

March 31, 2006

Assistant Secretary, Employment and Training Administration  
U.S. Department of Labor  
Attn: John Beverly, Interim Chief, Division of Foreign Labor Certification  
200 Constitution Ave., NW, Room C-4312  
Washington DC 20210

**Re: RIN 1205-AB42 Comments to Proposed Rule “Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity” (71 Fed. Reg. 7656 (February 13, 2006))**

Dear Sir/Madam:

The American Immigration Lawyers Association (AILA) submits the following comments on proposed regulations published in the Federal Register on February 13, 2006, that would alter the permanent labor certification program in several key ways.

AILA is a voluntary bar association of nearly 10,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA takes a very broad view on immigration matters because our member attorneys represent thousands of U.S. businesses and industries that sponsor highly skilled foreign professionals as well as essential workers seeking to enter the United States on a temporary or permanent basis. AILA members also represent tens of thousands of U.S. families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States. Our members also represent asylum seekers, often on a pro bono basis, as well as athletes, entertainers, and foreign students.

AILA shares the Department of Labor’s concern about the incidents of fraud that have been the subject of recent prosecutions, and in particular about the harm done to the aliens who so often are the victims of these frauds. We were pleased to see many of the safeguards that were put in the PERM and backlog reduction programs to ensure that these scams could not be repeated, and are committed to working with the Department to make certain that the safeguards work properly and that attorneys and employers are properly educated in how to avoid becoming party to such deceptions.

However, we are deeply concerned about the overreaching, vague and unworkable nature of many of the proposals in this particular rulemaking, as discussed in detail below. The Department is urged to abandon its proposed approach, and, rather than reach for seemingly easy answers that in fact do not comport with reality or law, look to ways to improve its processes to further limit the opportunity for, and improve the detectability of, fraud.

## I. LIMITS ON VALIDITY OF LABOR CERTIFICATIONS

The proposed regulation at 20 CFR § 656.30(b) would introduce a validity period for approved labor certification applications. Currently, approved labor certifications are valid indefinitely. Under the proposed regulation, an approved labor certification granted on or after the effective date of the final rule would expire within 45 calendar days of the approval, unless the application is filed with U.S. Citizenship and Immigration Services (USCIS) in support of an I-140 petition within that timeframe. A labor certification granted prior to the effective date of the rule would expire within 45 calendar days of the effective date of the rule, unless the application is filed with USCIS in support of an I-140 petition within that timeframe.

According to the DOL, the intended purpose of the truncated validity period is to eliminate the “black market” in approved labor certifications and prevent certified job opportunities from becoming “stale.” As discussed below, this proposal is beyond the DOL’s authority and is unworkable for a number of reasons. Labor certifications should not have an expiry date within which to file the Form I-140 Petition for Immigrant Worker. If such a time limit is nevertheless imposed, the suggested time period is impractical and unreasonably short.

### A. The Proposed Validity Period Exceeds the DOL’s Authority.

A labor certification is valid indefinitely, until the foreign national enters the U.S on the petition based on the labor certification. INA § 212(a)(5)(A) provides, in pertinent part, that:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that...there are not sufficient workers who are able, willing, qualified...and available at the time of application for a visa and admission to the United States....

This statutory provision makes clear that when an application is certified, a determination has been made that there are no U.S. workers to fill a job opening, and that a foreign national has satisfied this particular ground of admissibility. The statute conspicuously places *no time limit* on when an immigrant visa petition based on an approved labor certification application must be filed with USCIS. In other words, once certified, the application moves to the jurisdiction of USCIS. It’s *that* agency, *not* the DOL, which determines the rules for filing petitions there. The employer and foreign national become subject to USCIS procedures and standards, and it’s simply outside the scope of the DOL’s authority to place a filing deadline on the labor certification application that supports an I-140.

We remind the DOL that, in the past, this agency tried to place a limit on the validity of approved labor certification applications, and was thoroughly defeated in that attempt when a federal appeals court roundly ruled against it.<sup>1</sup>

In fact, the only time a limit was ever successfully imposed on the validity of a labor certification application was by an act of Congress. Some fifteen years ago, and only for a short time, there was a limit on labor certification validity as a result of the compelling national interest of transitioning to a new immigration regime brought about by the Immigration Act of 1990.<sup>2</sup> But that limit was imposed statutorily by Congress, and for a very limited reason. And in that instance Congress left the implementation of this very narrow provision up to the Immigration and Naturalization Service (INS), with no involvement by the DOL. Any limits on the validity of a certified application for alien employment certification *must* be brought about by an act of Congress, not through DOL's rulemaking authority.

### **B. The Rule Is Impractical and Will Not Resolve the Problems DOL Is Trying to Address.**

The supplemental information section of the proposed rule indicates that one of the reasons for imposing a 45-day limit on validity is concern that a job opportunity may change or become stale.<sup>3</sup> But, even the DOL itself has conceded that labor market conditions do not change that quickly.<sup>4</sup> The government changes its wage surveys only once a year, allows that PERM recruitment may be up to six months old, and has presided over a backlog that has frequently exceeded five years. Clearly, what would prevent a job opportunity from changing or becoming stale would be faster government processing and greater availability of visa numbers.

The DOL fails to consider that it has been government processing delays rather than the deliberate delay of employers or attorneys that has increased the supply of older labor certifications. First, there are hundreds of thousands of labor certification applications pending at the DOL Backlog Elimination Centers (BECs); these applications have been pending for years. And while DOL has, for the most part, established a faster processing record under PERM, numerous cases still take well beyond the DOL stated goal of 45 to 60 days.<sup>5</sup> Moreover, processing of the I-140 immigrant visa petition and adjustment of status application with USCIS easily take 12 to 18 months, and processing an immigrant

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<sup>1</sup> *Medellin v. Bustos*, 854 F. 2d 795 (5<sup>th</sup> Cir. 1988).

<sup>2</sup> A limit was set by Congress on when a labor certification-backed immigrant visa petition had to be filed to accommodate a change from the former third and sixth preference immigrant visa classifications to the current second- and third-preference classifications. The act that imposed the time limit was the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub.L.No. 102-232, 105 Stat. 1733.

<sup>3</sup> 71 Fed. Reg. 7656, 7659-60 (Feb. 13, 2006).

<sup>4</sup> "It should be recognized that labor market conditions do not change abruptly. They have not moved dramatically over the past year." May 28, 2002 memorandum titled "Clarification of Reduction in Recruitment (RIR) Policy in an Environment of Increased Layoffs" by Dale Ziegler, Chief of the Division of Foreign Labor Certification.

<sup>5</sup> 69 Fed. Reg. 77,326, 77,328 (Dec. 27, 2004) (DOL anticipates electronically filed application will have decision within 45-60 days.)

visa application with a consular post normally takes no less than six months. What can cause even greater delay is the long wait as a result of visa retrogression, which the Department of State predicts will cause a delay of three to four years in the employment-based third preference category.

A 45-day deadline is not a solution for the Department's concerns. All that the rule would do is impose a major burden on employers—a burden that, as discussed below, may prove impossible to overcome.

### **C. A 45-day Period is Unusually Short and Will Create a Huge Burden on the Affected Public.**

A 45-day filing deadline is unreasonable, if not impossible, for a number of reasons:

#### *1. Government delay warrants a longer filing period.*

First, there is the delay caused by the DOL itself. AILA members report that from the time an application is designated as approved on the PERM online system, there is often a delay of one to three weeks before the employer or attorney of record receives the certified ETA 9089 in the mail. If the 45-day period runs from the date of approval in the system rather than date the attorney or employer receives the approved certification, 45 days is a woefully inadequate time in which to file an I-140 petition. In fact, in too many cases, the labor certification will not have been even received before the 45 days are up.

#### *2. I-140 immigrant visa petition preparation requires more time than available under a 45-day filing deadline.*

Logistical and communication needs warrant a longer time frame within which to file. The preparation and documentation needed to file an I-140 is labor-intensive. Gathering the most up-to-date pertinent information, obtaining past tax returns, conducting financial analysis of an employer's ability to pay, obtaining substantive evidence of the foreign national's past experience, and commissioning an educational or experience evaluation of the foreign national's credentials are just a few of the tasks necessary to file an I-140 petition. These tasks take time and cost money. Given the costs associated with such preparation, it is not practical or reasonable to require the employer or alien to incur these expenses and to devote time and resources to the preparation of an I-140 petition without first knowing whether the first hurdle in the case – labor certification – has been overcome.

Other snags also make the 45-day period unrealistic. The parties that need to sign the forms are not always readily available. For example, the human resources director might be away on a business trip to a remote location or a foreign country. The foreign national might be on vacation, or, not uncommonly, still residing abroad. The attorney could be away on vacation for two to three weeks. Coordinating and obtaining signatures of these individuals takes time.

Obtaining the necessary documentation also can take more time than the 45-day period would allow. For example, the I-140 requires certain corporate documents such as licenses, charters of incorporation, organizational charts, tax returns, and other financial documents to evidence employer viability. Many corporate organizations require board approval before such documents can be released. Moreover, a company itself might have certain sign-off and related procedures to authorize the filing of an I-140 that can take several weeks.

USCIS requires that beneficiaries of I-140 petitions submit employment verification letters from former employers. While obtaining such letters prior to filing a labor certification application is a preferred procedure, in many cases, it simply is not possible, and employees can experience significant delays in securing them. For example, the former employer may have gone out of business, the employee may have left on bad terms, his or her former supervisor may no longer be with the company, the employer may be located in a foreign country making it difficult to obtain the requisite documentation, or the employment may have occurred so long ago that the employer cannot easily access its record of the individual's employment.

The proposed labor certification expiration date also would undermine the ability to concurrently file an I-140 petition and I-485 application when a visa number is available, a procedure both permitted and encouraged by USCIS. To file both the petition and adjustment application (sometimes for multiple family members of the foreign worker as well), an even greater amount of preparation time is required. Birth certificates and marriage certificates need to be obtained, reviewed, and translated. USCIS also requires a medical examination report to accompany the adjustment of status application. These examinations are expensive and expire if not filed within one year; therefore, it is not advisable or prudent to schedule a medical examination prior to the approval of a labor certification, nor is it reasonable to compel the foreign national and his family to complete a medical exam prior to knowing whether the labor certification application has been approved. Customers need more than 45 days to gather these documents and complete the multiple applications that must be filed in the adjustment process. A 45-day filing period would effectively eliminate concurrent filing in many cases, which would, in turn, create additional work and processing delays for USCIS.

### *3. USCIS electronic filing system will require additional time.*

The USCIS is modifying its own forms and electronic filing systems, which may require inputting additional data prior to filing immigration forms. The agency is contemplating a new e-filing system where both employer-petitioners and employee-beneficiaries will need to fill out extensive information prior to filing documents. AILA anticipates that all parties will take the entry of such data very seriously and work to ensure its accuracy prior to submitting it. Both employers and foreign nationals may need to seek the advice of counsel on the appropriate way to answer questions. Given that the many gray areas in immigration law and practice, the wrong answers may result in a finding of inadmissibility. These activities will take time and conceivably cut into the 45-day period. Again, the immigration process is very costly and labor-intensive and prior to the

time that a case is even certified by DOL, it would be inappropriate to require or expect that all work to prepare a Form I-140 or joint I-140/485 filing should be complete.

**D. Given That DOL Is Proposing Elimination of Substitution, Little Is Gained by a 45-Day Limit on Validity of a Labor Certification.**

As discussed elsewhere in this comment, AILA strenuously opposes the elimination of substitution. However, in the event that DOL does implement that aspect of the proposed rule, there should be no reason to impose a limited validity period on labor certifications. Labor certifications would be automatically limited to job opportunities at specific companies for specific foreign nationals. Nothing more would be gained by insisting that the application be used within a limited time frame.

**E. A One-Year Validity Period Is More Reasonable and Consistent with Existing Government Standards.**

For the reasons outlined above, placing a 45-day limit on the validity of a labor certification would unreasonably burden both employers and foreign nationals. While we believe that there should be no expiration at all for a certified application, we would suggest in the alternative that a 365-day period is more consistent with existing standards and more reasonable and practical. As previously mentioned, the government only changes its wage surveys once a year, and allows that PERM recruitment may be up to six months old. Another example is INA § 203(g), under which registration of aliens for purposes of immigrant visa issuance expires after one year, although registration can be reinstated within two years if the failure to apply is beyond the alien's control.<sup>6</sup>

A one-year validity period would permit employers and foreign nationals to gather required government documents, and leave room for the usual back and forth on completing papers for filing, while achieving government objectives of using only relatively recent certifications and eliminating the abuses that DOL perceives are taking place.

Any expiration provision for labor certification applications should contain a provision similar to the one in INA § 203(g), to allow reinstatement when expiration occurred in circumstances beyond the parties' control.

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<sup>6</sup> INA § 203(g), 8 U.S.C. § 1153(g), provides, in pertinent part:

The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa within one year following notification to the alien of availability of such visa, but the Secretary shall reinstate the registration of any such alien who establishes within two years following the date of notification of the availability of such visa that such failure to apply was due to circumstances beyond the alien's control.

## II. SUBSTITUTION

### A. The Proposal to Eliminate Labor Certification Substitutions Exceeds the Scope of Authority Granted to the DOL by Statute.

