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COMMITTEE RECOMMENDATIONS ON NOTICE OF PROPOSED RULEMAKING BY THE U.S. DEPARTMENT OF LABOR

These Comments are solely those of the Committee on Immigration and Nationality Law of the New York County Lawyers' Association. They have not been approved by the Board of Directors of the New York County Lawyers' Association and do not necessarily represent the views of the Board of Directors.

The New York County Lawyers' Association
Committee on Immigration and Nationality Law
Eugene J. Glicksman, Chair

Gilbert C. Ferrer, Subcommittee Chair

Comments on Notice of Proposed Rulemaking RIN 1205-AB42

The Committee on Immigration and Nationality Law of the New York County Lawyers' Association submits these comments in response to the Notice of Proposed Rulemaking ("NPR") published by the U.S. Department of Labor ("DOL") in the Federal Register on February 13, 2006 at page 7656. These proposed rules would (1) eliminate the practice of allowing the substitution of beneficiaries on labor certifications and applications**;** (2) impose a 45-day period within which an employer would have to file an approved labor certification in support of an I-140 petition with Department of Homeland Security ("DHS")**;** and (3) require that the employer pay the costs and attorney fees for the preparation of a labor certification application and preclude payment or reimbursement by the beneficiary.

In the NPR Preamble at 7658, the DOL states that the "current practice of allowing substitution of alien beneficiaries provides a strong incentive for the filing of fraudulent labor certification applications and creates an opportunity for fraud throughout the lawful permanent resident process."

We initially note that the DOL has not cited any hard statistics as a basis for the proposed regulations. There are no statistics cited regarding the number of filings done, labor certifications issued or attorneys involved in the process. Neither are there any statistics regarding alleged or proven fraudulent applications or labor certifications.

The only specific factual support cited refers to a single attorney in Virginia who filed "approximately 2,700 fraudulent applications...that he later sold to aliens for at least $20,000 apiece so that they could be substituted for the named beneficiary." The DOL should not burden unreasonably thousands of employers and potential lawful immigrants with overly strict regulations because of the acts of one individual.

<u>Comments Regarding Proposal to Eliminate Substitutions</u>

Criminal conduct results when individuals are so inclined. If a renegade attorney files 2,700 fraudulent labor certifications, we submit that it is not the fact that the named beneficiaries could be replaced with different foreign workers, but rather that there were inadequate controls at the state level regarding the labor certification review process. The ability to substitute one worker for another is not the issue; the labor certifications <u>themselves</u> were fraudulent. If the appropriate reviews are made to insure the validity of a labor certification

application, then allowing for a bona fide reasonable substitution later does not increase the risk of fraud, especially since the DHS conducts a detailed review of the I-140 before permanent residency is granted.

Reasonable safeguards can be taken against such illegal conduct by attorneys, consultants and employers, and the DOL has taken a large step in that direction by implementing the "employer-based" PERM process. In the PERM process, greater assurance can be expected that an employer is seeking to fill a bona fide position with a qualified foreign worker. We would urge that the DOL allow the development of experience under this process before considering taking steps as drastic as those proposed in this NPR.

For this reason, if the DOL insists upon the elimination of substitution of beneficiaries, it should be limited to labor certification conducted under the pre-March 2005 process.
It is noted in the NPR that there is no statutory entitlement to substitution, and that allowing the practice has been an accommodation to employers because of the long time it has taken in the past to pursue a labor certification to conclusion. It is also noted that if the original alien is no longer available, then the employer will need to find a replacement and "prohibiting substitution will ensure that employer again makes the employment opportunity available to U.S. workers." We respectfully take issue with the point made by DOL. The labor certification application reflects a test of the labor market to support the offer to a qualified alien worker of a **specific position of employment**. If a new beneficiary will be substituted into a labor certification, the test of the labor market **for that specific position has been completed and is not affected in any way**. The job title, duties, salary, place of employment, etc., remain the same in a substitution, so the test remains valid. The only changes involve the qualifications of the substituted employee, which the DOL is able to review through the submitted documentation.

For the substituted employee, sometimes the priority date of the original labor certification is a crucial consideration in making the substitution available. Further to our comments above, there is no reason not to allow the substituted employee to take advantage of this if the employer has already satisfactorily concluded the labor market test.

There appears to be an implication underlying this NPR that employers, attorneys and consultants will act fraudulently if given the opportunity. We think this is an overreaction by the DOL to the specific actions of one individual. The vast majority of employers in this country just want to conduct business and to hire the employees necessary to do so. In order to find those employees, employers conduct millions of dollars of job advertising. There is no additional need for DOL to "ensure" that they will take the necessary steps to find qualified

U.S. workers for a position any more than is already present in PERM.

There has to be a balance between protecting the U.S. worker and allowing U.S. employers to hire necessary employees without forcing the employer to bear an unreasonable burden. We would suggest that the DOL continue to permit substitutions within two years of the original approval (see comments below.)

