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PERM AUDITS REQUEST SWORN DECLARATIONS REGARDING IMPROPER PAYMENTS

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Recently, the Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) published its factsheet with statistics on the PERM program for FY2012 covering the period from October 2011 to September 16, 2012. Of the 67,400 PERM applications received during that period, 45% were audited for review. While audit notifications discussing the employer's use of an employee referral program, roving employees, or bearing requests for the resumes of all applicants are so frequently issued that they have almost become par for the course, the newest audit request came as quite the surprise. The latest audits now request declarations from the employer and the foreign worker, each signed under penalty of perjury, stating whether the employer received payments of any kind by the foreign worker or a third party for any activity related to obtaining permanent labor certification. Specifically, the audit request states:

> **Please provide declarations from the employer and the foreign worker, each signed by the respective individual under penalty of perjury, stating whether the employer received payments of any kind by the foreign worker or a third party for any activity related to obtaining permanent labor certification, including payment of the employer's attorney's fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application. Such payments include but are not limited to legal fees; administrative fees; advertising costs and/or any other costs or fees related to the filing of the application; wage concessions, such as deductions from wages, salary, or benefits; kickbacks, bribes or tributes; in-kind payments; free labor; and/or any other form of payment for services essential to the labor certification**

process. Note that any payment of fees by the foreign worker or third party for the benefit of the employer constitutes a "receipt of payment" by the employer, despite the fact that such payments may have been made directly to a party other than the employer – e.g., the employer's attorney, Department of State, etc.

> **If any such payments were made, please provide a list outlining the payment amount, who made the payment, to whom payment was made, dates, and the purpose of the payment.**

If payments were received from a third party to whose benefit work to be performed in connection with the job opportunity would accrue, please provide documentation explaining both the business relationship between the employer and the third party and the benefit of the work performed, or to be performed, in accordance with the Department's regulations at 20 CFR § 656.12(c).

If payments were made to the employer by the foreign worker as a result of an agreement/contract entered into prior to July 16, 2007, please provide documentation evidencing both that an agreement existed and that it was entered into prior to July 16, 2007. Examples include the contract, the agreement or a declaration signed by both the employer and the foreign worker under penalty of perjury, in the case of oral agreements.

The issue of payments for activity related to obtaining permanent labor certification first came up when the DOL published its final rule to "enhance program integrity and reduce the incentives and opportunities for fraud and abuse related to the permanent employment of aliens in the United States" which took effect on July 16, 2007. *See* 72 Fed. Reg. 27,903-27,947 (May 17, 2007). The rule revised the regulations found at 20 CFR §656 and implemented substantial changes to the labor certification process, including prohibition on the sale, barter, or purchase of labor certification applications and a requirement that employers pay all attorney's fees and costs associated with labor certification. The rule also made unenforceable any employer agreements requiring employees who leave within a certain time period to pay reimbursement costs associated with the labor certification. In passing this rule, the DOL rationalized that a prohibition against the transfer of labor certification costs from sponsoring employers to foreign national beneficiaries keeps legitimate business costs with the

employer, minimizes improper financial involvement by aliens in the labor certification process, and strengthens the enforceability of the bona fide job opportunity requirement. All reasoned opposition to the rule prior to its promulgation fell on deaf ears.

On July 16, 2007, the DOL also issued a FAQ to clarify certain aspects of the rule. The FAQ explained that pursuant to §656.12(b), an employer may not seek or receive payment of any kind for any activity (including recruitment activity and the use of legal services) related to obtaining permanent labor certification, except from a party with a legitimate, pre-existing business relationship with the employer, and when the work to be performed by the foreign national beneficiary will benefit that party. The preamble to the rule provided the example of physicians who frequently have split appointments between a Veterans Affairs Medical Center (VAMC) and an affiliated institution of higher education. In these cases, although there is one "employer of record" who files the labor certification application, the university, as a legitimate third party, could reimburse the VAMC for costs associated with the labor certification."Payment" includes, but is not limited to, monetary payments; deductions from wages or benefits; kickbacks, bribes, or tributes; goods, services, or other "in kind" payments; and free labor. This includes the prohibition against the alien paying the employer's attorneys' fees in connection with the labor certification application.

