



This Immigration Update[®] from FosterQuan, LLP contains important information regarding the following:

DOL SUSPENDS ISSUANCE OF MOST PREVAILING WAGE DETERMINATIONS

On Monday, August 1, 2011, the U.S. Department of Labor (DOL) announced delays in issuance of prevailing wage determinations. Subsequently, following inquiry by FosterQuan and the American Immigration Lawyers Association (AILA), the DOL clarified that the National Prevailing Wage Center has temporarily suspended prevailing wage determinations. The DOL has not yet specified a date for resuming issuance of prevailing wage determinations.

Impact of Suspension

The temporary suspension of prevailing wage determinations impacts all new Form ETA-9141, Applications for Prevailing Wage Determination, as well as those applications which remain pending with the DOL.

The suspension impacts PERM Applications for Permanent Employment Certification, also called "labor certification," which involves a test of the labor market as a first step in most employment-based permanent residency processes. Because a PERM Application cannot be filed, and certain regulatory pre-requisites cannot be met, until the DOL has issued a PERM Prevailing Wage Determination on Form ETA-9141, the suspension may delay the filing date for many new or recently-initiated PERM Applications by a few months.

The filing date of the PERM Application establishes the employee's "priority date," which is his or her "place in line" for an immigrant visa under the annual quota system. The backlog in visa availability under certain categories results in years-long delays in ultimate approval for permanent residency. Employees in those categories could experience many months delay in permanent residency for each month delay in DOL issuance of a prevailing wage.

A delay in filing PERM Applications may have a greater immediate impact on H-1B nonimmigrants approaching the end of their maximum six years of H-1B eligibility. To obtain extensions of H-1B status beyond the sixth year, it is necessary to have a PERM Application on file for at least one year, or to have obtained approval of an I-140 Immigrant Visa Petition, which is the second-step in the employment-based permanent residency process based on labor certification. In many cases, a delay in filing a PERM Application could result in ineligibility for such H-1B extensions, and thus potentially a disruption in lawful status and employment authorization.

Unique cases may experience unusually harsh impacts resulting from the suspension of prevailing wage determinations. For instance, foreign national employees with dependent children at risk of “age-out” are especially susceptible to the impacts of DOL delay. A one-month DOL delay could later make the difference in a dependent child’s eligibility to become a permanent resident as the dependent of his or her sponsored parent.

AILA has requested that the DOL resume issuance of PERM prevailing wage determinations, emphasizing the adverse impact on H-1B employees, the harsh impact on “aging-out” children, and even the financial impact on some employers in cases of extreme delay.

Should the DOL continue devoting resources solely to the reissuance of H-2B prevailing wage determinations, the suspension could remain in place until the DOL reissues all affected H-2B prevailing wage determinations. The DOL has confirmed it is likely that the DOL will complete the H-2B project by the effective date of the new H-2B prevailing wage regulation on September 30, 2011, which hopefully establishes October 1, 2011, as the latest date by which the DOL will again resume issuance of PERM prevailing wage determinations.

In the interim, new Form ETA-9141 Applications for Prevailing Wage Determination may be filed, but adjudication of these new applications may be suspended until all H-2B prevailing wage determinations are reissued in accordance with the new DOL regulation and Federal Court order.

Reason for Suspension

In order to comply with a Federal Court order mandating a change in the effective date for regulations that alter the DOL’s methodology for determining prevailing wages under the H-2B nonagricultural temporary worker program, the DOL issued a [final rule](#), published in the Federal Register on August 1, 2011, with an effective date of September 30, 2011. The new wage determination methodology, and thus new prevailing wages assessed, apply to all work performed on or after September 30, 2011, regardless of the date of issuance of the original prevailing wage determination. Because there are existing H-2B temporary labor certifications that have already been issued covering work to be performed after September 30, 2011, but for which the previously-issued prevailing wage determinations no longer apply, the DOL must “go back in time” and reissue thousands of prevailing wage determinations. It is unclear exactly how long the project will take, but the DOL has made the decision to divert resources from the issuance of Prevailing Wage Determinations in an effort to ensure compliance by September 30, 2011.

FosterQuan will continue to monitor developments in the DOL’s handling of new and existing Prevailing Wage Determinations and will provide relevant updates via future Immigration Updates[©] and on our website at www.fosterquan.com.