



## **IMMIGRATION ALERT**

### **PERM Regulations Significantly Change Labor Certification Process**

On December 27, 2004, the Department of Labor (“DOL”) published its final version of the long-awaited PERM regulations. PERM completely revamps the labor certification process and will take effect on March 28, 2005.

The primary goal of PERM is to streamline and regulate labor certification processing. As of March 28, 2005, labor certifications will be filed directly with the DOL through an automated, on-line system, using the new Form ETA 9089. There will be no supporting documentation submitted with the ETA 9089 form, but employers will be required to maintain documentation on recruitment and screening of U.S. workers for each application. The DOL estimates that labor certification processing under PERM will take 45 to 60 days, unless the DOL audits the application -- based either on certain criteria in the application or on random selection for quality control purposes. There is no current estimate on how long an audit may take to process.

### **BACKGROUND**

Labor certification is often the first step in the employment-based green card sponsorship process. To obtain labor certification, the sponsoring employer must establish that it was unable to find willing, qualified, and able U.S. workers for the job. There are currently two ways for an employer to file a labor certification application: (1) Under the traditional method, the employer files an application with the State Workforce Agency (“SWA”). After the application is reviewed, the SWA closely supervises the employer's recruitment effort to assess whether U.S. workers are indeed unavailable. If the labor certification application passes muster with the SWA, then the case is transmitted to the Federal DOL for final adjudication. (2) Under the fast track method, known as “Reduction in Recruitment” (“RIR”), the employer documents the unavailability of U.S. workers through its own recruitment efforts prior to filing the application with the SWA. In both the traditional and RIR filings, the Federal DOL ultimately grants or denies the labor certification application.



Although precise processing times vary by location, the average wait for labor certification approval exceeds two years, and the process itself is widely perceived as cumbersome.

The PERM program seeks to streamline the system for processing labor certification applications. In May 2002, the Department of Labor published a Notice of Proposed Rulemaking, which is the origin of the PERM program. The Notice of Proposed Rulemaking contained many restrictive provisions which would have dramatically reduced the ability of many foreign nationals to obtain permanent residence in the United States. Fortunately, many of the most restrictive items are not in-

cluded in the final regulations, although PERM generally imposes more stringent recruitment and screening requirements than the existing labor certification program.

## DETAILS OF THE PERM PROGRAM

The major provisions of PERM are as follows:

### Recruitment requirements:

PERM mandates the following three forms of recruitment for all applications:

(1) The employer must place print advertisements in two separate Sunday editions of a newspaper of general circulation between 30 and 180 days prior to the filing of the application; alternatively, the employer may place an ad in a professional journal in lieu of one of the Sunday ads, but only if the job requires experience and an advanced degree. The advertisement must contain the employer's name, the job location, a description of the position, and contact information on where to submit resumes. The advertisement does not need to include the salary for the position and does not need a "word-for-word" description of the position or of the minimum requirements, as long as an applicant is able to determine the general nature and requirements of the job from the text of the ad.



(2) The employer must place a job order for 30 days in the job bank maintained by the SWA where the job is located. The job order must have been completed 30 days prior to filing the labor certification.

(3) The employer must post a detailed position announcement (including salary) at the place of employment for 10 business days. In addition to this physical posting, the employer must post the notice in any in-house media (electronic or print) in accordance with the employer's normal procedure for recruiting similar positions. The posting must also have been completed at least 30 days (but no more than 180 days) prior to the filing of the labor certification.

For professional-level positions (generally, those jobs for which a bachelor-level degree is a prerequisite), PERM mandates that the employer conduct at least three additional forms of recruitment beyond the recruitment steps outlined above. The additional recruitment forms from which to choose are: (1) online job postings at the employer's website; (2) online job postings at third party websites (which may include the online version of the newspaper ad); (3) job fairs; (4) university campus recruitment or job notice placement (but generally only if the job does not require experience); (5) recruitment firms; (6) radio or TV advertising; (7) local or ethnic newspapers, to the extent appropriate for the job position; and (8) documented activities of trade organizations.

### **Minimum Job Requirements:**

PERM places two new restrictions on defining the minimum requirements for the occupation. First, PERM appears to restrict the total amount of education and experience that can be required for many occupations, in comparison to the current labor certification process. Existing labor certifications must comply with the DOL's Specific Vocational Preparation ("SVP") code system in defining the level of experience and education that can be required. However, applications filed under PERM must comply with the more restrictive O\*NET Job Zone requirements, available through the DOL's Online Wage Library. The result is that employers may not be able to require the level of education and experience that is normal to its own hiring practices. We are waiting for further guidance from DOL on this issue.

Second, PERM restricts the ability to use experience gained by the employee while working with the sponsoring employer in a more junior position to prove that the employee meets the minimum job requirements. Under PERM, an employee can use experience gained with the same employer only if it was in an occupation that is not "substantially comparable" to the current occupation. PERM defines two positions as "substantially comparable" if the employee performs the same job duties more than 50% of the time. This is in contrast to what is considered a more liberal standard under the current system which often allows employees to count job experience with the sponsoring employer.

