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THE U.S. DEPARTMENT OF LABOR IMPLEMENTS FINAL RULE LIMITING THE VALIDITY OF CERTIFIED APPLICATIONS FOR PERMANENT EMPLOYMENT CERTIFICATION AND ELIMINATING THE SUBSTITUTION OF BENEFICIARIES;

Substitutions To Be Eliminated Effective July 16, 2007

As reported in previous Tindall & Foster Email Bulletins, in February 2006 the U.S. Department of Labor (DOL) published in the Federal Register a Proposed Rule that would limit the validity of Certified Applications for Permanent Employment Certification and abolish the substitution of beneficiaries into certifications already obtained. The Proposed Rule cleared all review by the Office of Management and Budget and has now been implemented in only a slightly modified form as a Final Rule, effective July 16, 2007.

Limitation on Validity of Certified Applications for Permanent Employment Certification

The Proposed Rule would have limited the validity of a certified Application for Permanent Employment Certification (“labor certifications”) to 45 calendar days, meaning employers would be rushed to file I-140 Immigrant Visa Petitions with U.S. Citizenship & Immigration Services (CIS) within 45 days of labor certification issuance by the DOL. The Final Rule imposes a 180 calendar day limitation on validity. While a softening of the potentially unworkable 45-day validity period set forth in the Proposed Rule, the 180-day validity period remains in stark contrast to existing law that allows for the indefinite validity of labor certifications. Based on the new Final Rule, employers must soon file an I-140 Immigrant Visa Petition based on a certified Application for Permanent Employment Certification within 180 days of certification by the DOL.

Additionally, existing certifications will expire within 180 days after the effective date of the Final Rule on July 16, 2007. Therefore, even those Applications which have already been certified, and which do not bear a visible expiration date, must be filed with U.S. CIS in support of an I-140 Immigrant Visa Petition prior to 180 days after July 16, 2007, or they will become invalid. This rule results in an effective expiration date of January 10, 2008, for all Applications for Permanent Employment Certification that have already been certified by the DOL, or that will be certified by the DOL prior to July 16, 2007.

Elimination of the Long-Standing Option to Substitute Beneficiaries into Certified Applications for Permanent Employment Certification

Another unattractive aspect of the Proposed Rule, the complete elimination of the long-standing option of substituting qualified beneficiary employees into labor certifications

has been implemented without change in the Final Rule. Beginning July 16, 2007, employers will no longer be able to substitute a new, qualified beneficiary into an Application for Permanent Employment Certification originally filed for another individual, such as a former employee who is no longer with the company, or a current employee who has since pursued an alternative route to permanent residency. Because substitutions will be eliminated on July 16, 2007, employers who have received DOL certification of Applications that are no longer required for the original beneficiary should act immediately to identify any potentially qualified candidates who may benefit from the certification the employer has expended significant resources to obtain.

Restriction on a Foreign National's Financial Contributions to the Cost of the Labor Certification Process

The Proposed Rule would have imposed a somewhat vague restriction on financial contributions by the foreign national beneficiary to offset the costs associated with the labor certification process. The restriction has survived the notice and comment period and appears in the Final Rule with slight modification that serves to clarify prohibited payments and activity.

Effective July 16, 2007, the DOL Final Rule specifies that an employer may neither seek nor receive payment of any kind from the foreign national beneficiary for any activity related to obtaining permanent labor certification, including the employer's attorney fees and recruiting costs. "Payment" includes, but is not limited to, monetary contributions, wage concessions, deductions from wages, salary or benefits, and free labor. The employer is also prohibited from accepting such payments from third parties except in the extremely limited circumstance wherein the foreign national's labor pursuant to the job opportunity would benefit the third party, and the third party has an established business relationship with the employer. This prohibition on a foreign national's contributions to the costs associated with the labor certification process extends to the common practice of the employer entering into agreements with the employee for the reimbursement of the employer's costs associated with portions of a foreign national's permanent residency process in the event that the foreign national leaves the employment of the petitioning employer prematurely. If your company has entered into such an agreement or intends to do so, Tindall & Foster, P.C. will be happy to review the terms of the proposed agreement with you for purposes of ensuring compliance with DOL regulations.

New Penalties for Fraud or Misuse of the Labor Certification Program

In the Final Rule implemented by the DOL, the DOL provides for new penalties, including debarment from use of the labor certification program for up to three years in the event of a finding of fraud or a pattern and practice of noncompliance with the requirements of the labor certification regulations. This penalty is in addition to penalties already provided by law, both civil and criminal, with respect to fraud, misrepresentation, and conspiracy.

For more information regarding the labor certification process or the impact of these new regulatory changes, please contact your Tindall & Foster, P.C. immigration attorney. Your Tindall & Foster attorney will be able to assist you with refining internal policies in

connection with the permanent residency process on behalf of your foreign national workforce and can work with you to develop effective, case specific strategies tailored to meet your company's needs.