

PUBLICATION

Immigration Update: Global Printing Problems for Immigrant Travel Visas; More Road Signs on the Foggy PERM Highway

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Snapshots of both big picture and meaningful small-scale developments in the world of immigration.

Printer Error on an International Scale

A printing problem usually can be fixed in minutes by swapping out a toner cartridge or adding some paper, or it could take a little longer to clear a complex paper jam. Right? Not at the U.S. Department of State! Apparently their printer problems are as convoluted and difficult to fix as, well, any federal government problem these days.

Once a foreign national has patiently waited for an employment- or family-based petition to be approved by United States Citizenship and Immigration Services (USCIS), completed the requisite DS-160 or DS-260 application form (and medical examination, if required), submitted all required paperwork to qualify for a visa (police certificates, original civil documents, etc.), and finally is scheduled for the interview at a U.S. embassy or consulate abroad, waiting for the actual visa stamp in the passport to be *printed* should only have a marginal impact on the applicant's travel arrangements. Not so for the past few weeks! At the end of July, numerous visa applicants began receiving notices following their interview appointment such as:

Due to worldwide technical problems, there may be a delay in printing your visa. This issue is affecting visa processing at all U.S. embassies and consulates. We are working as quickly as possible to resolve the issue so your visa can be printed and passed to the courier, DHL, for delivery. Please avoid making any travel plans until you have received your visa.

The Department of State (DOS) issued an alert on July 25 that it was experiencing technical problems with its systems and cautioned that applicants may be unable to obtain – or be delayed in obtaining – passports, Consular Reports of Birth Abroad or visas. System engineers have been diligently working to address the technical problems at the Department of State Bureau of Consular Affairs, but the printing delays, which were not restricted to any particular country, citizenship document or visa category, continue to impact travelers around the world.

As of August 4, 2014, the DOS has indicated that it is working diligently to clear the backlog, has made “significant progress and issued most of the worldwide backlog of nonimmigrant visa cases,” and that it is currently prioritizing “immigrant visas, adoption cases, and emergency nonimmigrant visa cases.” Even with this improvement, we continue to recommend that clients avoid making *any* nonrefundable travel arrangements until the ink is dry and they are actually holding the passport with that precious visa stamp in their hands.

Tools to Navigate through the PERM Maze

This month has been a busy one in the world of the Permanent Labor Certification Program (PERM). Processing times are improving, a new decision resolves the split in authority on recruitment content, “familial

relationships” are defined, and employers and practitioners are given technical guidance for the restrictive fields on Form ETA 9089.

Statistics

The Office of Foreign Labor Certification released its Third Quarter Statistics reflecting improved processing times. DOL analysts are currently reviewing initial filings from March 2014 and audited cases from March 2013, which shows a welcome improvement from the more than 12 month initial processing times reported in late 2013. The report, available at <http://www.foreignlaborcert.doleta.gov/performance/cfm>, includes statistics on the number of applications received, top occupations, work site states, industries, countries of citizenship, and minimum educational requirements, as well as details on the number of certified, denied and withdrawn applications.

Content of Advertising

On July 30, 2014, the Board of Alien Labor Certification Appeals (BALCA) announced in *Matter of Symantec Corporation*, that the “three additional steps” for recruitment for professional positions (documented in 20 CFR §656.17(f)) are not held to the content requirements applicable to the required steps of newspaper or journal ads and internal posting. The *Syantec* decision resolves the split in authority on this issue and appears to allow employers freedom to engage in generalized recruiting efforts, but a footnote in the decision leaves this newfound freedom in drafting advertising content somewhat fettered:

The CO additionally relies on *East Tennessee State University*, 2010-PER-38 (Apr. 18, 2011) (en banc), where the Board concluded that an advertisement placed in fulfillment of an additional recruitment step must not include requirements not listed on the Form 9089. *Id.*, slip op. at 8, n.7. We do not find this conclusion to be binding upon us today, as the issue was not raised or briefed by the parties, or necessary to the resolution of the appeal, and the Board did not analyze the scope of § 656.17(f) in any depth.

Matter of Symantec, 2011-PER-01856 (July 30, 2014)(en banc) at p. 6, n.4.

BALCA also left open the possibility that an employer could show bad faith in seeking to deter qualified workers by including requirements or job duties in the additional recruitment steps that are more restrictive than the minimum requirements and job duties in the ETA Form 9089, but BALCA did not find that in the instant case. Although this decision clarifies the conflicting case law and offers breathing room in recruitment content, the safest approach continues to be to conform all recruitment to the requirements outlined in the regulations in §656.17(f).

Familial Relationships

The PERM application Form ETA 9089 includes a question (C.9.) asking not only if the employing entity is a closely held company, but also if there is “a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien[.]” Failure to respond accurately to this question is a material misrepresentation and could be grounds for denial, revocation or invalidation. DOL has added an FAQ to help employers (and their counsel) properly respond to this critical question. In short:

A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, cousins of all degrees, aunts, uncles, grandparents and grandchildren are included. It also includes relationships established through marriage, such as in-laws and step-families. The term 'marriage' will be interpreted to include same-sex marriages that are valid in the jurisdiction where the marriage was celebrated.

For the full discussion and FAQ: <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#FM1>

Licensure and Credentials

When applying for permanent residency pursuant to a labor certification, the individual applicant must be able to document that he or she meets the minimum requirements for the position. These minimum requirements include certifications, licensure or other credentials that do not fall neatly within the duties for one of the applicant's previous jobs. The OFLC has now clarified in a FAQ that these additional qualifications should be listed separately in Section K under item 9 "Job Details" if not listed elsewhere in the application (e.g., in connection with prior employment). Sounds fairly straightforward, right?

The trick is that to complete any "Job Detail" information in Section K, you have to also complete the fields describing the job, dates employed, position title, etc. in items K1-K8 or else these additional qualifications listed will not be saved with the submitted copy of the ETA 9089. Although the American Immigration Lawyers' Association (AILA) has provided a practice alert with a complicated work-around involving completing dates with a combination of zeroes and "N/A"s to fill in the required fields in K1-K8, properly documenting the individual applicant's credentials may ultimately require a bit stronger band-aid to overcome the limitations on Form ETA 9089.

For the FAQ on Completion of Section K: <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#alien8>