The statutory basis for labor certifications resides at Immigration and Nationality Act § 212(a)(5), which provides:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that –

- (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The proposed rule at 8 C.F.R. § 656.11(a) prohibits “substitution or change to the identity of an alien beneficiary on any application . . . whether filed under the current or any prior regulation, and on any resulting certification.” In support of this proposed rule, the DOL states that “No statutory entitlement exists to allow substitution . . . nor do DOL regulations authorize or address the practice of alien substitutions.”<sup>7</sup>

In fact, the statute and DOL regulations *do* provide entitlement to substitution, which is why the practice has been in effect for decades. The scope of authority granted to the DOL under INA § 212(a)(5) is a limited one. The Department simply certifies that there are not sufficient U.S. workers able, willing, qualified and available, and that the employment of the alien will not adversely affect wages and working conditions of similarly employed U.S. workers. And, under its own regulations, the Department provides that the labor certification application can be valid for *any* qualified worker, which would include a substituted worker.<sup>8</sup>

Prior attempts by the DOL to even limit, much less do away with, substitution met with the approbation of a federal appeals court. In *Medellin v. Bustos*,<sup>9</sup> the Certifying Officer refused to permit the substitution of an alien on a labor certification application for the sole reason that more than six months had elapsed from the date of certification to the

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<sup>7</sup> 71 Fed. Reg. at 7658.

<sup>8</sup> 20 C.F.R. § 656.30(c)(2) provides:

A labor certification involving a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the *Application for Permanent Employment Certification* form.

The regulation does *not* provide that the labor certification application is valid *only* for the specific worker named on the application, as it does for the particular job opportunity and for the area of intended employment. Thus, the regulation does in fact permit substitution.

<sup>9</sup> *Medellin v. Bustos*, 854 F.2d 795 (5<sup>th</sup> Cir. 1988).

date of the attempted substitution. At that time, the DOL's regulations provided at 20 C.F.R. § 656.30(c)(2), as they do today, that a labor certification application was valid only for the specific job opportunity and only for the area of intended employment. No mention was made about the identity of the worker, leaving the door open to substitution.

Despite the clear language of the statute and the regulation, DOL asserted that, pursuant to interpretative guidance published in its Technical Assistance Guide (TAG),<sup>10</sup> it was permitted to limit the period in which substitution may take place to six months. The TAG tried to limit the scope of a labor certification in two ways: First, it provided that the application was "limited to the specific job opportunity, *the alien for whom the certification was granted*, and the area of intended employment stated on the application."<sup>11</sup> An exception was provided if the alien declined the job. In that case, the second limitation was imposed: If the employer found an equally qualified worker, substitution would be permitted, but only if it took place within six months of certification.<sup>12</sup> Because the employer in *Medellin* sought to substitute after six months, the Certifying Officer turned it down.

The *Medellin* court disagreed with the Certifying Officer, and with the lower court that heard this case. In reaching its conclusion, the appeals court determined that their decisions were not "an appropriate interpretation of section 212(a)(14),"<sup>13</sup> for three reasons:

1. The interpretation upset the delicate interplay of administrative power established by the statute, effectively allowing the Secretary of Labor to decide the eligibility status of particular aliens, when that authority resides in the INS (now USCIS) rather than the DOL. The court indicated that, while the DOL is charged with the responsibility to determine whether sufficient U.S. workers are able, willing, qualified, and available at the time and place where the alien is to be employed, and whether employment of such aliens will adversely affect the wages and working conditions of the U.S. workers similarly employed, it is the INS, not the DOL, that must determine the fate of particular aliens. The court noted that if the DOL were to exercise the authority to decide the visa eligibility status of individual aliens, that shift of administrative power would have to result from an act of Congress, not from a mere interpretation by the DOL of a regulatory provision promulgated by the agency.<sup>14</sup>

2. The interpretation did not accord with the practices of either the INS or the DOL in this area of immigration law. The court noted that it can take several years between certification and obtaining lawful resident status, and the DOL

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<sup>10</sup> *Technical Assistance Guide No. 656 Labor Certifications*, U.S. Dep't of Labor, Employment and Training Administration, 1981.

<sup>11</sup> *Id.* at 104.

<sup>12</sup> *Id.* at 105.

<sup>13</sup> At the time of the *Medellin* decision, the statutory provision which is now INA § 212(a)(5)(A) was INA § 212(a)(14). Nothing in the provision is different today other than its recodification.

<sup>14</sup> *Medellin v. Bustos*, 854 F.2d at 797.

does not reevaluate the labor market conditions during that period. That being the case, limiting the scope of substitution made no sense.<sup>15</sup>

3. Most important, the court noted that the DOL's interpretation did not merely interpret the relevant statute and regulations, it rewrote them. "Nothing in the language of section 212(a)(14)" said the court, "suggests that the Secretary limit a labor certification to the alien for whom the certification was granted."<sup>16</sup>

*Medellin v. Bustos* remains good law today. The only procedural difference between the DOL's position in *Medellin* and the proposed rule at 20 C.F.R. § 656.11(a) is that the issue now appears in the form of a proposed regulation rather than an interpretation contained in the TAG. Then, as now, DOL may not adopt a regulation or enforce an interpretation of the governing statute that is *ultra vires* – beyond the authority granted to DOL by law.

Not only is a rule banning substitution beyond DOL's rulemaking authority, because any fair interpretation of INA § 212(a)(5)(A) just won't support it, it's also a foray into the responsibilities of the USCIS. Not all substitutions are requested while an application for labor certification languishes at the DOL. USCIS permits employers to request substitution of a new worker for the one designated on the application for labor certification by submitting appropriate papers to one of the agency's four regional Service Centers.<sup>17</sup> The DOL rule clearly cannot extend to USCIS, and since USCIS has not issued a cognate regulation that would extinguish the practice of substitution at the Service Centers, the practice has to remain in effect.

Even the DOL recognizes that its proposed rule runs up against USCIS procedures:

The Department also recognizes that banning substitution on pending or approved labor certifications could, at least to some degree, affect USCIS's current practice of allowing U.S. employers to substitute an alien through the filing of a new Form I-140 petition, supported by a labor certification application in the name of the original beneficiary.<sup>18</sup>

Though the Department "recognizes" the issue, it has no answer. Nor can it fashion an answer. What the USCIS does on the question of substitution is up to that agency, and is completely beyond the power of the DOL to decide.

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<sup>15</sup> *Id.* at 797-98.

<sup>16</sup> *Id.* at 798.

<sup>17</sup> See, e.g., Memorandum to All Regional Directors, All District Directors (including foreign), Director, Office of Administrative Appeal, All Service Center Directors, All Officers in Charge, Deputy Director, IOA, Glynco, GA, Deputy Director, IOA, Artesia, NM, *Substitution of Labor Certification Beneficiaries* (Mar. 7, 1996), available at <http://www.aila.org> (document no. 96030790).

<sup>18</sup> 71 Fed. Reg. at 7659.

## **B. The Fundamental Premises Underlying the Proposed Elimination of Substitution Are Incorrect.**

The DOL's premise that substitutions are no longer necessary to accommodate long wait times is incorrect.<sup>19</sup> The DOL explains that the PERM regulation has reduced the processing time for employers who need to file a new application.<sup>20</sup> However, it is the DOL's continued processing delays of the *original* application under the prior regulation that created the need for substitution in the first place.

The Department begs the question when it states, “[i]f substitution is no longer necessary to accommodate long wait times, the Department believes there is no longer a compelling reason to allow the practice.”<sup>21</sup> In fact, there are major flaws in this reasoning due to (1) the massive backlog of more than a quarter of a million unadjudicated applications now pending at BECs;<sup>22</sup> (2) the retrogression of priority date cutoffs in the second and third preference categories for employment based immigrant visas; and (3) continuing issues creating delays in adjudication of PERM applications.

- 1. By the DOL's own optimistic estimate, the current backlog will not be processed until September 30, 2007.*

Long wait times continue to exist for the more than 250,000 applications pending at BECs. In December 2004, the DOL publicly acknowledged that “it takes approximately 5 years to obtain a labor certification and an approved I-140 petition,”<sup>23</sup> and used that fact as justification for requiring employers to retain supporting documents for a PERM application for a minimum of five years.<sup>24</sup> The DOL's target for clearing the current backlog is September 30, 2007.<sup>25</sup> Thus, even if the BECs meet what appears to be an unrealistic goal, a key premise used by the DOL to justify elimination of substitutions is quite obviously false. With the massive backlog of pre-PERM applications still languishing at BECs, it is at best premature for the DOL to declare that substitutions are no longer needed to accommodate long wait times.

- 2. Priority date retrogression has resulted in queues of at least five years for the major employment based immigrant visa categories that require labor certification.*

The governing statute at INA § 212(a)(5) requires the DOL to certify that “there are not sufficient workers who are able, willing, qualified . . . and available *at the time of*

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<sup>19</sup> *Id.* (“If substitution is no longer necessary to accommodate long wait times, the Department believes there is no longer a compelling reason to allow the practice.”)

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Comments of John Beverly, Administrator, Office of National Programs and Interim Chief, DFLLC, DOL, on the panel “DOL-Getting a Certified Job Offer,” AILA Spring Conference, March 24, 2006. Mr. Beverly advised that as of the third week of March 2006, there were more than 250,000 cases at the BECs.

<sup>23</sup> 69 Fed. Reg. at 77,340.

<sup>24</sup> *Id.*

<sup>25</sup> *See, e.g.*, [http://www.plc.doleta.gov/eta\\_start.cfm](http://www.plc.doleta.gov/eta_start.cfm) (“Backlog will be eliminated 9/30/2007.”).

*application for a visa and admission to the United States.”* This means that the certification must remain valid at the conclusion of the green card application process when the applicant is a lawful permanent resident. This cannot occur until the beneficiary’s priority date (here, the date on which the labor certification application was filed) is on or before the cut-off date assigned by the Department of State for the beneficiary’s visa category.

For example, in March 2006, the priority date cut-off for the worldwide employment-based third preference category was May 1, 2001.<sup>26</sup> This means that beneficiaries whose labor certification applications were filed after May 1, 2001 are not eligible to apply for an immigrant visa;<sup>27</sup> this would include many of the more than 250,000 applications that are still pending at the DOL’s BECs. It also means that the beneficiary of a PERM application filed today would have to wait until the State Department moves the cut-off date of May 1, 2001 forward to today’s date. At the current rate of progression,<sup>28</sup> it will be approximately ten years before that beneficiary will be eligible to file either an application for adjustment of status or a consular immigrant visa application. Similar examples of delays due to priority date retrogression exist in the second preference category for nationals of India and China.

Thus, long wait times will persist, and the DOL certification must remain valid for a period of several years even if the PERM program fulfills its promise of rapid adjudication of applications.

3. *The PERM program has thus far failed to live up to the DOL’s optimistic estimates of adjudication times.*

Initially, DOL forecasted that PERM applications would be processed within 45 to 60 days of filing.<sup>29</sup> Recently, a year into the program, AILA provided the DOL with more than 750 current examples of PERM applications that have not been adjudicated within 90 days, with numerous examples of applications that have been pending for more than six months. In cases involving the erroneous denial of an application, the DOL has advised attorneys to file a motion to reconsider, but has thus far not acted on more than a tiny handful of motions to reconsider, leaving these applications to languish without a defined process for resolving the errors and moving them forward.<sup>30</sup> In addition, the

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<sup>26</sup> U.S. State Department, *Visa Bulletin*, March 2006 available at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_2847.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_2847.html).

<sup>27</sup> *Id.* (“This bulletin summarizes the availability of immigrant numbers during March . . . Only applicants who have a priority date earlier than the cut-off date may be allotted a number.”)

<sup>28</sup> During the four-month period from December 2005 to April 2006, the cut-off date for the employment-based third preference category advanced from March 1, 2001 to May 1, 2001, an advance of only two months; thus the cut-off date has advanced at roughly half of the advance of real time. At this rate, a PERM application approved today would not be useful for ten years. *See*, U.S. Department of State, *Visa Bulletin*, *supra* note 26.

<sup>29</sup> 69 Fed. Reg. at 77,328.

<sup>30</sup> American Immigration Lawyers Association, “Summary of AILA/DOL-ETA Liaison Meeting November 2005,” at 7, available at <http://aila.org/infonet> (document no. 05120260) (“DOL states that they are finalizing the appeal procedures. . . No decisions have been made on any of the appeals or motions to

DOL reports that “a new application cannot be filed if there is an appeal pending.”<sup>31</sup> The numerous examples of extended processing times required to process a PERM application undermine the DOL’s claim that substitutions are no longer necessary to accommodate long wait times.

### **C. Substitution Serves Valid Public Policy Objectives; Elimination of Substitution Would Harm Legitimate Employers and Employee Beneficiaries.**

The DOL ignores the necessary and practical function served by the vast majority of labor certification substitutions, which are requested by legitimate employers for legitimate purposes. Employers who file labor certifications cross the full spectrum of U.S. business and industries, from sole proprietorships to Fortune 500 businesses and from startups to long established companies. All sectors of industry are represented, from healthcare to high tech to hospitality. Employers who file labor certifications, including the nation’s largest and most respected companies, have every incentive to avoid fraud and comply with immigration laws and regulations.

The harm to an employer’s reputation caused by the risk of prosecution and the threat of other sanctions, as well as the loss of benefit to the alien beneficiary, are all strong incentives for most employers to take all reasonable steps to ensure that labor certifications are filed only when necessary and only in compliance with all of the requirements. By the time an employer files an application for labor certification, the employer has expended considerable staff time in preparing the application, ensuring that the recruitment is conducted in accord with the regulations, and in screening and evaluating applicants. This is in addition to any expenses for recruitment efforts and/or attorneys’ fees, if the employer is paying those expenses. All this represents a heavy investment into proving that the job opportunity should be certified to sponsor an alien employee.

