

PROTECTING EMPLOYEE & CONSUMER RIGHTS



ATTY. CONRADO JOE SAYAS

Have you been paid for all the hours you worked?

Labor Standards Enforcement (DLSE) has adopted the practice of the US Department of Labor of "rounding" employee's hours for purposes of calculating the number of hours worked. The federal regulations allow rounding of hours to five minute segments. It has been an accepted industry practice to record the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. This practice of computing working time is accepted by DLSE, provided that it will not result over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

In recording working time, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot, as a practical administrative matter, be precisely recorded for payroll purposes, may be disregarded. However, this rule applies only where there are uncertain and indefinite periods of time involved of a few seconds' or minutes' duration, and where the failure to count such time is due to practical considerations of the work environment.

An employer may not use this policy to justify the failure to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time regularly required for assigned duties. A difference of \$4 per day, spread across 4 years of work or approximately \$4,000 is "not a trivial matter to a workingman." If this affects 100 employees, then the employer's violation is not insignificant.

When the total number of hours do not exceed 8 hours per day, the time that exceed the regular scheduled working hours should be paid at the employee's regular rate. However, if the extra minutes bring the total number of hours worked in a day to over 8 hours, the extra minutes should be paid at the overtime rate of 1½ times the regular rate.

A few employers have learned the hard way of the need to accurately calculate and compensate employees for actual work hours. Employers' failure to follow the rules has caused employment lawsuits resulting in substantial penalties and back wages in favor of employees. It is therefore critical that employers and employees alike be aware of the rules in this regard.

C. Joe Sayas, Jr., Esq. is an experienced trial attorney who has successfully obtained significant results, including several million dollar recoveries for consumers against insurance companies and big business. He is a member of the Million Dollar-Advocates Forum—a prestigious group of trial lawyers whose membership is limited to those who have demonstrated exceptional skill, experience and excellence in advocacy. He has been featured in the cover of Los Angeles Daily Journal's Verdicts and Settlements for his professional accomplishments and recipient of numerous awards from community and media organizations. His litigation practice concentrates in the following areas: serious personal injuries, wrongful death, insurance claims, unfair business practices, wage and hour (overtime) litigation. You can visit his website at www.joesayaslaw.com or contact his office by telephone at (818) 291-0088.

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ATTY. JOEL R. BANDER

Changing jobs while on pending Form I-485

ACCORDING to the May 2009 Visa Bulletin, EB-3 visas are unavailable. The slow processing of applications for adjustment of status (Form I-485) and those with pending Form I-485 are faced with seemingly endless waiting for their green cards. This is problematic especially for those whose petitioning employers have shut down their businesses or at the brink of doing so due to the present economic situation. Fortunately, with the portability of employment-based immigrant petition (Form I-140), those with approved Form I-140 can avail of the opportunity to change to a new employment provided certain requirements are met.

Under Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), the approval of a Form I-140 petition shall remain valid when an alien changes jobs or employers if: (1) the Form I-485 has been pending for at least 180 days; and (2) the new job is in the same or similar occupational classification as the job for which the Form I-140 petition was filed. Under current regulations, the Form I-140 must have been approved before a favorable determination of a portability request can be made. In filing a request for Form I-

140 portability, the alien is expected to submit evidence that the new offer of employment is in the same or similar occupational classification as the offer of employment for which the Form I-140 petition was filed. The USCIS adjudicators consider the following factors in determining whether the two employments are same or similar: (1) job descriptions; (2) Dictionary of Occupational Title and/or Standard Occupational Classification code assigned to the Form I-140 job offer and that which may be appropriate for the new position; and (3) substantial discrepancy between the Form I-140 wage and the wage offered for the new position.

An alien availing of the Form I-140 portability benefit is not required by law to notify the USCIS. However, under certain circumstances, it would be prudent to do so. Under USCIS rules, if the approved Form I-140 is revoked or withdrawn by the employer after the Form I-485 has been pending for at least 180 days, and the alien has not submitted evidence of a new qualifying offer of employment, the adjudicating officer is required to issue a Notice of Intent to Deny the pending Form I-485. If the alien fails to respond or fails to establish that the new offer of employment is in the same or similar occupation, the adjudicating officer may immediately deny the Form I-485.

