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## **DOL Publishes Final Rule, Eliminating Substitution, Creating Expiration Date for Approved Labor Certifications**

On May 17, 2007, the Department of Labor published a Final Rule in the Federal Register, making changes to the rules for labor certifications, purportedly aimed at reducing fraud. The rule goes into effect on July 16, 2007.

The most significant change is that as of July 16, employers will no longer be permitted to substitute new aliens into approved but unused labor certifications. Labor substitution has long been permitted. It is the practice whereby an employer who obtained a labor certification on behalf of an alien who ceased working for that employer prior to obtaining permanent residence, submits that labor certification in support of an I-140 petition for a new foreign national employee. In order to qualify for substitution, the new beneficiary must have met all of the education, experience, and/or training requirements at the time the original labor certification application was filed. If the beneficiary does qualify, he is granted the priority date of the old labor cert.

The rationale behind allowing substitution was that the employer had already tested the labor market for the open position and that the identity of the foreign national who benefits from that labor market test is irrelevant. However, DOL's rationale for doing away with labor substitution is that it allows approved labor certifications to enter into a "black market" where they can be bought and sold.

Any labor substitutions submitted before July 16 will be processed to completion. Labor substitutions submitted after that date will result in I-140 denial. As a result of this change, USCIS announced on May 17, 2007 that as of May 18, 2007, it would no longer accept for Premium Processing I-140 petitions requesting labor substitution. USCIS did not feel it could meet the demand for premium processing on these cases.

The second big change made by the rule is that starting on July 16, all approved labor certifications will "expire" 180 days after they are approved, unless submitted in support of an I-140 petition. The current law places no expiration date on labor certifications. The DOL rationale for the change is, again, that this change will prevent labor certifications from being sold on a "black market."

The third and final major change made by the final rule is that foreign nationals are no longer permitted, after July 16, 2007, to pay attorney's fees for labor certifications filed by their employer unless they are independently represented by that attorney. In most cases, one attorney represents both the foreign national and the employer; therefore the employer will be required to bear the cost of attorney fees now in almost all cases.

## **Consular Offices Resume I-130 Processing**

We previously reported in *Immigration Newswire* that pursuant to the Adam Walsh Act, U.S. Consulates abroad had suspended I-130 processing so that background checks could be conducted on I-130 petitioners prior to immigrant visa issuance. Starting in March 2007, however, the Department of State announced that, effective immediately, consular posts have resumed processing of I-130 petitions for immediate relatives of U.S. citizens who are resident in their consular districts, as well as members of the armed forces and true emergency cases. DOS was able to work out a system for running the required security clearances at consular posts.

### **L-1 Petitions Approved at Ports of Entry Fail to Receive Approval Notices in Some Cases**

As a rule, petitions to grant L-1 status to nonimmigrants must be submitted to USCIS by mail. Upon approval, the petitions can be used by foreign nationals to obtain visas and enter the U.S. Since Canadian citizens are visa exempt by law, they are not required to obtain visas. In addition, Canadian citizens are permitted, under the North American Free Trade Agreement (NAFTA) to present L-1 petitions for adjudication directly at ports of entry along the border. When an L-1 petition is approved at the border, a copy of the petition is forwarded directly to the USCIS service center with jurisdiction over the state in which the port of entry is located. For petitions submitted at the ports of entry in Buffalo, that is the USCIS Service Center in St. Albans, Vermont. The Vermont Service Center then reviews the petition to make sure that it is approvable. They then issue an I-797 Approval Notice directly to the attorney of record or to the petitioner.

In many recent cases submitted on behalf of our clients, no I-797 Receipt or Approval Notice has been issued by the Vermont Service Center. While no regulation requires presentation of an L-1 approval notice (I-94 cards, which L-1 beneficiaries do receive directly at the border, should suffice), Customs and Border Protection officers have begun to delay our clients who are traveling with L-1 I-94 cards and no approval notice when they attempt to enter the U.S. In following up on these cases, it appears that either the officers at the port of entry never forwarded the L-1 petitions to the Vermont Service Center as required, or that they were lost in transit. As a result, there is no way to create an approval notice for these L-1 beneficiaries.

Other attorneys in the Buffalo, NY area have noticed the same thing happening to their L-1 clients, and have contacted CBP to try to get something done about the problem. CBP denies responsibility and states that it is a problem at the Vermont Service Center. We have contacted the AILA liaison to the Vermont Service Center to attempt to resolve this issue and will report any information that we receive.

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