

Immigration Newswire
Volume 5, Issue 9
October 9, 2006

Department of Labor Extends RIR Conversion Deadline

On October 6, 2006, the Department of Labor (DOL) published a [Notice](#) in the Federal Register which extends the cut-off date for RIR conversions. Previously, a pre-PERM labor certification filed under the traditional process could be converted to RIR only if it was filed prior to August 3, 2001. According to the Federal Register Notice, however, any traditional labor certification filed prior to March 28, 2005 (the implementation date of PERM) can now be converted to RIR.

With a traditional labor certification, DOL directs recruitment and specifies the location and duration of all advertisements. Under RIR, on the other hand, the employer need only submit evidence that it has conducted a good faith "pattern of recruitment" within the 180 days preceding the filing of the application. The processing for RIR is quicker and often much cheaper for the employer.

To request conversion of a pending case that was filed under the traditional procedure, an employer would need to conduct the recruitment. Once the recruitment is done, the RIR conversion request needs to be filed with the Backlog Elimination Center where the traditional labor certification application is pending, along with evidence of the recruitment. The request should be paired with the pending application and the application should be considered for RIR when it is ready to be adjudicated.

RIR cannot be requested on any application for which the Department of Labor has already begun directing recruitment under the traditional procedure. This could potentially create a problem for some cases because recruitment must be conducted prior to filing an RIR conversion request. Thus if DOL begins directing recruitment under the traditional procedure *after* an employer begins its own recruitment for the RIR request, but *before* the employer completes and files the RIR conversion request, any recruitment already done by the employer up to that point will be a loss, and the employer will still need to follow the Department of Labor's recruitment schedule.

**USCIS Expands Premium Processing to Additional
I-140 Categories**

As reported previously in [Immigration Newswire](#), USCIS made premium processing available to most I-140 third preference petitions (excluding the "other worker" category) in August. As of September 25, 2006, Premium

Processing is now also available for Employment-Based First Preference (EB1) Outstanding Professors and Researchers; Employment-Based Second Preference (EB2) members of the professions with advanced degrees or exceptional ability *not seeking a National Interest Waiver*; and Employment-Based Third Preference "Other Workers" (i.e., unskilled labor requiring less than two years of training or experience).

Premium Processing remains unavailable for the following categories: EB1 Aliens with Extraordinary Ability; EB1 Multinational Executives and Managers; and EB2 National Interest Waivers.

Highlights from Customs & Border Protection Meeting

In a recent meeting with the American Immigration Lawyers Association, Customs & Border Protection (CBP) provided helpful guidance on a couple of issues:

- 1.) When a beneficiary of a timely filed petition for extension of stay leaves the U.S. while the extension is pending, the person should take copies of the following to present to show when returning to the U.S.:
 - a.) Prior I-797 Approval Notice;
 - b.) Current I-797 Receipt Notice;
 - c.) Current I-94; and
 - d.) Employment verification letter, verifying current employment (if for an employment-authorized status).

This will demonstrate that the request for extension of stay was timely filed (i.e. the receipt notice shows a filing date earlier than the expiration date on the previous approval notice); and that the beneficiary is therefore in a period of stay authorized by the Attorney General rather than unlawfully present in the U.S.

- 2.) For Canadian citizens who enter the U.S. in L-1 status pursuant to an adjudication at the Port of Entry, the \$500 Fraud Prevention & Detection Fee should be collected only upon the first admission following implementation of the L-1 Visa Reform Act of 2004. CBP has stated that it will annotate I-94 cards with "fraud fee collected" so that L-1 beneficiaries are not charged the fee twice. For those L-1 holders who have paid the \$500 fee but whose I-94 cards have not been annotated, they should bring proof (such as a receipt) to the border when they apply for extension of their L-1 status.

