

## THE NEW PERM LABOR CERTIFICATION RULES

On December 27, 2004, the U.S. Department of Labor issued final regulations that significantly alter the rules for obtaining a certified Labor Certification application. Effective as of March 28, 2005, the Regulations on Labor Certification for the Permanent Employment of Aliens in the United States (or "PERM" regulations) put in place an entirely new procedure for filing and processing Labor Certification applications. As discussed below, many of these changes are positive and will likely result in Labor Certification applications being processed more quickly. Unfortunately, other changes add levels of complexity and confusion to the process that did not exist before. The PERM regulations are wide ranging and complex and will affect the processing of Green Card cases going forward – this Immigration Alert is intended to provide an overview of the most significant changes.

For most foreign nationals seeking employment based permanent resident status ("Green Cards"), the Green Card process is composed of three stages: (i) the Labor Certification application which is processed by the U.S. Department of Labor ("DOL"); (ii) the Immigrant Visa Petition which is processed by Citizenship and Immigration Services ("CIS"); and (iii) the Adjustment of Status application (or Consular Processing) which is also processed by the CIS. The Labor Certification application is an attestation by an employer that it has conducted a test of the labor market in the local area for the position for which a foreign employee is being sponsored and that it has failed to locate U.S. workers who are qualified for the position. The current Labor Certification application procedures have been in place for approximately 25 years and while the central principles of this process remain the same, the PERM regulations will, as of March 28, 2005, make the following significant changes:

### PREVAILING WAGES DETERMINATIONS

Under the PERM regulations, the salary to be paid to the sponsored foreign employee must be at least equal to the "Prevailing Wage" for the occupation in the local area. Prevailing Wage determinations are made by the local State Workforce Agency (the "SWA") - in Massachusetts, the Division of Career Services - based on published Department of Labor wage data. The DOL wage data is currently reported in only two levels for each occupation. The DOL is now mandated under the PERM regulations to revise its data to have at least four levels for each occupation reflecting different prevailing wages for differing levels of education and experience. Until it reports this data, two interim levels of

wages will be calculated between the current Level 1 and Level 2 based on a formula. As under current rules, an employer may use alternative wage data in an effort to convince the SWA to change its prevailing wage determination.

### PREFILING RECRUITMENT

In order to test the local labor market for the availability of qualified U.S. workers for the sponsored position, the employer must engage in the following recruitment activities prior to filing the Labor Certification application – these recruitment activities must take place no more than 180 days before the application is filed:

- A. The employer must post the job opportunity at its place of business for at least 10 business days;
- B. If the employer customarily posts job opportunities through other in-house media (including a web site/Intranet) then it must list the job opportunity on that in-house media;
- C. The employer must place a job order with the local SWA for a period of 30 days. These job orders are a free listing of the position on the State's unemployment Job Bank;
- D. The employer must run two advertisements in Sunday editions of a newspaper of general circulation in the area of intended employment;
- E. If the sponsored job opportunity is a "professional" position (defined as a position for which the attainment of a Bachelor's degree or higher is the usual educational requirement), then the employer must also engage in at least three of the following forms of additional recruitment:
  - i. Participation in a Job Fair;
  - ii. Listing on the employer's web site;
  - iii. Listing on a search web site other than the employer's;
  - iv. On-campus recruitment efforts;
  - v. Listing with a trade or professional organization;
  - vi. Listing with a private employment firm;
  - vii. Using an employee referral program provided the program includes monetary incentives;
  - viii. Listing the position at a College or University placement office (provided the position requires a degree but no experience);
  - ix. Listing the position in local or ethnic

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- newspapers; and
  - x. Radio and television advertisements.

## THE RECRUITMENT REPORT

At the end of the period of pre-filing recruitment, the employer must assemble and sign a Recruitment Report that summarizes the recruitment efforts and indicates the results, explaining in the case of rejections of any U.S. applicants, why they failed to meet the minimum requirements listed for the position. This Recruitment Report must be supported by copies of the various recruitment efforts (tear sheet for print advertisements, photocopies of online listings, etc.) as well as the resumes of any applicants for the position. The employer maintains the Recruitment Report and the supporting materials on file in the event of a later audit of the Labor Certification application by the DOL.

