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Immigration Update

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Employment-based Immigration Labor Certification and the New PERM Regulation

The **Program Electronic Review Management** system, commonly known as PERM, is a completely new approach to the labor certification process. PERM uses an attestation and audit structure under which recruitment takes place before the application for labor certification is filed .

The PERM regulation will take effect on March 28, 2005. A new prevailing wage determination process will take effect several weeks earlier, on March 8, 2005.

Labor Certification Process Changes

PERM is an attestation/audit process. Employers seeking permanent labor certification will conduct recruitment activities before filing the PERM application. Applications will be filed online at a dedicated Department of Labor (DOL) website or will be sent by mail to one of two national processing centers. The application form is a new, lengthy questionnaire with both basic labor certification and prevailing wage information. The DOL has indicated that applications will take an estimated 45 to 60 days to adjudicate, unless they are selected for auditing by DOL personnel, either randomly or because responses to certain questions on the application trigger a need for additional information or supervised recruitment. Cases selected for audit should expect processing times to exceed the 45- to 60-day estimate.

Preparing for PERM

Employers should begin advance preparation for the implementation of the new system, conducting recruitment with an eye toward filing new cases as PERM cases, as well as possibly re-filing pending cases as PERM cases. Currently, employers file for labor certification using either the traditional filing method or the reduction in recruitment (RIR) method. PERM will replace these filing methods with a new standardized system.

Although it is possible to "upgrade" a currently pending labor certification to PERM, this decision should be made case by case. There are some uncertainties with the PERM process and we are awaiting guidance from the DOL on several key issues.

Pending Labor Certifications

Cases already filed under traditional or RIR processing can remain in that system. Those cases are being mandated at special "backlog reduction" centers. Employers are not required to convert currently pending cases to the PERM system.

Conversion Rules

Existing cases can be "converted" to PERM, but the re-filing provision, described below, does not provide for a simple conversion of already-filed applications to PERM.

With certain restrictions, employers may re-file pending labor certification applications under the PERM system without losing the established priority date, which sets the foreign national's place in line for an

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immigrant visa. Given that visa numbers have retrogressed for some countries and that further retrogression is possible in the future, preservation of priority dates is a key issue. Labor certification cases may be re-filed as a PERM case and retain the original priority date, so long as:

(1) No job order has been placed with the State Workforce Agency (SWA); cases that are withdrawn and re-filed as PERM cases after the state job order has been placed will be assigned a new priority date;

(2) All PERM-related prevailing wage, advertising and recruitment requirements have been met; and

(3) The job opportunity is deemed to be "identical" to the job description in the original application. "Identical" is defined as a job opportunity where the employer, foreign national, job title, job location, job requirements, and job description are identical to those stated in the original application.

There is a level of risk in converting a current case to PERM. The DOL will regard the re-filing of a case under PERM with a request to retain the original priority date as a request to withdraw the previously filed case. If the DOL then determines that the PERM application is not "identical," it will be accepted and assigned a new priority date, and the old case will be considered withdrawn and the old priority date will be lost.

The recruitment and prevailing wage information utilized in a re-filed case must comport with the PERM rule: recruitment may be no more than 180 days old. This will likely exclude much of the recruitment completed for already-filed cases.

Note that the re-filing provision may have implications for foreign nationals who have commenced the employment-based immigration process, are in H-1B nonimmigrant status, and are nearing the six-year limit on H-1B stays. These individuals are eligible for extensions of H-1B status past the six-year limitation if, among other scenarios, it can be demonstrated that a labor certification application on which the foreign national will rely for immigrant status has been pending for 365 days or more. It is unclear how a labor certification withdrawal and re-filing under PERM will affect this right; guidance from U.S. Citizenship and Immigration Services (USCIS) will be necessary to clarify this issue. Again, guidance will be made available as soon as possible.

PERM Application Process

The PERM system imposes a streamlined and automated electronic application process, preceded by a recruitment period with a list of mandatory steps and strict posting requirements. It is important to note that the new system will also make important changes to record keeping and documentation requirements. Employers will be obligated to maintain documentation of their recruitment efforts and of layoffs by the employer in the area of intended employment and in the occupation that is the subject of the labor certification or a related occupation. Such documentation will not be initially submitted with the PERM application, but will be provided only when the application is selected for auditing by the DOL. PERM audits will be based on specific compliance criteria, as well as random audits for quality control purposes.

