



MEMORANDUM

TO: Employees Seeking PERM-based Permanent Residency
FROM: Seyfarth Shaw Business Immigration Group
RE: PERM Overview Memo

PURPOSE

This memorandum provides guidance to foreign national employees seeking permanent residence based on the second (“EB-2”) or third (“EB-3”) employment-based preference categories, each of which involves, as a first step, the so-called PERM process.

GREEN CARD PREFERENCE CATEGORIES

If your employer is sponsoring you for permanent residence (a “green card”) under the EB-2 or EB-3 employment-based preference category, then the employer must undergo the PERM process. PERM stands for “Program Electronic Review Management.” PERM is the first stage of a three-stage green card process. In general, your PERM filing date, your preference category, and your country of birth will determine how quickly you will receive your green card.

United States Citizenship and Immigration Services (“USCIS”) determines your preference category based on the minimum experience and education required for your green card job position. This is important to remember: whether you are EB-2 or EB-3 is NOT determined by your educational background or years of work experience, but rather by the minimum education and years of experience required to perform the green card job.

In other words, you may hold a Master’s degree and 10 years of experience in your field, but if the green card job position only requires, for example, a Bachelor’s degree and 4 years of experience, then we cannot “upgrade” the preference category to match your personal background.

PERM GENERAL OVERVIEW

USCIS is the agency responsible for the second and third green card stages, but the U.S. Department of Labor (“DOL”) governs the PERM stage. The purpose of the PERM process is to establish that there are no qualified U.S. workers available to fill the green card job position.

The DOL has very strict requirements on how to prove that there are no qualified U.S. workers to fill the job position. First, your employer must submit a prevailing wage request with the DOL to establish the minimum salary requirement for the position. While the prevailing wage request is pending, you will request employment verification letters from your prior employers. Once these steps are completed, your employer will actively advertise and recruit for the green card job position according to the strict DOL requirements.

After the 60-70 day advertising period has concluded (which includes a 30-day “cooling off” period), your employer will assess the recruitment results. Assuming that no qualified U.S. workers have been identified, the sponsoring employer will file a Labor Certification Application with the DOL (also called the “PERM Application” or “ETA 9089”).

Unless the PERM application is selected for an audit or supervised recruitment, a decision on the application should be issued by the DOL within about six (6) months. Please note, DOL processing times can vary, so the decision from DOL may take longer than six months or may take less than six months.

STEP 1: GREEN CARD JOB POSITION

The foundation of a successful PERM application is the job description, minimum educational requirements, prior work experience requirements, and any special skills that will serve as the basis of the green card job position. Your Seyfarth Shaw attorney and your manager/supervisor will discuss and define these minimum requirements during the PERM strategy call (or meeting, as applicable). You may also be asked to join as well.

The job requirements for the green card job position must be true and accurate minimum requirements. They must be objective, not tailored or customized to your skills and education. If the job only requires a Bachelor’s degree, then we cannot require a higher level degree, even if you possess a higher level degree. The job requirements are based on the requirements for the position and not merely on the qualifications of the person filling the position. For example, we cannot state that a Software Engineer position requires a Ph.D. when another identical position in the same business unit would require only a Bachelor’s degree.

For important information and guidance on formulating the specific requirements of the green card job position, please read our memo, *PERM Guidelines - How to Define Minimum Job Requirements*.

STEP 2, PART 1: PREVAILING WAGE

The sponsoring employer must offer a salary that equals or exceeds the prevailing wage for the job offered as the basis of the PERM filing. As such, before filing the online labor certification application, the sponsoring employer must obtain a prevailing wage determination from the DOL. The sponsoring employer does not need to pay the prevailing wage until the permanent residence process is complete and a green card is issued.

Generally, in assessing the prevailing wage, we first use the salary database that the DOL uses (called the OES Online Wage Library). If the OES database reflects a wage level that is too high, then we might be able to request a prevailing wage determination based on an alternative wage survey if one is available and if the alternative wage survey is accepted by the DOL. If the DOL does not agree with the sponsoring employer’s prevailing wage level, then the sponsoring employer can request a review of/challenge the wage determination. The sponsoring employer may also appeal to the Board of Labor Certification Appeals (“BALCA”) within 30 days of the determination.

In most instances, the sponsoring employer will not move forward with the recruitment phase until a prevailing wage has been determined and agreed upon.

STEP 2, PART 2: EMPLOYMENT VERIFICATION LETTERS

The green card process will fail if you cannot prove that you yourself satisfied the green card minimum job requirements -- generally BEFORE you joined your current employer. Seyfarth Shaw will provide you with templates for obtaining employment verification letters from prior employers while the prevailing wage is pending. These letters must very specifically demonstrate how you gained the experience and skills that are required for the green card job position.

Generally speaking, this prior experience must have been gained after you have earned the qualifying education degree and before you began working for the sponsoring employer. For more important information on obtaining employment verification letters, please see our memo *Requirements for PERM Employment Verification Letters*.

