



PERM UPDATE

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- Validity and Invalidation
- Supervised Recruitment
- Revocation of Approved Cases

Validity of Labor Certification

What events can affect the validity of a labor certification?

- Expiration of the labor certification
- Changes
 - If the employer does not want to continue the sponsorship process;
 - Change in the job location;
 - Change in name or ownership of employer;
 - Change in title, salary, or job duties .

Validity of Labor Certification

Expiration of a Labor Certification.

Labor certifications approved on or after July 16, 2007, will expire 180 days from their date of issue, unless filed prior to expiration with the Department of Homeland Security in support of a Form I-140 immigrant petition for an alien worker. 20 CFR 656.30(b)(1).

- An approved labor certification must be filed in support of a Form I-140 petition during the validity period established by DOL;
- USCIS will reject Form I-140 petitions that require an approved labor certification that are filed with a supporting approved labor certification that has expired.

<http://www.uscis.gov/files/pressrelease/DOLPermRule060107.pdf>

Validity of Labor Certification

Validity of Expired Labor Certification.

USCIS will continue to accept amended or duplicate Form I-140 petitions that are filed with a **copy** of a labor certification that is expired at the time the amended or duplicate Form I-140 petition is filed, if the **original approved labor certification was filed in support of a previously filed petition during the labor certification's validity period.**

- When a new petition is required due to successor-in-interest;
- Where the petitioning employer wishes to file a new petition subsequent to the denial, revocation or abandonment of the previously filed petition and the labor certification was **not invalidated due to material misrepresentation or fraud relating to the labor certification application;**
- Where the amended petition is requesting a different visa classification than the visa classification requested in the previously filed petition;
- When the previously filed Form I-140 petition has been determined to have been lost by USCIS or DOS.

Validity of Labor Certification

Validity of Expired Labor Certification for 7th 7th year H-1B extension

- June 1, 2007 Neufeld Memo to USCIS on the impact of the DOL final rule limiting Labor Certification validity states that if a labor certification was used as the basis of a prior I-140 filing, and that I-140 was denied, revoked, or abandoned, the labor cert can form the basis of a subsequent I-140 filing, arguably then it should be valid for use for H-1B extension.
- December 27, 2005 Aytes Memo advises that "until further guidance is published", Service Centers shall not deny a 7th year H-1B extension where there is an approved labor cert on the basis that no I-140 or I-485 has yet been filed.
- California Service Center requires I-140 to be filed within the labor certification validity in order to form basis for H-1B extension.

Validity of Labor Certification

Validity of Approved Labor Certification where circumstances have changed.

Approved labor certification generally cannot be amended, except to correct mistakes made by the CO. March 30, 1992, DOL National Office Memo, and May 7, 1992, DOL Field Memorandum No. 47-92 (57 Fed.Reg. 31219 (1992)).

- USCIS will evaluate changes occurring after the approval of the certification to determine whether the changes affect the validity of the certification.
- USCIS has authority to invalidate a labor certification only for fraud or misrepresentation regarding a material fact that occurred during the labor certification process
- However, USCIS has broad authority to evaluate the alien's eligibility to immigrate, including whether the material issues underlying the certification continue to be the same.

Validity of Labor Certification

Validity of Labor Certification if there is a change in employment.

Any significant change in employment may affect the validity of the labor certification. 656.30(c)(2). According to the regulations, a permanent labor certification involving a specific job offer is valid only for the particular

- **job opportunity,**
 - **the alien named on the original application (unless a substitution was approved prior to July 16, 2007). (No substitution of one alien for another (except for professional athletes) 72 Fed. Reg. 2904 (May 17, 2007), effective July 16, 2007), and**
 - **change in the area of intended employment stated on the Application for Alien Employment Certification (Form ETA 750) or the Application for Permanent Employment Certification (Form ETA 9089).**
- **Exception if portability provisions apply (I-485 filed pending for over 180 days)**

Validity of Labor Certification

Validity of Labor Certification affected by a change in the area of intended employment .