Thus, substitution of beneficiaries of labor certifications is good public policy because it preserves business resources and allows movement of scarce workers, benefiting the economy by enhancing the competitiveness of U.S. businesses. The overwhelming majority of users of the labor certification process resort to substitution only when necessary and only for legitimate reasons. Most employers prefer to hire U.S. workers when they are available, if for no other reason than to avoid the expense, complexity, delay, and uncertainty of the green card process. The vast majority of employers who file labor certification applications do so with full awareness and respect for the attestations that have always been a part of the procedure: that the employer has a job opportunity open to any qualified U.S. worker; that the employer has conducted a test of the labor market and failed to find sufficient able, willing and qualified U.S. workers; and that the employer will pay a salary that meets or exceeds the prevailing wage. The required affirmations must be signed under penalty of perjury, and most employers do not sign such statements lightly. Fraud and abuse are the rare exceptions.

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*reconsider as of this date. . . They are taking it slowly and working with the solicitor’s office.”*) (Emphasis added.)

<sup>31</sup> *Id.* at 8.

Substitution became necessary, in part, because the DOL has been unable, throughout the entire history of the labor certification program, to process applications in a timely manner. Long waits for an immigrant visa number to become available have been a source of discontent for employers, hampering them from freely, and without consequences, changing the job duties of sponsored employees. After all, four or five years or more is a long time for an employee to remain in the same position, and sometimes beneficiaries are either promoted into a different position, or may join another employer while their application languishes at the DOL, leaving the position that was the subject of the application open to a new employee.

Forcing American businesses to then start the process over for the same position due to untimely processing delays is completely counterproductive. Allowing substitution is more than a mere accommodation by DOL; it is a necessity given the lengthy processing delays that are common today. Substitution allows an employer who has made a substantial investment in recruiting and complying with DOL requirements to make use of that investment on behalf of a new beneficiary who meets the requirements of the position and who is in all relevant respects indistinguishable from the original beneficiary.

Substitution is good public policy because it preserves the time, effort, and expense that went into the labor certification application process, and allows for freer movement of scarce and highly skilled workers among and within employers. It also provides a vehicle to accommodate business needs and individual career growth curves, which change more rapidly than the DOL's arcane and poorly managed processes can handle. Substitution thus improves the competitiveness of U.S. employers against foreign competition and benefits the overall economy. For all of the reasons stated, it is clear that the strong public policy in favor of substitutions outweighs the DOL's unsubstantiated reasons for ending the beneficial process.

#### **D. Elimination of Substitution Is Not the Best Solution**

Any process that confers a benefit is vulnerable to fraud, and examples of individuals who would abuse a system through fraud are commonplace throughout our society (e.g., credit card fraud, Medicare fraud, tax fraud, etc.). Despite the obvious prevalence of these common examples of fraud, our response to such wrongdoing is not to eliminate the program or benefit, but rather to improve efforts to detect and deter fraud, and prosecute wrongdoers. The DOL states as justification nothing more than "there has been fraud, therefore we must eliminate substitutions." The proper questions are whether the benefits of the process to legitimate employers who use substitutions for proper and beneficial purposes outweigh the risk of fraud by a few wrongdoers, and are there better ways to deter fraud while working to meet the statutory obligation to administer the benefit?

In fact, as discussed below, the DOL has implemented improved fraud prevention and detection systems in both its PERM process and its procedures for processing pending RIR labor certification applications at BECs. None of the fraud cases cited by the DOL in the supplementary information to the proposed regulations occurred post-PERM or

post-establishment of the employer validity checks now being conducted by the BECs, so there is no evidence that additional anti-fraud mechanisms are needed.

### III. SAFEGUARDS

#### A. Perm Has Built-In Safeguards to Protect Itself from Abuse.

The PERM process has introduced significant protections which should significantly reduce or eliminate the misuse of the labor certification process. In light of the detection and prevention mechanisms found at every level of the system, the regulations proposed by the DOL to eliminate substitution, impose a 45-day validity date for certified applications, and punish and debar those suspected of “possible” fraud or misrepresentation are not just drastic, they are simply unnecessary. As the Department itself said when it introduced PERM: “We believe commenters exaggerate the current [pre-PERM] system’s ability to identify fraud *and underestimate the new system’s ability to deter it.*”<sup>32</sup>

##### 1. Protections Prior to the Submission of the Form ETA-9089.

At least five protective mechanisms have been incorporated into the PERM process even before an application is electronically submitted:

##### i. The initial establishment of the PERM account.

The PERM system involves complex procedures that an employer must follow to establish an account. Additional procedures are in place to enable use by attorneys and/or agents. These processes allow *only the employer* to set up its presence in PERM. It also allows *only the employer* to designate an attorney or agent for participation in the process. Multiple PERM labor certification filings by the same employer requires the employer’s action in designating an attorney *each time* it brings an attorney into the process, and for *each* corporate entity.

We note that in the most infamous of the fraudulent filing cases referred to by the DOL in the supplementary information to the proposed regulation, the employer(s) was not aware that labor certification applications were being filed on its behalf. But PERM changes that. Now, registration into the system won’t be permitted unless it’s undertaken *by the employer*. Moreover, the employer is notified each time an application is filed. Thus, the PERM system prevents large-scale fraud from the outset.

##### ii. Verification of employer existence.

The employer must demonstrate its existence and viability by listing its federal employer identification number (FEIN). If the DOL has any questions about an employer’s

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<sup>32</sup> 69 Fed. Reg. at 77,329.

existence, it will not register the employer unless and until those questions are satisfactorily resolved.

iii. Establishment of PINs.

Through the establishment and use of personal identification numbers (PINs), the DOL has eliminated the ability of anyone other than an authorized user to participate in the labor certification process.

iv. Only the Employer May Make Changes to Accounts and Sub-Accounts.

Only the employer may make changes to accounts and sub-accounts, and the system will close an account where someone other than the employer attempts to make a change in the account, even if the employer has approved the change. Therefore, the employer is always aware of what is happening with its account.

v. ISP Protections.

Although the public is not privy to all the protections that are built into the PERM system, it seems clear that the system recognizes unauthorized users. Attorneys or agents who attempt even innocuous changes to an account will find they're unable to do so.

*2. The DOL's Protections at the Time the ETA-9089 is Filed.*

i. Employer emails/phone calls.

Every employer who files or on whose behalf a PERM labor certification is filed receives an email requesting specific corroboration of the filing. If the email is not responded to, a phone call is made verifying the employer's intention to file the labor certification, and up to three more calls are made within stated time frames if there is no response.<sup>33</sup> This information is verified by responses to four specific questions. If the email/phone mail protocols are not responded to satisfactorily, the application will be denied.

ii. Verification of Employer Existence.

Through searches of various databases, an employer's existence is verified by DOL. If it cannot be so verified, the employer is affirmatively required to demonstrate its valid existence. An employer's business is verified prior to submission by the insertion of its FEIN. It is verified after submission by this and other independent evidence.

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<sup>33</sup> Comments of Melanie Shay, Team Leader, PERM, Foreign Labor Certification, Employment and Training Administration, DOL, on the panel "DOL-Getting a Certified Job Offer," AILA Spring Conference, March 24, 2006,

iii. Review by Staff.

It is our understanding that prior to the issuance of any approval or audit, individual staff review is given to each application. If there are any questionable issues that the computers have not identified, human intervention will do so.

iv. Audits.

If, after all the preceding procedures, there are any remaining questions about an application, the DOL has broad authorization to conduct an audit. In fact, it may conduct an audit for up to five years after an application is approved.

*3. The Entire Labor Certification Process Is Now Centralized.*

Under the regulations in effect prior to March 28, 2005, the DOL shared responsibility for the labor certification process with the State Workforce Agencies. Under that bifurcated system, it was apparently not difficult for a party to file multiple fraudulent labor certifications without detection. However, under PERM, the Department has total, centralized control of the labor certification process, and while we're not privy to all the capabilities of the system, we believe it is able to identify companies making an unusually large number of submissions. We would also think that the system has the ability to monitor suspicious submissions, and to cross check aliens' names to determine whether the same person's name is being inappropriately used in numerous applications. If the system does not have these capabilities, it most certainly should.

After the PERM application has been approved and filed with USCIS in conjunction with an I-140 petition, that agency takes over the next phase of the permanent residence case, adding yet another layer of fraud oversight. In the unlikely event that a fraudulent application has slipped through the intense scrutiny it receives at the DOL, USCIS now gets a second opportunity to examine the application and, if warranted, investigate its bona fides.

**B. Other Processes also Include Protections against Abuse.**

Cases pending at the BECs also go through a data entry process, permitting the DOL to identify red flags such as numerous applications filed for the same beneficiary. The BECs have the ability, which they exercise as needed, to contact employers or their representatives to obtain more information or answer questions about pending applications. BECs also have the authority to deny RIR and order supervised recruitment. They may also issue Notices of Findings if the requirements of the regulations have not been satisfied.

The I-140 petition process administered by USCIS provides additional safeguards to detect and deter fraud. USCIS has the ability to request additional evidence, deny or revoke petitions, or refer a petition for investigation if there is reason to suspect fraud. For all of these reasons, the existing procedures are sufficient to identify and stop fraud.

#### IV. THE PROPOSED RULE WOULD HAVE AN UNFAIR IMPACT ON PENDING AND PAST APPLICATIONS.

As we've already explained, we do not believe that Congressional intent as expressed in INA § 212(a)(5)(A), permits the DOL to prohibit or limit substitution in any way. However, we are particularly concerned about the proposed rule's retroactive impact on all cases filed before the effective date of a new rule, either under the PERM program or under the rules in effect prior to March 28, 2005.

Employers and employees across the country have made critical hiring and transfer decisions in reliance on the availability of substitution. Take, for example, a software engineer employed for five years in H-1B status by Company A, which never filed a labor certification case on his behalf. Company B, which did file an RIR application for one of its workers four years ago, which was recently certified, finds itself in need of a replacement engineer when the employee it sponsored quit the company. Relying on its ability to retain the Company A's engineer long term by substituting him on the labor certification application,<sup>34</sup> Company B can make him an offer of employment and fill its vacancy expeditiously.

Doesn't it make eminent sense for Company B to be able to hire the software engineer from Company A, and substitute the worker on its pending labor certification application? After waiting four years, and having expended a great deal of time, money, and other resources on the process, shouldn't Company B have something to show for its efforts other than a useless application, rendered dead by the DOL?

Further, by applying the rule change to all but substitutions approved by the effective date of the regulation, DOL is setting itself up for further challenges and pressures. Already, it has projected a completion date for the BECs that all informed observers agree is unrealistic, and has promised a turnaround time on PERM that it has been unable to meet in far too many cases. Is DOL saying that it will endeavor to process requested substitutions prior to the rule's effective date? Which program's resources will be diverted to do this: PERM or the BECs? Or, will these requests be allowed, like so many labor certification applications have before them, to lie untouched until they are negated by the effective date of the rule? If so, will DOL not have essentially made the rule effective immediately, without notice and opportunity for comment, by its own inaction?

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<sup>34</sup> H-1B workers substituted into a labor certification application certified in the name of another worker may be eligible for extensions of H-1B status beyond the normal six-year limitation. *See, e.g.,* Memorandum from William R. Yates, Acting Associate Director for Operations, to all BCIS, BICE and BCBP Offices, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273): Adjudicator's Field Manual Update AD 03-0,9*, File No. HQBCIS 70/6.2.8-P (Apr. 24, 2003) at 4, available at <http://www.aila.org/infonet> (document no. 03050145); Memorandum from William R. Yates, Associate Director for Operations, USCIS, *Interim Guidance for Processing Form I-140 Employment-Based Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*, HQPRD 70/6.2.8-P (May 12, 2005) at 9, available at <http://www.aila.org/infonet> (document no.05051810) and at <http://uscis.gov/graphics/lawsregs/handbok/AC21interm051205.pdf>.

The variations on this theme are innumerable, but the bottom line is the same. Many employers have made hiring decisions, and many employees have changed their employment situation, in reliance on the availability of substitution. To change the rules mid-stream is unfair, and most likely unlawful.<sup>35</sup> Any change in the rules governing substitution should only be prospective in effect, and not apply to any labor certification application filed before the new rule's effective date.

**V. THE DOL'S PROPOSED RULES ARE UNCLEAR, AND IN ANY EVENT,  
THE DEPARTMENT MAY NOT EXTEND ITS REACH INTO THE  
JURISDICTION OF USCIS.**

Both in the supplementary information to the proposed rule, and in the proposed rule itself, the DOL is trying to insinuate itself into territory beyond its reach. The Department states that its proposed amendment at 20 C.F.R. § 656.11(a) would “prohibit the substitution of alien beneficiaries on pending applications for permanent labor certification *and on approved permanent labor certifications not yet filed with USCIS.*”<sup>36</sup> The proposed regulation itself provides that, not only would substitution or change to the identity of an alien beneficiary be prohibited on “any application” filed with the Department under the current or any prior regulation, but that the bar would also extend to “*any resulting certification.*”<sup>37</sup> Because requests for substitution on *certified* applications are filed solely with the USCIS, it's simply not within the DOL's scope of authority to make any rules about post-certification substitutions.