The successor employer is not required to apply for a new labor certification or file a new Form I-

140 to enable the alien to port to the new employment. It is also not necessary that the new employment be in the same geographic area as the Form I-140 position. The new employment may be in a different county or state, as long as it is for same or similar occupational classification. Further, the new employment need not comply with the prevailing wage set in the underlying labor certification and Form I-140 petition. However, a substantial discrepancy in the wage rates may be considered for purposes of determining whether the two positions are same or similar.

If you have any questions regarding Form I-140 portability, we at Bander Law Firm are happy to assist you. Our firm has multilingual staff who can communicate effectively in Tagalog, Spanish, Korean, Sinhala, Farsi and Mandarin. Please feel free to call Bander Law Firm at 213-873-4333 t. To learn more about immigration concerns and read Atty. Bander's previous articles, visit www.BanderLaw.com.

Atty. Joel R. Bander is the partner of Bander Law Firm, LLP. With over 15 years of litigation and immigration experience, Mr. Bander is a leading litigator and accomplished trial strategist. He has successfully handled numerous cases before Federal, State, Civil, and Criminal Judges and has participated in hundreds of arbitrations and trials. Bander Law Firm, LLP Downtown office address: 1055 W. 7th Street, Suite 1950, Los Angeles, CA, 90017. Tel: (213) 873-4333 Fax: (213) 873-4334. San Gabriel Office address: 1045 E. Valley Blvd., #A215, San Gabriel, CA 91776. Email: info@banderlaw.com.

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Ang priority date at processing date

TAPAT SA BATAS



ATTY. RHEA V. SAMSON

green card ay maaaprubahan na. Hindi ito tama dahil ang green card ay hindi maaring maaaprubahan kung unavailable ang visa number para sa priority date nila.

Halimbawa, noong July 2007, ang priority date ay naging current para sa EB3 category, o para sa mga employment-based petitions ng professionals at skilled workers. Dahil dito, marami ang nag-file ng green card application nila. Sa Nebraska Service Center ang processing date ngayon para sa green card application ay August 17, 2007. Ang ibig sabihin nito ay currently under review na ang mga green card applications na filed noong July 2007 kayat maaari nang mag-issue ng Request for Evidence para dito kung kailangan. Kung nadetermina na ng USCIS na approveable ang kaso, ito ay itatabi muna hanggang mag-ing current ang priority date ng kaso ayon sa Visa Bulletin. Ngayong May 2009, ang priority date sa EB3 ay unavailable.

Marami sa mga nagfile ng employment-based green card application noong July 2007 ay nagpapa-follow up ng kanilang kaso sa USCIS. Ngunit ang problema ay hindi ang processing date ng USCIS kundi ang availability ng visa numbers na may limit ayon sa batas. Kahit current na ang processing date sa USCIS, kung wala pang visa number na available ayon sa visa bulletin, ang green card ay hindi maibibigay.

Si Attorney Rhea V. Samson ay abogado dito sa California at sa Pilipinas. Siya ay nagturo sa Ateneo De Manila University ng Essentials of Philippine Business Law, Obligations and Contracts, Corporation Law, Partnership Law at Labor Laws and Social Legislation. Siya rin ay nagkatha ng librong, "Working With Labor Laws, A Comprehensive Guide on Conditions of Employment, Employee Benefits Under Special Laws, Termination and Retirement" na inilathala ng Ateneo de Manila University Press at University of Hawaii Press. Itong libro niya ay kasalukuyang textbook sa kursong Labor Laws and Social Legislation ng Ateneo de Manila University. Siya ay humuhugot ng inspirasyon mula sa kanyang mga magulang na sina Engr. Roger Samson at Gng. Bella Valle Samson, na tubong Batangas. Si Attorney Samson ay mahilig mag-kaape at manood ng The Filipino Channel.

Nagbibigay si Attorney Samson ng free initial consultation sa kanyang opisina, Samson Law Corporation, 3550 Wilshire Boulevard, Suite 1765, Los Angeles, CA 90010; telephone no: (213)637-5630; fax no: (213)637-5637; email address: samson@samsonlawcorp.com; website: www.samsonlawcorp.com.

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Bander Law Firm, LLP
Email: info@banderlaw.com

DOWNTOWN OFFICE:
1055 W. 7th Street, Suite 1950,
Los Angeles, CA 90017
Tel: (213) 873-4333
Fax: (213) 873-4334

LAS VEGAS OFFICE:
5155 S. Durango #101
Las Vegas, NV 89148
Tel. (702) 367-8000
Fax (702) 367-8011

For more information, please visit our website:
www.banderlaw.com