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ALERT

MAY 17, 2007

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www.mintz.com

One Financial Center
Boston, Massachusetts 02111
617 542 6000
617 542 2241 fax

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202 434 7300
202 434 7400 fax

666 Third Avenue
New York, New York 10017
212 935 3000
212 983 3115 fax

707 Summer Street
Stamford, Connecticut 06901
203 658 1700

Department of Labor Final Rule

Drastic Changes to Labor Certification Practice

On May 17, 2007, the U.S. Department of Labor (DOL) published in the Federal Register its final rules regarding procedural matters at the core of its Alien Labor Certification program. These rules will have an effective date of **July 16, 2007**, and include the following major changes to current procedures:

- Commencing on the effective date, the employer must pay 100% of the costs (including recruitment fees and attorney fees) of preparing, filing and obtaining the labor certification. The transferring of these costs to the alien is prohibited, as is any reduction of wages—even if the alien consents. There is a provision permitting the alien to pay his or her own attorney's fees incurred in protecting the alien's rights, but this may *not* include the preparation or filing of the labor certification. This represents a sea change in existing practice; it is extremely controversial and may be challenged in federal court.

- Labor certification applications that are certified by DOL on or after the effective date must now be filed with the U.S. Citizenship and Immigration Services (USCIS) as part of an immigrant visa petition (Form I-140) within 180 days of the DOL certification, or else they will be void. All labor certification applications that were certified by DOL prior to the effective date must be filed with USCIS as part of an I-140 petition within 180 days of the effective date. This is a drastic change from current law (until now, labor certifications have always been valid indefinitely), but it is not as harsh as the 45-day expiration that had originally been proposed by DOL.

- There will be no substitution allowed of a new foreign national for the one originally named on the labor certification application when filed. Originally the reason DOL and USCIS

203 658 1701 fax

1620 26th Street
Santa Monica, California 90404
310 586 3200
310 586 3202 fax

1400 Page Mill Road
Palo Alto, California 94304
650 251 7700
650 251 7739 fax

9255 Towne Centre Drive
San Diego, California 92121
858 320 3000
858 320 3001 fax

The Rectory
9 Ironmonger Lane
London EC2V 8EY England
+44 (0) 20 7726 4000
+44 (0) 20 7726 0055 fax

allowed such substitution was to accommodate employers due to the extremely lengthy time it took to adjudicate labor certification applications. But now that PERM applications are averaging two months from filing to adjudication, DOL is choosing to end the substitution of one foreign national for another, with the hope that this will reduce fraud. The final rule will not affect substitutions already approved or in progress prior to the effective date.

Huge Gains: Priority Dates for Immigrant Visas Jump Almost Two Years in Third Preference, and More Are Likely to Come

Contrary to its own prediction, the U.S. State Department's June 2007 Visa Bulletin announces that priority dates have moved significantly forward, especially those for professional and skilled workers in the employment-based third preference. Eligible foreign nationals with priority dates earlier than June 1, 2005 (except for China, India and Mexico) may be able to apply for adjustment of status or consular processing in the month of June. This is 22 months ahead of where the cutoff date was in the May 2007 Visa Bulletin. Priority dates for persons born in China and India also moved ahead in the third preference, and made significant jumps in the second preference as well. For precise processing dates, see Visa Bulletin for June 2007.

The immediate impact of this jump is that numerous foreign nationals who had been stuck in the long EB-3 and EB-2 queues will finally be able to file their final green card applications—Form I-485, Application to Register Permanent Residence or Adjust Status—on June 1. While the State Department has said that it expects there to be further advancement of current priority dates for all preferences in the coming months, we do advise clients with current priority dates as of June 1 to make all efforts to file their Form I-485 in June just in case the July priority dates retrogress.

Finding Work Eligibility During the H-1B Cap Gap

We are reviewing each case that has been shut out of H-1B status for FY2008 to try to find possible work authorization during this "cap gap." Every case is different, and some options should not be used depending on the facts, but we have had success using the following strategies:

- Nonprofits that are "affiliated" with an institution of higher education are not subject to the H-1B cap. USCIS rules permit for-profit companies to partner with such affiliated nonprofits in certain situations which will result in an H-1B employee not being subject to the cap.

- O-1 Visas are for foreign nationals who have risen to be among the few at the very top of their field of endeavor.
- J-1 training visas may be obtained in situations where a U.S. employer is willing to give significant training to a foreign national as part of its employment offer.
- PERM applications are moving quickly, and priority dates are advancing, thus making it possible that a foreign national seeking permanent residence might obtain an employment authorization document through the green-card process faster than waiting for the next batch of H-1Bs on October 1, 2008.
- Foreign nationals who are going to work for a U.S. employer abroad may ultimately qualify for L-1 visas faster than waiting for the next batch of H-1Bs to become available on October 1, 2008.

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If you would like more information on any immigration matter, please contact your immigration attorney at Mintz Levin or go to www.mintz.com.

Susan Cohen
617.348.4468 | SCohen@mintz.com

Jeffrey Goldman
617.348.3025 | JGoldman@mintz.com

Reena Thadhani
617.348.3091 | RThadhani@mintz.com

William Coffman
617.348.1890 | WCoffman@mintz.com

Brian J. Coughlin
617. 348.1685 | BJCoughlin@Mintz.com

Lorne Fienberg
617.348.3010 | LFienberg@mintz.com

Marisa Howe
617.348.1761 | MHowe@mintz.com

Daniel Maranci
617.348.1885 | DMaranci@mintz.com

Timothy Rempe
617.348.1621 | TRempe@mintz.com