Moreover, what the DOL is proposing at 20 C.F.R. § 656.11 seems to contradict its new proposed regulation at 20 C.F.R. § 656.30(c)(2). Section 656.11 prohibits substitutions even on approved cases not yet filed with USCIS. But in § 656.30(c)(2), the Department states that substitution will be prohibited “unless a substitution was approved prior to” the rule's effective date. That certainly seems to mean that a case in which a worker was substituted can, indeed, be filed with the USCIS, directly contradicting what the DOL seems to be saying at 656.11.

When read together, these rules make no sense. Clearly, § 656.11 must be in error because the DOL has no right or authority to decide the cases USCIS will adjudicate.

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<sup>35</sup> Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) (rule is a statement that has legal consequences only for future, and agency lacks power to promulgate retroactive rules absent statutory grant to do so).

<sup>36</sup> 71 Fed. Reg. at 7658 (emphasis added).

<sup>37</sup> 20 C.F.R. § 656.11(a) (proposed) (emphasis added).

## VI. ATTORNEY'S FEES

### *Introduction*

We want to be completely clear right from the start: AILA opposes any attempt by the DOL to regulate the payment of attorney's fees in the labor certification process.<sup>38</sup> Payment of those fees, whether by the employer, the employee, or a third party, is simply not a question that the DOL has any right to inquire into. The regulation of the practice of law is the province of the States, not the DOL, and there is no precedent that we are aware of that permits an agency to intrude into the attorney-client relationship by mere regulation.

This proposed regulation bears all the markings of a rule hastily put together, not well thought out, and not even consistent within its own terms. For example, in the supplementary information, the DOL would ban the payment *by the alien* of the "employer's" attorney's fees, leaving open the possibility that the alien could pay his *own* attorney's fees.<sup>39</sup> On the other hand, the DOL also asserts that "employers, not aliens" file labor certification applications, and therefore, these costs must not be paid or reimbursed *by the alien*.<sup>40</sup> Even though the DOL admits that "legitimate" employers may seek reimbursement from aliens for attorney's fees,<sup>41</sup> it still proposes "a complete prohibition"<sup>42</sup> on employers being reimbursed for its legal fees *by the alien*. The actual proposed rule goes even further than the supplementary information would suggest, seeming to ban even third party payments of attorney's fees. In fact, proposed 20 C.F.R. § 656.12(b) is so badly drafted that it would even bar payment of the attorney's fee by *anyone, including the employer*: "Payment...of the employer's attorney's fees...is prohibited."

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<sup>38</sup> It's not entirely clear to us what this rule seeks to proscribe in the attorney's fees arena because the proposed rule doesn't present a clear and unambiguous statement of what the DOL is trying to achieve, as required by the Administrative Procedure Act, which at 5 U.S.C. § 553(b) provides in pertinent part:

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

This proposed rule's description of the subjects and issues involved is murky, at best. Although we understand that the Department wants to regulate who may pay an attorney's fees in the labor certification process, we are not certain whether DOL is insisting that in all cases, *only* the employer may pay those fees. Assuming that that's what the Department is attempting to do, AILA strenuously opposes any such rulemaking.

<sup>39</sup> 71 Fed. Reg. at 7660.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

The DOL has included its proscriptions on attorney's fees in the same section dealing with all sorts of unseemly conduct, including the sale, barter, or purchase of approved labor certification applications.<sup>43</sup> In the same paragraph in which the DOL prohibits "kickbacks," "concessions," "payroll deductions" and misrepresentations on the labor certification application, it also seeks to regulate payment of attorney's fees, as though kickbacks, fraud, and payments to a lawyer for legal services rendered are all the same.

Because the DOL has not clearly set forth its reasoning for regulating attorney's fees, or even specifically set forth all the conduct that it would deem to be a violation of this rule,<sup>44</sup> we can only guess what the Department is getting at. It would *seem* that the DOL premises its rule on the following reasoning: It deems the attorney's fees to be the employer's business expense. Hence, it forbids the employer from passing that expense along to another party. And that would include by "seeking" or "receiving" payment *of any kind, from any source in connection* with the labor certification application. Apparently, though not certainly, the DOL is also prohibiting third party payments directly to the attorney, even though that payment is *not* a reimbursement of the employer's expenses.

For the reasons set forth below, we believe that the DOL would exceed its statutory authority in proposed 20 C.F.R. § 656.12(b) as applied to attorney's fees. We also believe that the rule interferes with the attorney-client relationship, and that it tramples on the statutory rights of certain parties to have their attorney's fees paid by third parties. Because a violation of the proposed regulation would carry with it the possibility of criminal prosecution, we also believe that the regulation, so ambiguously drafted that it's impossible to know what it proscribes, would be void for vagueness.<sup>45</sup>

#### **A. "Congress does not...hide elephants in mouseholes."<sup>46</sup>**

For more than forty years the DOL has been administering the labor certification process. Never once in that time has it ever suggested that the statute under which it operates permits it to regulate the attorney-client relationship or to dictate who should be

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<sup>43</sup> *Id.*

<sup>44</sup> Because this regulation promises a full range of penalties, from denial of the labor certification application all the way up to imprisonment, it must be specific about which conduct it prohibits. See, e.g., *Ruiz v. Comm'r of the Dep't of Transportation of the City of New York*, 687 F. Supp. 888 (S.D.N.Y.), *aff'd*, 858 F.2d 898 (2d Cir. 1988).

<sup>45</sup> For example, the attorney, employer, and employee sign the labor certification application, and certify that to the best of their knowledge, the information contained in the application is true and correct, under penalty of fine or imprisonment. Those are stiff penalties to face, and yet the proposed rule offers no guidance on how to respond to question at part I, (e) 23: "Has the employer received payment of any kind for the submission of this application?" If the employee or a third party paid the attorney's fees, should the answer to this question be "yes," or "no"? For a general discussion of the void for vagueness doctrine, see Anthony Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

<sup>46</sup> *American Bar Ass'n. v. Federal Trade Comm'n*, 430 F.3d 457, 467 (D.C. Cir. 2005), (*quoting* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

responsible for paying the attorney’s fees.<sup>47</sup> Not even the DOL can point to any provision of law that justifies this attempted turf expansion. Snubbing its nose at the body of law that has arisen under the Administrative Procedure Act, the DOL does not even bother to explain where Congress either explicitly or implicitly intended to delegate to the DOL the power to regulate attorney’s fees. Congress, as the Supreme Court observed, does not hide elephants in mouseholes. Had Congress intended to give the DOL the authority to regulate the attorney-client relationship—a fiduciary relationship held almost sacred by our system of justice—and had Congress intended to set limits on the payment of attorney’s fees, it would have done so explicitly and unambiguously as it has in other contexts.<sup>48</sup>

## **B. The Proposed Rule on Attorney’s Fees Exceeds the DOL’s Statutory Authority.**

The regulation of the practice of law is the province of the States.<sup>49</sup> There is not a shred of evidence in the statutory scheme governing labor certification applications<sup>50</sup> that Congress ever intended to intrude on a State’s right to regulate its licensed attorneys, or to regulate who may pay the attorney’s fees in the labor certification context. The DOL merely tips its hat at the statute, stating, for example, that in *some* instances, the alien’s payment of attorney’s fees “may” indicate that there is not a “bona fide” position and wage available to U.S. workers. But the statutory provision at INA § 212(a)(5)(A) renders an alien inadmissible unless, among other factors, his employment will not adversely affect the wages of U.S. workers similarly employed. The DOL doesn’t even attempt to explain how

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<sup>47</sup> In the somewhat related area of “costs,” a commenter had suggested a rule prohibiting employers from requiring aliens to pay the costs of the labor certification process. The DOL’s response was: “While the suggestion to have the employer provide documentation of financial involvement may be of some merit, it was not included in the NPRM, *and is a major departure from past practice.*” 69 Fed. Reg. at, 77,336 (emphasis added).

<sup>48</sup> See, e.g., former 38 U.S.C. § 3404(c), which set a \$10 cap on the amount fees a claimant could pay to an attorney in connection with certain Veterans Administration claims. See also 38 U.S.C. § 5904(c)(1), which prohibits payment of attorney’s fees *before* the date the Board of Veterans’ Appeals makes a final decision on a case.

<sup>49</sup> See, e.g., Am. Bar Ass’n, Report of the Commission on Multijurisdictional Practice 13 (2002), [http://www.abanet.org/cpr/mjp/final\\_mjp\\_rpt\\_6-5.pdf](http://www.abanet.org/cpr/mjp/final_mjp_rpt_6-5.pdf) (“[t]he Commission believes that the principle of the regulation of the practice of law by the state judicial branch of government . . . should be preserved, and therefore recommends that the ABA affirm its support for this fundamental principle.”).

<sup>50</sup> The entire labor certification process grew out of a single statutory provision, INA § 212(a)(5)(A), 8 U.S.C. § 1182(a)(5)(A), which provides, in pertinent part:

Labor certification and qualifications for certain immigrants

(A) Labor certification

(i) In general

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that--

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

the payment of attorney's fees by anyone other than the employer has an adverse impact on the wages of U.S. workers.

Nor may the DOL attempt to insert itself between an attorney and a client by regulating attorney's fees based on some implied vacuum in the statutory scheme, or on some flimsy claim that the statute is silent or ambiguous with respect to attorney's fees, thus permitting this regulation. Simply because INA § 212(a)(5) does not expressly bar the DOL's interpretation of what the statute covers doesn't mean that the agency's construction is legal or entitled to deference.<sup>51</sup> Nowhere does INA § 212(a)(5) contain any language or suggestion that the DOL can regulate attorney's fees. Nor does the legislative history of this statutory provision even hint that a law designed to define who is and who is not inadmissible to the United States has anything whatsoever to do with attorney's fees.

In addition to everything else that's wrong with the DOL's logic, the Department never explains where it finds the authority to dictate who pays attorney's fees in those areas where a test of the U.S. market is not required. For example, Schedule A comprises those occupations for which the DOL has predetermined that there are not sufficient U.S. workers, and whose working conditions and wages *would not be affected* by the alien's employment.<sup>52</sup> Yet, even here, the Department would impose its rules about attorney's fees.

### **C. Both the Employee and the Employer Have Strong and Compelling Interests in the Labor Certification Application.**

The DOL asserts that since employers, not aliens, file labor certification applications, the process "belongs" to the employer, and all expenses related to it must be borne solely by the employer. What the Department chooses to overlook is that, as we explain below, both the employer and the employee have equally strong and compelling interests in the labor certification application, interests that have been recognized by Congress and by federal courts.

#### *1. Under the Structure of INA § 212(a)(5)(A), the Employee Is the Party in Interest*

The statutory provision from which the DOL derives its authority over the labor certification process is INA § 212(a)(5)(A), a section that governs the admissibility or inadmissibility of the *alien*. Thus, under the structure of the statute, it is the employee, not the employer, who is the immediate party in interest under the law. The worker has a thorough and compelling interest in the advice and assistance of counsel in this process.

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<sup>51</sup> See *e.g.*, *American Bar Ass'n. v. Federal Trade Comm'n*, 430 F.3d 457, 469 (D.C.Cir. 2005) (deference to agency's interpretation not warranted when statute does not expressly negate existence of claimed administrative power); *Railway Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (only if Congress left gap for agency to fill pursuant to express or implied delegation of authority is agency's interpretation given deference); *Beverly Enterprises v. Herman*, 119 F. Supp.2d 1 (D.D.C. 2000) (simply because statute does not expressly bar DOL's construction does not entitle it to deference).

<sup>52</sup> 20 C.F.R. § 656.5.

Whether an employer will “sponsor” a foreign national for permanent residence is a business decision that may involve negotiation and express or implied contract. The decision to proceed is based on the employer’s business judgment and the employee’s wish to remain in the United States permanently. The employer conducts a test of the labor market in furtherance of its agreement to sponsor the foreign national, and both parties understand that if there is a qualified U.S. worker for the position, the labor certification may not move forward. Both are involved in and have an interest in the application from the beginning. These interested parties, not the DOL, should determine who pays for what.

Moreover, the labor certification application is signed by *both* the employer and the employee, and both expose themselves to sanctions under the law for any misrepresentations that are made on the application. By imposing this rule, the DOL would, in essence, strip the foreign worker of the right to seek independent counsel to protect his interests, while at the same time exposing him to punishment in the form of revocation of an approved application, prosecution under federal fraud and conspiracy laws, and revocation of his permanent resident status if the DOL later conducts an audit and finds irregularities.

While it is true that the employer is in the logical position to conduct the labor market test and submit the application, it doesn’t follow that the worker has no rights and interests in the application. And it certainly doesn’t follow that only the employer bears the responsibility for paying the attorney’s fees. That makes no more sense than insisting that it’s the employer’s responsibility to foot the bill for the total costs of providing healthcare, professional training, and education opportunities for its workers.

## *2. A Federal Court Endorses the Position That a Foreign Worker Has Rights and Interests in the Labor Certification Process.*

A recent federal court case is instructive.<sup>53</sup> An employer agreed to sponsor an employee for permanent residence through the labor certification process, and hired an attorney for that purpose. The case stalled right from the start, when the State Workforce Agency found that the prevailing wage for the position was almost double the alien’s salary. Because the employer would not pay the worker nearly 100 percent more than her current salary, it did not proceed with the case. The worker sued the employer, alleging, among other things, breach of contract, breach of fiduciary duty, and promissory estoppel. When the employer moved for summary judgment, the court ruled against it, finding that the worker had adequately stated claims for:

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<sup>53</sup> *DerKevorkian v. Lionbridge Technologies*, No. 04-cv-01160-LTB-CBS, 2006 U.S. Dist. LEXIS 4191 (D. Colo. Jan. 26, 2006) (employee stated claim for breach of contract and promissory estoppel when employer did not go forward on labor certification application).

