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Department of Labor Publishes Long-Awaited PERM Regulations

On December 27, 2004, the Department of Labor (DOL) published the long-awaited PERM regulations that revamp Labor Certification processing. Labor Certifications are applications that U.S. employers must submit to the Department of Labor before sponsoring certain categories of alien workers for permanent residence. PERM consolidates the state and federal level adjudications of labor certification applications into one process conducted at the federal level. The state-level agencies, or State Workforce Agencies (SWA's) will continue to exist, but instead of reviewing labor certifications they will have limited ancillary functions in the labor cert process). This will purportedly cut down on processing times for labor certifications. This newsletter provides a basic overview of the changes made by PERM.

Effective Date

PERM will go into effect March 28, 2005. After that date all labor certifications must be filed in accordance with the PERM regulations. However, until that date, labor certifications can continue to be filed under the current system.

Transition to PERM

Once PERM goes into effect in March, employers can withdraw pending applications and re-file them under PERM. However, employers who filed a traditional, non-RIR labor certification application may not convert cases if the State Workforce Agency (SWA) has already placed a job order. All other cases, apparently including RIR cases, can be withdrawn and re-filed under PERM after March 28. An employer who successfully withdraws and re-files a labor cert under PERM will preserve the original priority date from the first labor certification application. Retention of priority date is particularly important to cases where (1) the alien beneficiary is using the pending labor certification application to qualify for a 7th year extension of H-1B status under the American Competitiveness in the Twenty-First Century Act (AC21), or where (2) the alien is a Third Preference worker from a country in which there is a visa backlog.

A case re-filed under PERM will only retain the original priority date if:

1. They are re-filed within 210 days of withdrawal;
2. An SWA job order has not yet been issued;

3. The re-filed application is for an "identical job opportunity," meaning the application has the same employer, alien, job title, job location, job description, and minimum requirements, including changes made in response to an assessment notice from the SWA prior to PERM's effective date; and
4. The re-filed case complies with all of PERM's requirement, including recruitment method, timing of recruitment between 30 and 180 days prior to re-filing, prevailing wage, etc.

Given the restrictions on a re-filed application, and the fact that an employer must withdraw a case that possibly has an old priority date prior to finding out whether it will be accepted as a "re-filed" case, it is very risky for an employer to withdraw and re-file a case without first consulting with an immigration attorney. There is no guarantee the priority date will be retained. Also, employers must evaluate older cases to see whether they would be approvable under the new PERM requirements.

Note that if a pending case is withdrawn and re-filed under PERM, and DOL determines that the application is not for an "identical job opportunity," then the case will be treated as a new application and provided a new priority date.

PERM states that old labor certification applications that are not re-filed under PERM will continue to be processed under the old DOL regulations governing labor certifications. However, with the conversion to PERM, it is unclear whether old style labor certifications that remain pending will be processed in a reasonable amount of time. These cases may fall into yet a deeper backlog.

Electronic Filing Option

PERM allows employers to submit labor certification applications electronically. A web site is being created for this purpose. If submitted electronically, the employer will be required to sign application once it has been certified by DOL, and keep a copy on file. The original signed ETA must be submitted with the subsequent I-140 petition. Electronic applications do not need a G-28 even if an attorney files.

While electronic filing is still an option, employers retain the ability to file the applications by mail. In many cases this option may be preferable as it allows the employer, the attorney, and the applicant to review and sign off on the application prior to filing. This would seem to cause fewer errors.

Attestation-Based System

Under current labor certification procedures, employers are required to submit forms ETA-750 as well as documentary evidence of its efforts to recruit U.S. workers (e.g. tear sheets from ads run in newspapers, proof of attendance at job fairs, etc.). However, under PERM, a new form ETA-9089 is replacing the ETA-750 for all applications except those filed on behalf of professional athletes, who will continue to use the ETA-750. The ETA-9089 form elicits much of the same information from the ETA-750 forms, including the job offer, the educational and experience requirements, etc. However, it also contains a series of attestations that the employer has conducted the required recruitment efforts.

DOL will take these attestations at face value in most cases, but will conduct audits on questionable cases, and will also perform random audits of applications. The attestation & audit system is similar to what is used by the IRS for federal income tax purposes, or what is currently used for Labor Condition Applications in the H-1B context. The audit procedures are discussed further below.

Because an audit is possible, employers are required by the PERM regulations to retain evidence of all recruitment efforts in their file for 5 years after the date on which the labor certification application is submitted.

Prevailing Wage

100% of the Prevailing Wage Required

Under current labor certification procedures, an employer is required to pay an alien at least 95% of the prevailing wage for the position in the metropolitan area. DOL allows the employer to pay less than 100% of the wage to account for any flaws in the statistical procedures used to gather the wage data. However, under PERM, an employer must now pay 100% of the prevailing wage. The prevailing wage issue is important not only for new applications filed under PERM, but also as a consideration when attempting to re-file a pending labor certification under the PERM requirements. If the employer did not offer 100% of the prevailing wage in the initial application, then it will not qualify for re-filing under PERM.

Four-level wage system

In addition to requiring the employer to pay 100% of the prevailing wage, PERM also provides for four levels of wages commensurate with experience, education, and supervision. The four level system is much more realistic than the 2-level wage system that DOL currently uses for labor certifications. Wage surveys providing only two wage levels can still be used. The level one wage in the two-level wage will still be the level one wage when it is converted to the 4-level system. The level two wage will become the 4th level wage, and two wage levels will be sandwiched in between. To determine these two wage levels, one can divide the difference between the two wage levels by three, and add the quotient obtained to the first level, and subtract it from the second level.

