DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 656

RIN 1205–AB25

Labor Certification Process for the Permanent Employment of Aliens in the United States; Refiling of Applications

AGENCY: Employment and Training Administration, Labor.

ACTION: Proposed rule; request for comments.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (Department or DOL) proposes to amend its regulations relating to the permanent employment of aliens in the United States. The proposed amendments would permit employers to request that any labor certification application for permanent employment filed on or before July 26, 2000, and which has not been sent to the regional certifying officer, be processed as a reduction in recruitment request, provided recruitment has not been conducted pursuant to the permanent labor certification regulations. ETA anticipates that the proposed amendment would reduce the backlog of labor certification applications for permanent employment in State Employment Security Agencies (SESA). This measure to reduce backlogs would result in a variety of desirable benefits, a reduction in processing time for both new applications and those applications currently in the queue, would facilitate the development and implementation of a new, more efficient system for processing labor certification applications for permanent employment in the United States, and would reduce government resources necessary to process applications for alien employment certification.

DATES: Interested persons are invited to submit written comments on the proposed rule on or before August 25, 2000.

ADDRESSES: Submit written comments to the Assistant Secretary for Employment and Training, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–4456, Washington, DC 20210, Attention: James H. Norris, Chief, Division of Foreign Labor Certifications.

FOR FURTHER INFORMATION CONTACT: Denis M. Gruskin, Senior Specialist, Division of Foreign Labor Certifications, Employment and Training Administration, 200 Constitution Avenue, NW., Room N–4456, Washington, DC 20210. Telephone: (202) 219–5263 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

A. Background

Backlogs of applications for permanent alien employment certification have been a growing problem in ETA regional and SESA offices. These increasing backlogs have resulted in an increase in the time it takes to obtain a determination on an application for permanent employment in the United States.

Recent measures to reduce backlogs in ETA's regional offices have met with considerable success. Consequently, ETA is now turning its attention to reducing the number of backlogged cases in SESA's. Instituting measures to reduce backlogs in SESA's without first reducing backlogs in regional offices would not have resulted in a reduction in mean processing time. Implementing measures to reduce backlogs in SESA's without first reducing backlogs in the regional offices, would have merely resulted in transferring the backlogged applications from the SESA's to ETA's regional offices.

B. Statutory Standard and Implementing Regulations

Before the Immigration and Naturalization Service (INS) may approve petition requests and the Department of State may issue visas and admit certain immigrant aliens to work permanently in the United States, the Secretary of Labor must first certify to the Secretary of State and to the Attorney General that:

(a) There are not sufficient United States workers, who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(b) The employment of the alien will not adversely affect the wages and working conditions of similarly employed United States workers. [8 U.S.C. 1182(a)(5)(A)].

If the Secretary, through ETA, determines that there are no able, willing, qualified, and available U.S. workers and that employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers, DOL so certifies to the INS and to the Department of State, by issuing a permanent alien labor certification.

If DOL cannot make one or both of the above findings, the application for permanent alien employment certification is denied. DOL may be unable to make the two required findings for one or more reasons, including, but not limited to:

(a) The employer has not adequately recruited U.S. workers for the job offered to the alien, or has not followed the proper procedural steps in 20 CFR part 656.

(b) The employer has not met its burden of proof under section 291 of the Immigration and Nationality Act (INA or Act.) (8 U.S.C. 1361), that is, the employer has not submitted sufficient evidence of its attempts to obtain available U.S. workers, and/or the employer has not submitted sufficient evidence that the wages and working conditions which the employer is offering will not adversely affect the wages and working conditions of similarly employed U.S. workers.

C. Department of Labor Regulations

The Department of Labor has promulgated regulations, at 20 CFR part 656, governing the labor certification process described above for the permanent employment of immigrant aliens in the United States. Part 656 was promulgated pursuant to section 212(a)(14) of the INA (now at section 212(a)(5)(A)). 8 U.S.C. 1182(a)(5)(A).

The regulations at 20 CFR part 656 set forth the factfinding process designed to develop information sufficient to support the granting of a permanent labor certification. These regulations describe the nationwide system of public employment service offices available to assist employers in finding available U.S. workers and how the factfinding process is utilized by DOL as the basis of information for the certification determination. See also 20 CFR parts 651 through 658, and the Wagner-Peyser Act (29 U.S.C. Chapter 4B).

