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## FRAUD REDUCTION EFFORTS IN “GREEN CARD” PROCESSING WILL INCREASE COSTS FOR EMPLOYERS

By Jolene Konnersman and Howard Shapiro

*New federal regulations attempt to reduce fraud in connection with green card applications by: (1) prohibiting employers from making any amendments to or substituting employee beneficiaries of approved or pending labor certification applications; (2) mandating that employers bear all financial costs of the labor certification application; and (3) limiting the time period for filing an immigrant visa petition after approval of an application for labor certification.*

The U.S. Department of Labor (DOL) has adopted a final rule relating to labor certification applications for foreign workers who seek a “green card” -- permanent residence in the United States through employment. Applications for labor certification are filed by employers with the DOL through a process known as PERM. The PERM application process requires the employer to first test the labor market through newspaper ads, internet postings, and other mandatory recruitment activities in order to demonstrate that there are no able, willing, and qualified U.S. workers available to fill the position and that the employment of the alien will not adversely affect the wages and working conditions of U.S. workers. If the labor certification application is approved, the employer must then file a Form I-140 Immigrant Visa Petition with the Department of Homeland Security’s United States Citizenship and Immigration Services (formerly known as the Immigration and Naturalization Service).

The DOL’s final rule, which became effective on July 16, 2007, was passed in response to concern over fraud and abuse at the PERM stage of the green card application process. For example, some applicants were being offered jobs that were never truly open to U.S. workers in return for paying a kickback to the employer (or the employer’s agent). In an attempt to curb these abuses, the final rule imposes the following new requirements on employers:

- (1) **No Substitutions:** Historically, employers could substitute an alien named on a pending or approved labor certification application with another prospective alien employee. The new rule prohibits the alteration of any information contained in the labor certification application after it has been filed with DOL, and specifically prohibits the substitution of the alien named on the application for another alien worker.
- (2) **Employers Required to Pay All Costs:** The final rule prohibits the sale, barter, or purchase of permanent labor certifications and applications. Importantly, the new regulations also require that all costs associated with preparing, filing, and obtaining the certification be borne by the employer. This includes attorneys’ fees and the costs of recruitment. Moreover, employers are now prohibited from seeking reimbursement for such costs, even if the employee voluntarily leaves the employment during or subsequent to the filing of the application for labor certification.
- (3) **180-Day Filing Period:** Under the final rule, the labor certification is valid for 180 days from the date of certification, giving employers just six months from the date the certification is issued to complete the second

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**Q:** OUR COMPANY HAS AN EXISTING REIMBURSEMENT AGREEMENT WITH AN EMPLOYEE WHO IS SEEKING PERMANENT RESIDENT STATUS. IS IT ENFORCEABLE UNDER THE FINAL RULE?

**A:** AFTER JULY 16, 2007, AN EMPLOYER MAY NOT REQUEST REIMBURSEMENT FOR ANY COST OR ACTIVITY ASSOCIATED WITH AN EMPLOYEE’S APPLICATION FOR LABOR CERTIFICATION, INCLUDING REIMBURSEMENT OF THE EMPLOYER’S ATTORNEYS’ FEES AND EMPLOYEE RECRUITING COSTS. EMPLOYERS WHO SHARE AN ATTORNEY WITH THEIR EMPLOYEES ALSO MAY NOT SEEK REIMBURSEMENT FOR THESE FEES AND COSTS. THIS IS TRUE EVEN IF THE EMPLOYEE QUILTS OR IS TERMINATED FOR CAUSE WITHIN A FIXED PERIOD OF TIME. THE FINAL RULE EXPLICITLY PROHIBITS REIMBURSEMENT AGREEMENTS AT THE LABOR CERTIFICATION STAGE AND INSTEAD ALLOCATES THE RISK OF EMPLOYEE SEPARATION TO THE EMPLOYER. HOWEVER, THE NEW REGULATIONS DO NOT PROHIBIT AN EMPLOYER FROM SEEKING REIMBURSEMENT FOR ATTORNEYS’ FEES, FILING FEES, AND/OR COSTS ASSOCIATED WITH FILING FORMS I-140, ADJUSTMENT OF STATUS APPLICATIONS, CONSULAR PROCESSING OF IMMIGRANT VISA APPLICATIONS, AND NON-IMMIGRANT VISA PETITIONS (SUBJECT TO EXISTING RULES THAT

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stage of the application process by filing the Form I-140 petition. As a result, employers should obtain necessary supporting documentation in advance of receiving the labor certification so that the Form I-140 may be filed in a timely manner.

With immigration continuing to be a hot topic in Washington this year, employers are encouraged to examine their policies and any agreements they may have with alien workers to ensure that they are in compliance with these new regulations.

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PROHIBIT AN EMPLOYER FROM SEEKING REIMBURSEMENT FOR PORTIONS OF H-1B FILING FEES). EMPLOYERS WHO WISH TO SEEK REIMBURSEMENT OF THESE LATTER COSTS SHOULD PROVIDE AN ACCOUNTING TO THE EMPLOYEE THAT SEPARATELY ITEMIZES THESE FEES AND COSTS FROM THOSE ASSOCIATED WITH THE LABOR CERTIFICATION APPLICATION AND PERM.

**Q: HOW CAN WE AVOID DELAY AND REJECTION OF OUR EMPLOYEE'S LABOR CERTIFICATION APPLICATION?**

**A:** IT IS CRITICAL THAT THE LABOR CERTIFICATION APPLICATION BE CORRECTLY COMPLETED WHEN IT IS FILED BECAUSE THE NEW REGULATIONS PROHIBIT THE MODIFICATION OF APPLICATIONS IN ANY WAY – INCLUDING THE CORRECTION OF TYPOGRAPHICAL ERRORS – AFTER THEY HAVE BEEN FILED. IF A MISTAKE IS MADE ON AN APPLICATION, THE APPLICANT MUST WITHDRAW THE APPLICATION, MAKE THE CORRECTION AND THEN REFILE. IN AN EFFORT TO AVOID MISTAKES, THE DOL HAS ADDED SYSTEM CAPABILITIES IN THE FORM OF “POP UP” ALERTS THAT WILL NOTIFY APPLICANTS IF A RESPONSE TO A QUESTION IS IN CONFLICT WITH THE REGULATIONS OR INSTRUCTIONS FOR COMPLETION OF THE FORM. IN ORDER TO AVOID REJECTION OR DELAY OF THE APPLICATION, EMPLOYERS SHOULD ENSURE THAT ALL FORMS ARE COMPLETED AND REVIEWED BY AN ATTORNEY WHO IS EXPERIENCED IN THE LABOR CERTIFICATION APPLICATION PROCESS AND THE DOL'S NEW REGULATIONS.

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