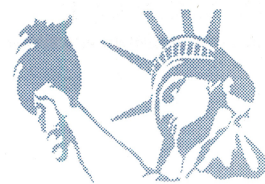


# U.S.



# IMMIGRANT

A CURRENT REVIEW AND ANALYSIS OF IMMIGRANT RIGHTS

VOLUME 2, NUMBER 6, 1994

PRICE \$3.50

## The Lottery is here!

June 1 - June 30



*Also:*

How a Green Card May be  
Taken Away  
Litigating with the INS  
Navigating through Labor  
Certification



## Immigrating to the United States

# Navigating Through the Hostile Waters of Labor Certification

by Alice Yardum-Hunter

*Alice Yardum-Hunter is a Commissioner to the State Bar of California, Board of Legal Specialization, Immigration and Nationality Law Advisory Commission which monitors attorneys specializing in immigration law. She is certified as a specialist in Immigration and Nationality Law and co-edited the book "Representing Professionals Before the Department of Labor." She currently practices in Los Angeles, California.*

People wanting to immigrate to the United States who do not have family members to petition for them may obtain permanent residence through an offer of employment. This includes people who hold advanced degrees, professionals with Bachelor's degrees, skilled workers having two years of training or experience, and unskilled workers.

The Immigration Act of 1990 (IA90), while it allowed for greater numbers of more highly skilled immigrants, has resulted in long delays for unskilled workers. And current negative sentiments against immigration have made what was once a straightforward procedure much more challenging. Labor certifications are still an excellent means to immigrate to the U.S., but it is crucial to have the assistance of counsel who knows what he or she is doing on these choppy seas.

To obtain a green card through an offer of employment, a

labor certification must be issued by the U.S. Department of Labor (DOL), a federal agency separate from the Immigration and Naturalization Service. There are 10 regions of the DOL throughout the U.S. The application process begins when an Application for Alien Employment Certification is filed with the local office of the state employment security administration. In California, this is the Employment Development Department.

The state employment security administration monitors the recruitment process. This process is designed to seek out U.S. workers for the position that is offered to the foreign-born employee. The process requires advertisement, internal posting at the place of employment, and registration at a state job bank.

The object of the labor certification is to show that there are no available and qualified U.S. workers. It is therefore critical that the application

be prepared in anticipation of any pitfalls which may occur later. This has always been important, but especially now since the DOL is scrutinizing cases more closely.

It is important that the job be categorized as one which needs at least two years of training or experience, or a Bachelor's degree to qualify. If less than two years is deemed to be required, then, thanks to IA90, the foreign-born worker will have to wait as long as 10 to 20 years for a green card.

One reason it is so difficult to apply for nannies is that these positions are not considered to require at least two years of training or experience. There is pressure on the Department of Labor to recognize that to be a qualified nanny, at least two years of experience is required. As of this writing, it still takes so long for nannies to immigrate that by the time an immigrant visa (green card) is available, the child whom the nanny



## The Hostile Waters of Labor Certification. . .

would take care of has already grown up.

The result is that no one wants to bother with this option. It is, therefore, very important to attempt to categorize the position as *skilled*. By doing so, a green card is obtainable in most countries in approximately one and one half years or less.

Another critical aspect of preparing the Application for Alien Employment Certification is to describe the duties and requirements for the position. The description must tread the fine line between encompassing many of the qualifications of the foreign-born worker while at the same time not unreasonably restricting U.S. workers from qualifying for the position.

It is best not to include all of the qualifications of the individual, because then it looks like the job was tailored to the foreign-born worker. For example, Alain from France speaks six European languages, and he has been offered a job as a manager of a travel agency. While it would make sense to require perhaps one or two foreign languages for the job, requiring all six languages would be excessive.

The Department of Labor, which makes the decision on labor certification once the recruitment period is over, has always required foreign languages to be justified by businesses who say they need them. Today, given the hostile environment against immigration, many job requirements, which were routinely accepted in the past, are being questioned by the Department of Labor.

In the example above, if the manager job requires knowledge about certain computer programs, or requires the completion of college level management courses, given the current

climate, the Department of Labor could seek to deny the application unless the requirements are justified or the job is re-advertised without the requirements.

The employer must be prepared to fight to prove what it needs. This can be accomplished by summoning experts in the same industry and requesting that they express their written opinions to the effect that the requirements are both normal and/or necessary under the circumstances.

Another aspect which the Department of Labor is increasingly watching is how the employer handles actual job applicants. An employer must be vigilant in contacting those applicants who look as though they may qualify, as well as those whom the employer is not certain will qualify. The employer should contact all



applicants within a short time frame after receiving resumes to prevent being accused of not acting in good faith.

In years past, my experience is that the Department of Labor in Region Nine (covering jobs located in California, Nevada, Arizona, Hawaii and Guam) was satisfied when, on average, 10% of applicants who applied

were actually interviewed. Now I have seen several cases where the DOL believes that all applicants should have been interviewed!

Other Regions have different standards. While I do not believe that all job applicants should be routinely interviewed in labor certification cases, my recommendation would be to interview all applicants who could remotely qualify.

The DOL is also now questioning the ownership of some companies. When a foreign born worker owns or controls a business, the DOL believes that the business would not be willing to displace the foreign-born worker and, therefore, a labor certification will not be issued.

In years past, this question would not arise except in those circumstances where the application indicated ownership or control by a foreign born individual. Now, the DOL will examine the ownership or control of a company when a job description simply requires considerable responsibility.

Labor certification processing may not last forever and may go the way of the dinosaur. Robert Reich, Secretary of Labor, does not like it and the Department of Labor has been making efforts to both modify and do away with the process. It is therefore critical for foreign born workers with job offers to avail themselves of the certification process while it lasts. But, due to hidden gusty winds and swells of waves that are out on the labor certification seas, it is more important than ever to have counsel experienced in this area of immigration law. □