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GREEN CARD APPLICATION VIA LABOR CERTIFICATION APPLICATION UNDER "PERM" PROGRAM

STEP #1 of 3 – PERM Labor Certification Application

The Program Electronic Review Management (PERM) program is the electronic attestation program of the Department of Labor (DOL) under which all labor certification applications must be filed. The DOL indicates that applications filed under PERM will be adjudicated in just a couple of months. The program was implemented to streamline and speed up the labor certification application process while guarding against potential fraud.

Recruitment

The PERM system requires that the employer conduct recruitment prior to filing the application and that the documentation of recruitment and the employer's inability to find qualified and available U.S. workers be kept on file with the employer. PERM requires that all recruitment be conducted within 30 to 180 days before filing the application, leaving the last 30 days as a period during which the employer should be reviewing resumes and interviewing applicants. However, there is no requirement that the recruitment be conducted over the 5 month period between the 30 to 180 days; instead the entire recruitment can be conducted within a couple of months during that period.

Recruitment for ALL positions require the following:

1. 30 day job order with the state labor department; and
2. two Sunday newspaper advertisements, with an exception for rural areas (and 1 Sunday ad can be replaced by a trade journal ad for positions requiring an advanced degree with experience.

For professional positions (those that typically require a bachelor's degree), 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. The three additional forms of recruitment must be selected from the following list:

1. Employer's web site
2. Other job search web site (such as newspaper's website where place print ad)
3. On campus recruitment (where employer sets up interviews on campus)

4. Trade / professional organization ad
5. Private employment firm
6. Employee referral program where employer provides incentives
7. Campus placement office (only entry level positions)
8. Local / ethnic papers
9. Radio / TV ads

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.

If within the 6 months prior to filing the application the employer has had layoffs in the same occupation or a related occupation (in the same geographic area) as that for which the employer is filing the PERM application, then the employer is required to notify and consider potentially qualified laid-off workers. PERM requires the employer to document its effort to notify and consider the laid-off workers in the recruitment file it maintains for the required 5 year period. Layoff is defined as any involuntary separation of one or more workers without cause or prejudice.

Notice

In addition to the recruitment, PERM requires that the employer provide notice during the same recruitment period. The DOL indicates that notice is distinct from recruitment because its purpose is to give employees an opportunity to provide documentary evidence bearing on the application to the certifying officer. Documentation of the notices must be kept on file with the recruitment documentation for the same 5 year period. The notice must consist of the following:

1. If there is a bargaining representative for the occupational classification in the area of intended employment, that person must receive notice in the form of a letter and copy of the application form (ETA 9089); or
2. If there is no such bargaining representative, a notice must be posted for 10 consecutive business days in a conspicuous location and be clearly visible to employees; and
3. The employer must also publish a copy of the notice in all in-house media, whether electronic or printed, where the employer would normally place notices of its job openings for similar positions.

The PERM application form and required attestations

The 10-page application form, ETA 9089, may be filed via email or by mail. The DOL expects that most applications will be filed electronically and these applications are likely to be processed in a couple of months. The DOL doesn't promise the same processing times for those filed by mail. The application form requires the employer to make

attestations 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 has 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.

The Form ETA 9089 further requires the following attestations:

1. The employer will pay a wage greater than or equal to 100% of the prevailing wage when permanent residence is issued or from the time the foreign national is admitted to take up the certified employment;
2. The wage is not based on commissions, bonuses, or other incentives unless these are guaranteed and paid at least monthly;
3. The employer has sufficient funds to pay the offered wage;
4. The employer is able to place the foreign national employee on its payroll on or before the entry of the foreign national into the United States.
5. The job offered does not involve unlawful discrimination, by race, creed, color, national origin, age, sex, religion, handicap, or citizenship.
6. The position is not vacant because the former occupant is on strike or locked out or at issue in a labor dispute involving a work stoppage.
7. The terms, conditions and occupational environment are not contrary to federal, state or local law;
8. The job has been and is clearly open to any US worker;
9. US workers who applied were rejected for lawful job-related reasons; and
10. The job opportunity is for full-time, permanent employment for an employer other than the foreign national.

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 training, or if specific 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. Lastly, the DOL has reserved the right to revoke any approved application 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.

STEP #2 of 3 -- Immigrant Visa Petition

After the DOL approves the PERM labor certification application, the next step is to prepare and file an immigrant visa petition with the Bureau of Citizenship and Immigration Services (“BCIS”). By filing the immigrant visa petition, the employer is indicating that the DOL, through the PERM labor certification application process, that it has been unable to find qualified US workers for the position and that it has identified a foreign worker who is qualified for the U.S. position. With the immigrant visa petition, the employer has to submit documentation indicating that the foreign national met all of the minimum requirements for the position as indicated in the advertisements prior to being hired by the employer or that the prior relevant position(s) with the same employer had job duties that were more than 50% different from the job duties of the position being offered. The employer must also demonstrate that it has the ability to pay the offered wage and had the ability to pay the offered wage when it filed the labor certification application with the DOL. The BCIS takes approximately 6 – 8 months or more, depending on the region, to process an immigrant visa petition.

The current law permits the concurrent filing of the immigrant visa petition (step #2) and the application to adjust status (step #3), in which the BCIS will adjudicate both applications at the same time if the foreign national’s priority date is current.

STEP # 3 of 3 -- Adjustment of Status Application or Immigrant Visa Application

If the foreign national is in the United States with temporary work authorization, the last step in the process is to file an application to adjust the foreign national’s immigration status to permanent resident status. If the foreign national resides outside of the United States, or is ineligible to adjust status in the United States, the last step is to file an immigrant visa application at the U.S. embassy or consulate in the foreign national's country of nationality or last foreign residence.

In some cases a foreign national who is eligible for adjustment of status in the United States may choose to file an immigrant visa application abroad in order to complete the green card process. It takes approximately 6 to 9 months to complete the process through an immigrant visa application at a US embassy abroad, compared to 12 to 24 months to complete an adjustment of status application in the United States.