- Breach of contract, since the employer failed to assist and fully support the worker in pursuing the labor certification application, as it said it would;
- Promissory estoppel, since the worker relied to her detriment on the employer's promise to provide full sponsorship for the permanent resident case; and
- Breach of fiduciary duty, since the employer had promised to pursue the labor certification application and had taken full control of the process. Yet, both the employer and its attorney allegedly withheld information from the employee and failed to properly communicate with her during the process.

This federal court would certainly not agree with the DOL's claim that the labor certification application is only the employer's.<sup>54</sup> The court found that an employee has legal rights in the labor certification process, even when the case is not yet filed with the DOL, and that an employee has a cognizable interest in having the case proceed. In fact, this case can stand for the proposition that an employer should limit its exposure to suit by insisting that an employee take full responsibility for hiring and paying her own attorney to handle a labor certification case.

### *3. Congress Has Granted Foreign Workers Certain Rights and Interests in the Labor Certification Application.*

That the worker, and not just the employer, has rights and interests in the labor certification application is confirmed by Congress, which has enacted legislation specifically recognizing and protecting those rights.

#### *(a) Extensions of H-1B status beyond the six-year limitation*

In recognition of lengthy processing times at both the DOL and the USCIS, as well as the possibility of long waits for an immigrant visa number to become available, Congress enacted the American Competitiveness in the Twenty-First Century Act of 2000 (AC21),<sup>55</sup> which, as amended, provides at § 106 that, as long as at least 365 days have passed since the filing of a labor certification application for a foreign worker in H-1B status, that fact alone may make him eligible for additional time in the United States while awaiting the final approval of his case.<sup>56</sup>

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<sup>54</sup> The DOL both implicitly and explicitly claims that the labor certification application is the employer's. "The Department, however, believes that any such reimbursement...to prepare *an employer's application...*" 71 Fed. Reg. at 7660 (emphasis added).

<sup>55</sup> Pub. L. No. 106-313, 114 Stat. 1251.

<sup>56</sup> The law, as amended by the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-272, 116 Stat. 1758, provides:

#### EXTENSION OF H-1B STATUS FOR ALIENS WITH LENGTHY ADJUDICATIONS.

(a) EXEMPTION FROM LIMITATION.—The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant

Under the express terms of § 106 of AC21, a worker who is the beneficiary of a labor certification application filed for him before he reaches the end of year five in H-1B status may remain in the United States, and work here, for as long as it takes for his permanent residence case to be approved, clearly a great benefit to that worker. That the worker has a vested interest in the labor certification application is underscored by the USCIS, which in interpretive policy guidance has confirmed that the H-1B worker's status may be extended beyond year six *even if* the employer seeking the extension is *not the employer that filed the labor certification application for him*.<sup>57</sup> In other words, the USCIS has given an *alien-based* reading to this provision, recognizing the *worker's* rights and interests in the labor certification application.

*(b) Adjustment of Status Portability*

At the same time that Congress enacted legislation that gave continued employment rights to H-1B workers, it also enacted two provisions which, in their way, revolutionized the entire labor certification process, permitting a worker to gain lawful residence status based on a job offer *other than the one* forming the basis of the labor certification application. In § 106(c) of AC21,<sup>58</sup> Congress explicitly expressed its wish to free foreign

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status under section 101(a)(15)(H)(i)(b) of such Act (8 U.S.C.1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since the filing of any of the following:

(1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. 1153(b)).

(2) A petition described in section 204(b) of such Act (3 U. S.C. 1154(b)) to accord the alien a status under section 203(b) of such Act.

(b) EXTENSION OF H-1B WORKER STATUS.—The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—

(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien

lawfully admitted for permanent residence.

<sup>57</sup> Memorandum from William R. Yates, Associate Director for Operations, USCIS, *Interim Guidance for Processing Form I-140 Employment-Based Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*, HQPRD 70/6.2.8-P (May 12, 2005) [hereinafter Yates May 2005 Memorandum] at 10, available at <http://www.aila.org/infonet> (document no. 05051810, and at <http://uscis.gov/graphics/lawsregs/handbok/AC21interm051205.pdf>).

<sup>58</sup> There are two parts to AC21 § 106(c). One provision added INA § 204(j) to the law, and provides: A petition under subsection (a)(1)(D) for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

The other part added INA 212(a)(5)(A)(iv) to the Act, which provides:

nationals from lengthy processing delays at the USCIS, and provided that if an adjustment of status application had not been approved within 180 days of its submission, the worker could “port” to a new job or employer, as long as the new employment was in the same or similar occupational classification as the sponsored job. The USCIS has recently confirmed that, in its view, the change in employment can also be to “self-employment.”<sup>59</sup>

What this means is, the employer who filed the labor certification application for a worker may not ultimately be the employer who benefits from his services beyond six months after the worker files his adjustment of status application. Put in other terms, the *employee* can transfer the rights that inure to him from the filing of a labor certification application to a different employment situation from the one specified on that application.

Thus, Congress and the USCIS have repeatedly confirmed that an employee has vested rights in a labor certification application. For the DOL to assert that the application “belongs” to the employer, and that therefore, only the employer may pay the attorney’s fees related to the application, is both disingenuous and a misinterpretation of the law.

#### **D. The States, Not the DOL, Regulate the Practice of Law.**

We said it once, but we’ll say it again: The regulation of the practice of law is the province of the States, not the DOL.

The State Bar organization of the State in which the lawyer is licensed is responsible for determining and applying the ethics rules relating to representation of a client and to the payment of legal fees by someone other than the client. As the body with expertise on the attorney-client relationship and with the interest of maintaining the integrity of the legal profession, the State Bar is best situated to determine which rules will enable the attorney to zealously represent the client as required, and not compromise the duty of loyalty to a client when jointly representing two clients.

The Model Rules on Professional Conduct of the American Bar Association provide:

##### Rule 1.8-Conflict of Interest: Current Clients: Specific Rules

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - (1) the client gives informed consent;
  - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  - (3) information relating to representation of a client is protected as required by Rule 1.6.

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A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

<sup>59</sup> Yates May 2005 Memorandum, *supra* note 57 at 5-6.

Thus, even if an employee were to hire his own attorney to handle the labor certification process, and the employer were willing to pay the attorney's fee as the DOL would require, the attorney may be prohibited from accepting such payment according to State Bar rules regulating the attorney's conduct.

There is simply no excuse or reasonable justification for the DOL to require that attorneys take actions that may compromise their rules of ethics.<sup>60</sup> The DOL should not insert itself here where it has no expertise relating to the attorney-client relationship. In the labor certification context, the DOL should defer to the State Bar rules governing the attorney-client relationship and when payments by third parties are and are not permissible. These rules as well as the penalties of perjury applicable to the employer and the foreign national are more than sufficient to safeguard the integrity of the labor certification process without mandating that only the employer may pay the fees or any other costs related to the labor certification.

There are many reasons why a foreign national may want his own attorney to handle the labor certification process and be willing to pay the fees. Some foreign nationals, for example, have had less than satisfactory experiences with the attorney that the employer hired for the H-1B process and want to make a change. Others have concerns about personal information that they know will later arise in the adjustment of status phase of a case, and want a lawyer they can freely confide in from the start. Some foreign nationals work for nonprofit institutions, including hospitals and universities, which for budgetary concerns simply cannot pay attorneys for their work, as explained in greater detail below. In no case is there even a question about the bona fides of the job offer, or about fraud, criminality, or employer exploitation of a worker, and certainly, there is no adverse impact on the wages or working conditions of U.S. workers.

#### **E. The DOL, Attorney's Fees, and ACWIA: The DOL Has Changed Its Tune.**

On December 20, 2000, the DOL issued a final rule implementing certain provisions of the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) related to the employment of H-1B nonimmigrants.<sup>61</sup> ACWIA amended INA § 212(n),

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<sup>60</sup> See, e.g., Comment to rule 1.7 of the ABA's Model Rules of Professional Conduct:

##### Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, *if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client.* See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation. (Emphasis added.)

<sup>61</sup> Pub. L. No. 105-277, 112 Stat. 2681.

which, since 1990<sup>62</sup> has provided that an employer must pay an H-1B worker the “required wage,” that is, the higher of the prevailing wage in the area of intended employment for that job, or the actual wage the employer paid to others with similar experience and qualifications. The DOL reasoned that the LCA and the H-1B petition are the employer’s “business expense,” which may not be passed along to the H-1B employee *if* that would have the effect of reducing the employee's wages below the required wage.<sup>63</sup>

While AILA opposed and still vehemently opposes the DOL’s implementation of the attorney’s fees rule in the H-1B setting, at least there, *some* connection existed between the regulations and the statutory provision at INA § 212(n), however attenuated that connection may be.

But what the DOL now proposes bears *no* relationship to the statutory provision, INA § 212(a)(5)(A), 8 U.S.C. § 1182(a)(5)(A), which simply provides that an alien is inadmissible unless the Secretary of Labor has determined that there are no qualified U.S. workers for the job, and the employment of the foreign worker will not have an adverse impact on the wages and working conditions of U.S. workers.

When it implemented its ACWIA regulations, the DOL reasoned that the attorney’s fees associated with the preparation and filing of a labor condition application and an H-1B petition were the employer’s “business expense,” not to be paid by the H-1B worker. But the prohibition against paying those fees was not across the board; it applied *only* if by paying the attorney’s fee, the worker’s salary would be brought below the “required wage.” AILA and many attorneys, trade associations, businesses, and universities opposed the DOL’s rule concerning who may pay the attorney’s fees. Even key members of the United States Senate opposed the rule, including Senators Abraham, Graham, and Brownback. In a letter to the Secretary of DOL, Senator Brownback wrote:

The proposed regulation would prohibit H-1B employees from paying expenses of the H-1B process. The costs of obtaining H-1B work authorization, like so many other employment expenses that are not peculiar to H-1B workers (such as relocation costs), are sometimes borne by the employer and sometimes by the employee. *That is not a matter for government regulation*, but instead should be left to agreement between the parties. Further, it is very disturbing to see the Department telling H-1B employees that preparation of the documentation that is so central to their future ability to work and live in the U.S. cannot be performed by the employee's attorney. *This is not something that the Department has the authority to dictate.*<sup>64</sup>

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<sup>62</sup> INA § 212(n) was added by § 205(c)(3) of the Immigration Act of 1990, Pub. L. No. 101-646, 104 Stat. 4978.

<sup>63</sup> 65 Fed. Reg. at 80,198 (supplementary information).

<sup>64</sup> Letter from Sen. Sam Brownback (R. Kansas), Chair, Senate Immigration Subcommittee, to Elaine Chao, Secretary, DOL and Michael Ginley, Office of Enforcement Policy, Wage and Hour Division, Employment Services Administration, DOL, Apr. 23, 2001 (emphasis added), *available at* <http://www.aila.org/infonet> (document no. 01051603).

Those opposed to the rule argued, among other things, that prohibiting the employee from paying attorney's fees could prevent that worker from obtaining the best legal representation available, or even the representation of his choice, interfere with the attorney-client relationship, and work a hardship on universities, nonprofit organizations, and small businesses, which have limited resources to expend on attorney's fees.<sup>65</sup>

Though the DOL brushed aside those concerns, it did go out of its way to stress that in obligating the H-1B employer to pay the attorney's fees, the Department meant *only* the fees for preparing the LCA and the I-129 petition, and only to the extent that such payment would bring wages below the required wage.

At the outset, the Department wants to clarify an apparent misconception by some commenters regarding the restrictions placed upon employers in assessing the employer's own business expenses to H-1B workers. An H-1B employer is prohibited from imposing its business expenses on the H-1B worker—including attorney fees and other expenses associated with the filing of an LCA and H-1B petition—*only to the extent that the assessment would reduce the H-1B worker's pay below the required wage*, i.e., the higher of the prevailing wage and the actual wage.

.....

The Interim Final Rule continues to provide that any expenses *directly related* to the filing of the LCA and the H-1B petition are a business expense that may not be paid by the H-1B worker if such payment would reduce his or her wage below the required wage.<sup>66</sup>

Hence, the DOL had to admit that those legal services not “directly related” to the LCA or H-1B petition could be paid by the foreign worker:

The Department also recognizes that there may be situations where an H-1B worker receives legal advice that is personal to the worker. Thus, we did not intend to imply that an H-1B worker may never hire an attorney in connection with his or her employment in the United States.<sup>67</sup>

Not only that, as DOL itself claimed,

Similarly, any costs associated with the H-1B worker's receipt of legal services he or she contracts to receive *relative to...the various legal obligations of the worker under the laws of the U.S...* that might arise in connection with residence and employment in the U.S., are not ordinarily the employer's business expenses. As such, they appropriately may be borne by the worker.<sup>68</sup>

Just in case it did not make itself clear about attorney's fees, DOL reiterated its position when it also stated:

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<sup>65</sup> 65 Fed. Reg. at 80,199-80,200.