Comments Regarding Proposal to Limit Validity Period for Filing of Labor Certifications with DHS to 45 Days

A validity period of 45 days within which an employer must file the labor certification in support of an I-140 is much too short. We agree with the general rationale that a labor certification of indefinite continuing validity is not desirable since it may no longer adequately represent the job, the employer, the offered salary, or the labor market several years after approval. However, too many things may interfere with the employer's ability to file the I-140 within 45 days after approval. For example:

- There could be a gap of many days between the approval and the receipt of the labor certification by the employer or the employer's representative.

- In many cases**,** an adjustment of status application will be filed with the I-140, perhaps with dependents. Preparation of the package, even in the best of good faith efforts to file in a timely manner, could easily stretch well beyond the 45 days.

- Since an employer's main concern is running a business, rather than pursuing immigration matters for employees, delays in the preparation and filing of the I- 140 can be expected.

As stated above, we agree that there should be a limit on the validity of an approved labor certification. We submit that a maximum validity period of two years after approval would satisfactorily meet DOL's anti-fraud concerns as well as allow an employer sufficient time to submit a labor certification for I-140 processing by DHS.

Comments Regarding Proposal to Prohibit Reimbursement of Employers

We agree with the DOL statement in NPR §656.12(a) that labor certification applications are "not articles of commerce." They should never be allowed to be sold, bartered or purchased by individuals. Our comment is specifically directed at §656.12(b): "Payment or

reimbursement of the employer's attorney's fees or other employer costs related to preparing and filing a permanent labor certification…is prohibited." In the preamble, DOL states that "any such reimbursement…to determine whether domestic labor is available or other such employer expenses, is contrary to the purpose of the labor certification process and should be a cost borne exclusively by the employer." Respectfully, we do not merely disagree with the DOL's statement; we believe it is wholly incorrect.

As previously stated, an employer's main concern is running a business and not pursuing immigration applications. The Congress instituted the certification requirement for employment-based immigration. As a result, the DOL created the mechanism of the labor certification process, recently modified by the PERM process, to implement that mandate. PERM imposes a regulatory obligation on an employer quite apart from the usual business costs of hiring a worker. In the vast majority of cases, the employer knows little beyond the fact that it needs a certain position filled and it has found an alien employee to fill it. It is ignoring reality to presume that the process is not employment necessity driven and that it is unreasonable to ask an employee who benefits from the process to share in or reimburse those costs.

The DOL had previously made it clear that the purpose of the labor certification process is to test the labor market to determine if there are qualified U.S. workers available for the position and whether hiring a foreign worker to fill the position would adversely affect working conditions for U.S. workers. It appears that the DOL is claiming that this "purpose" is somehow thwarted if the employer's costs are reimbursed by the employee. The DOL has offered no factual support for this assumption, which if applied broadly, imposes an unreasonable burden on all employers utilizing the labor certification process. The fact is that many honest employers want to conduct business and want to "do right" by their employees and meet their obligations under law. The two parties should continue to have the option to reimburse the employer for the costs of this process should the parties so decide.

Additionally, the proposed regulation would have a negative impact on an applicant's (or beneficiary's) right to counsel. It is understood that attorneys who represent both workers and employers in the labor certification context are in a potential conflict situation. That potential conflict should be resolved between the lawyers and their clients and not by DOL. If an improper situation exists, it can be better dealt with by the appropriate bar disciplinary committees or, in the extreme case, the local law enforcement agencies.

Payment of an employer's expenses should not be confused with the sale, barter or purchase of a labor certification. Who pays the lawyer has nothing to do with the DOL's mandate in the

U.S. immigration process: certifying labor market conditions. There has been no hard evidence presented, cited or discussed which in any way either demonstrates or tends to demonstrate that payments to lawyers by beneficiaries has led to any abuses.

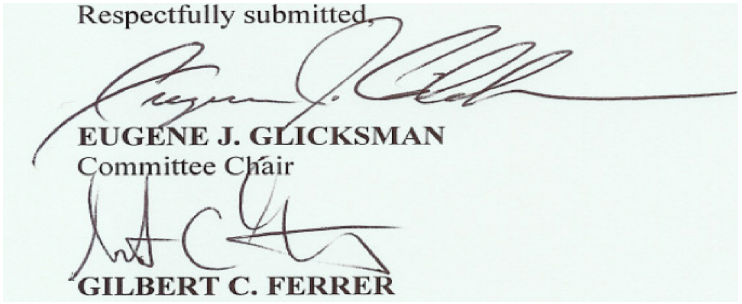
Conclusion

The combination of prohibiting substitutions in labor certifications, imposing a 45-day limit to an approved labor certification' s validity and prohibiting the payment of an employer' s expenses by the employee, will severely impair the use of this process in many cases for many employers seeking to retain valuable foreign employees.

We respectfully urge the DOL to consider reform of its own internal procedures. DOL audits under the PERM regulations are now taking more than nine months to be completed. Effective, prompt resolution of questions surrounding pending labor certifications would do much to improve employer compliance.

We also recommend that the DOL balance its anti -fraud efforts with a greater consideration of how the process is used in practice by employers and the genuine need for an effective work force. The result, desired by both the DOL and the employer, is the same: The alien worker who goes through the labor certification process comes out a U.S. worker at the end.

Thank you for your consideration of these comments.



Subcommittee Chair

April 12, 2006