

Immigration News and Updates

Labor Certification

October 26, 2004

As you may know, most foreign nationals who hold nonimmigrant visas are first required to file a Labor Certification Application with the U.S. Department of Labor, before applying for an immigrant visa and the adjustment of status to that of lawful permanent resident with the U.S. Citizenship & Immigration Services ("CIS"). Up to now, we had the option of filing a standard Labor Certification Application with the Dept. of Labor on Form ETA 750 Parts A and B. Then, the Dept. of Labor would tell the company how they wanted to see advertising for the position, to ensure that no U.S. workers would be displaced as a result of certifying the position for the foreign national. Or, we had the option of establishing a pattern of recruitment for a six-month period before the filing of the Labor Certification Application was submitted to the Dept. of Labor, and thereby request "Reduction in Recruitment" ("RIR") processing. RIR applications were processed almost two years faster than standard applications in most parts of the country.

For the past four years (or longer) we have been hearing rumors from the U.S. Dept. of Labor that the process of adjudicating Labor Certification Applications that are filed through the standard or through Reduction in Recruitment (RIR) will be overhauled. On September 29, 2004, the Assistant Secretary of the Employment & Training Administration of the Dept. of Labor issued a memo to the field entitled "FY 2005 Transition Guidelines" which provides guidance to centralizing the processing of all applications and implementing the Program Electronic Review Management (PERM) system. We obtained a copy of this memo on Friday, October 22, 2004. The memo indicates that we are very close to seeing the implementation of PERM and a new system to process Labor Certification Applications. Although we expect that the regulations will be published sometime before the end of this year, the Dept. of Labor realizes that it can begin re-engineering the process without waiting for the final PERM regulations, and it has already begun to do so.

Even if new regulations are not published this year, we are already experiencing changes in the way the state workforce agencies process Labor Certification Applications. Most state workforce agencies have already received instructions on sending out all Labor Certification Applications (standard and RIR) to two national processing centers (in Atlanta and Chicago). The "Transitional Guidance" memo also states that all state workforce agencies, and including the Michigan Dept. of Labor & Economic Growth, will only accept Labor Certification Applications up until January 1, 2005. After that date, the state workforce agencies will forward all these applications directly to the national processing centers, which will process applications on the basis of "first-in, first-out", regardless of the location where a case was originally filed. The Dept. of Labor believes this is a fair and equitable approach to all applicants, and will to the extent possible transfer backlogged cases to two temporary backlog reduction processing centers (in Philadelphia and Dallas) where the oldest cases will be processed first. These backlog reduction centers are scheduled to process all backlogged cases within the next two years. Then, these centers will be closed down, as the Dept. of Labor foresees all other cases will be processed by one of the two national processing centers. Accordingly, after January 1, 2005, the state workforce agencies will only forward cases to one of the designated processing centers, provide prevailing wage determinations, and process H-2A and H-2B applications.

As a result, there is no longer time to begin an RIR application for foreign national employees, as they would not meet the requirement of establishing a six-month pattern of recruitment by January 1, 2005. In Michigan and in most states, employers are faced with two options: Employers may submit a standard Labor Certification Application with the

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Michigan Dept. of Labor & Economic Growth, and then wait until it is forwarded to one of the national processing centers. Or, employers can wait until the regulations and forms are published and then file the application electronically under the PERM program. There is little information available regarding how the new program will work. However, we do know that it will be more streamlined than the current application process. There is speculation that alternative experience or education requirements, business necessity, and/or the 5% prevailing wage differential may all be eliminated by PERM. For some employers and foreign nationals it will be more difficult to obtain certification of applications in the future. In light of these changes, the safer strategy may in some cases be the submission of a standard Labor Certification Application now. Later, if and when PERM is implemented, and if it is more advantageous, the employer can withdraw and refile the Labor Certification Application under PERM.

As soon as our office obtains more information about this new process and PERM regulations, we will notify you. Should you have any questions regarding this information or in connection with a specific case, please do not hesitate to contact our office.

For more information about this, or other U.S. immigration issues, please contact our Miller Canfield Immigration Practice. This message is for general information only and should not be used as a basis for specific action without obtaining further legal advice.