USCIS Paying Increased Attention To Status Violations When Adjudicating Applications for Immigration Benefits

On May 3, 2006, USCIS issued a memorandum providing internal guidance on exercising discretion to issue Notices to Appear to aliens applying for

immigration benefits. Notices to Appear constitute initiation of Removal Proceedings. In addition, public statements by USCIS officials are paying increased attention to the inherent authority of USCIS to issue Notices To Appear when adjudicating applications for benefits, particularly in the context of filing a family-based immigrant (I-130) petition where the alien beneficiary is not in status. It is expected that USCIS will be increasing the number of NTAs it issues.

Department of Labor Confronts the Board of Alien Labor Certification Appeals' First Decision on a PERM Case in Matter of HealthAmerica

On July 18, 2006, the Board of Alien Labor Certification Appeals (BALCA) made its first ruling on a PERM case. [Matter of HealthAmerica, BALCA Case No: 2006-PER-1](#), dealt with a PERM application that was denied due solely to the fact that the employer had mistakenly typed the date of one of the required Sunday advertisements as having occurred on a Monday. Even though the employer could provide newspaper tear sheets showing that the ad had actually run on a Sunday rather than a Monday, the Certifying Officer refused to reconsider the denial.

The Board held that it is an abuse of discretion for a Certifying Officer to deny reconsideration to a case where (1) the documents retained by the employer as part of the recordkeeping requirements under PERM clearly show that the employer complied with the PERM advertising requirements; and (2) the application was denied solely on the basis of a typographical error in the Form ETA-9089. Moreover, the decision states that in a case where an employer complies with the regulation in question but “merely made a typographical error in filling out the application,” there is “[o]bviously ... no motive to deceive or defraud the government.” BALCA went on to state that the Certifying Officer’s “denial of the application based on the typographical error in the form 9089 elevates form over substance.”

This decision has been difficult for the Department of Labor (DOL) to implement. On the one hand, the PERM program did away with BALCA's ability to remand a denied labor certification application to the Certifying Officer for reconsideration. On the other hand, [Matter of HealthAmerica](#) states that a Certifying Officer may not deny a motion to reconsider that is meant to correct a technical error on an automatically denied PERM application. [Matter of HealthAmerica](#) thus made a very technical distinction between BALCA "remanding" a case to DOL and reversing DOL's denial of a motion to reconsider.

In the American Immigration Lawyers Association's September 12, 2006 liaison meeting with the Department of Labor, the DOL stated it is still working on how to modify the PERM system to implement [HealthAmerica](#). In the meantime, employers may continue to file Motions to Reconsider where they receive erroneous denials, and in light of [HealthAmerica](#), DOL will favorably consider

motions involving technical or harmless errors. DOL has not defined what it considers to be a harmless error.

Vermont Service Center Comments on Future Bispecialization Plans

During the September 20, 2006 meeting between the American Immigration Lawyers Association and the Vermont Service Center (VSC), the VSC stated that the tentative plan for the next phase of bispecialization (which is subject to change), is that all I-129 petitions will no longer be filed with the Vermont Service Center. Instead these filings will be divided between California and Vermont, based on the geographic location of the employment. Petitions that would have been filed with either the California or the Nebraska Service Center will be filed at the California Service Center; and petitions previously filed with the Vermont or the Texas Service Centers will be filed at the Vermont Service Center.

Similarly, I-140s and I-485s that would have previously been filed with the California or the Nebraska Service Centers will be filed at the Nebraska Service Center; and I-140s and I-485s that were previously filed with the Vermont or Texas Service Centers will be filed at the Texas Service Center.

I-130 petitions will be added to the groupings as well, and all I-130s that would previously have been filed with the California or Nebraska Service Centers will file them in California; and all I-130 petitions that would have been filed with the Vermont or Texas Service Centers will be filed in Vermont.

There will be some exceptions to this scheme; e.g. all I-360 and I-129 petitions for R-1 status will be filed with the California Service Center.

The Vermont Service Center did not state the exact date when these changes, which are only tentative, may go into effect. However, they anticipate that the changes will take place prior to January 1, 2007.

~ Disclaimer ~

*The information contained in this newsletter is for informational purposes only.
It does not constitute legal advice.*