



**LEGAL
NOTES**

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Substitution of aliens in labor certifications

Most labor certification applications take two to three years to process. In some cases, the wait is even longer. A labor certification is a document given by the Department of Labor stating that qualified US workers cannot be found in the area of intended employment who are available, willing and able to fill the position offered to the alien. The Department of Labor must be satisfied that the alien will not adversely affect the wages and working conditions of similarly employed US workers.

The certification specifies the name of the alien and the prospective employer, the job description, the job location, and the salary. It is required in most second and third employment-based immigrant visa petitions. Once approved, it is valid indefinitely, unless there was fraud or misrepresentation in the application process.

What happens if there is a change in the terms and conditions con-

tained in the labor certification after it is approved? Is the validity of the certification affected? If it is, do the employer and alien start the rigorous process all over again?

The following are the rules:

- If the original employment relationship is terminated, the employer may substitute a different alien beneficiary and retain the priority date of the old labor certificate, provided the original alien beneficiary and has not obtained permanent resident status. The substitution is accomplished by the filing with the INS of an I-140 petition accompanied by the original approved labor certification on behalf of the alien to be substituted. The substituted alien must show that he meets all the minimum education, training and experience stated in the original labor certification.

- Changes in the ownership of the employer may also affect the validity of the labor certification. Mergers, acquisitions or reorganizations are acceptable as the new employer is considered a successor-in-interest and assumes the rights and obligations of the old employer.

The situation in smaller companies is more problematic as it usually involves the purchase of assets rather than the stocks. The purchaser in such cases does not assume the obligations of the original

employer.

Partnership and sole proprietorships also pose a lot of problems as usually a purchaser of the business is considered a new employer.

- If there is a change of job location, either because of the relocation of the employer or the transfer of the alien to a different worksite, the certification is invalidated unless the change is still within the area of intended employment or "within normal connecting distance" from the original location. This is the case because the old location, not the new one, was tested for unavailability of US workers and lack of adverse effect on the working terms and conditions of similarly employed workers.

The INS determines if the location change as stated on the preference petition is within the area of intended employment. INS examiners, however, do not have the expertise in this kind of area determination so they may seek the advice of the Department of Labor.

- Substantial changes in the salary or the job duties may also invalidate the labor certification and in some cases may constitute fraud. Increases of 5 percent to 10 percent per year in the salary are considered normal but if the increase amounts to 50 percent or more per year, the INS may view the increase with suspicion. The addition of managerial duties may be also indicative of a different position from the one stated in the labor certification.