Law Offices of Rajiv S. Khanna, PC

immigration • com

Practicing US Immigration Law in all fifty states and abroad. Attorneys admitted in: DC, VA and NY.

16 August 2005

Via Hand-delivery

AUG 16 2005

Elaine L. Chao, Secretary of Labor
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, D.C. 20210

5225 N. Wilson Blvd.
Arlington, VA 22205-1148

Phone: (703) 908-4800
Fax: (703) 908-4890

firm@immigration.com
firm@businesslaw.com
www.immigration.com

Attorneys:

Rajiv S. Khanna *
Jitesh Malik +
Mathew Chacko +
David P. Murphy *

* Admitted to practice law in DC, VA
+ Admitted to practice law in NY

Re: 8th August 2005 FAQ regarding PERM

Dear Ms. Chao:

We are writing to apprise you of our protest against and our intention to seek judicial redress regarding the above referenced FAQ. We believe this policy reversal summarily discontinuing multiple filings of labor certifications is arbitrary, capricious, illegal, actionable and manifestly unfair.

USDOL has reversed its long-standing policy overnight thereby disallowing multiple labor certification applications for the same alien. This action affects substantive rights. This change in policy can only be taken through formal rule-making and not through ad-hoc memoranda and FAQ in which the concerned (and aggrieved) stakeholders have had no input or opportunity for appropriate notice and comment.

We, on our own behalf as a concerned employer, on behalf of several concerned employers and on behalf of members of our community hereby place you on notice. Unless USDOL rescinds this policy forthwith, we intend to move the court for appropriate interim and permanent relief.

To prevent unnecessary expenditure of the court's and taxpayers' resources, we are available to undertake a conference call with appropriate USDOL personnel to ascertain if this matter can be amicable resolved. **Accordingly, we will wait to hear from you until close of business 22 August 2005. Thereafter, we will move forward with formal legal proceedings against the impugned action.**

The following submissions are being made merely as points for settlement consideration and should not in any manner be construed so as to limit or detract from the merits of any submissions made in formal legal proceedings.

The Policy Reversal is Illegal

The announced policy reversal is unconstitutional and violates the requirements of the Administrative Procedures Act, *inter alia*, in that it does not permit for notice and comment and in that it reverses a long standing policy thereby depriving aggrieved parties of their rights without due process. Disallowing multiple filings made in good faith is a considerable incursion into existing substantive rights. APA would not permit such incursion without appropriate deliberation and rule-making.

The Policy Reversal is Manifestly Unfair and *Ultra Vires*

When Notice and Comment is not permitted, an agency can never by itself adequately address all eventualities. For instance, your FAQ notes:

> After August 31, 2005, once one permanent labor certification application for a particular alien is certified, all other applications for that alien filed under PERM will be denied.

This does not provide for a situation where, during the lengthy wait for a visa number (several years), the alien gets promoted to a position that would require the employer to file another labor certification. Just because the PERM process has made one part of the green card process speedier for PROSPECTIVE filers, does not eliminate injustice perpetrated by long waiting times. There are people still in the labor certification backlogs waiting since 2001 for their labor certifications. Additionally, visa number unavailability, an existing and escalating problem, forces years of further waiting even upon PERM filers. Under the current DOL jurisprudence, these aliens may not be promoted, unless they wish to start their labor certifications for promoted or possible future promoted positions all over again. The beneficiaries gain two advantages by multiple filings. One, they have a possibility of promotion. Two, they can transfer priority dates across non-identical labor certifications. PERM does not permit such a result, but USCIS regulations do.[1] Surely, USDOL would not have intended to bar this type of applications.

The FAQ also summarily dismisses the situation where an alien could, in good faith, have more than one job offer from the same employer in different locations or from different employers (both situations that arise frequently in case of much sought after, highly qualified employees).

You further note:

> Once one application has been certified, a Notice of Finding will be issued for any application(s) by the employer for the same alien filed under the prior regulation (in effect through March 27 2005) found pending in either of the Backlog Elimination Centers (BECs).

The above statement does not explain what would be the intent or content of the NOF. Is the DOL seeking an explanation for multiple filings? That would contradict the assertion:

> We do not intend to issue more than one permanent labor certification for the same alien regardless of the number of filed applications, and whether for the same or different job opportunities.

When the issues have been prejudged, so what then would be the intent of such an NOF?

---

[1] 8 CFR Section 204.5(e)

Retention of section 203(b)(1), (2), or (3) priority date. A petition approved on behalf of an alien under sections 203(b)(1), (2), or (3) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any classification under sections 203(b)(1), (2), or (3) of the Act for which the alien may qualify. In the event that the alien is the beneficiary of multiple petitions under sections 203(b)(1), (2), or (3) of the Act, the alien shall be entitled to the earliest priority date.

The FAQ also states:

> Once an application for the alien has been certified in a BEC, any pending application in either of the National Processing Centers (NPCs) filed by the employer for the same alien will be denied

and:

> In the event multiple permanent labor certification applications for the same alien under PERM are inadvertently certified, we intend to revoke all but the first certification under 20 CFR § 656.32. In the event multiple permanent labor certification applications for the same alien are certified at both the NPC and the BEC, we intend to revoke the one filed under PERM.

Such unilateral action is clearly arbitrary and capricious. We do not believe USDOL has the authority to take such an action in utter disregard of the right of the employers and the aliens. USDOL may not abrogate an employer's right to continue with their preferred application, nor may it abrogate an employee's existing right to carry forward their priority date.

The impugned policy also fails to take into account possible changes in jobs for applications that have been pending for years. These changes MAY render the old labor certifications invalid, but then again, they may not. The choice to protect the alien and the employer should be left in the hands of the employers.

USDOL seeks to draw its authority for revocation of pending multiple filings from 20 C.F.R. § 656.32. That regulation provides that a CO may revoke a labor certification where it is found that "certification was not justified." This does little to further the rule of law. This undefined phrase, which bestows an authority unfettered by time or intelligible criteria for exercise of discretion creates anarchy. We also fail to see what possible rationale there could be to process the most recent ("last application filed") application in one situation and the oldest ("first certification") in another.

USDOL has had ample opportunity to address the issue of multiple filings in the PERM regulations. USDOL made a deliberate choice not to do so. Even after the promulgation of the regulations, USDOL made a deliberate choice to not address this issue. Not only that, even the instructions to Form 9089 (Instructions, Page 2) give public the impression that keeping multiple applications pending is a choice.

We maintain that to unilaterally decide such an important issue affecting so many people is illegal and manifestly unfair.

Unfortunately, the impugned policy has clearly revealed the USDOL's illegal and unjustified bias against multiple filings. Under the circumstances, even a withdrawal of this policy may not be sufficient. The adjudicators' minds have already been influenced to prejudge the issues. In our view, until new regulations are issued in accordance with law, USDOL must affirmatively permit multiple filings, and must further announce the revised policy in writing to redress the wrong already done.

Thank you for your time and attention.

Sincerely,

Rajiv S. Khanna

Cc: Emily Stover DeRocco
Chief of Division of Foreign Labor