Application Process

- The complete application process will consist of one form, the "Application for Permanent Employment Certification" (ETA Form 9089).

- PERM applications will be filed online at a dedicated DOL website (www.workforcesecurity.doleta.gov/foreign) or may be sent by mail to one of two national processing centers. The DOL has indicated in the supplemental materials to the PERM regulation that applications submitted by mail will not be processed as quickly as electronic filings. Submission of applications by facsimile transmission will not be accepted.

The ETA Form 9089 contains a number of attestations requiring a "Yes," "No," or "Not Applicable" response. Other questions will require that information be placed in blocks. Cases may be flagged for audit on the basis of certain factors, or simply randomly selected. The audit process may include a request for additional documentation, after which the Certifying Officer can certify or deny the application or call for supervised recruitment.

Form ETA 9089

The DOL website will include detailed instructions, prompts, and checks to help employers and/or attorneys fill out and submit the new ETA 9089. We expect that there will be an option permitting frequent users to set up secure files within the ETA electronic filing system. The form will be submitted electronically and will thereafter be certified electronically in a projected 45 to 60 days, unless designated for audit. **Once the DOL certifies a case, the employer must print out the application and sign it. The employer must maintain a copy of the signed form in its files, and must submit the original signed form to U.S. Citizenship and Immigration Services (USCIS) along with Form I-140, the Immigrant Petition for Alien Worker.**

PERM Application Audit

If an application is selected for audit, the employer will be notified and required to submit, within 30 days, documentation to verify the information stated in or attested to on the application. Certifying Officers will have the discretion to grant extensions up to an additional 30 days. If DOL determines that the documentation is complete and consistent with responses on the ETA 9089, it will certify the application. If the documentation is deemed deficient by the DOL, the certification may be denied. Alternatively, the Certifying Officer may request additional documentation or order "supervised recruitment."

Supervised Recruitment

Supervised recruitment will be similar to the current process, and will require the placement of advertisements in conjunction with a 30-day job order. At the completion of supervised recruitment, the employer will have 30 days to document in a recruitment report the outcome of the effort, and the lawful job-related reasons for not hiring U.S. worker applicants. Upon receipt of the employer's recruitment report, the Certifying Officer will either certify or deny the application.

Appeal Process

A notification of denial of a PERM application should include a list of deficiencies. The employer will be able to seek an appeal of the denial by the Board of Alien Certification Appeals (BALCA), with 30 days to file the appeal. BALCA may affirm or overturn a denial, but may not remand a case to a Certifying Officer, as is the case under current practice.

Recruitment Procedures

Employers are expected to conduct recruitment during the 30- to 180-day period prior to filing the application for labor certification.

Recruitment and Advertisement Rules

The final rule contains a stringent list of requirements, greater specificity in regard to the placement of the ads, and some very specific time requirements. Recruitment consists of the placement of two Sunday advertisements in a newspaper of general circulation appropriate to the occupation and the placement of a job order with the state employment office serving the area of intended employment. These recruitment steps must occur at least 30 days but not more than 180 days before the filing of the application. The rule makes an exception from the Sunday requirement if a Sunday edition of a paper is not available in a rural area. In the case of jobs requiring experience and an advanced degree, the second Sunday advertisement can be replaced by an ad in an appropriate professional journal, although this is not required.

The advertisement must (1) contain the name of the employer; (2) direct applicants to report to, or send resumes to the employer (depending on what is appropriate for the occupation); (3) provide a job description specific enough to apprise U.S. workers of the job opportunity; and (4) indicate the geographic location of the job opportunity clearly enough to permit applicants to understand the relative commuting distance. While the advertisement does not need to include a salary or wage, if a wage is included, it may not contain a rate lower than the prevailing wage. If a wage range is included in the ad, the bottom of the range may not be lower than the prevailing wage. Additionally, the ad may not contain any requirements or duties exceeding requirements on the labor certification application or any terms or conditions that would arguably be less favorable than those offered to a foreign worker.

