



USCIS Update

May 24, 2007

USCIS ANNOUNCES NEW PROCEDURES FOR EMPLOYERS IN RESPONSE TO NEW DEPARTMENT OF LABOR RULE ELIMINATING SUBSTITUTIONS ON LABOR CERTIFICATIONS

WASHINGTON – United States Citizenship and Immigration Services (USCIS) is instituting new procedures for filing a *Petition for Alien Worker* (Form I-140) that requires an approved labor certification application. These procedural changes are in response to the Department of Labor's (DOL) final 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*, published in the *Federal Register* on May 17, 2007. The DOL rule takes effect on July 16, 2007.

The immigrant visa classifications that generally require an individual labor certification include members of professions holding advanced degrees or aliens of exceptional ability (EB-2); and skilled workers, professionals and other workers (EB-3).

The DOL rule will significantly impact the filing of Form I-140 petitions with USCIS because it:

1. Prohibits substitution of alien beneficiaries on any permanent labor certification application after the application has been filed with DOL.
2. Establishes a 180-day time period within which a DOL-approved labor certification must be filed with USCIS in support of a Form I-140 petition in order to remain valid.
3. Requires that any labor certification approved by DOL *prior to* July 16, 2007 be filed with USCIS in support of an I-140 petition within 180 days after the effective date of the DOL final rule in order for the certification to remain valid.

Requests for Labor Certification Substitution filed with USCIS prior to the Effective Date of the DOL Final Rule

USCIS will continue to accept and adjudicate Form I-140 petitions that request labor certification substitution and that are filed with USCIS prior to July 16, 2007. USCIS has, in a separate notice, announced that Premium Processing (adjudication in 15 days) for such petitions will no longer be available as of May 18, 2007. USCIS will decide those cases based on procedures outlined in the March 1996 DOL Delegation Memorandum of Understanding,¹ to include the adjudication of any relating motions to reopen or reconsider, or an appeal (Form I-290B) by the Administrative Appeals Office (AAO).

In accordance with current practice and procedures, USCIS will reject all Form I-140 petitions that require an approved labor certification that are filed without the original labor certification unless the original labor certification was previously filed in support of another Form I-140 petition or a duplicate labor certification is being requested by the petitioning employer.

¹ See March 7, 1996 Memorandum of Understanding between the Immigration and Naturalization Service (INS) and Employment and Training Administration (signed by Louis D. Crocetti, Jr., Associate Commissioner, Examinations, and Raymond Uhalde, Deputy Assistant Secretary for Employment and Training).

Substitution Petitions filed on or after the Effective Date of the DOL Final Rule

USCIS will reject all Form I-140 petitions requesting labor certification substitution that are filed on or after the effective date of the DOL rule. USCIS will deny any petitions that are accepted in error when it discovers that the alien beneficiary on the Form I-140 petition is not the same as the alien named on the labor certification.²

Validity Period for a DOL-Approved Labor Certification:

The DOL rule establishes a validity period for those labor certifications that are approved prior to the effective date of the rule, as well as a validity period for labor certifications approved on or after the effective date of the rule. Employers must file an approved labor certification in support of a Form I-140 with USCIS within the applicable validity period established by DOL. USCIS will reject all Form I-140 petitions that require an approved labor certification if the validity period of the labor certification application has expired. USCIS will deny all petitions that are accepted in error when it discovers that the petition was filed with an expired labor certification.

Exception: USCIS will continue to accept amended or duplicate Form I-140 petitions that are filed with a copy of a labor certification that is expired at the time the amended or duplicate Form I-140 petition is filed, **only if** the original approved labor certification was filed in support of a previously filed petition within the labor certification's validity period. In instances where the amended I-140 petition is requesting a different visa classification for the same alien beneficiary or where the previously filed Form I-140 petition has been determined to have been lost by USCIS or DOS, then such filings may occur when:

1. A new Form I-140 petition is required due to successor-in-interest,
2. The petitioning employer wishes to file a new petition for the same alien beneficiary subsequent to the denial, revocation or abandonment of the previously filed petition, and
3. The labor certification was not invalidated due to material misrepresentation or fraud relating to the labor certification application.³

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² Some petitioning employers may have requested labor certification substitution during the labor certification application process with DOL. Labor certification substitution requests that are granted by DOL on or before the approval of the labor certification application will not impact the validity of the labor certification with regard to new 20 CFR 656.11. Such an approved labor certification may be accepted in support of the Form I-140 petition filed on or after the effective date of the DOL final rule.

³ See 20 CFR 656.31 for Form ETA-750s filed prior to March 28, 2005 or 20 CFR 656.30(d) for Form ETA-9089s filed on or after March 28, 2005.