Kidambi & Associates
A Professional Corporation

On the Web at www.kidambi.com
Phone: (203) 961-1886
Fax: (203) 961-1872

Business Immigration
An Update
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Requiem Le RIR – Is the Process Dead? An Analysis of the Department of Labor's Policy Change on Fast-Track Labor Certification

By Attorney Vaman B. Kidambi

Background:

In a recent Memorandum to the Regional Certifying Officers of the Departments of Labor, Chief of Foreign Labor Certification, Dale M. Ziegler evaluated the Department's position on Reduction in Recruitment (RIR) requests in an environment of increased layoffs and reductions in workforce in the American industry. The content of that memorandum and the resultant change in RIR adjudication procedure at Regional Offices of the Department of Labor is the subject of this article.

Subsequent to the release of this Memorandum, Region I, comprising of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont announced that as a result of the memo from Dale Ziegler, it is strongly encouraging and recommending that labor certifications for occupations in the IT industry be filed under the regular labor certification process rather than RIR.

Connecticut is currently processing regular Labor Certification cases filed as far back as March 1999, as opposed to June 2001 for RIR requests. New York is even worse. They are currently processing March 1998 cases under regular processing and April 2001 for RIR requests. This shift in policy, while justifiable as a result of the layoffs in the industry, would lead to endless delay in processing of Labor Certification Applications.

The Reduction in Recruitment process was introduced by the Department of Labor in 1997 as part of a General Administrative policy [GAL 01-97] to streamline the Labor Certification process and reduce

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House votes to abolish INS. What Next?

The House passed H.R. 3231, a Bill that would reorganize the Immigration and Naturalization Service (INS). AILA commends Representatives Sensenbrenner and Conyers for their hard work to reform a deeply troubled federal agency. The final measure the House passed today takes some positive steps, but leaves other important concerns to be addressed. AILA strongly supports a reorganization of the INS that works. A successful reorganization plan must put someone in charge with clout. It must

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backlogs. In adjudicating RIR applications, Certifying Officers were required to take into account the following considerations:

1. Adequacy of the recruitment conducted by the employer applicant, e.g., newspaper advertising, job fairs, Internet, etc;

2. Availability of U.S. workers for the occupation involved in the employer's application.

The Memorandum from Dale M. Ziegler talks about additional procedures that should be followed by Regional Certifying Officers (CO's) on evaluating RIR requests when available information indicates that there may have been layoffs in the occupation by the employer or layoffs in the occupation in the area of intended employment.

The Memorandum further requires that the following standard operating procedures be followed in evaluating RIR requests:

A. U.S. Worker Availability:

In determining whether an RIR should be permitted the Memorandum requires the Certifying Officer to assess the availability of U.S. workers. In making that assessment the Memorandum mandates that the CO shall:

> "Consider recent regional office experience in processing non-RIR cases involving occupations similar to those for which the employer is requesting RIR. E.g., did a market test for similar occupations in the area of intended employment produce qualified U.S. worker(s) for those occupations?
>
> Contact State agencies to obtain information on the labor market. Such information may be based, for example, on the State's recent experience in processing cases involving occupations involved in the employer's application, type of workers registered for unemployment benefits, type of workers registered in the states' job bank, or current labor market studies available from the state labor market information unit.
>
> Review current relevant articles that may have appeared within the last 6 months in newspapers, trade or professional journals concerning the availability of workers in the occupation in the area of intended employment."

The Memorandum adds, if after evaluating all of the information obtained, the Certifying Officer is confident qualified U.S. workers may be available for the occupation involved in the RIR, the RIR requestshould be denied and returned to the state agency [SESA] for further processing.

The Memorandum adds, if after evaluating all of the information obtained, the Certifying Officer is confident qualified U.S. workers may be available for the occupation involved in the RIR, the RIR request should be denied and returned to the state agency [SESA] for further processing. This will then result in the SESA sending out a letter to the Employer, requiring him to conduct supervised recruitment for the proffered position. Given the current backlog, the letter from SESA could take forever coming.

