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July Sizzles with Immigration Rule Change

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July 2007 will be a hot month for immigration law, with significant Department of State, Department of Homeland Security and Department of Labor rule changes going into effect.

- Department of Homeland Security Announces Immigration Filing Fee Increase; File by July 28, 2007, to Avoid Increase.
- State Department Announces Jump Forward in Immigrant Visa Priority Dates, Effective July 1, 2007; Speeds Up Last Phase of Green Card Process, but Expect Backlogs After July.
- Department of Labor Rules Restrict Employees From Paying for Their Own Labor Certification and Other DOL Rule Changes, Effective July 16, 2007.

Following are details:

A. Immigration Filing Fee Increase.

On July 30, 2007, filing fees for most immigration applications and petitions will increase. This increase was imposed by the Department of Homeland Security's agency, U.S. Citizenship & Immigration Services (USCIS). It will affect applications for U.S. citizenship, for permanent resident status, for employer-sponsored petitions and for most immigration benefits.

For example, the fee for an employer to file a petition using form I-129 for a foreign employee to work in the U.S. temporarily in many classifications, such as for an H-1B specialty occupation, L-1 intracompany transfer, O-1 extraordinary ability, or TN (Trade NAFTA) extension, will increase from \$190 to \$320. The fee for filing an application for naturalization to become a U.S. citizen will more than double, from \$330 to \$675. The fee for an I-140 for an employer to sponsor a foreign national for permanent resident status will increase from \$195 to \$475. The Premium Processing fee to request processing of an I-129 or I-140 within 15 days stays the same at \$1,000.

In the permanent resident context, the fee for applying to adjust status from a temporary status in the U.S. to permanent resident status will increase from \$325 to \$1,010 for each adult applying and \$600 for children. However, the fee will include "free" employment authorization document (EAD card) applications for work authorization, as well as Advance Parole for return to the U.S. after travel abroad and the biometrics (fingerprint and photograph) fee, for as long as the application takes for processing until the applicant has his or her green card in hand. Currently,

the EAD fee is \$180 and the Advance Parole fee is \$170. For adjustment of status applications filed before July 30, the applicant must pay those fees each time he or she applies to renew the EAD or Advance Parole.

The fee increase goes into effect on Monday, July 30, 2007, and *not* July 31 or August 1. USCIS applies the “mailbox rule,” which means that petitions and applications need to be placed in the mail or sent to USCIS by a delivery service by Saturday, July 28, to avoid the fee increase. Petitions and applications mailed or sent on July 30 (or thereafter), will be rejected if the increased filing fees are not included.

The USCIS schedule of the new filing fees can be found at <http://www.uscis.gov/files/nativedocuments/FinalUSCISFeeSchedule052907.pdf>.

B. Jump Forward in Immigrant Visa Priority Dates, Effective July 1, 2007; Speeds Up Last Phase of Green Card Process; Backlogs Likely to Follow.

Foreign nationals who have been waiting years for their priority dates to become current can file adjustment of status to get in line for their green cards, effective July 1, 2007. This development affects the last phase of the three-phase process toward permanent resident status. Following are typical phases of the process:

Phase 1: Labor certification application ("Labor Cert," currently submitted through the Program Electronic Review Management process, or "PERM" process), through which the employer demonstrates to the U.S. Department of Labor that there are no qualified, willing, and available U.S. workers for the job;

Phase 2: Immigrant petition for alien worker (I-140), to ask U.S. Citizenship & Immigration Services (“USCIS”) under the Department of Homeland Security to allow the employer to hire a specific foreign worker;

Phase 3: Adjustment of Status (I-485), for foreign nationals in the United States to apply to USCIS to change the person’s temporary status (such as H-1B status) to permanent resident status to apply for a green card.

