

Daily Labor Report

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News

Immigration

Labor Department Backs Away From Bar On Multiple Labor Certification Applications

The Labor Department has backed away from a statement it made earlier in the month that, as of Aug. 31, employers would not be permitted to file more than one labor certification application (LCA) for the same foreign worker that they are sponsoring for a green card.

A new, streamlined system of processing LCAs, dubbed "PERM," went into effect in March. Some employers have been filing new LCAs for foreign workers under the PERM system while keeping their old applications for the same workers active. Priority is given to green card applicants at the Department of Homeland Security based on the date their employers filed an LCA for them.

DOL, in an Aug. 8 posting on its Web site, said employers could not have two active LCAs pending for any single foreign worker and that after Aug. 31, if an LCA is approved for a foreign worker, "all other applications for that alien filed under PERM will be denied."

That Aug. 31 deadline is no longer in effect, a DOL official told BNA in an Aug. 30 e-mail. The agency also removed the statements barring multiple applications from its Web site. "Based on stakeholder feedback, the Department recognized that the guidance on multiple filings may require further clarification," the

official said. "The Department removed the response on August 24th to consider information and questions stakeholders had submitted in response to this posting."

On its Web site, DOL now says it is "considering questions and information stakeholders have submitted in response to this FAQ posting, and will be developing and posting a clarified response in the near future." The DOL official said the agency "is not certain" how its next response will differ, "if at all" from its earlier response.

Multiple Applications Are 'A Work-Around.'

Employers routinely file green card applications for foreign workers who are working for them under temporary visas, such as the H-1B visa for highly skilled foreign workers. Under the old system, it took up to four years for LCA approval.

After employers obtain labor certification approval, they must wait for final adjudication on the green card application from the Department of Homeland Security. The entire process of obtaining a green card could extend beyond six years.

"When time passes, life happens," said American Immigration Lawyers Association Deputy Director of Programs Crystal Williams. In attempting to deal with the years-long process of obtaining green cards for employees, employers routinely filed second and third LCAs for those workers as their jobs evolved. "It's a work around the backlog," she told BNA.

Technical Glitches in New System

The new PERM rule allows employers to submit applications electronically directly to the department. Before the

rule went into effect, employers were required to get approval for the application from a state workforce agency before seeking certification from DOL.

The new PERM processing system had technical difficulties for several months after it was activated, according to Williams. For example, she said, employers would file an LCA online and receive an instant message saying the application was denied. They then would file new applications for the same employee with slightly different responses to the questions, until they no longer received a denial message.

DOL, in its attempts to fix the technical glitches, wound up having multiple applications approved for the same employee, she said.

Two LCA Processes In Effect

Meanwhile, LCAs filed under the old system are still being processed at various DOL centers around the country, and DOL is using a separate procedure to handle applications under the new PERM program.

The new system results in quicker decisions from DOL, with employers saying they generally receive notices of approval or denial within 30 and 60 days of filing, according to Stuart Anderson, executive director of the **National Foundation for American Policy**, a think tank focused on immigration issues.

In an Aug. 25 letter to Labor Secretary Elaine Chao, Anderson said individual employees are "pressing their employers to file applications through PERM" because shorter processing times could reduce their wait for a green card. "For logical reasons, employers would like to maintain

current labor certification cases now pending in the backlog when a PERM case is filed," the letter said.

Moreover, the letter said, priority for employment-based green cards is determined on the basis of the date that the employer files an LCA. "[I]t makes sense that employers would not want to lose that priority date," the letter said.

H-1B employees who are waiting for green cards also have an incentive to keep their old green card applications active. Under current law, they can only remain in the country beyond their visas' six-year limit if they have an LCA pending that is at least one year old.

Statement Called a New Rule

Employers and attorneys who file LCAs for foreign workers said DOL's initial statement barring multiple applications amounted to a new rule that should be published in the Federal Register with a notice and comment period.

"If they had done that, they would have heard about all these considerations," Williams said. "There's a lot of uncertainty" about the new system for processing LCAs. "A lot of times, it gets thrown into a black hole for bizarre technical reasons," she said.

Anderson said DOL bears some responsibility for the LCA backlog because it initially created an overly bureaucratic process. "If they're smart, they'll just drop the entire issue," he told BNA. "You would think they would be a little more conscious of not appearing high-handed in their approach."

By Fawn H. Johnson