## FILING THE LABOR CERTIFICATION APPLICATION

The PERM regulations use a new form – the Application for Permanent Employment Certification (ETA 9089) for the Labor Certification application. This form can be filed either electronically or by mail at one of several regional processing centers. The Form 9089 is filed without any supporting documentation. The Form is, however, quite lengthy (10 pages in total) and requires that the employer and the sponsored foreign employee make a number of attestations concerning the nature of the recruitment, the job opportunity and prevailing wage as well as the credentials of the foreign employee.

Upon filing, the case will either be certified and approved, denied or referred for audit, in any event within 45 to 60 days. If denied, a new application (based presumably on a new period of pre-filing recruitment) can be filed without delay.

## AUDIT OF A PERM CASE AND SUPERVISED RECRUITMENT

The PERM regulations indicate that cases will be selected for audit both randomly and due to factors identified in advance by the DOL. If a case is selected for audit, the DOL will request evidence of the recruitment process. At this stage, presumably, the employer would provide the DOL with the Recruitment Report that was prepared after the pre-filing recruitment period as well as copies of supporting materials. Based on this additional material, the DOL will either certify and approve the case, deny the case or refer the case for a period of “supervised recruitment.” If referred for a period of supervised recruitment, the DOL will instruct the employer to engage in additional recruitment as determined by the DOL and will then have to submit written evidence to the DOL detailing the recruitment and its results. Note that at this stage, the DOL can also penalize an employer (presumably for failing to follow the PERM regulations) by requiring that all Labor Certification applications from that employer go through supervised recruitment for a period of up to 2 years.

## THE JOB OPPORTUNITY AND REQUIREMENTS

Earlier proposed versions of the PERM regulations contained new restrictions and limitations on the ability of an employer

in structuring a job opportunity to use alternative educational and experience requirements, foreign language requirements and requirements of prior experience with the sponsoring employer. In the PERM regulations these restrictions were largely lifted and the customary “business necessity” standard was retained allowing an employer to use alternate and non-customary requirements where it can show that there is a valid business purpose for these requirements.

## TRANSITION RULE AND CONVERSIONS OF EXISTING LABOR CERTIFICATION APPLICATIONS TO PERM

Before March 28, 2005, employers can file Labor Certification applications under the pre-PERM rules. These applications, as well as most currently filed applications, will be processed to completion by the DOL at several Backlog Reduction Centers around the country. It is unclear at this time whether the transfer to the Backlog Reduction Centers will delay the processing of these pre-PERM cases or speed it up.

The PERM regulations also permit the conversion of Labor Certification applications filed under the existing system into the PERM system. If the case is converted properly and is approved, the application will retain its original Priority Date (the date that the Labor Certification was originally filed). Cases may only be converted if a job order has not yet been placed and structured recruitment begun with respect to the existing case. In order to convert an existing case to PERM, the job opportunity must be identical and the employer must have complied with all of the pre-filing recruitment requirements set forth in the PERM regulations. The filing of a conversion into PERM will, however, constitute a withdrawal of the original Labor Certification application and thus if the case is denied in PERM, the original Priority Date will be lost entirely.

A copy of the PERM regulations, as well as comments and a Press Release can be found at:

[www.doleta.gov/whatsnew/new\\_releases/december2704-Certification.cfm](http://www.doleta.gov/whatsnew/new_releases/december2704-Certification.cfm). Employers need to understand the changes in the Labor Certification application processing made by the PERM regulations, and more critically in the short-term, need to understand the impact of those regulations and the PERM conversion process on Labor Certification applications that have been recently filed or that are in the process of being prepared for filing.

*Please contact Donald W. Parker (781-622-5930; [dwp@mbbp.com](mailto:dwp@mbbp.com)) with questions about the PERM regulations, their application to your employees or clients, and whether action needs to be taken now under the transitional or conversion rules with respect to Green Card cases that are in process.*