Professional Positions Rules

Employers recruiting for professional positions, **defined in the rule as requiring a college or higher degree, would also have to select three other additional recruitment steps that would be required before filing the application.** Acceptable recruitment channels for professional positions are:

- The employer’s Internet site;
- Job fairs;
- Job search websites, including Internet versions of a newspaper’s print ad;
- Private employment agencies;
- On-campus recruiting;
- Trade or professional organizations;
- Employee referral programs with incentives;
- Campus placement offices, if the position requires a degree but no experience;
- Local and ethnic newspapers; and
- Radio and television advertisements.

Two of the three methods of recruitment must be completed within the 30- to 180-day period prior to filing the application; one method of recruitment could be conducted within the 30 days prior to filing.

Recruitment Report and Notice Requirements

Although employers are required to maintain documentation of its recruitment efforts and results (including the lawful job-related reasons for rejecting U.S. workers who applied for the job), documentation of the recruitment results are not submitted with the application. One important addition to the process: U.S. workers who could acquire skills necessary to the job in a reasonable period of on-the-job training can not be rejected.

Note that employers **will be required to retain documentation of recruitment efforts for five years after the date the PERM application is filed with the DOL.**

Recruitment Report

The report, signed by the employer, must describe the recruitment steps undertaken and the results achieved, the number of hires, and if applicable, the number of U.S. workers rejected, characterized by the lawful job related reasons for such rejections. Employers will be required to maintain recruitment reports with sufficient detail to assess a match of job applications against specific positions, though recruitment reports need not identify individual U.S. workers. Resumes and other documentation must also be maintained. In the event of an audit, the Certifying Officer may request the U.S. workers' resumes or applications, sorted by reasons the workers were rejected.

Notice and/or Posting Requirement

Employers must give notice of the planned filing of the PERM application to the employees' bargaining representative in the area of intended employment, if any. If there is no bargaining representative, employers must post a notice about the job opportunity for 10 consecutive business days in a conspicuous place at the location of employment, between 30 and 180 days prior to filing the application. **Moreover, in a departure from current law, employers must publish the notice in any and all in-house media normally used to fill positions in the organization, in accordance with normal procedures used for recruitment for similar positions in the organization.** The notice must: (1) state that it is being provided as a result of the filing of a labor certification for the relevant job opportunity; (2) state that any person may provide documentary evidence bearing on the application to the DOL; (3) provide the address of the appropriate Certifying Officer; (4) contain all of the information now required in advertisements; and (5) state a rate of pay.

Fees

While this has been addressed throughout the years, and was referenced in the proposed and final rule, the DOL stated that Congressional action would be required prior to the imposition of a fee. At the present time, no fee is expected, but this could change. (In the past a $1000 fee was discussed.)

Layoffs

If there has been a layoff by the employer in the area of intended employment within six months of the filing of the labor certification application, the rule requires employers to attest to and document the notification and consideration of potentially qualified U.S. workers involved in the layoff and the results of such notification. In addition, the supplementary information to the regulation indicates that general labor market conditions, including layoffs by other employers in the industry - could be factors in triggering an audit and supervised recruitment, although the form does not ask the employer to provide such information.

Prevailing Wage Issues

Employers must submit a request for a prevailing wage determination to the appropriate State Workforce Agency (SWA) prior to beginning recruitment or filing the application. The employer must begin recruitment or file the labor certification during the validity period of the SWA's prevailing wage determination.

The SWA will normally rely on the wage component of the DOL's Occupational Employment Statistics (OES), with the state office assigning a wage based on the skill level of the position. Absent a collective bargaining agreement, employers may submit alternative wage survey information with their labor certification applications, but such data will have to be endorsed by the state office prior to filing the application. The rule eliminates the requirement of using Davis-Bacon Act or Service Contract Act wages for job categories covered by those Acts, though it permits their use if an employer so wishes. A wage determination will be valid for filing a period of 90 days to one year after issuance by the SWA, depending on the state office.

5% wage differential

The rule eliminates the ability of employers to offer the employee 5 percent less than the prevailing wage. This change is also being implemented for new H-1B Labor Condition Application (LCA) filings pursuant to recent legislation, and the PERM regulation cites the new law. The effective date for the new prevailing wage rule is March 8, 2005. Additionally, the new legislation calls for a four-tiered rather than two-tiered OES wage system.