B. Establishment of Pattern of Recruitment:

The Memorandum categorically states, "the recent change in the economy should not change the established policy set-forth in GAL 01-97, change #1, regarding what is required of an employer applicant to show evidence of a pattern of recruitment for RIR purposes."

The Memorandum reminds Certifying Officers that, specifically, once it has been determined that RIR processing is appropriate for the area of intended employment and the occupation;

> "Certifying Officer's are reminded that the following, and not more, are required:

one print advertisement in a newspaper of general circulation or a relevant journal, plus enough other activities to show evidence that a pattern of recruitment has been completed to adequately test the labor market for the occupation of the subject application. These may include a combination of: job order with the state workforce agency, internal company recruitment activities, company and commercial internet web page ads, Community, college or other job fairs, private employment agency, additional print advertisements

The Memorandum clarifies that it is ETA policy that when an RIR is denied, the application shall be returned to the SWA for regular processing in the order of the application's priority date. In other words, the Application should not be returned to the back of the queue, but treated as a regular application filed in order of the priority date established when the RIR Application was first filed with the Service. So, if the SESA's are processing cases received as of March 1999 and the application was filed in April 2002, it will be a year, before the SESA will respond in that case.

In other words, the Application should not be returned to the back of the queue, but treated as a regular application filed in order of the priority date established when the RIR Application was first filed with the Service.

C. Layoffs in the Employer-Applicant Firm:

Layoffs pose a special problem. The Memorandum directs Certifying Officers to send out a letter to the Employer if there is reason to believe that the employer may have, laid off any workers within the last 6 months.

The Letter is expected to list the following questions:

1. Within the last 6 months has the [insert name of employer] laid off any workers in the occupation of [insert name of the occupation involved in the application and its DOT code]? If yes, provide the information requested below.

2. Provide the number of workers that were laid off from the occupation of [insert name of the occupation involved in the application and its DOT code]?

3. Provide documentation, by geographic area and worker, of the consideration given to the laid off workers for the position for which certification is sought. If any U.S. workers were rejected for the position for which certification is sought, the employer must provide the lawful job related reasons for each worker rejected.

If the employer responds satisfactorily to the inquiry concerning the number of workers, the application will be certified. If the employer declines to provide the requested information and/or documentation or otherwise does not respond satisfactorily to the letter requesting information about the number of workers laid off and the consideration given to them, a Notice of Findings will be sent to the employer. This will notify the employer of the Department's intention to deny the application if the employer does not respond satisfactorily to the request about the number of workers it laid off and does not satisfactorily document the consideration given to the workers that were laid off, including the lawful job-related reasons for each U.S. worker that was rejected.

D. General Layoffs in the Industry or Occupation in the Area of Intended Employment After Filing the Application:

The Memorandum also addresses layoffs by other employers in the same industry. If the Certifying Officer has reason to believe that there have been layoffs by other employers that may involve the occupation involved in the employer-applicant's application subsequent to the test of the labor market, the Certifying Officer should provide the employer with the option of publishing one additional advertisement consistent with the advertisement provided in the original RIR application, or requesting that the application be remanded to the state for regular processing. If the employer chooses to run the additional advertisement, the employer will be instructed that, after allowing a minimum of two weeks for U.S. workers to respond, the employer is to submit a written result of this recruitment effort. This report is to be consistent in form with recruitment results provided in the RIR application. Based on the recruitment results, the Certifying Officer will have the option of approving or denying the RIR, or issue a Notice Of Finding, as deemed appropriate.

E. Layoffs by the Employer-Applicant Firm, and General Layoffs in the Industry or Occupation in the area of intended employment:

Finally, the Memorandum directs Certifying Officers to gather information about possible layoffs by the Employer-Applicant Firm and the Industry in general, before certifying an application. An onerous standard given the limited time and resources available to the Department.

