for labor certification or approved labor certification;
- Prohibited payment for an activity related to obtaining permanent labor certification;
- Willful provision or assistance in the provision of false or inaccurate information for an application for labor certification;
- Pattern or practice of failure to comply with the terms of Form ETA 9089, Application for Permanent Employment Certification, or Form ETA 750, Application for Alien Employment Certification;
- Pattern or practice of failure to comply with the Permanent Labor Certification audit process;
- Pattern or practice of failure to comply with the Permanent Labor Certification supervised recruitment process; or
- Fraud or willful misrepresentation involving a Permanent Labor Certification, as determined by a court, the Department of Homeland Security, or the Department of State.

When does an approved labor certification expire?

The expiration date of an approved labor certification depends on when it was approved. For labor certifications approved prior to July 16, 2007, the labor certification expires 180 days after July 16, 2007 – that is, January 12, 2008-- unless

filed prior to its expiration with the Department of Homeland Security in support of a Form I-140 immigrant petition for alien worker. Labor certifications approved on or after July 16, 2007, will expire 180 days from their date of issue, unless filed prior to expiration with the Department of Homeland Security in support of a Form I-140 immigrant petition for an alien worker.