

DOL Provides Further Guidance on Suspension and Anticipated Resumption of Its Processing of Prevailing Wage Requests for PERMs

August 9, 2011

The U.S. Department of Labor (DOL) announced that it will suspend its processing of prevailing wage requests for permanent labor certifications (PERMs) in order to comply with the U.S. District Court for the Eastern District of Pennsylvania's June 15 order implementing the court's August 30, 2010 decision in *CATA v. Solis*. DOL has advised that processing will resume no earlier than August 31, 2011 and could be suspended until September 30, 2011. This decision impacts all foreign nationals seeking permanent residence through the PERM process, from lower-skilled workers through highly skilled engineers and researchers in positions requiring advanced degrees.

As many employers seek a prevailing wage determination from DOL at the beginning of the PERM process, prior to initiating the required recruitment steps for a PERM, DOL's action may effectively halt the initiation of new permanent residence processing for foreign nationals seeking green card sponsorship or force employers to change recruitment practices in well-established PERM labor certification programs. In addition, the timing of the filing of a PERM is crucial to the ability of certain foreign nationals in H-1B status to remain in the United States. Thus, the additional delay in the processing of prevailing wage requests may well necessitate strategic contingency planning for employers with H-1B workers who are in or approaching the final year of H-1B status, and for whom the employer has not yet initiated the PERM process. The delay may also impact foreign nationals in other nonimmigrant categories who are reaching the end of their maximum permissible stay in the United States.

Background

A PERM is a DOL-mandated test of the U.S. labor market that is frequently required before an employer may offer a position to a foreign worker on a permanent basis. As a part of the PERM process, an employer is required to request a DOL-issued prevailing wage determination for an occupation in which the employer proposes to employ a foreign worker on a permanent basis. DOL issues prevailing wage determinations to ensure that the wages of U.S. workers are not potentially depressed by lower-paid foreign workers. Employers are required to test the labor market by documenting its efforts to hire U.S. workers using specific means of recruitment established by DOL. The employer is required to offer qualified U.S. workers identified through recruitment the higher of the prevailing wage, or the actual wage that the employer pays to workers in similar positions in the area of intended employment.

The court's decision in *CATA* and its subsequent order stems from DOL's failure to use the proper methodology in calculating prevailing wages for seasonal/temporary nonagricultural workers in the H-2B visa category. The court ruled on June 15, 2011 that DOL's proposal to implement the new prevailing wage system for work only performed on or after January 1, 2012 was invalid because the delay was not a "logical outgrowth" of its proposed rule, thereby violating the Administrative Procedures Act, and that DOL violated the Immigration and Nationality Act in considering hardship to employers in establishing the effective date. By not applying the new, court-ordered prevailing wage methodology to work performed before January 1, 2012, H-2B workers would continue to be underpaid, as the court initially found in its August 30, 2010 decision.

DOL has advised that these 4,000 prevailing wage requests must be processed manually, with many of the requests including multiple worksites, each of which requires a separate prevailing wage determination.

How This Affects You

Employers with foreign national employees who are reaching the end of their authorized period of stay in H-1B or L status, and for whom the employer has not yet started the PERM labor certification process, may need to explore other options, such as temporary assignment abroad or other nonimmigrant categories for which an employee may be eligible. For more information, or if you have any questions regarding the issues discussed in this Immigration Alert, please contact any of the following attorneys:

Washington, D.C.

Eleanor Pelta	202.739.5050	epelta@morganlewis.com
Eric S. Bord	202.739.6040	ebord@morganlewis.com

San Francisco

A. James Vázquez-Azpiri	415.442.1343	ajvazquez@morganlewis.com
Lance Nagel	415.442.1345	lnagel@morganlewis.com

Now Available: *AILA's Focus on Immigration Practice Under AC21*

Written by Eleanor Pelta and A. James Vázquez-Azpiri, *AILA's Focus on Immigration Practice Under AC21* provides invaluable insight on the effect AC21 has had on the H-1B visa category. For more information, please visit www.ailapubs.org/ac21.html or call 1.800.982.2939 to order a copy.

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