While the PERM regulations provide clear guidance on how to convert a two-level wage into a four-level wage survey, the regulations do not provide guidance on what amount of experience, education, and supervision is commensurate with these new, intermediate levels. DOL will provide further guidance on this issue. In the meantime it is assumed that the intermediate wage levels will correspond to education and experience levels currently used in private wage surveys such as Watson-Wyatt.

Prevailing Wage Determinations Required

Another significant change that PERM makes to prevailing wages is that it requires all employers to obtain a Prevailing Wage Determination (PWD) from the State Workforce Agency (SWA) in its state prior to filing the labor certification application. (The current

system allows employers to submit evidence of the source from which they determined the prevailing wage, but does not require the employer to receive a determination directly from a DOL office). Since SWA's will no longer be involved in reviewing labor certification applications, they will be able to devote more resources to providing Prevailing Wage Determinations. However, it is likely that the SWA's will soon be swamped with PWD requests and it is foreseeable that a backlog will develop for PWD's. If this happens, employers will be delayed in even filing a labor certification application.

Recruitment Method

Under the old Labor Certification regulations, there were two basic kinds of labor certification applications. The first was a traditional labor cert. Traditional labor certs began with the U.S. employer filing an application with the Department of Labor. A DOL Certifying Officer would then provide a schedule of recruitment efforts for the employer to undertake in search of U.S. workers willing, qualified, and able to work in the position that the employer wished to offer to the alien beneficiary. If no such U.S. workers were found for the position in the course of this recruitment, the Labor Certification would be certified and the employer would be free to extend the permanent job offer to the alien, and to sponsor the alien for permanent residence.

The other type of labor certification application under the old DOL regulations was called a Reduction in Recruitment, or RIR. Under RIR, an employer was required to document that in the 6 months preceding the filing of the RIR labor certification application, it had engaged in a pattern of recruitment in an effort to hire U.S. workers for the position, but was unsuccessful in finding qualified and available U.S. workers. The recruitment methods under RIR could vary with the position offered, and were up to the discretion of the employer rather than subject to the control of a DOL Certifying Officer.

Under the new PERM regulations, the employer will be required to recruit for U.S. workers *prior* to filing the labor cert. This recruitment will be similar to RIR in that the recruitment must be conducted within the 180-day period preceding the filing of the labor cert. However, unlike RIR, the employer will not have discretion over recruitment methods. PERM is very clear that for a **non-professional job**, an employer must take the following steps:

1. The employer must post notice of the job opportunity for at least ten consecutive business days (rather than 10 consecutive days under the current labor certification regulations). The notice must say that any person may provide documentary evidence bearing on the application to the DOL. The purpose of the posted notice is to allow the employer's present employees to comment to DOL on the application; it is not part of the recruitment effort. In addition to posting the notice in a prominent place at the employer's place of business, the employer must also post the notice in any and all in-house media, whether electronic or printed, if those media are normally used by the employer to recruit employees in-house. The notice must include the amount of the wage being offered to the alien. Again, the notice is not part of the recruitment process.

2. The employer must place a job order with the State Workforce Agency (SWA) for a period of 30 days.
3. The employer must place two advertisements on two different Sundays in the newspaper of general circulation in the area of intended employment. Both ads must be placed more than 30, but not more than 180 days before filing. They may be placed on consecutive Sundays. (However, if the job requires experience and an advanced degree, the employer may use a professional journal in lieu of one of the Sunday ads.)

For a **professional job**, three additional recruitment steps are required. The list of permitted additional recruitment steps in PERM include:

1. Job fairs
2. Employer's web site
3. Job search web site other than employer's
4. On-campus recruiting
5. Trade or professional organizations
6. Private employment firms
7. An employee referral program
8. A notice of the job opening at a campus placement office, if the job requires a degree but no experience
9. local and ethnic newspapers, to the extent that they are appropriate for the job opportunity
10. Radio and television advertisements

Note that for the additional three recruitment steps, employers are not required to provide information about the specific job opportunity; they need merely state the occupation.

An employer may choose any three of these ten additional recruitment methods. These must be done in addition to the posting notice; the job order; and the two Sunday advertisements as outlined above.

To help employers distinguish between a "professional" and a "non-professional" job for the purposes of recruitment, the DOL has provided an appendix of jobs that it considers professional. If a job is on the appendix, then the additional recruitment steps outlined above are required. It is not clear whether a job that an employer considers "professional" but which is not on the list is required to undergo additional recruitment steps. However, DOL would never frown on an employer engaging in extra recruitment steps.

Audit Procedures & Supervised Recruitment

While DOL anticipates that most cases will be processed based on the results of the above-noted recruitment efforts alone, the Certifying Officer has discretion to audit a questionable application. Random applications will also be audited to ensure integrity of the program. If the Certifying Officer selects a case for audit, the employer must provide documentary evidence of recruitment efforts to which it has attested in the ETA-9089

form. Failure to supply any documentary evidence within 30 days will result in denial of the application.

After the Certifying Officer receives the evidence from the employer in response to an audit, the officer can either approve the case, request additional information or evidence, or direct supervised recruitment. Supervised recruitment is similar to the current process used for traditional, non-RIR labor certifications, where the Certifying Officer provides the employer with a schedule of recruitment that it must follow in order to seek U.S. workers to fill the position.

On one final note, PERM does preserve Special Handling for employment of college and university teachers. They are filed by submitting the ETA-9089 with DOL. The rule clarifies that universities can choose to file using regular procedures or Special Handling. In either case, the employer must document that the alien is more qualified than each U.S. worker who applied for the job.

Also of note is the fact that no filing fees have been implemented for the labor certification process.

The foregoing is but a cursory overview of the regulations. The full text of the regs is available on line at http://www.ilw.com/lawyers/immigdaily/federal_reg/2002,0507-PERM.shtm.

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