<sup>66</sup> *Id.* at 80,199 (emphasis added).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

In addition, if an applicant for a job hired an attorney *clearly to serve the employee's interest*, to negotiate the terms of the worker's employment contract, to provide information necessary for the H-1B petition or review its terms on the worker's behalf, or to provide the applicant with advice in connection with application of U.S. employment laws, including the various employee protection provisions of the H-1B program and its new whistleblower provisions, the fees for such attorney services are not the employer's business expense.<sup>69</sup>

In public pronouncements, the DOL further explained what it meant about limiting its rule only to the fees for the LCA and H-1B petition, acknowledging that as to any other legal fees, the DOL has “no right or any interest in inquiring into those” costs.<sup>70</sup>

Similarly, the DOL also stated that an attorney may allocate the various fees involved in an H-1B case, determining how much is for the LCA and H-1B petition, and how much for a consultation, an equivalency evaluation, advice regarding permanent residence, advice concerning the immigration status of the spouse and children, preparation of an application to change or extend the status of the family members, preparation of a nonimmigrant visa application, advice regarding travel, portability issues, and related matters. Agreeing that the preparation of the petition and the LCA is just a part of the total fee, and that that portion alone has to be allocated to the employer, an official of the DOL publicly stated: “We are in absolute agreement on the allocation of fees and the demonstration of what is paid for what. . . . If we get that kind of information, that’s all we’re looking for.”<sup>71</sup>

Just to set the record straight, AILA reiterates that it never agreed with the DOL’s rule concerning attorney’s fees in the H-1B context, and it vigorously opposes the proposed rule, which would force an employer to pay the legal fees related to a labor certification application, no matter what. But we want to point out that the DOL *is on record* that foreign nationals may freely hire attorneys to serve their interests, that only specific and limited costs are the employer’s responsibility, that the H-1B worker can pay his own legal fees so long as after doing so, his salary meets the required wage, and that third parties can pay the costs deemed to be the employer’s responsibility.

We also note that, *unlike* the labor certification application, the H-1B worker does not sign the LCA or the H-1B petition and faces no sanctions for the employer’s statements made on those documents, which the worker often does not see until the case is approved. The labor certification application, on the other hand, is a very different matter. At Part L, the alien must sign this statement:

I declare under penalty of perjury that Sections J and K are true and correct. I understand that to knowingly furnish false information in the preparation of this form and any

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<sup>69</sup> *Id.* at 80,200 (emphasis added).

<sup>70</sup> Comments of Linda Jan Pack, Counsel, Employment Standards, Fair Labor Standards Division, Department of Labor, on the panel “ACWIA H-1B Regulations: Three Years Later,” 2001 Annual Conference of the American Immigration Lawyers Association (AILA), Conference Tape #60.

<sup>71</sup> *Id.*

supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both (18 U.S.C. 2, 1001).

With so much at stake, including exposure to criminal prosecution, it is inconceivable that the Department's proposed rule, limiting an employee's choice of legal representation, would withstand challenge. In effect, the DOL is saying that even if an alien were to hire his *own* attorney for the process, to represent his *own* interests recognized under the law, the Department would deem those legal fees, too, to be the employer's business expense, to be paid only by the employer.

The Department proposes to include in this prohibition a ban on alien payment, directly or indirectly, of the employer's attorney's fees and costs related to preparing, filing, and obtaining a permanent labor certification. Employers, not aliens, file a permanent labor certification application and, therefore, these employer costs are not to be paid or reimbursed in any way by the alien beneficiary.<sup>72</sup>

In one stroke, the DOL would abridge the worker's right to be represented by counsel of his choice. We believe that this is unprecedented under our system of justice.

Finally, we would like to remind the DOL that the whole notion of passing along an employer's "business expense" to the employee grew out of the Fair Labor Standards Act of 1938 (FLSA).<sup>73</sup> Expenses under the FLSA that may not be passed on to the employee include uniforms (if the employer requires the employee to wear a uniform), uniform cleaning and maintenance, certain costs for tools, and certain deductions for cash register shortages. Although DOL is obviously borrowing the notion of "impermissible deductions" and the "employer's business expense" from the FLSA,<sup>74</sup> that Act *never contemplated* the costs associated with hiring an attorney to provide legal counsel to a worker. That the DOL would even think of comparing the price of a uniform for a parking lot attendant to the attorney's fees that a physician might expend for his permanent residence case is such a distortion of Congressional intent that the argument simply must be rejected out of hand. As attorneys for the DOL said in another context: "This is a truly perverse argument that should be rejected."<sup>75</sup>

## **F. Third Party Payments Must Be Allowed.**

In implementing its ACWIA regulations, the DOL never suggested—not in the regulations themselves or elsewhere—that a third party could not pay an H-1B worker's attorney's fees. In fact, a senior official of the Labor Department was very clear on this point: The regulations do not proscribe the payment of attorneys fees by a third party so

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<sup>72</sup> 71 Fed. Reg. at 7660.

<sup>73</sup> Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219).

<sup>74</sup> Comments of Linda Jan Pack, Counsel, Employment Standards, Fair Labor Standards Division, Department of Labor, on the panel "ACWIA H-1B Regulations: Three Years Later," 2001 Annual Conference of the American Immigration Lawyers Association (AILA), Conference Tape #60.

<sup>75</sup> Brief of Administrator, Wage & Hour Division, Employment Standards Administration, U.S. Department of Labor in Matter of Kutty, ARB Case No. 03-022, *available at* <http://www.dol.gov/sol/media/briefs/kutty-3-23-2003.htm>.

long as the H-1B worker does not later reimburse the third party.<sup>76</sup> The DOL position on attorney's fees, then, is similar to its position on the \$1,500 H-1B filing fee:

The Department agrees that the statute does not prohibit payment of the filing fee by a third party, nor does it require payment only from the employer. However, the Interim Final Rule does prohibit third-party payment if the third party receives or asks for reimbursement from the alien.<sup>77</sup>

But now, in total disregard of its own published and publicly broadcast pronouncements about attorney's fees, the DOL is insisting that, like its position on the LCA and H-1B petition, the labor certification application belongs solely to the employer. But for some unidentified reason, in *this* arena, *all* costs related to the labor certification process, including attorney's fees, must be borne *solely* by the employer.

There are any number of reasons why a third party must be permitted to pay the attorney's fees related to a labor certification application. Here are but a few examples:

#### *1. Labor Unions and Other Cooperative Groups.*

Many labor unions have Legal Services Plans,<sup>78</sup> funded by contributions from employers, employees, or both. Often, the funds are pooled and are contributed by several different employers within a group of employers. Although employers are generally prohibited from paying money to a union, one of the exceptions to that rule is money paid to a trust fund established by the union for defraying the costs of legal services for employees, their families, and dependents for counsel or plan *of their choice*.<sup>79</sup>

This proposed rule would prohibit payment of attorney's fees and costs by a union's legal services plan because payment of those fees and costs would not then be coming from "the" employer. Even in cases where the legal services plan is funded only by employers, and not employees, those funds are generally *pooled* from multiple employers, and do not represent contributions only from "the" employer. The proposed rule may even bar the union's own attorneys from handling a member's labor certification case, since his "fees" would be paid by the union, and the costs would also be borne by the union.

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<sup>76</sup> January 2002 telephone conversation between an AILA member and Linda Jan Pack, Counsel, Employment Standards, Fair Labor Standards Division, Department of Labor, who was a senior official at the Labor Department intimately involved in writing the ACWIA regulations.

<sup>77</sup> 65 Fed. Reg., at 80,175 (supplementary information).

<sup>78</sup> 29 U.S.C. § 1002 provides in pertinent part:

#### Definitions

For purposes of this subchapter:

1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A)...*prepaid legal services*....(Emphasis added.)

<sup>79</sup> 29 U.S.C. § 186(a) and (c).

To the extent that the proposed rule prohibits a labor union or other cooperative group of employees from employing counsel to represent the interests of its members, either directly or through a legal services fund, it may contravene the holdings in Supreme Court cases confirming a union's First and Fourteenth Amendment right to assert legal rights.<sup>80</sup> Many teachers unions pay attorneys for handling labor certification cases for its members, and other unions, such as a union of medical interns and residents, do the same. Does the DOL mean to proscribe these practices?

## 2. *Joint Payment Arrangements.*

It is not uncommon for entities other than "the employer" to pay for part of the attorney's fees in a labor certification case. For example, physicians often have split appointments between a Veterans Affairs Medical Center (VAMC), where they work 40 hours a week, and its affiliated institution of higher education. In those cases, frequently the university reimburses the VAMC for the proportion of the fees commensurate with the proportion of the work week spent at the university. This would now be a prohibited payment, since the university is not "the employer."

## 3. *Other Third Party Payments.*

Third party payments have been endorsed by other agencies where fee limitations are statutorily mandated. For example, a fee may not be charged, allowed, or paid for services of attorneys with respect to services provided to a claimant before the Board of Veterans' Appeals makes a final decision in the matter.<sup>81</sup> Nevertheless, it is well settled that only *claimants* are prohibited from paying the attorney, not third parties.<sup>82</sup> And in a 1986 memorandum opinion of the Office of Legal Counsel (OLC) to the General Counsel of the Veterans Administration, prepared when the limit a veteran claimant could pay to an attorney was \$10, the OLC found that a third party could pay the attorney and avoid the \$10 cap.<sup>83</sup> That opinion also noted that since the statute in question contained criminal provisions, as do the DOL's proposed regulations, the rules of construction supported a narrow reading of the provision. Under the "rule of lenity," the OLC instructed, criminal provisions subject to more than one reasonable construction should be interpreted narrowly, with ambiguity resolved in favor of lenience.<sup>84</sup>

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<sup>80</sup> *See, e.g.,* *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217 (1967) (union has protected right to hire attorneys to assist its members in asserting legal rights).

<sup>81</sup> 38 U.S.C. § 5904(c)(1).

<sup>82</sup> *See, e.g.,* *Carpenter, Chartered v. Secretary of Veterans Affairs*, 343 F.3d 1347 (Fed. Cir. 2003). *See also* 62 Fed. Reg. 64,790, 64,791-92 (Dec. 9, 1997) (supplementary information to proposed regulation) (organization, governmental entity, or other disinterested third party may pay attorney's fees under circumstances in which claimant may not).

<sup>83</sup> *Legality of State Payments to Attorneys Representing Veterans*, Memorandum Opinion of the Office of Legal Counsel for the General Counsel, Veterans Administration 1986 OLC LEXIS 56; 10 Op. O.L.S. 1 (Jan. 28, 1986).

<sup>84</sup> *Id.* at \*11.

## **G. Contracts to Reimburse the Employer in Case of Early Termination of Employment by Employee.**

It is very common for companies, including some of the largest corporations in the United States, to strike a bargain with their foreign national employees. The company will pay for all costs related to the labor certification process, including attorney's fees, but if the employee decides to leave the company before a set time, he agrees to pay the employer for all or part of the costs the employer has incurred in pursuing the case. Under the proposed rule, these arrangements would be prohibited, because the repayment would be seen as a reimbursement of the employer's costs. This is an improper interference with private contract. The employer should be able to protect its investment in the labor certification process by providing the employee with an incentive to stay once the permanent residence is obtained.<sup>85</sup>

## **H. The Proposed Rule Discriminates Against Certain Employers.**

Some of the workers we most want to remain in the United States are employed by the very institutions least able to pay the legal fees associated with the labor certification process. Foremost among them are universities, public school systems, public hospitals, government employers, and not-for-profit entities, including voluntary agencies. Indeed, in recognition of the limited financial resources available to some of these employers, and the talent and value their workers bring to this country, Congress enacted legislation that exempts them from paying the special ACWIA training fee in the H-1B arena,<sup>86</sup> and accords them a more favorable computation of prevailing wages in the H-1B and labor certification settings.<sup>87</sup> These employers routinely require workers to cover their own

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<sup>85</sup> In the H-1B context, the DOL confirms that an employer may recover its expenses related to the petition and LCA as liquidated damages: "The Department concurs with the comments that the ACWIA does not preclude the recovery of expenses in connection with the filing of the LCA and H-1B petition as liquidated damages. It is the Department's view that there is no basis for distinguishing attorney fees and other expenses in connection with these filings from other expenses which may be permitted, under state law, as liquidated damages." 65 Fed. Reg. at 80,200. Is the Department now backing away from its stated position that attorney's fees may be recovered?

<sup>86</sup> INA § 214(c)(9), 8 U.S.C. § 1184(c)(9) provides in pertinent part:

"(A) The Attorney General shall impose a fee on an employer (*excluding* any employer that is a primary or secondary education institution, an institution of higher education, as defined in section 1001(a) of title 20, a nonprofit entity related to or affiliated with any such institution, a nonprofit entity which engages in established curriculum-related clinical training of students registered at any such institution, a nonprofit research organization, or a governmental research organization)" for filing an H-1B petition. (Emphasis added).

<sup>87</sup> INA § 212(p), 8 U.S.C. § 1182(p) provides:

(1) In computing the prevailing wage level for an occupational classification in an area of employment for purposes of subsections (n)(1)(A)(i)(II) and (a)(5)(A) of this section in the case of an employee of--

(A) an institution of higher education (as defined in section 1001(a) of title 20), or a related or affiliated nonprofit entity; or

(B) a nonprofit research organization or a Governmental research organization, the prevailing wage level shall only take into account employees at such institutions and organizations in the area of employment.

