



McCandlish Holton
A PROFESSIONAL CORPORATION

Labor Certification

Labor Certification is required for the EB-3 category, and for EB-2 where an NIW is not available.

In order to sponsor an employee for a green card through labor certification, the employer must show that adequate recruitment has been conducted by the employer and that there are not enough qualified U.S. workers available to fill the positions available for the job offered.

On December 27, 2004, the U.S. Department of Labor (DOL) published a new regulation that will govern all applications for Alien Labor Certification filed on or after March 28, 2005. Employers file applications for Alien Labor Certification with the DOL in order to sponsor an alien for Lawful Permanent Resident status by demonstrating that there are insufficient U.S. workers available who meet the minimum qualifications for a given position. The DOL's new regulation, known as Program Electronic Review Management (PERM), will *not* apply to applications for Alien Labor Certification that are currently pending. Neither will PERM apply to applications for Alien Labor Certification that are filed before March 28, 2005. This summary will describe the procedure for filing basic cases using the PERM procedure, followed by a discussion of the special rules for filing cases for university teaching faculty.

PERM provides for an electronic automated attestation system to replace the old paper-based system, which required both the local state employment agency staff and DOL federal staff to review all applications filed. Under PERM, employers will complete an electronic application form called an ETA-9089 in which they answer a series of questions relating to the sponsoring employer and the job offer the employer wishes to have certified. The employer must maintain certain documentation in support of the application but need not submit it to the DOL unless the

employer is audited. The DOL will audit some applications at random and others for cause prior to certification.

In cases where no audit is initiated, the DOL estimates that it will approve PERM cases within 45-60 days. In the event of an audit, the DOL Certifying Officer will send the employer an audit letter requesting additional documentation. The employer will have 30 days to respond to this letter with a possible 30 day extension at the request of the employer. Upon receiving the employer's response, the DOL Certifying Officer may (1) approve the labor certification application; (2) request more documentation; or (3) require that the employer conduct additional recruitment for the position under the direct supervision of the DOL.

Additional key provisions and ramifications of the PERM regulation include the following:

Recruitment Evidence: Before filing Form ETA-9089, employers will have to undertake certain recruitment efforts and document the results. The nature of this recruitment is specifically mandated by the regulation. At a minimum the employer must:

1. Post a notice of the job opportunity in conspicuous places at the work site for at least 10 consecutive business days.
2. Post a notice of the job opportunity through all in-house media within the employer's organization. This includes both electronic (e.g., websites) and printed in-house media and is separate from the posting requirement listed above. The duration and manner of these in-house media postings must accord with normal procedures used by the employer to recruit for similar positions.
3. Place a Job Order with the State Workforce Agency (SWA) for at least 30 days. The SWA is the local state office of the DOL having jurisdiction over the place of employment.
4. Place two advertisements on two different Sundays in the newspaper of general circulation in the area of intended employment. The ads need not include the salary or a detailed listing of the job requirements but they must be specific enough to apprise U.S. workers of the job opportunity. The employer's name must be mentioned in the advertisement. If the job requires experience and an advanced degree, the employer may opt to use a professional journal advertisement instead of one of the two Sunday ads.
5. For professional positions, take three additional recruitment steps. In addition to the measures set forth above, for professional positions (i.e., those that require that attainment of a Bachelor's degree or higher), the employer must undertake at least three of the following ten recruitment efforts within 180 days before filing the application: (1) job fairs; (2) employer's web site; (3) job search web site other than the employer's; (4) on-campus recruiting; (5) trade or professional organizations; (6) private employment firms; (7) an employee referral program, if it includes identifiable incentives; (8) a notice of the job opening at a campus placement office; (9) local and ethnic newspapers if appropriate for the job opportunity; and (10) radio and television advertisements.

6. Prepare a detailed recruitment report. The employer must prepare and sign a recruitment report upon completion of advertising. The report must include the number of hires and the number of U.S. workers rejected categorized by the lawful job-related reasons for the rejection. The Certifying Officer may request copies of the resumes of those U.S. workers who applied for the position and require the employer to sort the resumes according to the basis for rejection.
7. Consider qualified laid-off workers: If applicable, the employer must notify and consider for the position any workers it laid off within the six months prior to filing Form ETA-9089 who had worked for the employer in the occupation for which certification is sought or in a related occupation. The employer must document that it offered the position to those laid-off workers who were able, willing and qualified to do the job.

Prevailing Wage: Under PERM, the employer will be required to pay 100% of what DOL determines to be the prevailing wage for the certified position. Previously, employers were permitted to pay within 95% of the prevailing wage for the position. Employers must submit a prevailing wage request form to the SWA and receive a response before filing Form ETA-9089. If an employer disagrees with a prevailing wage determination, it may file supplemental information, submit a new prevailing wage request or appeal the SWA's determination.

Special Rules for University Teaching Faculty: Labor Certification Applications filed on behalf of college and university teachers were previously processed through a "Special Handling" procedure at the DOL. Under PERM, the procedure remains in place but is called "Optional Special Recruitment" for college or university teachers. This procedure is very beneficial, since standard for evaluating US candidates is more favorable to the university teaching faculty. Under normal PERM processing, the standard is: if any US worker meets even the minimum qualifications for the position, the employer cannot proceed with the application for the foreign worker, even if the foreign worker is better qualified. Under Optional Special Recruitment, the standard is: if the foreign faculty member is the best qualified, then the employer can proceed with the application even if other minimally qualified US workers applied.

In order to take advantage of this standard, cases for university teaching faculty filed on or after March 28, 2005 must include the following information:

- Form ETA 9089: This is the new attestation-based Labor Certification Application under PERM. Applications must be filed within 18 months after the date that the alien is selected for the position pursuant to a competitive recruitment process.
- Prevailing Wage: The employer must agree to pay 100% of the determined prevailing wage for the position once the alien becomes a permanent resident. Previously, employers were permitted to pay within 95% of the prevailing wage for the position. If an employer disagrees with a prevailing wage

determination, it may file supplemental information, submit a new prevailing wage request or appeal the SWA's determination.

Recruitment Documentation: The employer must recruit in accordance with the normal procedures set forth in PERM **or** document that the alien was selected through a competitive recruitment process during which the alien was found to be more qualified than any of the U.S. workers who applied. The employer must prepare a signed, detailed statement explaining its recruitment efforts that lists the total number of applicants and the specific, job-related reasons why the alien was found to be more qualified than each of the other U.S. worker applicants. The employer must also prepare the following documentation:

- A final report of the body recommending that the alien teacher be hired following the competitive selection process;
- A copy of an advertisement placed in at least one national professional journal, including the job title, duties and requirements;
- Evidence of all other recruitment sources used by the school to fill the position; and
- A written statement attesting to the alien's educational or professional qualifications and achievements.

Processing after the Labor Certification is approved

- § After the DOL issues a labor certification, the employer files a green card petition (form I-140) with CIS. CIS reviews the application to see that the foreign applicant in fact qualifies for a green card by meeting all of the requirements demanded of U.S. workers.
- § Assuming the I-140 is approved, the employee is now eligible for a green card, and can apply to "adjust status" to permanent resident if a visa number is available. This involves fingerprinting, a medical exam and numerous forms.

Third Preference (EB-3 Unskilled Workers)

Under current law, full-time employees in jobs not requiring two years experience or training can still qualify for Green Cards provided that a testing of the job market under ***Labor Certification*** procedures shows that there are no U.S. citizens or permanent residents meeting minimum qualifications for the job.