



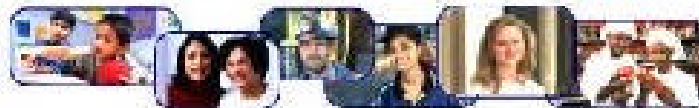
## **IMMIGRATION ALERT!**

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## **THE PERILS OF PERM**

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In May 2002 the Department of Labor (DOL) published a Notice of Proposed Rulemaking for a revamped labor certification program—the PERM program.

As background, labor certification is generally 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 position. There are generally two ways for an employer to file a labor certification application. 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 process passes muster with the SWA, then the case is transmitted to the Federal DOL for final adjudication. Under the fast track method, known as Request for Reduction in Recruitment (RIR), the employer establishes 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. The DOL is expected to publish final regulations in July 2003, with implementation anticipated prior to the end of 2003. If implemented, the PERM program will radically change the processes that are currently in place for processing labor certification applications.

This Immigration Alert provides summary information on what to expect in the final PERM regulations.

***1. How will the PERM program affect the current processing of labor certification applications?***

The PERM program will replace both traditional as well as RIR labor certification processing that is currently in place.

***2. What is the role of the SWA under the PERM program?***

Under the PERM program the SWA's role will be limited to determining the prevailing wage for the job position that is being offered to the foreign national.

***3. What are the recruitment requirements under the PERM program?***

For job positions that require at least a bachelor-level degree, the sponsoring employer will be required to publish two advertisements in a local newspaper with circulation over the area of employment. The ads must be at least 28 days apart and must be published on a Sunday. The advertisements must name the employer and the job position and must specify the salary offered. Employers will also have to place a job order with the SWA. Employers also will be required to demonstrate compliance with any three (3) of the following additional methods of recruitment:

- (a) Attending job fairs;
- (b) On-campus recruitment;
- (c) Using private recruitment agencies;
- (d) Advertisement on job search web sites and/or employer's external web site;
- and
- (e) Recruitment from professional and/or trade organizations.

If the minimum job requirement includes prior work experience or a master-level degree, then the employer must publish the advertisement in one Sunday newspaper and in a trade journal in addition to the SWA job order and three of the above methods of recruitment.

***4. Will there be any changes in posting requirements?***

Yes, in addition to posting of the notice of filing of the labor certification application at the work-site, employers will also be required to post the notice of filing on all in-house media.

### ***5. Can employers require special skills to perform the job duties?***

Under the current proposed rules, the PERM program severely limits an employer's ability to require special skills to perform the job duties. Employers will only be permitted to list job requirements in terms of number of years of required experience, education and training needed to perform the job. Employers will be able to list additional skills only if a U.S. worker has held that position within two (2) years of filing of the labor certification application. Further, employers will not be able to reject U.S. workers for the job on the ground that they do not possess all of the skills required to perform the job duties if the skills are such that they can be acquired through on-the-job training within a reasonable period of time.

### ***6. What about experience in related job positions and experience gained with the same employer?***

Current regulations permit employers to require and accept experience gained in related job positions. Current regulations also permit employers to count work experience gained with the sponsoring employer if the green card position is different and distinct from the other position. Under the proposed PERM regulations, employers will no longer be permitted to accept work experience in a related position. Further, the employer will not be permitted to count experience gained with the sponsoring employer even if it is in a completely different job position within the company. Under PERM the term "employer" is very broadly defined to include predecessors- and successors-in-interest, parent, branch, subsidiary, affiliates and contractual relationships.

### ***7. What are the wage requirements under PERM?***

Under PERM, employers will be required to pay 100% of the prevailing wage determined for the job position. Under the current regulations only 95% of the prevailing wage is required to be paid.

### ***8. What will be the effect of lay offs on the labor certification process?***

If there are any lay offs "in the area of intended employment" within the past six (6) month period from the date of filing of the labor certification application, the employer will have to notify and consider all potentially qualified former employees. The results of any such efforts will have to be documented to the Department of Labor.

### ***9. What are the proposed filing and processing procedures under PERM?***

The labor certification filing will consist of two forms: (i) Application for Permanent Labor Certification (Form ETA 9089); and (ii) Prevailing Wage Determination Request (PWDR) (Form ETA 9088).

The PWDR will be submitted to the SWA. Once the prevailing wage has been determined, the completed PWDR will be submitted electronically along with the Permanent Labor Certification Application to the regional Department of Labor. The Labor Certification Application will be screened via an automated system designed to identify applications meeting a particular profile so that those applications may be audited. The automated system will also randomly select applications for audit. Upon completion of audit, the certifying officer may either approve or deny the labor certification application or may order supervised recruitment. Applications not selected for audit will be approved.

**10. *What penalties are proposed by the PERM program?***

If an employer makes a material misrepresentation concerning any recruitment or documentation requirements, the employer may be required by the Department of Labor to conduct supervised recruitment for all labor certification applications for a period of up to two years.

**11. *What happens to pending RIR applications?***

Employers will have an option to convert pending RIR applications to filings under the PERM program without losing the original priority date. The conversion requires that the pending RIR application be withdrawn. Further, the employer must comply with the advertisement and other requirements specified by the PERM program.

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