### **Effect of Recent Layoffs**

If the employer has laid off employees in the same or a similar occupation within the six month period prior to filing the labor certification application, the employer is required to notify each laid off employee who worked in the same or similar occupation and who was laid off within the past six months. The employer must consider whether any such worker meets the minimum job requirements.

### **Prevailing Wage Requirements:**



One of the benefits of PERM is that the DOL is mandated to establish a new prevailing wage system with four levels, instead of the current system with only two levels. This should result in an improved prevailing wage system that provides more "real world" wages for mid-level positions. Prior to filing an application for labor certification, the employer must obtain a prevailing wage determination from the SWA where the position is located. PERM eliminates the 95% exception to the prevailing wage and instead requires payment of 100% of the prevailing wage. As with the current labor certification program, the employer does not need to pay the prevailing wage until the permanent residence process is complete. In addition, PERM provides a mechanism for submitting a private wage survey in lieu of the SWA wage survey, similar to the existing alternative wage system.

## **CONVERSION OF EXISTING LABOR CERTIFICATION APPLICATIONS TO PERM**

PERM will take effect on March 28, 2005. Any applications filed before this date will continue to be processed under the existing labor certification system. However, the PERM regulations also provide for an existing application to be “converted” to PERM. Converted applications will keep their original priority date (which is important for many foreign nationals who need to have a labor certification filed for one year in order to be in a position to extend the H-1B temporary work permit beyond the six-year limit that would otherwise apply).

PERM requires that converted applications contain the identical job description and requirements as the original application. This may create problems because applications filed under the existing labor certification program may contain requirements which are deemed to be too restrictive under PERM.

In order to “convert” an application to PERM, the existing application must be withdrawn and a new application filed under PERM within 210 days of the withdrawal.

It is not clear to what extent the DOL will permit employers to file an application under PERM without withdrawing the originally filed application, where the PERM application is not “identical” to the original application. The literal language of the PERM regulations would seem to permit such a filing (whereby both applications would be processed), although under the current system the DOL prohibits the practice of having two applications pending for the same employee for the same job.

## **ANALYSIS OF PERM**

There are three major considerations for employers in light of the PERM program:

- 1) Should employers rush to file labor certification prior to March 28, 2005 – the date on which PERM becomes the exclusive path to labor certification?
- 2) Should any or all of an employer’s existing applications be converted to PERM?
- 3) What are the steps that must be taken before filing a PERM application?

The analysis for the first two questions is similar and must be undertaken on a case-by-case basis. Many employees will not make good candidates under PERM, and their applications should thus be filed prior to the March 28 deadline. Although the existing labor certification process offers dramatically longer processing times, this will still be the better option in some circumstances. Factors that affect the analysis of whether to beat the PERM deadline (or whether to re-file under PERM) include:

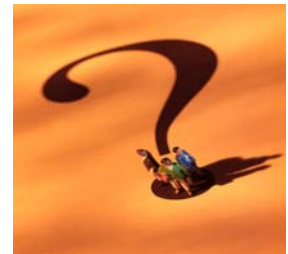
- Employers who have gone through recent layoffs may not want to file under PERM because of the requirement that recently laid-off employees be notified of the job opening.

- Employees hired soon after graduation and who gained experience with the employer in a more junior position may not be able to use that experience to meet the minimum job requirements under PERM if there is not a 50% or greater difference in the job duties.
- Re-filing under PERM requires a re-test of the labor market, including the additional cost of print ads and attorney fees.
- Re-filing under PERM means that, in response to the new recruitment that is conducted, qualified U.S. applicants could surface, thus resulting in potentially "wasted" print ad costs and attorney fees.
- Re-filing an "identical application" under PERM (required in order to retain the original filing date) could be a problem because of PERM's requirement that a different set of data be used to determine the maximum education and experience that can be required for a job, potentially resulting in the need to justify minimum job requirements under the old application that are deemed excessive under the new application.
- Re-filing under PERM will require that a new minimum salary level be set, with the attendant risk that the new salary level will be higher than the green card salary that was initially projected for the case.

For the third question, there are multiple steps requiring adherence to rigorous time constraints prior to filing a PERM application. Advanced planning is vital when considering employees who are approaching the end of their overall nonimmigrant status limit. For example, as above discussed, an H-1B nonimmigrant must have a labor certification filed for at least one year before he or she runs out of time in H-1B status in order to preserve the right to extend H-1 status beyond the six-year limit. Because of the more stringent requirements for advertising and recruitment under PERM and given the 30-day "cooling off" period that applies, employees who are approaching a status limit must be identified earlier in the process in order to file for labor certification to allow them to maintain lawful status in the U.S.

## CONCLUSION

The PERM program raises complex issues for consideration by the employer, and this Alert is not intended to equip employers to resolve those issues in the absence of further consultation with qualified counsel. PERM may also offer a real opportunity for accelerated, streamlined labor certification processing if the application process is efficiently managed and monitored. We encourage you to work with your Seyfarth Shaw immigration contacts to learn more about PERM and the opportunities that it provides.



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