The State Department announced that it would release enough immigrant visa numbers to bring all employment-based immigrant categories current, except for the category of “other workers” requiring no degree and less than two years of experience. Foreign nationals who have been waiting for years to move to the final stage of applying for permanent resident status and a “green card,” particularly those in India, China, Mexico and the Philippines, with long backlogs, can apply as of July 1, 2007.

With the probable flood of adjustment applications, a new backlog is likely to develop very quickly, possibly as early as August 1, 2007. Therefore, applicants should obtain the necessary documentation, medical examinations, and photographs, and prepare to file for adjustment of status as soon as possible.

To read the Visa Bulletin announcing this development, visit the Department of State website:
http://travel.state.gov/visa/frvi/bulletin/bulletin_3258.html.

C. Rules Restricting Employees Paying for Their Own Labor Certification and Other DOL Rule Changes, Effective July 16, 2007.

The U.S. Department of Labor (DOL) announced a rule change affecting employers' sponsorship of foreign employees sponsored to work in the United States. The rule impacts the labor certification (Labor Cert) application from the first phase of the three-phase process toward permanent resident status, as described above.

Following are three key effects of the rule:

- 1. Employee attorney fee payment prohibition.** Employers cannot require an employee to pay the attorneys' fees for preparing and filing a Labor Cert.
- 2. 180-day validity period.** 180 days after the date that a Labor Cert is certified, it expires, and an employer cannot use an expired Labor Cert to proceed to Phase 2 of the process.
- 3. Substitution of beneficiary prohibition.** The DOL will only certify a Labor Cert for one employee. Employers can no longer substitute beneficiaries or use a Labor Cert for anyone other than the employee or potential employee listed on the Labor Cert.

These changes go into effect on July 16, 2007.

The DOL stated it adopted the changes to enhance the employment-based immigrant program integrity and reduce the incentives and opportunities for fraud and abuse related to the permanent employment of aliens in the United States.

1. Employee attorney fee payment prohibition.

The fee payment provision prohibits employers from the following:

- Requiring employees to pay the costs of preparing, filing and obtaining a labor certification;
- Recouping the costs from the foreign worker;
- Reducing or withholding the wages, salary or benefits of a foreign worker named on a Labor Cert for any expense related to the preparation and filing of the application; may not receive payment of any kind as an incentive or inducement to file;
- Receiving kickbacks or "free labor" as payment for filing a Labor Cert;
- Making employer-employee agreements requiring reimbursement if the employee leaves the company before a specified time.

The rule appears to allow the foreign national to hire his or her own attorney and pay his or her own legitimate costs in the permanent labor certification process, including attorneys' fees for representation of him or herself.

2. 180-day validity period.

Regarding the 180-day validity provision, Labor Certs certified after July 16, 2007, expire 180 days after certification if not filed in support of an I-140 petition. Note, the expiration is tied to the date of certification and not the date of receipt. There is no flexibility, including where there is a delay in the employer receiving the notice of certification. For those certified before the effective date, they expire if not filed in support of an I-140 petition within 180 calendar days of July 16, 2007, that is, on Saturday, January 12, 2008.

3. Substitution of beneficiary prohibition.

For the substitution of beneficiary prohibition, in Phase 2, after July 16, USCIS will not accept a Labor Cert along with the Phase 2 I-140 petition for a foreign national other than the person named on the Labor Cert. A Labor Cert is valid only for the particular job opportunity, the person named on the original application (unless a substitution was approved prior to July 16, 2007) and for the area of intended employment stated on the application.

What Does This Mean for Employers?

In order to take advantage of the window of opportunity for getting in line for the last phase of the green card process before backlogs develop once again, applicants need to prepare to file adjustment of status applications by July 31, 2007. To avoid the filing fee increase, applications must be on their way to USCIS by July 28. To avoid the effects of the new DOL rules, employers must file the Phase 2 Form I-140 petition by July 16, 2007.

These changes could be just the beginning of significant changes in immigration law. The month of July could really sizzle if either the Senate or the House of Representatives pass Comprehensive Immigration Reform legislation.

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