The FAQ clarified that an employer, or attorney representing an employer, who entered into a contract where payments from the foreign national are either owned after July 16, 2007 or owed prior to July 16, 2007 but not paid until after that date, have the right to seek the payment provided the payment obligation accrued *prior to* July 16, 2007. The employer must answer YES to Question I.e.23 on the ETA Form 9089 which asks, "Has the employer received payment of any kind for the submission of this application?" Then, the employer must explain and provide supporting details in I.e.23-A which states, "If Yes, describe details of the payment including the amount, date and purpose of the payment."

The FAQ also explained another exception to the rule which provides that "attorneys may represent aliens in their own interests in the review of a labor certification (but not in the preparation, filing and obtaining of a labor certification, unless such representation is paid for by the employer), and may be paid by the alien for that activity." The rule also did not prohibit the

alien from paying fees associated with the subsequent visa petition (Form I-140) and the adjustment of status application (Form I-485).

Pursuant to §656.20(a), an audit letter may be issued by the DOL if a labor certification is randomly selected for quality control purposes, or if, after reviewing the application, the certifying officer finds more information is needed before a determination can be made. Neither of these reasons justifies this new request for declarations. Questions I.e.23 and I.e.23-A on the ETA Form 9089 already address the issue. In response to an audit, the employer must submit a copy of the submitted ETA Form 9089 **with original signatures** in Section L (Alien Declaration), Section M (Declaration of Preparer (if applicable)), and Section N (Employer Declaration) to affirm that the information listed is true and accurate. As clearly stated on the ETA Form 9089, each declaration must be signed under penalty of perjury. In light of this, it is not clear why additional sworn declarations are now being requested. In any event, it is important to respond truthfully.

If the employer did not receive payments from the foreign national or a third party, the employer may submit a signed and notarized statement as follows:

did not receive payment of any kind from the or from a third party for any activity related to obtaining permanent labor certification.

> *did not receive payment for the legal fees; administrative fees; advertising costs and/or any other costs or fees related to the filing of the labor certification application; wage concessions, such as deductions from wages, salary, or benefits; kickbacks, bribes or tributes; in-kind payments; free labor; and/or any other form of payment for services essential to the labor certification process.*
> *I swear under penalty of perjury that the foregoing is true and correct.*

The foreign national may submit a signed and notarized statement as follows:

I did not pay any fees in relation to the filing of a labor certification application on my behalf.

> *did not receive payment from me for the legal fees, administrative fees, advertising costs and/or any other costs or fees related to the filing of the application. Also, did not ask me for any wage concessions, such as*

deductions from wages, salary, or benefits; kickbacks, bribes or tributes; in-kind payments; free labor; and/or any other form of payment for services essential to the labor certification process.

I swear under penalty of perjury that the foregoing is true and correct.

Only time will tell whether this new request will become another audit standard. It is essential that practitioners inform new clients and remind existing clients of the rule regarding payment of fees in connection with a labor certification. It is understandable why an employer would want to seek some type of protection, e.g. through employer agreements for reimbursements, against spending thousands of dollars to sponsor a foreign national only to have him leave the moment he obtains permanent residence. But employers must also be informed that the DOL, under §656.31(a), may deny any labor certification if the certifying officer finds the application contains false statements, is fraudulent or otherwise submitted in violation of the DOL's regulations. Under §656.31(b) the DOL may, if it learns that an employer, attorney or agent is involved in possible fraud or willful misrepresentation, refer the matter to the Department of Homeland Security or other appropriate governmental authority and suspend processing of any labor certification involving the employer, attorney or agent until completion of any investigation. Under §656.31(f) the DOL may debar an employer for up to three years upon a determination that the employer has participated in or facilitated "the sale, barter or purchase of permanent labor applications or certifications, or any other action prohibited under §656.12" or "the willful provision or willful assistance in the provision of false or inaccurate information in applying for permanent labor certification" or "a pattern or practice of failure to comply with the terms of the Form ETA 9089." Finally, the DOL could, under §656.32, take steps to revoke an approved labor certification if it is later found that the certification was not justified. It is obvious that the issue of improper payments is one that must always be taken very seriously.