- If the change of location is outside of the area of intended employment and the portability rule does not apply, the validity of the labor certification will be affected.
- USCIS will evaluate the changes of the job location as part of the petition adjudication, applying DOL standards.
- Any location within normal commuting distance of the original area will be considered the same area of intended employment. 20 CFR Sec. 656.3 (Any location within MSA is deemed within normal commuting distance)
- If I-140 is already approved and portability does not apply, the employer must file a new I-140 before the change occurs indicating the new location, referencing the prior petition.

Validity of Labor Certification

Validity of Labor Certification affected by a change in ownership

- The labor certification is valid only for the employer to which it is issued
- Exceptions for a merger, acquisition, or reorganization where the new employer is a **successor-in-interest**.
- DOL and legacy INS agreed that such changes will be reviewed by the immigration service. 57 Fed. Reg. 31219 (1992)
- If the new employer is not 'successor-in-interest' then the labor certification is not valid. Matter of United Investment Group, Int. Dec. 2990 (Comm'r 1985).
- The new entity must file a new I-140 with proof of the successorship, referencing the prior petition and a copy of the labor certification.

Validity of Labor Certification

When a new employer is a successor-in-interest?

- The new entity must assume all of the rights, duties, obligations, and assets of the original employer.
 - **Stock purchase.** In case of a corporate reorganization, merger, or acquisition, usually the labor certification survives if the new entity has assumed the rights and obligations of the original entity (i.e., if there is a stock purchase), and
 - There is no change in location outside the initial area of employment
 - **Assets purchase.** More problematic if the second company bought the assets rather than the stocks of the original employer. The new entity must have agreed to acquire all of the rights and obligations of the original employer. Usually new company buys assets to avoid any liability prior to the sale date.
 - Additional problem is if the employer stops functioning as a going concern prior to the second company buying the assets. If there is a gap, the job opportunity ceased to exist.
 - **Partnership and Sole Proprietorship** present additional challenges

Validity of Labor Certification

Validity of Labor Certification affected by a change in job opportunity

- USCIS will review the changes in salary or duties.
- Changes in duties may affect the validity of the labor certification. Analysis must include if the change still involves substantially the same duties and requires the same education, experience, and education, or if the requirements are different.
- If the change in salary is normal for the occupation, no change in validity of the labor certification.
- Increases in salary out of proportion may cause suspicions that the alien is filling a different job
- Employer must demonstrate commensurate increase rates with other employees
- Portability provision has different rules. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2001).

Invalidation of Labor Certification

Who has authority to invalidate a labor certification?

- The Department of Homeland Security
- Consul of the Department of State

When can these agencies invalidate the labor certification?

- If either the agencies determine in accordance with their procedures or if a court determines that that fraud or willful misrepresentation of a material fact involving the labor certification application exists.
PERM FAQ 1, March 2005

Supervised Recruitment

CO has complete discretion to order Supervised Recruitment

- Supervised recruitment may be ordered in any case where the CO deems it appropriate.
- Where questions arise regarding the adequacy of the employer's test of the labor market.
- Where the Certifying Officer determines it appropriate, post-filing supervised recruitment may be required of the employer for the pending application or future applications pursuant to §656.20(b).
- The recruitment, will be supervised by ETA COs.
- Under § 656.21, if the employer is directed to complete supervised recruitment, the CO may take notice of industry layoffs in directing the employer to make additional recruitment efforts.

Supervised Recruitment

Requirements of Supervised Recruitment

- Consists of advertising for the job opportunity by placing an advertisement in a newspaper of general circulation or in a professional, trade, or ethnic publication, and any other measures required by the CO.
- If placed in a newspaper of general circulation, the advertisement must be published for 3 consecutive days, one of which must be a Sunday;
- If placed in a professional, trade, or ethnic publication, the advertisement must be published in the next available published edition.
- The advertisement must be approved by the Certifying Officer before publication, and the CO will direct where the advertisement is to be placed.

