

PERM - Happy Anniversary?

March 28, 2006 marked the first anniversary of PERM, the Department of Labor's new labor certification filing process for the sponsorship of foreign workers for permanent residence by U.S. employers. The jury is still out on whether the system is a dramatic improvement over the old system. PERM was introduced to streamline the labor certification process and in many ways it has done just that. Clearly PERM is significantly faster – we've experienced PERM approvals within as little as 1 week and typically within a 45-60 day range. However, PERM is also cumbersome and wholly unforgiving of technical, harmless errors. The slightest typo on the form or miscue in timing of recruitment can be fatal and leave an employer with no other option but to conduct some or all recruitment anew.

PERM consists of three mandatory forms of recruitment - (i) advertisements in two Sunday editions of a major newspaper of general circulation; (ii) listing in the State Workforce Agency's ("SWA") Job Bank for 30 days; (iii) posting of the job opportunity for labor certification at the workplace for 10 consecutive business days – and fulfillment of three alternative forms of recruitment (e.g. the employer's website, a job search website, a trade or profession organization journal, local or ethnic newspaper, employee referral program, job fair participation, on-campus recruiting, or use of a private placement firm).

Having successfully filed dozens of PERM cases over the past year, we would like to give you a sense of several of the lessons learned:

✓ The PERM recruitment process is highly structured and timing is critical. Under PERM all steps must be completed timely and the application filed within 180 days of the commencement

Does your business:

- ✓ Sponsor foreign workers for permanent U.S. residence?
- ✓ Struggle to understand the requirements for PERM?
- ✓ Know how to respond if a PERM application is denied?

Then, read on...

of the earliest recruitment, so organization is key. However, the regulations mandate that 30 days must pass after the completion of all but one of the three alternate forms of recruitment before the application can be filed.

The regulations also mandate that the SWA Job Bank listing be maintained for at least 30 days. This mandated recruitment evaluation period means that under PERM the absolute earliest an employer can file an application is 61 days after commencing recruitment. In most instances filing within the 61st day is unrealistic since it would require the employer to run all forms of recruitment within the first 30 days and complete all candidate reviews within the next 30 days. In our experience a more realistic period for commencement of recruitment to filing of the PERM case is 90 days. Conversely, if an employer spreads its advertisements out, not paying attention to the 180 day rule, it can risk having early forms of recruitment become stale or it could lose the validity of the prevailing wage determination previously issued by the State Workforce Agency.

✓ One of the requirements for the PERM process is that the employer obtain a prevailing wage determination from the SWA for the position which is being sponsored and that the employer's salary for that position exceed the SWA's prevailing wage. Depending on the state in which the job is located, the prevailing wage can be valid for anywhere from 90 days to 1 year. The

DOL has stated that it will recognize the validity of prevailing wage determinations that have expired provided the recruitment commenced while the prevailing wage was valid.

✓ Before an employer can submit an application in the PERM online system it must be registered with the DOL. We have found that in some cases, the registration process can take weeks as opposed to days because, for instance, the DOL requires additional documentation from the employer to verify that it is a valid employer in proper legal existence in the state in which it is engaged in business. Thus, registering the employer early in the process is sensible, since a late registration can delay filing, in some cases beyond the 180 day window.

✓ Once a PERM case is filed online, the DOL notifies the employer that an application has been filed and requires that the employer consent to the filing of the application. Failure to provide this consent within strict timelines established by the DOL will result in denial of the PERM filing. An employer receives notification from the DOL of a filing in the form of an email which asks the employer to click on the attached link and confirm that



it consents to the PERM filing. The employer has seven days to respond to this email. If the employer does not respond in seven days, the DOL will send the case to the Call Queue system for a follow-up telephone call by a DOL representative. The Call Queue system is apparently set up to track the calls. If no contact can be established with the employer in the first telephone call the DOL must wait at least 72 hours before making the second call. If the employer is not reachable in the second call the DOL must wait an additional 48 hours before making the third call. If all three calls have been made and the DOL is still unsuccessful in reaching the employer the DOL will deny the application. Like many new systems, DOL's email and Call Queue system have not worked flawlessly. The DOL has experienced problems with its notification system and employers have wrongfully received denials of pending applications for alleged failure to respond to emails that simply never sent.

- ✓ A central flaw of the PERM system is that it does not provide an employer with the ability to correct a pending application form once it has been submitted. The only mechanism the DOL provides for an employer to correct an application after submission is to withdraw the application and resubmit a corrected application.

That's not typically a problem if the employer's recruitment has all taken place within 180 days of the withdrawal and resubmission. However, if an employer realizes a mistake after any of the recruitment is more than 180 days old, that recruitment is lost and the employer has no ability to simply correct the mistake.

- ✓ If a PERM application is denied an employer has two avenues of recourse: (1) refile the application (which may require new recruitment if any element of the current recruitment is more than 180 days old); or (2) file a motion for reconsideration/appeal to the DOL Certifying Officer with a request to forward it to Board of Alien Labor Certification Appeals ("BALCA") should the reconsideration not be accepted. The major problem with filing an appeal is that an employer is precluded from filing a new application on the employee's behalf until Appeal review has completed. At present no one knows how long BALCA will take to address appeals following submission.

Despite its significant shortcomings, PERM represents an improvement over the former system with respect to efficiency and clearly defined rules. Where it needs improvement is in the interface between the applicant and the DOL. Were DOL properly staffed by information officers able

to access pending PERM applications and were applicants allowed to correct pending applications while they are in the "In Process" stage, the system would represent a great step forward for the filing of Labor Certifications – without adequate staffing of accessible "live" and well-trained information and certifying officers the system is destined to create as many problems as it has sought to solve.

The Morse, Barnes-Brown & Pendleton, PC, **Immigration Practice Group** provides sophisticated legal services and practical advice to employers of all sizes, ranging from technology start-ups to Fortune 500 companies.

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