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**Immigration Update –February 14, 2005**

**More on PERM Changes to the Green Card Process**

As we informed you in our last Update, after March 28, 2005, all labor certification (“LC”) applications must be filed under the new PERM system. This update provides a brief description of what is required to file a new application under PERM, and examines some of the issues involved in re-filing under PERM an application that is already pending under the existing LC system.

**Conversion of Pending LC to PERM**

The PERM regulations do not allow for converting to PERM an LC application that is pending with U.S. Department of Labor (“DOL”). Instead, the PERM regulations allow a pending application to be “re-filed” under the new system. Re-filing an application under PERM requires the same steps as filing a new application, including the need to conduct recruitment immediately prior to filing the PERM application. The employer must conduct new recruitment that satisfies the PERM requirements even if it has already conducted recruitment prior to filing a Reduction in Recruitment (“RIR”) application under the existing system.

The anticipated benefit of re-filing under PERM is a faster processing time. How quickly these applications will be processed remains to be seen. Employers and foreign nationals will need to weigh the cost of re-filing an application under PERM and the PERM issues outlined below against the benefit of a faster processing time.

**Summary of Requirements for Filing under PERM**

**Prevailing wage:** The employer must pay 100% of the prevailing wage as determined by the DOL versus 95% of the prevailing wage as required under the existing system. DOL wage information will now have 4 levels of wages, which should be more realistic than the existing 2 level wage system.

**Recruitment:** PERM requires recruitment to be conducted between 30 days and 180 days prior to filing of the application. The required recruitment must include: (1) a 30 day job order with the state labor department; (2) two Sunday newspaper advertisements, with an exception for rural areas; and (3) an internal posting notice. For professional positions, employers are required to use at least three additional forms of recruitment, only one of which can be done within 30 days prior to filing the application.

**Application Form:** The new 10 page application, Form 9089, may be filed via email or by mail. The DOL expects that most applications will be filed electronically. The application form requires attestations from the employer about the job offered, the recruitment conducted, the family relationship between the employer and employee (if any), how the employee satisfies the minimum requirements of the position, and other related issues. The form also requires the employer to attest that it considered US workers who could be trained within a reasonable period to perform the duties of the position, even though they may not meet the minimum requirements, and that it offered the job opportunity to recently laid-off workers.

**Documentation of Recruitment:** PERM requires the employer to prepare and maintain for 5 years documentation of its recruitment (copies of ads, resumes and recruitment results including lawful reasons for rejecting applicants), documentation of how the foreign national employee satisfied the minimum requirements, and documentation of any issues relating to the attestations on the Form 9089 in case the application is selected for audit.

**Some Risks /Issues of PERM and Re-filing under PERM:**

**Priority date:** A pending LC or RIR application that is re-filed under PERM will only retain the original filing date (priority date) of the pending application if the PERM application is for an “identical position” as the pending application. The regulations indicate that an identical position must have the same employer, same employee, same job title, same location, same job description and same requirements as the job as listed on the pending application. It is not yet clear how strictly DOL will interpret these requirements for an identical position. Until this issue is clarified by DOL, re-filing under PERM is risky if the employee needs to maintain the original priority date.

The risk of losing the original priority date if DOL finds that the jobs are not identical is particularly troublesome in two situations: (1) foreign nationals who need to have an LC pending for more than 365 days in order to obtain extensions of their H-1B visa status beyond 6 years; and (2) foreign nationals who are citizens of India, Philippines, or Mexico, where there has been retrogression in immigrant visa availability for the “skilled worker” category.

**Processing times:** Although PERM anticipates processing applications in 60 days or less, this is not guaranteed. There is serious concern as to how well this system will work, particularly in the beginning. The DOL’s implementation of a similar attestation system for H-1 visa petitions several years ago was chaotic for the first several months. In addition, audits of some PERM applications will cause delays while the employers submit documentation of their recruitment or attestations on Form 9089, or conduct additional recruitment required by DOL.

**Audits / Denials /Revocations:** The DOL will audit PERM applications in 3 ways: randomly, based on pre-selected criteria on Form 9089, and through a review process by DOL officers. The DOL is likely to audit applications and request additional information if the foreign national’s qualifying work experience or education was gained while employed by the sponsoring employer, if there is a family or financial connection to the employer, if the employer paid for education or

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training, or if other issues arise. The employer should prepare documentation relating to these issues prior to filing the application, and must maintain that documentation for 5 years. No one knows yet how in-depth the supporting documentation must be to overcome an audit. Therefore, re-filing under PERM runs the risk of an audit, followed by a denial. Further, PERM applications have a risk that does not exist under the current system - - approved applications can be revoked at any time in the future.

If the DOL determines through an audit that the employer did not conduct the recruitment in a satisfactory manner, the DOL will require the employer to conduct additional supervised recruitment. In addition, the DOL can require an employer to conduct supervised recruitment for all future applications for a period of 2 years.

### **Timing for Filing a New LC Application Under PERM**

Due to the timing of certain recruitment requirements under PERM, it is not feasible to file a PERM application by March 28, 2005 when PERM takes effect. We expect that very few PERM applications will be filed before May.

There are still many unresolved issues in the new PERM regulations. While it may be tempting to rush into the re-filing process in the hope of obtaining faster processing times, we are inclined to wait and see how the DOL handles the first round of applications under PERM. As this new process unfolds, we expect to receive additional information and clarifications from the DOL.

If you have questions about PERM--whether to file an LC application under the current regulations before PERM takes effect on March 28, or to wait and file under PERM, or to re-file a pending application under PERM-- please contact one of the Trow & Rahal attorneys listed below.

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