



EMAIL BULLETIN

U.S. DOL MAY SOON LIMIT THE VALIDITY OF LABOR CERTIFICATIONS AND ELIMINATE THE SUBSTITUTION OF BENEFICIARIES INTO CERTIFIED APPLICATIONS FOR PERMANENT EMPLOYMENT CERTIFICATION

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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 a Certified Application for Permanent Employment Certification and abolish the substitution of beneficiaries into certifications already obtained. Immediately following its publication, the Proposed Rule attracted criticism

The Proposed Rule would limit the validity of a certified Application for Permanent Employment Certification (“labor certifications”) to 45 calendar days, meaning employers would be rushed to file Immigrant Visa Petitions with U.S. Citizenship & Immigration Services (CIS) within 45 days of labor certification issuance by the DOL. In the past, and to date, labor certifications have always been valid indefinitely. While a time limitation on the validity of labor certification may arguably serve the stated DOL goal of reducing fraud and the “black market” trafficking in labor certifications, a 45-day time frame in which to file an Immigrant Visa Petition based on labor certification is wholly unreasonable. Furthermore, the inability to predict precisely when a labor certification will be issued, frequent delays in U.S. mail, or non-receipt of the original certification could become issues of far greater consequence. Additionally, when authorized personnel of the petitioning employer take extended leave or beneficiaries are traveling abroad, the logistics of preparing and filing an Immigrant Visa Petition within 45 days can be challenging even without mail delays and the occasional failure of the DOL to enclose the actual labor certification when mailing the notice of approval.

Additionally, the Proposed Rule would eliminate the long-standing option of substituting qualified beneficiary employees into labor certifications. In some cases, a particular beneficiary may no longer be available to accept the permanent position that has been certified in the labor certification. In the past, because it has always been the case that the position, and not the beneficiary, was subject to certification, employers have been permitted to substitute another qualified beneficiary into the existing labor certification in lieu of the original beneficiary. The DOL asserts that substitutions perpetuate a “black market” in labor certifications and increase the risk of fraud in the process. Setting aside the lack of evidence supporting this theory, it is important to consider the meaning of labor certification—it is the DOL certification that there are not sufficient U.S. workers

who are qualified and available to accept the position at the prevailing wage rate in the geographic area. It is essentially a certification that there are not enough (U.S.) workers available.

A year after publication of the Proposed Rule, the DOL has now sent the Rule, presumably in modified form or with ample discussion defending the existing proposal, to the U.S. Office of Management & Budget (OMB) for review. Upon clearance by OMB, the Proposed Rule can be published as a Final Rule in the Federal Register. It is presently unclear whether the DOL has modified its original regulatory proposals in order to provide a more reasonable validity period or permit ongoing substitution of beneficiaries in some cases.

While DOL efforts to reduce fraud are admirable, a limitation of labor certification validity to one or two years while still permitting substitution of beneficiaries during the full validity period would appear to adequately address DOL concerns regarding fraud and the alleged “black market” in labor certifications. While such a proposal might be agreed by most to be reasonable and fair, the final regulatory outcome is yet unknown. Publication of the Final Regulation will likely be in March or April of this year.

If your company has unused labor certifications and known candidates who may qualify for substitution into them, please contact your Tindall & Foster immigration attorney for more information on the substitution of qualified beneficiaries. Your Tindall & Foster immigration attorney will be able to evaluate the candidate’s qualifications, assist with an appropriate request for substitution, or assist in the development of an appropriate alternative permanent residence strategy in cases where the employee is not a good candidate for substitution. Tindall & Foster will continue to monitor regulatory developments and will provide additional information via future Email Bulletins and on our web site at <http://www.tindallfoster.com/ExportedSite/ImmigrationResources/Immigration%20Resources.htm>.