

HIRING IMMIGRANTS: ALIEN LABOR CERTIFICATION

SUMMARY

Hiring a foreign national can be difficult. This BMA will explain the process for hiring a person from abroad. The following are the requirements under the Immigration & Nationality Act.

WHO'S IN CHARGE

The U.S. Departments of Labor (DoL), Justice and State have jurisdiction over who can or cannot enter the United States. The DoL Employment Service determines the labor need. The Immigration and Naturalization Service (INS), which is under the Justice Department, processes the paperwork and keeps records on how many immigrants are here. The State Department investigates the immigrants abroad, then issues a visa for entry into the United States.

WHO IS AN ALIEN

The immigration laws of the United States define any person who is not a citizen or national of the U.S. as an alien. Aliens are classified as non-immigrants or immigrants. A non-immigrant is a person whose permanent residence is in a foreign country and who has no intention of abandoning that residence when they visit the U.S. for (1) business and (2) pleasure on a temporary basis. Non-immigrants here as visitors for pleasure or in transit through this country may not be employed.

EMPLOYER REQUIREMENTS FOR TEMPORARY LABOR CERTIFICATION

The alien who wants to work in the U.S. on a temporary basis must have filed for him/her two copies of a labor certification (Form ETA 750). This is done by the prospective employer and must be sent to the employer's local state employment agency.

Temporary certification is difficult to obtain and is judged strictly by the temporary nature of the job. The work must be above and beyond the employer's normal level of operation and not expected to become a part of the employer's future operations. The employer must submit documentation clearly show-

ing that his efforts were unsuccessful to recruit United States workers as specified in the paragraph of this BMA discussing "documentation recruitment."

A temporary certification may be issued for the duration of the temporary employment opportunity, not to exceed 12 months. If the temporary job opportunity extends beyond 12 months, the employer must file a new application; however, temporary certification may not be granted for the same job opportunity for a total period (including extensions) or more than three (3) years, except in applications for recurring peak load or seasonal employment.

The employer should file requests for temporary labor certification at least 45 days before the labor certification is needed but not more than 120 days before the worker is needed.

A petition to classify a non-immigrant as a temporary worker (Form I-129B) must be filed with INS after certification has been received from DoL's Regional Certifying Officer. This form contains four categories. In this industry you normally will be filing under the H2 category.

The H2 category describes a person who will perform temporary service or labor, if an unemployed American capable of performing such service or labor cannot be found in this country. Form processing by the DoL may take four months or more. Many people file for temporary status and then apply for permanent immigration status once they have been working here for awhile. If immigration suspects that this is the alien's original intent, he will certainly be turned down.

WHO IS AN IMMIGRANT

An immigrant is, of course, any alien who enters the U.S. on a permanent basis. Entering the U.S. for employment under either category has its pros and cons, but it all boils down to a time element.

EMPLOYER REQUIREMENTS FOR PERMANENT LABOR CERTIFICATION

The process for an immigrant is slightly different and will take substantially more time. For a person to enter the U.S. under this category, the alien must enter what is called the preference category of immigration. The U.S. has six preference categories and each one has a certain number of aliens that can come into the country during a given years.

When application is made, a priority date is established. The priority date becomes the visa issue date. An example of how a priority date works is if the immigration service is reviewing petitions that were filed June 15, 1982, the people who filed after that date are still waiting to have their applications reviewed.

In this industry you will be petitioning under the sixth preference. There are 270,000 immigrants admitted to this country under all preference categories annually. Ten percent of that number are allotted to sixth preference; this is why it takes two or more years to process your petition for permanent immigration papers.

The sixth preference category includes an alien who is capable of performing skilled or unskilled labor, for which a shortage of employable and willing persons exists. This means the labor certificate process must be adhered to first.

EMPLOYER LABOR CERTIFICATION REQUIREMENTS

There are two methods of recruiting that satisfy the labor certification responsibilities. Those methods are called the "REDUCTION IN RECRUITMENT WAIVER REQUEST" and "RECRUITMENT EFFORTS AFTER SUBMISSION OF AN APPLICATION." Both methods have advantages and disadvantages. The most important factor is which method gets the application to the State Employment Service at the earliest time for a priority date.

The Reduction in Recruitment means the employer need only conduct his normal recruiting procedures within six

months of submitting the application and provide a written request for a Reduction in Recruitment. The employer's recruitment efforts after filing an application may be reduced, if the employer can document that the labor market was adequately tested.

The Recruitment Effort After Submission of an Application means upon receipt of a completed application, the Alien Labor Certification office will examine the application and from it will prepare and process a job order through the regular employment service recruitment system for 30 calendar days. The local and state employment service will refer U.S. workers to the employer. The employer must then report the results of his recruitment to the employment service.

DOCUMENTING RECRUITMENT

Documenting recruiting effort means the employer must advertise the job opportunity in a media of general circulation for (3) consecutive days or in a trade or ethnic and professional publications in the local area. The advertisement must offer prevailing wages, working conditions and describe the job opportunity in detail. A copy of at least one advertisement placed by the employer (specifying name of the media used, date(s) of the advertisement and results of such advertising) must be attached to each application (EA 750).

After the labor certification is granted another petition is filed with the INS. The form used for a preference petition is called a I140.

Instructions for filing the Labor Certification Applications Booklet, containing the ETA 750 A & B forms, may be obtained from the Alien Labor Certification Unit of the State Employment Service, free of charge. Other contacts include: Local Office of Employment Service, Department of Justice, and Department of Labor.

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