

National Foundation for American Policy

July 31, 2008

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Research: DOL Labor Certification Policies Harm Competitiveness

Study Finds Many Labor Department Requirements Placed on Companies Sponsoring Skilled Immigrants “Made Up Out of Whole Cloth”

Arlington, Va. – The U.S. Department of Labor (DOL) is harming the competitiveness of U.S. companies and the growth of U.S. jobs and innovation by enforcing a labor certification policy not intended by Congress and divorced from economic reality, concludes a new study released today by the National Foundation for American Policy (NFAP), an Arlington, Va.-based policy research group. The study, “Certifiable: The Department of Labor’s Approach to Labor Certification,” found that while the law requires labor certification for most skilled immigrants seeking a green card, the Department of Labor has “created the current system out of whole cloth.”

The study can be found on the NFAP website at www.nfap.com.

The analysis comes at a time when DOL has announced a mass labor certification audit of a major immigration law firm and Congress is considering legislation to make it feasible for skilled foreign nationals to be hired directly on green cards. The bill, H.R. 6039, authored by Rep. Zoe Lofgren (D-CA), would exempt from green card quotas international students who earn a master’s degree or higher in a science or technology field from a U.S. university, with a goal of keeping this talent in the United States. But with a large portion of labor certification cases subjected to time-consuming audits by the Department of Labor even if the legislation passes it will still not be feasible for individuals to be hired directly on green cards (rather than first on H-1B visas), notes the study.

For years, the Department of Labor has required that employers sponsoring skilled immigrants fulfill the provisions of the Immigration and Nationality Act by placing advertisements to show no eligible U.S. worker could fill the job, documenting the results of the recruitment, and other methods that require volumes of paperwork and time for the government agency to review. However, none of these requirements are in current U.S. law.

“U.S. employers will always opt for the option of hiring an equally qualified U.S. worker – it’s far easier than recruiting a foreign professional, navigating the federal bureaucracy, and administering a very cumbersome visa process. However, when a foreign-born professional is the most qualified, the Department of Labor should not create new employment hurdles that aren’t required by current law,” said NFAP Executive Director Stuart Anderson, a former staff director of the Senate Immigration Subcommittee.

The labor certification process made news recently when the Department of Labor announced in a press release it would audit all applications for green cards from employers that used the nation’s largest immigration law firm, pushing potentially thousands of cases back a year.

The Department stated it is auditing Fragomen, Del Rey, Bernsen & Loewy to examine whether the firm’s attorneys were advising clients on the qualifications of U.S. workers responding to advertisements mandated by DOL. This has never been an issue in the past and the law firm says it is simply advising clients on technical and legally complex aspects of labor certification.

Missing from recent news coverage are several facts addressed in this policy brief:

- “There was no mention of individualized recruitment in the proposed labor certification regulations on November 19, 1965, or the final version of these same implementing rules that came out on December 3, 1965. There was no sense that employers had to advertise,” concluded attorney Gary Endelman in a review of the legislative history of labor certification.
- At the time of the 1965 Immigration Act, Senator Edward Kennedy (D-MA) stated: “It was not our intention, or that of the AFL-CIO, that all intending immigrants must undergo an employment analysis of great detail that could be time consuming and disruptive to the normal flow of immigration.” He said DOL could simply use available statistical data on employment.
- Today, the Department of Labor considers no economic facts in adjudicating labor certification applications, such as that most unemployment rates for professionals have hovered between 1 to 2 percent, essentially full employment, or that major U.S. technology companies today average more than 470 U.S.-based job openings for skilled positions, according to the National Foundation of American Policy. Moreover, the National Science Foundation reports foreign nationals with advanced degrees from U.S. universities earn more than natives after controlling for age and years since degree. And

when companies recruit they find most graduate students in key tech fields on U.S. campuses are foreign nationals.

- Because the low quotas on employment-based green cards translate into waits of 5 years or more, companies typically must first use H-1B temporary visas to hire skilled foreign nationals found in the course of normal recruiting. Labor certification is generally required when employers decide to sponsor such foreign nationals for permanent residence. The Department of Labor then requires an employer to advertise, in effect, to replace someone a company is so happy with it would pay approximately \$10,000 in legal fees to retain.
- The process bears no resemblance to the reality of how companies actually recruit, with few employers using print ads for highly skilled positions, as DOL requires for labor certification, and most engaging in ongoing use of the Internet, networking and employee referrals.
- The numerous DOL-mandated steps make labor certification an enormous misuse of time and resources. (The Department of Labor acts as if it is performing a service by using American professionals as “pawns” to apply for jobs that actually are already filled.) Moreover, DOL’s “test” of the labor market is unrelated to normal hiring criteria: DOL rejects an employer’s application if anyone who is “minimally” qualified applies for the job, likely sending the foreign national to work for a competitor overseas.
- DOL has made the process so complex that employers need the advice of attorneys to navigate the system. A recent book by ILW.COM published to explain labor certification to businesses totals nearly 900 pages and weighs almost 7 pounds.
- Historically, DOL has badly mismanaged labor certification. By requiring so much government oversight it created backlogs that lasted years. The new PERM (Program Electronic Review Management) system is supposed to be streamlined. Yet since DOL audits a large proportion of cases it still takes a year or more.
- U.S. companies would gain a significant competitive advantage if they could hire skilled foreign nationals directly on green cards (for permanent residence). However, that will never be possible so long as the U.S. Department of Labor maintains its current policies.

The Department of Labor's labor certification system adds a significant dead weight cost to the operations of many of America's most innovative companies, diverting energy and resources that employers could better utilize on innovations that could create more jobs and wealth in the United States, concludes the analysis. The study recommends that Congress largely remove the Department of Labor from the process by exempting many highly educated foreign nationals from labor certification, as proposed in a Senate-passed bill in 2006. Absent that, labor certification requirements could be satisfied by employers showing a) they pay the immigrant the same or more than a comparable American and b) they engage in recruitment typical to their industry.

The study concludes the Department of Labor, given its actions, has shown no interest in proposing or operating a simple system, since it would reduce the role and influence of Labor Department employees. "It increasingly appears that the process maintained by the Department of Labor and the Department's battles against employers and their attorneys is not about protecting jobs for U.S. workers but jobs for employees at the U.S. Department of Labor," said NFAP's Stuart Anderson.

About the National Foundation for American Policy

Established in the Fall 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder and other prominent individuals. Over the past 24 months, NFAP's research has been written about in the Wall Street Journal, the New York Times, the Washington Post, and other major media outlets. The organization's reports can be found at www.nfap.com.

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