Part 656 also sets forth the responsibilities of employers who desire to employ immigrant aliens permanently in the United States. Such employers are required to demonstrate that they have attempted to recruit U.S. workers through advertising, through the Federal-State Employment Service System, and by other specified means. The purpose is to assure that there is an adequate test of the availability of U.S. workers to perform the work, and to ensure that aliens are not employed under conditions that would adversely affect the wages and working conditions of similarly employed U.S. workers.

D. Backlogs

Since Fiscal Year (FY) 1995, backlogs of applications for permanent alien employment certification in ETA regional offices and SESA's have increased dramatically. Between October 1994 and October 1998, the total backlog in both regional and SESA offices increased from 40,000 to 104,000 applications for alien employment certification. Regional office backlogs alone increased from 10,000 to 30,000 cases over that period, while backlogs in the SESA offices increased from 30,000 to 74,000 cases. The number of backlogged cases in SESA's on March 31, 1999, stood at about 86,000 applications.

Early in calendar year 1999 ETA instituted a number of measures to reduce the backlog of applications for permanent alien employment certification that numbered over 38,000 cases in its regional offices. The most important of these measures put in place in February 1999, were:

- Implementation of a system nationally which allowed employers to transmit H–1B labor condition applications (LCA) electronically and to receive a certification decision on their applications by return fax. Implementation of this system allowed many of the regional staff that it had been necessary to assign to processing LCA's in order to ensure compliance with the statutory 7-day H–1B processing requirement, to be reassigned to processing permanent cases.
- Implementation of a special priority backlog reduction effort by providing $500,000 for overtime and hiring temporary staff. These additional funds allowed experienced analysts to concentrate on processing permanent cases.

The efforts to reduce backlogs in regional offices met with considerable success. As of late October 1999, the number of backlogged cases in ETA regional offices numbered 14,642. To accomplish this large reduction in backlogs, regional offices processed over 71,000 cases. In addition to processing backlogged applications, the regions had to keep abreast of the 47,800 new cases received from the SESA's between the beginning of February and late October 1999.

E. Reduction in Recruitment (RIR) Requests

On October 1, 1996, because of the increasing workloads, ETA issued General Administrative Letter No. 1–97, *Measures for Increasing Efficiency in the Permanent Labor Certification Process* (GAL 1–97). The GAL instituted a number of measures to increase efficiency which were achievable under current regulations. One of the measures to increase efficiency was to encourage employers to file requests for reduction in recruitment under § 656.21(i) of the permanent labor certification regulations. Requests for reduction in recruitment are given expedited processing at ETA's regional offices, if they contain no deficiencies. The reduction in recruitment provision allows certifying officers to reduce partially or completely the employer's recruitment efforts through the State Employment Security Agencies, for example, by decreasing partially or completely the number of days which the job order and/or ad must be run. The notice requirement at § 656.20(g)(1)(i) and (5) can be reduced partially, but it cannot be eliminated, since it is based on a statutory requirement. See Immigration Act of 1990, Public Law 101–649, sec. 122(b) (Nov. 29 1990).

The reduction in recruitment provision may be utilized by certifying officers when the labor market has been adequately tested within 6 months prior to the filing of the application and there is no expectation that full or partial compliance with the prescribed recruitment measures will produce qualified and willing applicants.

The emphasis on the use of the reduction in recruitment regulation by GAL 1–97 in appropriate cases has worked well and has contributed significantly to ETA being able to manage its increasing case load with limited staff resources. Backlogs in both the regional offices and SESA's would undoubtedly be substantially larger if the use of the RIR provisions in the regulations had not been encouraged by GAL 1–97.

ETA has concluded that backlogs in SESA's could be substantially reduced if employers are allowed to have applications that were not originally filed as RIR cases and which meet the appropriate criteria removed from the SESA's processing queues and processed as reduction in recruitment cases. Furthermore, reducing or eliminating the backlogs would facilitate the development and implementation of a new permanent employment certification system that ETA has been developing.

The proposed amendment to the RIR regulation at 20 CFR 656.21(i) would allow an employer to file a request to have an application filed on or before July 26, 2000, which has not been sent to the regional office, processed as a RIR request under § 656.21(i), provided that recruitment has not been conducted pursuant to §§ 656.21(f) and/or (g). Since the RIR procedure is designed to expedite processing by permitting employers to substitute recruiting conducted prior to filing the application for the recruitment required by § 656.21, it would be incongruous to entertain an RIR request from an employer who had already engaged in the mandated recruiting. Those applications should be approved or denied based on that recruitment.