Eligibility Standards

Under current rules, an employer may reject a U.S. applicant who lacks one or more of the minimum requirements for the advertised position. The final rule provides that employers will not be able to reject a U.S. worker if it is found that the U.S. worker could acquire, during a "reasonable" period of on-the-job training, the skills necessary to perform the job. The full meaning of this is not yet entirely clear, but we do not expect that the new rule will require employers to hire workers who do not meet the minimum requirements in terms of education, training and experience. It will mean that skills that can be learned during such a "reasonable" period of time may not be used as a grounds for rejecting a U.S. worker. For instance, if a professional job requires use of a particular word processing software, which can be learned with a few days of training, that might support rejection of U.S. workers who lack that particular skill.

On the Job Experience

PERM allows experience gained on the job in a dissimilar position to be utilized, so long as the employer can demonstrate that the foreign national was originally hired into a job that is not "substantially comparable" to the job for which certification is being sought. A "substantially comparable" job or position is one where the same job duties are performed more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on various duties, organizational charts, and payroll records. A second exception, "infeasibility to train," will be maintained in acknowledgement of the legitimate interests of the business community, although it is rarely used.

An employer filing a PERM application is the "same" employer where on-the-job experience was obtained if it has the same Federal Employer Identification Number (FEIN).

"Business Necessity"

Currently, an employer's job requirements must generally be consistent with those normally required for similar jobs in the United States in terms of education, training and experience. Job requirements that exceed "normal" requirements are generally deemed to be unduly restrictive, unless the employer can demonstrate that the potentially restrictive requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer.

This will continue under the final rule. Employers will be permitted to interject a fair amount of specificity into the application to best tailor jobs to their needs. However, it should be noted that changes to the standards that define what is "normal" for the occupation will change under the PERM regulation. As of March 28, 2005, the Department of Labor will transition from using the Dictionary of Occupational Titles, a very comprehensive listing of requirements for thousands of occupations, to the more general Occupational Information Network (O*NET). O*NET's "job zones" will be used to set the normal training, education, and experience requirements for the occupation. Where the job requirements exceed the level of education, training and experience deemed normal for the position, as determined by O*NET, the employer must demonstrate business necessity. Therefore, while the business necessity justification remains largely intact, a different triggering factor - exceeding the requirements deemed "normal" - has been adopted, which may result in more applications requiring a business necessity justification.

Foreign Language Requirements

If business necessity can be demonstrated, a foreign language requirement is permitted. "Business necessity" for a foreign language requirement may be demonstrated based on the (1) the nature of the occupation (e.g., a translator) and (2) the need to communicate with a large majority of the employer's customers, contractors, or employees who cannot communicate effectively in English, as documented by criteria specifically set forth in the regulation.

Combinations of Duties

The final PERM regulation does not use "combination of duties." Instead, adopting new terminology, the regulation will permit "combinations of occupations" in certain circumstances. An employer may justify such combinations if it can demonstrate at least one of the following: (1) it has normally employed workers in the combination of occupations set forth in the labor certification; and/or (2) workers customarily perform the combination of occupations in the area of intended employment; and/or (3) the combination job opportunity is based on a business necessity.

Current DOL policy permits a Regional Certifying Officer to consider the reasonableness of the job duties when an employer combines two traditionally separate jobs into one position. If DOL determines that a job offer unreasonably combines duties from two distinct job classifications, then the employer may be required to justify the business necessity of the proposed duties, using the business necessity standards discussed above.

Revocation of Approved PERM Applications

The final rule provides that an approved PERM application can be revoked if the CO finds that approval of the application "was not justified." This means that the CO can revoke a PERM application based on any ground that could have resulted in a denial of the original application, whether unintentional or willful, such as fraud, willful misrepresentation or obvious errors. The Certifying Officer must send the employer a Notice of Intent to Revoke containing a detailed statement of the grounds for revocation. The employer may submit evidence in rebuttal within 30 days of receipt of the notice. There is no time limit on the authority of the CO to revoke a PERM application, which may also be invalidated by the Department of Homeland Security or the Department of State

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