See also GAL No. 1-00; 20 C.F.R. § 656.40(c) establishing a separate prevailing wage scale for institutions of higher education and affiliated nonprofits.

legal fees, and this is done *not* because the job offer is not bona fide. Rather, this is done for legitimate budgetary reasons, where the alternative is not to use a lawyer at all.

If this rule were to be implemented, the impact on certain employers would be devastating including:

- Community health clinics hiring primary care physicians, dentists, and psychiatrists;
- Public and private schools hiring teachers, particularly bilingual teachers;
- Inner city and rural public schools, and community colleges, hiring math, science, and language teachers;<sup>88</sup>
- Social service agencies hiring social workers and psychologists;
- Mental health clinics hiring bilingual professionals, including social workers, psychologists, and psychiatrists who speak Spanish or other languages;<sup>89</sup>.
- International nonprofit agencies, which regularly hire foreign nationals to participate in projects with an international scope including the environment, human rights, and economic development.

In our experience, the vast majority of schools and other nonprofit entities are not in a position to afford all of the legal fees related to the labor certification process. If the proposed rule becomes final and precludes employees from contributing to the cost of their green cards, it will send two strong messages:

1. To the roughly one million foreign students studying in the United States: Do not go into teaching or the nonprofit sector. Even if they can obtain an H-1B visa, they will not be able to obtain permanent residence if only the employer must pay all fees related to the labor certification process.
2. To qualified professionals abroad: Do not apply for positions in the United States in the nonprofit sector—there is no path to permanent residence.

Is this really the result the DOL wants?

### **I. The DOL Is Creating a System with Disparate Impact.**

In addition to every other reason why forcing an employer to pay all the attorney's fees related to a labor certification application is unlawful and unwise, the rule would have a disparate impact on workers, depending on how they obtain lawful permanent residence status. Those subject to the labor certification provisions will be prohibited from paying any part of those fees, and may be foreclosed from seeking the independent advice of counsel. But workers who pursue residence through other avenues can do as they wish.

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<sup>88</sup> In recognition of the importance of these teachers to the community, the DOL's former Region V in Chicago experimented with expedited labor certifications for public school teachers to help alleviate the shortage of these professionals in the region.

<sup>89</sup> See Presidential New Freedom Report on Mental Health, <http://www.mentalhealthcommission.gov/reports/FinalReport/FullReport-04.htm>. Goal number 3 states that disparities in mental health care among minority and immigrant populations are particularly severe.

Thus, an outstanding professor whose university files a petition for him under the employment-based first preference category can find the best lawyer available and pay for his services, while a professor undergoing special handling must fall prey to the vagaries of his university's policies, which often provide that only nonlawyers employed by the university can prepare those cases. A multinational manager may pay for his own attorney if he wishes, and so may an alien whose work is in the national interest. And whereas an alien of extraordinary ability can hire and pay a lawyer of his choice to prepare his case, an alien whose exceptional ability brings him within the ambit of Schedule A, Group II, cannot. Aside from the fact that this differential treatment of classes of foreign workers is distasteful, we assert that it is also unlawful, and yet another reason why the DOL must abandon this part of its proposed rule.

#### **J. “Related To”—What Does This Mean?**

The proposed rule seems to prohibit anyone other than the employer from paying any of the legal fees in any way related to the labor certification application: “An employer shall not seek or receive payment *of any kind for any activity related to* obtaining a permanent labor certification.”<sup>90</sup> How far does the DOL intend to reach when it proscribes payments “related to” obtaining a labor certification? Quite far, we fear.

The DOL reserves to itself the right to conduct an audit of a labor certification case for up to five years.<sup>91</sup> By then, a foreign national whose labor certification case was approved, and whose subsequent adjustment of status case was also approved, may have changed employers. Does the DOL think that the original employer would have an interest in vigorously responding to the audit? And if the labor certification is revoked for reasons that have nothing to do with the qualifications of the alien, would the DOL also claim that this worker cannot pay an attorney to represent him in revocation proceedings initiated by the USCIS, because those proceedings are “related to” the labor certification application?

### **VII. COSTS OF THE LABOR CERTIFICATION PROCESS**

In addition to trying to regulate the attorney/client relationship, the DOL attempts in this proposed rule to dictate who pays the costs of the process. For many of the same reasons that this effort is inappropriate with respect to attorney's fees, it is also inappropriate for other costs of the process.

As previously mentioned, INA § 212(a)(5)(A) renders an alien inadmissible unless there are insufficient U.S. workers available and qualified for the position and unless the alien's employment will not adversely affect the wages and working conditions of U.S. workers. The DOL doesn't even attempt to explain how the payment of costs by anyone other than the employer has an adverse impact on these factors.

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<sup>90</sup> 20 C.F.R. § 656.12(b) (proposed).

<sup>91</sup> 20 C.F.R. § 656.10(f).

The labor certification process is, under its guiding statute, a test of the labor market to enable the Secretary of Labor to certify that there are not sufficient workers able, willing and qualified, and available at the time of application for a visa and admission, for the position in question. As the process has been designed by DOL, it is not a true, real-life recruitment. Few employers would actually structure a recruitment the way the regulations dictate. Thus, the labor certification recruitment process is a thing separate and apart from the actual recruitment to fill the position.

Indeed, in many cases, the alien beneficiary is already on the job under a nonimmigrant status or work authorization. The recruitment effort that resulted in the hiring has usually already taken place before the effort to comply with the regulations is even commenced. This is because, in the vast majority of instances, the employer had no idea at the time of the “real” recruitment that a foreign national was going to be hired, and thus there was no thought as to whether the steps taken would comply with DOL regulations. It was only when the recruitment produced a non-U.S. worker that the employer discovered that, if it is going to keep this employee on a long-term basis, a very different recruitment is going to be necessary. Also, many employers will want to wait until the employee has been in the job for a while to see if his performance is going to be worth the investment of a green card effort.

So, in most cases, there are really two recruitments—the one in which the beneficiary had actually been found and the one that is designed to comply with DOL regulations. In both recruitment efforts—the real-life one and the one conducted under the strictures of the regulations—there must be a bona fide job opening. But only the real-life recruitment is truly the employer’s own expense. The DOL-imposed process is a cost not of actual recruitment, but of testing the labor market to see if the alien can be employed on a regular basis. In the end, if a qualified, able and willing U.S. worker appears, the law does not compel the hiring of that worker. It only compels that certification cannot issue.

Because the DOL-dictated process is one that is to determine whether or not the alien is admissible, the employee has at least as much interest in the process as the employer, if not more. Depending on the size, for-profit or non-profit status, or other factors of the employer, that employer may or may not be in a position to pay the costs of another recruitment, particularly the highly stilted and unrealistic one that the labor certification regulations dictate. Yet, that repeat process is necessary if the *employee* is to obtain permanent residence.

As discussed in the context of attorney’s fees, whether an employer will “sponsor” a foreign national for permanent residence is a business decision that may involve negotiation and express or implied contract. The decision to proceed is based on the employer’s business judgment and the employee’s wish to remain in the United States permanently. The employer conducts a test of the labor market in furtherance of its agreement to sponsor the foreign national, and both parties understand that if there is a qualified U.S. worker for the position, the labor certification may not move forward. Both are involved in and have an interest in the application from the beginning. These interested parties, not the DOL, should determine who pays for what.

## VIII. ENFORCEMENT PROVISIONS

### A. The DOL Lacks the Authority to Impose Debarment

The Department of Labor proposes, at 20 C.F.R. § 656.31(e), to debar employers for up to three years for any “improper or prohibited” action, upon a finding that the employer, attorney, and/or agent has participated in or facilitated a broad array of activities.

It is a well-settled principle of administrative law that a delegation by Congress of authority to promulgate legislative rules must derive either from an explicit grant of such authority in the statute or from an implicit delegation in the event of ambiguous language in the statute.<sup>92</sup> Here, the DOL derives its authority from INA § 212(a)(5), which renders an alien inadmissible unless the Secretary of Labor has certified that there are not sufficient U.S. workers able, willing and qualified to perform the labor and that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

That provision of law goes solely to the admissibility of an alien coming to work in the United States. It does not grant authority—either explicitly or implicitly—to legislate a system of penalties against the employer and attorney. AILA finds it revealing that no effort was made in the rulemaking notice to identify the Department’s source of authority to issue this legislative rule. The reason for this glaring omission is obvious: No such authority exists.

Indeed, if Congress wanted to impose a system of debarment, it knows how to do so. Congress legislated debarment in the H-1B program<sup>93</sup> and it created a form of debarment in the H-2A program.<sup>94</sup> It has never granted similar authority for debarment in the permanent labor certification program.

### B. The Proposed Debarment Penalty Lacks Reasonable Standards and Safeguards.

When Congress has legislated debarment, it has done so in a manner that balances rights against responsibilities, and creates specific standards and safeguards. The DOL proposes no such standards and safeguards in its rulemaking. This failure to provide due process is a primary reason that legislation is left to the legislative branch, with agencies having such authority only when so granted by Congress. It seems that, in throwing off the controls of statutory authorization, the Department has also thrown off all efforts to arrive at reasonable standards and due process.<sup>95</sup>

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<sup>92</sup> See *e.g.*, *American Bar Ass’n. v. Federal Trade Comm’n*, 430 F.3d 457 (D.C. Cir. 2005).

<sup>93</sup> INA § 212(n)(2)(C), 8 U.S.C. § 1182 (n)(2)(C).

<sup>94</sup> INA § 218(b)(2)(A), 8 U.S.C. § 1188(b)(2)(A).

<sup>95</sup> This seems to be part of a pattern of DOL disdain for the rule of law. For example, footnote 1 of the DOL proposed rule states: “The 1991 Interim Final Rule included a provision prohibiting substitution. That provision was overturned by the U.S. Court of Appeals for the DC Circuit *on a technical Administrative Procedures Act ground*. *Kooritzky v. Reich*, 17 F.3d 1509 (DC Cir. 1994).” 71 Fed. Reg. at 7657 (emphasis

Congress, in creating the debarment penalties in the H-1B and H-2A programs, specified clear and fair standards, and required opportunity for due process before such sanctions could be imposed. In the H-2A program, the employer must have violated a “*material* term or condition of the labor certification. . . .”<sup>96</sup> In the H-1B program, debarment occurs only for a “*substantial* failure” to meet a condition of the labor certification or a “misrepresentation of *material* fact in an application.”<sup>97</sup> Both legislative provisions specify that debarment occurs only after notice and opportunity for a hearing.<sup>98</sup>

By contrast, the DOL proposal would impose this severe penalty for any error: an employer, attorney or agent could be debarred for provision of *any* false or inaccurate information no matter how minor or immaterial, *any* failure to comply with the terms of the application whether meaningful or not, or *any* failure to comply with an audit or supervised recruitment no matter how meaningless the failing. This is all without regard to materiality, substantiality, knowledge or willfulness. The debarment provisions would punish an employer, attorney or agent for such things as a typographical error in the application regarding the alien’s date of birth; an application with an inaccuracy in the foreign national’s job history (not properly recalling the exact day, he/she commenced employment with an employer ten years ago); or an inadvertent mistake in the number of employees, relationship to alien, or federal employer identification number. Any of these persons or entities could be penalized for relying on the other even in the complete absence of scienter.

As distinguished from the due process provided by Congress in, for example, the H-1B context, the DOL proposal allows virtually no notice or opportunity for a hearing before debarment is ordered. Congress mandated for the H-1B process that there be “notice and opportunity for a hearing,”<sup>99</sup> and the DOL implemented that mandate by providing in its regulations an opportunity to request a hearing before an Administrative Law Judge if the Administrator issues negative findings.<sup>100</sup> If the ALJ finds against the employer, opportunity for appeal is available.<sup>101</sup>

The proposed rule provides no such procedural protections. As the rule is written, the Chief of the Foreign Labor Certification Division would issue a Notice of Debarment without opportunity for hearing (or, as discussed below, in many instances even notice that an investigation was underway), and the subject of this Notice would have one, very limited opportunity to appeal.

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added). The provision in question was, in fact, overturned due to the DOL’s complete and utter failure to follow the law. That, in our view, is hardly a trivial “technical” ground.

<sup>96</sup> INA § 218(b)(2)(A), 8 U.S.C. § 1188(b)(2)(A).

<sup>97</sup> INA § 212(n)(2)(C)(i), 8 U.S.C. § 1182(n)(2)(C)(i).

<sup>98</sup> In the H-1B context, the provision guaranteeing notice and opportunity for a hearing is found at INA § 212(n)(2)(A) and (B), 8 U.S.C. § 1182(n)(2)(A) and (B). In the H-2A context, the notice and hearing provision is at INA § 218(b)(2)(A), 8 U.S.C. § 1188(b)(2)(A).

<sup>99</sup> INA § 212(n)(2)(C)(i), 8 U.S.C. § 1182 (n)(2)(C)(i).

<sup>100</sup> 20 C.F.R. § 655.820 et seq.

<sup>101</sup> 20 C.F.R. § 655.845.

Also, this proposed rule goes further than the H-1B and H-2A systems in imposing debarment on attorneys in addition to employers. Here, the agency is wandering into territory best left to the bodies with expertise regarding attorney conduct—the state bar or state professional regulatory agency. The DOL does not license attorneys to practice, nor should it; and we believe it is inappropriate for federal agencies to unilaterally impose a national disciplinary scheme where the states should have sole jurisdiction.