STEP 3: RECRUITMENT

To demonstrate that there are no qualified U.S. workers available for the green card job position, the sponsoring employer must actively advertise for the green card job position. You cannot be involved in the recruitment process. The sponsoring employer will place advertisements in various job recruitment media, as required by the DOL. The active recruitment period lasts approximately 30-40 days.

The recruitment “clock” starts when the first advertisement is placed. The PERM application must be filed no later than 180 days after the first mandatory advertisement is placed. We will aim to file the PERM application 60-90 days (two to three months) after the first advertisement is placed, barring any unforeseen complications.

➤ Mandatory Recruitment

The DOL mandates the following three forms of recruitment for all applications:

1. **Print Ads:** The sponsoring employer must place print advertisements in two separate Sunday editions of a newspaper of general circulation. Alternatively, the sponsoring 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.
2. **Job Bank:** The sponsoring employer must place a job order for 30 days in the job bank maintained by the State Workforce Agency (“SWA”). We will typically place the job bank advertisement for 35 days to account for any holidays or glitches in the SWA system.
3. **Internal Posting Notice:** The sponsoring employer must post a detailed position announcement (including salary) at the place of employment for 10 business days. There is no exception to the salary posting requirement.
 - a. **Intranet:** In addition to this physical posting, the sponsoring employer must post the notice in any in-house media (electronic or print) if such a posting would be in accordance with the sponsoring employer’s normal procedure for recruiting similar positions.

➤ Additional Recruitment

For professional-level positions (generally, those jobs for which at least a bachelor-level degree is required), the DOL requires that the sponsoring employer conduct at least three additional forms of recruitment beyond the mandatory recruitment outlined above.

The additional recruitment activities from which to choose are: (1) online job postings on the sponsoring employer's website; (2) online job postings on 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; (8) documented activities of trade organizations; and (9) employee referral bonus programs.

STEP 4: COOLING OFF PERIOD/REVIEWING APPLICANTS

A mandatory 30-day "cooling off" period starts the day after the last piece of recruitment closes. We cannot file the PERM application until the cooling off period has ended. No mandatory recruitment can take place during the cooling off period.

During the cooling off period, the sponsoring employer will review and assess any applications against the minimum requirements set forth in the green card job description. The sponsoring employer must continue to accept and review all applications until the PERM application is filed.

STEP 5: RECRUITMENT REPORT

The sponsoring employer must prepare a recruitment report that describes the recruitment steps and the recruitment result, including the number of applicants and, if applicable, the number of U.S. workers who were rejected, as well as the lawful job-related reasons for rejection.

The DOL Certifying Officer (i.e., the person reviewing the PERM application) will consider a U.S. worker qualified for the job if the worker is "able, willing, qualified, and available for and at the place of the job opportunity." The U.S. worker must be able to perform the job in a normally accepted manner and as customarily performed by other U.S. workers similarly employed. The worker cannot be rejected if he or she is unable to perform the job but can be trained to do the job in a "reasonable period of on-the-job training."

In reviewing applicants for the job position, the sponsoring employer is generally required to accept any and all experience that would reasonably prepare an applicant for the position. If a qualified applicant has been identified, then the sponsoring employer will set up a phone screen. If after the phone screen the applicant is still considered qualified, willing, available, and able, then the PERM process must stop.

STEP 6: THE PERM APPLICATION

The PERM application (a/k/a the Labor Certification Application or the ETA 9089) is an electronic application to the DOL that outlines: the PERM job description and minimum requirements; the recruitment steps taken; your education and experience history (which should match your degree and employment verification letters); the sponsoring employer's business;

and other specific criteria having to do with the recruitment process and the green card job position.

We will send you the PERM application to review and sign prior to submitting.

STEP 7: AFTER THE PERM HAS BEEN FILED

There are three potential outcomes after the PERM application has been filed:

➤ **Audit**

The DOL Certifying Officer will audit the PERM application if there is a perceived problem with the application or if the application has been randomly selected for an audit. The audit request will describe the documentation that must be submitted by the sponsoring employer and set a time-line (30 days from the date of the audit letter) by which the required documentation must be submitted. If the required documentation has not been sent by the due date, the application will be denied.

In the event of an audit, the DOL Certifying Officer may request a copy of the applicants' resumes or applications, sorted by the reasons why the workers were rejected. Certifying Officers have the discretion to extend the audit response time by up to 30 days.

➤ **Supervised Recruitment**

DOL Certifying Officers have broad discretion to require supervised recruitment, including cases in which supervised recruitment is deemed appropriate based on labor market information.

Supervised recruitment means the sponsoring employer must re-advertise the job in publications using text approved by the DOL Certifying Officer. Ads in newspapers must be placed for three consecutive days, one of which must be a Sunday, or, if directed to advertise instead in a professional, trade or ethnic publication, the advertisement must be published in the next available edition and any other media required by the DOL. The ads direct applicants to send their resumes to the DOL Certifying Officer and must include a job number and address designated by the DOL Certifying Officer. The advertisement also needs to describe the job duties and requirements and list a wage equal to or higher than the prevailing wage.

➤ **Decision on Application**

If the application is not selected for audit and if supervised recruitment is not required, then the case decision will be issued within about 6 months following online submission.