

THE PROPOSED NEW PERM LABOR CERTIFICATION PROGRAM

The application for U.S. Permanent Resident or "Green Card" status is composed of three separate applications: (i) the Labor Certification application, which is processed by the local state employment security agency ("SESA") and U.S. Department of Labor; (ii) the Immigrant Visa Petition, which is processed by the Citizenship and Immigration Service ("CIS"); and (iii) the Adjustment of Status application or Immigrant Visa Petition, which are processed by the CIS or the U.S. State Department, respectively. The purpose of the Labor Certification application is for the employer to establish through a test of the local labor market that there are no U.S. workers who are qualified for the position for which a foreign employee is being sponsored.

REASONS FOR THE PROPOSED PERM PROGRAM

For years, employers and their foreign employees have labored with a maze of ambiguous and conflicting rules and procedures for processing Labor Certification applications. These conflicting rules and procedures have led to a system in which the ultimate outcome of a Labor Certification is often unpredictable. At the same time, local SESAs and the U.S. Department of Labor have been inundated with thousands of Labor Certification applications during a period of budget cuts, thus burdening their systems and resulting in huge processing delays. Presently, a Labor Certification application for a position in a large metropolitan area in the United States can take as long as two to three years to be completed.

As a means of addressing the confusing array of rules and the processing backlog, the U.S. Department of Labor is currently in the process of implementing a new procedure for the processing of Labor Certification applications called the Program Electronic Review Management System or "PERM". The U.S. Department of Labor currently projects that the PERM program will be in operation by the end of this year and, although that deadline appears to be optimistic, it is very likely that it will be in place by the first quarter of 2005. Once implemented, the PERM

program will replace the existing Labor Certification application process for all cases other than those that have already been filed under the pre-PERM system. Note in this regard that the conversion to PERM will likely result in even greater delays for Labor Certification applications that were filed under the pre-PERM system.

THE NEW PERM LABOR CERTIFICATION PROCEDURES

The PERM Program will streamline the Labor Certification process by replacing the current, paper-based system with its heavy reliance upon detailed substantive review by government employees. Under PERM, employers will be required to conduct a recruitment process similar to that of the current Reduction in Recruitment or "RIR" process (that is, pre-filing recruitment over a period of several months using sources customary to the industry, such as newspaper advertisements, internet job postings and college fairs). The Labor Certification application will then be filed on-line and will rely solely on the employer's attestations regarding the results of this pre-filing recruitment, satisfaction of prevailing wage requirements and necessary job requirements.

In contrast to the Labor Certification process as it currently exists, PERM will not require that any supporting documentation be submitted for review. Instead, the system will rely solely upon audits to prevent abuse. The U.S. Department of Labor projects that under the PERM program between 75% and 80% of applications will be adjudicated and approved without further review within approximately 3 weeks of the on-line filing. This means that some 20% to 25% of cases will not be approved automatically but instead will be selected for audit. Though the U.S. Department of Labor's method for selecting cases for audit has not yet been outlined, it is clear that cases will be red flagged if questions arise regarding the stated job requirements or the proffered wage, or when the application is being made for positions for which U.S. workers are known to be available. In addition, the electronic system will randomly select a certain percentage of applications for audit.

If a case is chosen for audit, the employer will be required to submit a comparable level of documentation in support of the application as is currently required for RIR cases – evidence of actual recruitment, copies of resumes of all applicants and an explanation as to why each applicant was not qualified for the position.

NEW RESTRICTIONS CONTAINED IN THE PERM PROGRAM

As part of its overall goal of streamlining the Labor Certification application process, the PERM program removes to a great extent the ability that exists under the current system to customize the job opportunity for which a foreign employee is being sponsored by reflecting real-world duties and requirements. As a result, the PERM system will preclude adjudication of the following kinds of Labor Certification applications that would be accepted for processing under current standards:

- Currently, an employer may require proficiency in a foreign language if it can be shown that there is a “business necessity” for such a requirement. Under PERM, a language requirement cannot be used under any circumstances.
- Under the current system, an employer may require experience that was gained by the foreign employee only while working with the sponsoring employer if it can be shown that the experience gained with the employer was in a materially different position than the position for which the foreign employee is being sponsored. PERM will prohibit the use of a job requirement that is satisfied only by the foreign national’s employment with the sponsoring employer.
- Currently, an application in which the required education and years of experience

exceed the maximum allowable by the U.S. Department of Labor under the Specific Vocational Preparation (“SVP”) system can still be processed if the employer can establish a “business necessity” for the higher levels of education and/or experience. Under PERM, education and experience requirements must in all cases be structured to fall within the SVP guidelines regardless of the specific needs or circumstances of the employer.

- Under the current system, professional experience gained by the foreign employee may be used in place of formal education as required on the Labor Certification application. Under PERM, degree equivalencies based on experience will no longer be accepted.
- Under the current system, the salary offered for a position in a Labor Certification application must be no less than 95% of the “prevailing wage” for the position as determined by the U.S. Department of Labor or the SESA. Under PERM, the wage offered for the position will have to equal or exceed the prevailing wage for the position.

While the PERM Program will be significantly more efficient and streamlined than the current system, it is clear that, unless changes are made to the program, many Labor Certification applications that can be processed today will simply not be able to be filed and approved under PERM. Employers are urged to review their existing pool of foreign employees who are likely to be sponsored for a Green Card now, to determine whether the particular facts of any of their cases would be problematic under the PERM program – for these cases, it may be sensible to consider filing a Labor Certification application under the current system before the PERM system is adopted.

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