The proposed regulation provides that the option to have a permanent labor certification application processed as an RIR request would apply only to cases that were filed on or before July 26, 2000. ETA's operating experience indicates that without such a limitation employers may be motivated to file large numbers of cases, many of which may be inadequately prepared, simply to obtain a filing date [1] and then convert such cases to reduction in recruitment requests. Providing sufficient lead time to employers that may file large numbers of cases that could subsequently be converted to RIR cases would undermine the purpose of the proposed rule which is to reduce backlogs of existing cases and to facilitate the orderly implementation of a new streamlined labor certification system.

Before the issuance of GAL 1–97, cited above, on October 1, 1996, the RIR provisions at § 656.21(i) were not fully utilized for a variety of reasons. The issuance of GAL 1–97 instituted a uniform policy that RIR requests were to be viewed favorably, set forth operating guidelines that were to be followed by all regional offices, and clarified ETA policy regarding the priority to be given RIR requests. Between the issuance of GAL 1–97 in October 1996, and the publication of this document in the **Federal Register** employers have had ample encouragement and opportunity to file RIR requests.

The proposed regulation also provides that for the request to have a previously filed application processed as an RIR request it must be accompanied by documentary evidence of good faith recruitment conducted within the 6 months immediately preceding the date of the request. This provision will allow expeditious processing of previously filed applications as RIR requests upon receipt of the employer's request.

[1] The filing date is important to employers because, according to INS regulations, ''[t]he priority date of any petition for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor shall be the date the request for certification was accepted for processing by any office within the employment service system.'' See 8 CFR 204.5(d).

The proposed regulation does not specifically address the ability of an employer to amend its application at the time the employer makes a request to have a previously filed application processed as a RIR request. The Department believes that the current administrative practices that have been developed to handle requests to amend labor certifications after filing are sufficient. Interested parties, however, are invited to submit comments on this issue and the Department will consider those and any other comments in the development of the final rule.

Executive Order 12866

The Department has determined that this proposed rule is not an ''economically significant regulatory action'' within the meaning of Executive Order 12866, in that it will not have an economic effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.

While it is not economically significant, the Office of Management and Budget reviewed the proposed rule because of the novel legal and policy issues raised by this rulemaking.

Regulatory Flexibility Act

The proposed rule would only affect those employers seeking immigrant workers for permanent employment in the United States. The Department of Labor has notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. It will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132

This proposed rule will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a summary impact statement.

Assessment of Federal Regulations and Policies on Families

The proposed regulation does not affect family well-being.

Paperwork Reduction Act

The proposed rule would not modify the existing collection of information requirements in 20 CFR 656.21.

Catalogue of Federal Domestic Assistance Number

This program is listed in the Catalogue of Federal Domestic Assistance at Number 17.203, ''Certification for Immigrant Workers.''

List of Subjects in 20 CFR Part 656

Administrative practice and procedure, Aliens, Crewmembers, Employment, Employment and training, Enforcement, Fraud, Guam, Immigration, Labor, Longshore work, Unemployment, Wages and working conditions.

Accordingly, Part 656 of Chapter V of Title 20 of the Code of Federal Regulations is proposed to be amended as follows:

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The authority citation for Part 656 is revised to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A) and 1182(p); 29 U.S.C. 49 *et seq.*; sec.122, Pub. L. 101–649, 109 Stat. 4978.

§ 656.21 [Amended]

2. Section 656.21 is amended by adding a new paragraph (i)(6), to read as follows:

§ 656.21 Basic labor certification process.

* * * * *

(i) * * *

(6) Notwithstanding the provisions of paragraph (i)(1)(i) of this section an employer may file a request with the SESA to have any application filed on or before July 26, 2000, and which has not been sent to the regional certifying officer, processed as a reduction in recruitment request under this paragraph (i), provided that recruitment has not been conducted pursuant to paragraph (f) and/or (g) of this section.

Signed at Washington, DC, this 19th day of July, 2000.

Raymond L. Bramucci,

Assistant Secretary of Labor for Employment and Training.

[FR Doc. 00–18865 Filed 7–25–00; 8:45 am]

BILLING CODE 4510–30–P