Supervised Recruitment

Timing of Supervised Recruitment

- The employer must supply a draft advertisement to the CO for review and approval **within 30 days of being notified that supervised recruitment is required.**
- The advertisement must be placed in accordance with the guidance provided by the CO.
- The employer must notify the CO when the advertisement will be placed.

Additional or substitute recruitment:

- The Certifying Officer may designate other appropriate sources of workers from which the employer must recruit for U.S. workers in addition to the advertising.

Supervised Recruitment

Ad requirements § 656.21(b).

The advertisement must:

- i. Direct applicants to send resumes or applications for the job opportunity to the CO for referral to the employer;
- ii. Include an identification number and an address designated by the Certifying Officer;
- iii. Describe the job opportunity;
- iv. Not contain a wage rate lower than the prevailing wage rate;
- v. Summarize the employer's minimum job requirements, which can not exceed any of the requirements entered on the application form by the employer;
- vi. Offer training if the job opportunity is the type for which employers normally provide training; and
- vii. Offer wages, terms and conditions of employment no less favorable than those offered to the alien.

Supervised Recruitment

Recruitment Report § 656.21(e)

- The employer must submit a detailed written report signed by the employer and contain specific information regarding the recruitment process.
- The Recruitment Report must be consistent with the requirements of § 656.10(b)(2)(ii).
- The recruitment report must be submitted within 30 days of the CO's request for the report.
- If the employer does not respond within the 30 days, the CO shall deny the application.
- The CO has discretion to grant one extension to the Employer.

Supervised Recruitment

Recruitment Report § 656.21(e) continued

The Recruitment Report must meet the following requirements:

- 1) Identify each recruitment source by name and document that each recruitment source named was contacted (for example, copies of letters to recruitment sources such as unions, trade associations, colleges and universities and any responses received to the employer's inquiries; tear sheets from ads placed in newspapers, professional, trade, or ethnic publications, dated copies of web pages, etc.)
- 2) State the number of U.S. workers who responded to the employer's recruitment.
- 3) State the names, addresses, and provide resumes (other than those sent to the employer by the CO) of the U.S. workers who applied for the job opportunity, the number of workers interviewed, and the job title of the person who interviewed the workers.

Supervised Recruitment

Recruitment Report § 656.21(e) continued

The Recruitment Report must meet the following requirements:

4) Explain, with specificity, the lawful job-related reason(s) for not hiring each U.S. worker who applied.

- Rejection of one or more U.S. workers for lacking skills necessary to perform the duties involved in the occupation, **where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training**, is not a lawful job-related reason for rejecting the U.S. workers.
- A U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.

Revocation of Approved Cases

CO has authority to revoke an approved labor certification.

- A CO can revoke an approved labor certification if the labor certification was not justified 20 CFR Sec. 656.32(a).

- No time limit on the authority of CO to revoke an approved labor certification.

- Based on any ground that could have resulted in denial of the original application, whether unintentional or willful. FAQ 1, March 2005.
- This may include obvious errors, fraud, willful misrepresentation, or improper labor certification process.
- This includes labor certifications submitted using a PIN assigned to a non-employer.
- Violation of employer payment regulation is also basis for denial or revocation.
- Employer is required to keep support documents for 5 years although the labor certification can be revoked beyond this period.

Revocation of Approved Cases

Procedures for Revocation

- The CO must send a Notice of Intent to Revoke an approved labor certification
- This Notice must contain a detailed statement of the grounds for the revocation and the time period allowed for the employer's rebuttal. 20 CFR Sec. 656.32(b).
- The employer has 30 days to submit evidence on rebuttal.
- The CO then has 30 days from the date of receiving any rebuttal evidence to issue a decision
- If the employer does not submit evidence, the Notice of Intent to Revoke becomes the final DOL decision.
- If the employer files rebuttal evidence and CO revokes the Labor Certification, the employer may file a BALCA appeal.

Questions?

For any questions regarding this presentation, please contact

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