While the Memorandum appears to be a reactionary statement, largely based on the happenings in the industry, one cannot ignore the obvious lack of direction. The Memorandum does not address how the SESA's are expected to tackle the endless backlog of existing regular labor certification applications filed in the last two and in some cases three years. While not eliminating the process, the Memorandum raises new standards of review. At the time of writing this article, I learn that the Department of Labor is likely to issue a second memorandum explaining and clarifying the obvious anomalies in the first one. In the meantime, I do not see any option, but to continue filing Labor Certification Applications requesting RIR processing. Employer's should not stop recruitment efforts in light of this Memorandum and should continue to provide the Department with evidence of non-availability of experienced professional candidates, however unlikely that may seem!

House votes to abolish INS...

separate, but coordinate, adjudications and enforcement functions. It also must provide adequate funding for both arms of the reorganized agency. AILA looks forward to working with the House, Senate and the Administration on an improved reorganization plan that will address the agency's many problems.

"INS reorganization is not just about changing a government bureaucracy. It is about people's lives," said Jeanne Butterfield, Executive Director of AILA. While H.R. 3231 separates the two functions of the INS, enforcement and adjudications, the bill does not give the person in charge sufficient authority to do the job nor provide the necessary coordination between the two functions. AILA supports the separation of enforcement and adjudications functions, but for such separation to succeed also supports the creation of one strong central authority in control and effective coordination between the two functions.

"The two bureaus could end up working at cross-purposes, with its leaders sending conflicting messages on policy matters dealing with complex laws"

"Our immigration function needs someone in charge, one voice to speak on immigration," said Ms. Butterfield. "Coordination is as important as separating the two functions," continued Ms. Butterfield. This coordination is largely lacking in H.R. 3231 because there is no high level official with authority over the two bureaus who would be able to integrate shared information systems, policies, and administrative infrastructure, including personnel and training. The two bureaus could end up working at cross-purposes, with its leaders sending conflicting messages on policy matters dealing with complex laws. The absence of coordination can lead to inconsistent opinions and policies, and can result in each bureau implementing a law differently.

"INS reorganization is not an academic exercise. Having no one in charge and little coordination can lead to unfortunate situations taking place daily. We need to get it right," continued Ms. Butterfield. We call on the Administration to make clear that the House bill is the beginning of the process and that it will look to the House and the Senate to improve on this effort, especially with regard to enhancing the authority of the person in charge.

-Courtesy AILA

INS issues new Visitor Visa Regulations

April 12, 2002

INS issued 3 new rules in the Federal Register. An interim rule would prohibit nonimmigrants admitted in B visitor status from pursuing a course of study prior to obtaining approval of a change to student status. A new proposed rule would eliminate the 6-month admission period for B-2 visitors and would instead base the admission period on the amount of time needed to accomplish the purpose of the trip (in many cases 30 days). A third rule would require an alien with a final order of removal to surrender to the INS within 30 days of the issuance ofthat order. Individuals failing to comply would be prohibited from acquiring future immigration benefits.

INS Recommends Filing Petitions with Middle Name

April 3, 2002

AILA has been advised through several INS contacts that: "Effective immediately, all applications and petitions at all Service Centers and at all District offices are being screened for name checks through IBIS and other name databases at the point of adjudication. This means that all individual Petitioners, Applicants and Beneficiaries listed on all INS applications and petitions should list the full middle name, not just the middle initial. Failure to list the full name may result in a significant additional processing delay and an RFE requesting the missing info (i.e. the initial "M" stands for "Mary".) To avoid extra delays and unnecessary RFE's solely to discover the full name of the beneficiary or petitioner so that a name check can be run, the Service Centers recommend including the full name in the original submission." **Go to www.kidambi.com for more updates and the latest news.**

High Court rules on Back Pay to Undocumented Alien

March 28, 2002

In an opinion written by Chief Justice Rehnquist, a majority of the U.S. Supreme Court ruled March 27 that federal immigration policy, as expressed by IRCA, precludes an undocumented alien, who was not legally authorized to work, from receiving back pay pursuant to an NLRB finding that the alien was illegally laid off due to his union-organizing activities. Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented. **Go to www.kidambi.com for more updates and the latest news.**

KIDAMBI & ASSOCIATES, P.C.
800 Summer Street, Suite 209
Stamford CT 06901
PHONE: (203) 961-1886
FAX: (203) 961-1872
Email: immigration@kidambi.com