AILA shares the DOL’s concern for the instances of fraud that have been detected in the old labor certification system, and understands the need for an enforcement mechanism. But imposition of an unauthorized and unbalanced debarment penalty is not the right mechanism. Rather than trying, without lawful authority, to borrow from the H-1B process (particularly when not borrowing the checks and balances of that process), AILA urges that the Department instead look to the safeguards embedded in the new PERM process for permanent labor certification, and use a system of audits, revocation, and selected directed recruitment to guard against abuse in the program.

### **C. The Rule Is Impermissibly Vague.**

This proposed regulation, as well as the supplementary information to the rule, are so inartfully drafted that no reasonable person would be advised as to what “offenses” are proscribed. For example, the rule forbids conduct that is “improper” at the time the action occurred,<sup>102</sup> without defining in any manner what constitutes “improper conduct.” The supplementary information states that the DOL is also banning the “sale, barter and purchase” of a labor certification application, but does not define what these are. The penalties for violation are harsh, including criminal prosecution, but if one is going to be penalized for conduct, one has to know exactly what conduct is prohibited.

It has long been a tenet of law that a regulatory provision is void for vagueness if it so vague it gives no warning of the conduct that is prohibited.<sup>103</sup> The vagueness doctrine serves a twin purpose: to provide fair notice to affected individuals that their conduct falls within a certain category, and to guard against arbitrary and discriminatory enforcement.<sup>104</sup> And yet the proposed rule, while offering punitive sanctions that include the suspension of processing of applications, criminal prosecution, and debarment, does not provide *any* definitions for what conduct would trigger those sanctions. Instead, the Department paints with a broad brushstroke, threatening dire consequences for “improper” actions;<sup>105</sup> the “sale,” “purchase” or “barter” of labor certification applications;<sup>106</sup> the receipt of payment from any sources “in connection with” a labor certification application;<sup>107</sup> and “possible” fraud.<sup>108</sup> We hope the DOL appreciates our utter confusion as we try to fathom just what it is that’s forbidden. This rule, in violation

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<sup>102</sup> 20 C.F.R. § 656.31(e) (proposed) and supplementary information at 71 Fed. Reg. 7658.

<sup>103</sup> See, e.g., *Gay Men’s Health Crisis v. Sullivan*, 733 F. Supp. 619 (S.D.N.Y. 1989).

<sup>104</sup> *Id.*

<sup>105</sup> 20 C.F.R. § 656.12 (proposed); 20 C.F.R. § 656.31(e) (proposed).

<sup>106</sup> 20 C.F.R. § 656.12(a) (proposed).

<sup>107</sup> 20 C.F.R. § 656.12(b) (proposed).

<sup>108</sup> 20 C.F.R. § 656.31(a) (proposed).

of the vagueness doctrine, neither provides fair notice, nor does it offer a protection from arbitrary and discriminatory enforcement.

#### **D. The Rule Would Impose a New Standard of “Possible Cause.”**

In addition to the lack of materiality, knowledge, or substantiality standards with respect to the debarment penalty, the rulemaking would impose on the processing of existing applications legal criteria that are heretofore unprecedented in law. Under this rule as written, the DOL would authorize itself to suspend indefinitely<sup>109</sup> processing of *all* applications involving the employer, attorney, or agent if the Department “discovers...possible fraud.” No other reference is made to what weight of evidence would result in suspension or debarment. That leaves the stated standard of “possible fraud.” In other words, the DOL is proposing a new legal standard of “possible cause” in order to impose punishment.

If the DOL believes that material false statements have been made in an application, it has a mechanism in place to deal with that: denial of the application and/or imposition of supervised recruitment in future filings.<sup>110</sup> This process provides a standard (materiality) and due process protections in the form of reconsideration and appeal. The DOL should stay with, and possibly refine, the better-thought-out approach in its PERM regulations rather than adopting the vague and overbroad indefinite suspension contained in the proposed rule.

#### **E. The Rule Makes No Provision for Notice.**

Unlike the statutorily-authorized debarment processes in the H-1B and H-2A contexts, the unauthorized rulemaking attempt by DOL lacks “notice and opportunity for a hearing.”<sup>111</sup> The proposed rule provides no requirement that the DOL notify the subject of the investigation until such time as the debarment notice is actually issued. (And even then, as discussed above, there is no hearing—only an opportunity to appeal, and even then the appeal must be requested within 30 days of the date on the debarment notice.)

Similarly, there is no notice provision for the indefinite suspension of application processing. In fact, it appears that DOL deliberately contemplates providing no notice, in that it states that notice will be provided to the employer if it is the attorney or agent under investigation. No notice—and thus no opportunity to provide documentation or explain oneself—is provided to the attorney or agent at all, and none to the employer if the employer is under investigation.

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<sup>109</sup> One meaningless gesture toward a finite time frame is made, in stating that if 180 days pass without the start of an enforcement action, the DOL *may* continue to process some applications, or may continue suspension until the investigation is completed. Since it is solely within the government’s control when the suspension is lifted, this is essentially an indefinite debarment without any form of due process.

<sup>110</sup> 20 C.F.R. § 656.24.

<sup>111</sup> INA § 212(n)(2)(C)(i), 8 U.S.C. § 1182 (n)(2)( C)(i); INA § 218(b)(2)(A), 8 U.S.C. § 1188(b)(2)(A).

And here we thought that the Star Chamber had been abolished in 1641.<sup>112</sup> Apparently, the DOL means to bring it back.

#### **F. The DOL Places No Temporal Limits on the Rule's Reach.**

Most punitive laws include a statute of limitations, past which violations cannot be prosecuted or pursued. This is for obvious reasons: evidence and recollections fade with time. This rule, however, would have no time limits. Conceivably, DOL could pursue debarment 20 years after an application is filed. The H-1B program imposes a one-year time limit to lodge a complaint. Consistent with this rule's overreaching, on the other hand, no limitation is provided.

### **IX. TIME FRAMES**

AILA notes with some dismay the changes in the amount of time the DOL has accorded itself for delaying labor certification applications. Under the current regulation regarding investigations for possible fraud or willful misrepresentation, if the DOL refers a matter to USCIS for investigation while a labor certification is in process (i.e., before a final determination), once 90 days had passed, the Certifying Officer is empowered to continue the application if no criminal indictment or information is filed or if no notification is received from USCIS, the DOL OIG, or "other appropriate authority" (which remains undefined).<sup>113</sup> However, in the proposed rule, that time of waiting is now increased to 180 days, twice the current time, before the Certifying Officer can continue the case. And, as previously mentioned, even then the Certifying Officer is not required to continue the case---he only "may" do so. This expansion of the time in which an application may be in limbo because of an investigation for "possible fraud" is without justification in the regulatory preamble; it is not even mentioned.

The DOL's presumed concern regarding upholding the integrity of the labor certification process misses the mark with respect to this change. The doubling (or more) of the time permitted to hold an application in abeyance imposes an unfair burden on an employer who is unwittingly caught in an investigation, especially since the trigger of an investigation for fraud or misrepresentation is ill-defined and subject, presumably, to change. This open-ended hold on a case is all the more troubling since the standards for referring a case for "possible fraud or misrepresentation" are not defined by the DOL.

While this organization can understand the DOL's reasons to keep such parameters to itself, the harm that can result from such an investigation is not justified by the policies on the other side. Employers' hiring needs are brought to a standstill by such activities; employees seeking certification are brought one step closer to indentured servitude.

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<sup>112</sup> The Star Chamber was an English court of law that sat from 1487 until 1641, when the court was abolished. The power of the Court of Star Chamber grew considerably until it had become synonymous with misuse and abuse of power by the king and his circle.

<sup>113</sup> 20 C.F.R. § 656.31(a) (proposed).

Moreover, the 180 days the DOL is giving itself to commence an investigation stands in stark contrast to the mere 30 days permitted employers to appeal a case to BALCA. Employers are forced to decide the value of tying up a case in a Motion for Reconsideration in the space of days, putting together the case on which they have the burden of proof in short order and on the basis of little case law grounded in the shifting standards of PERM. Yet the DOL gives itself and its fellow agencies six times that amount of time to open an investigation—not even concluding it, but only arriving at a place where a “notification” can be received and, even then, the time frame can be extended indefinitely. This inequity is not accounted for with any policy reasoning, because there is none.

AILA recommends that the DOL return to its current standard of 90 days for this purpose, and that the language be changed so that the Certifying Officer “shall” continue the case. Ninety days is more than sufficient time to leave an employer in limbo of uncertainty in a process that already has many such uncertainties, and returns the employer to a place where there is some balance in the burdens. The DOL, which offers no justification for this change, should not be permitted to decide how long it can hold employers in limbo without some valid policy reasons for doing so.

## **X. MODIFICATIONS TO FILED PERM APPLICATIONS**

The DOL’s proposal to forbid any modifications to filed PERM applications, including small corrections to obvious mistakes, is a measure so extreme and so removed from the Department’s stated goal of maintaining program integrity and eliminating fraud, that we urge the Department to re-examine its unprecedented position on this issue.

As justification for this proposal, the Department claims it fears that an “open amendment process” would engender “continual back and forth exchange between the employer and the Department,” thus subverting the goals of a “streamlined” process.<sup>114</sup> The DOL will not even make allowances for small mistakes, and has crafted an unforgiving rule admitting of no human error: “The online application system is designed to allow the user to proofread and revise before submitting the application, and the Department expects and assumes users will do so.”<sup>115</sup>

The DOL commends itself for creating a system so efficient that modifications aren’t even necessary: “Further,” the Department says, “the re-engineered certification process has eliminated the need for changes.”<sup>116</sup> Clearly, that’s not true. Take, for example, the *errors made by the DOL* in reviewing applications, which many of our members are still trying to sort out. We are aware of cases that were denied for failure to include the language that the employer would accept “any suitable combination of education, training, or experience,” when, in fact, that language *was* included in the application. We have also reviewed cases denied because, the DOL said, the alien did not possess the

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<sup>114</sup> 71 Fed. Reg. at 7659.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

required academic credentials, when, in fact, he did, and those credentials were clearly noted in the application in the appropriate place. In yet another case, the DOL denied a case because, it said, the alien did not meet the minimum requirements for the position as stated in the advertisements. In that case, the employer listed *two* positions in its advertisements, and the examiner looked at the wrong one and denied the case.

Perhaps most troubling of all is the Department's insinuation that any request for modification is grounded in fraud:

Moreover, in signing the application,<sup>117</sup> the employer declares under penalty of perjury that he or she has read and reviewed the application and the submitted information is true and accurate to the best of his or her knowledge.<sup>118</sup>

In other words, the DOL is saying that, by signing an application, an employer swears that he has read it and attests to the accuracy and truth of every single word in that application. Hence, the Department asks, how can any change be needed? Our answer, which even the DOL agrees with, is that "inadvertent errors" happen.<sup>119</sup>

A common example of an inadvertent error is a mistake on the date that an advertisement ran in the newspaper. There are cases, for example, where the *date* entered on the form 9089 was not one of the required Sundays, a mere typographical mistake on the application, when in fact, the ad *did* run on a Sunday. The DOL's remedy? "In the event of an inadvertent error or any other need to refile, the employer can withdraw the application, make corrections and file again immediately."<sup>120</sup> While that may be a reasonable option in some cases, there are many reasons why refiling is not usually a viable alternative:

1. Often, an application preparer is not aware that an error had been made. Even if the mistake comes to light before the DOL issues a denial, it may be too late to refile because the recruitment may have become stale by that time.
2. Certain post-filing, pre-certification events, including but not limited to changes in corporate structure resulting in a change of employer name, tax identification number, or address, require the amendment of the application;
3. Refiling applications also means the loss of the priority date set by the first filing. That, in turn, may render an H-1B nonimmigrant otherwise eligible for a seventh year extension under AC21, ineligible, since to benefit from that legislation, the application had to have been filed at least 365 days before the worker reached the end of year six in H-1B status;
4. All too often, DOL has taken so long in rendering and sending the decision that the recruitment is no longer valid.

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<sup>117</sup> Note that an employer does *not* sign an application filed electronically until the application is certified.

<sup>118</sup> 71 Fed. Reg. at 7659.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

Therefore, the employer should be permitted to amend the application through a clearly articulated, reasonable and described mechanism.

If this proposed regulation were to go into effect, it would make the DOL the only Government agency we can think of to adopt such a truculent rule. Every other agency, guided by notions of fundamental fairness and due process, permits amendments, corrections, and supplemental submissions to correct minor mistakes. But this rule could have the effect of banishing a person from the country simply because of a mistaken keystroke. And here, we do not overstate the case. An application denied because of a mistake in a date could overturn a priority date needed by the foreign worker to maintain his nonimmigrant status in the United States.

Finally, although it is clear in the supplementary information to the proposed regulation that the “no modification policy” applies only to applications filed under the PERM program, and not to applications filed under the rules in effect before March 28, 2005,<sup>121</sup> this should be clearly stated in the regulation itself.

## **XI. CONCLUSION**

As indicated at the outset of this comment, AILA shares the DOL’s concern for the fraudulent practices that have been identified in the labor certification process, and commends the Department for the steps taken in the PERM process to address them. Unfortunately, in this rulemaking, the DOL exceeds both its authority and reason to propose muddled, illogical, impractical and, in some instances, unlawful solutions. AILA urges that the DOL withdraw this proposed regulation.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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<sup>121</sup> *Id.* (Rule applies to “applications filed under the new. . .regulation”; requests for modifications under “current” regulation not accepted).