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### **Department of Labor Issues Final PERM Rule**

On December 27, the Department of Labor issued its final rule implementing PERM, ("Program Electronic Review Management" System) (69 Fed. Reg. No. 247) , a long-anticipated set of rules aimed at streamlining the labor certification application process. Then final rule will take effect on March 28, 2005.

#### **Major Provisions of the PERM final rule**

- **What is PERM?** PERM is designed, in part, to automate the labor certification system and to minimize the role of the State Workforce Agencies (SWAs) in the labor certification process, making the application an attestation-based procedure amenable to automated review on the Federal level. Under the final rule, employers will be able to file Applications for Alien Employment Certification by electronic means or by mail. It is contemplated that the electronic system will retain certain basic information about employers, thus making multiple filings for various positions by the same employer somewhat simpler. Adjudication is expected within 45 to 60 days under the new system.
- **Prevailing Wage.** An employer will first be required to complete a form to obtain a prevailing wage from the SWA with jurisdiction over the geographic location of the position. The employer will use any form that is required from the local SWA. Under current law, the employer may offer a salary that is 95% of the prevailing wage. Under the recently enacted Omnibus Appropriations Act of 2005, and effective March 8, 2005, the employer must pay 100% of the prevailing wage for both H-1B and labor certification applications. The Omnibus Appropriations Act also allows employers to calculate two additional wage levels from the OES wage data, using a specific formula. This may be used both for H-1B and permanent labor certification purposes.
- **Alternate Wage Surveys.** Under the final PERM rule, employers may use alternate wage surveys that meet DOL requirements, including surveys that contain the median wage but do not contain the arithmetic mean. In addition, employers may use surveys that provide just one wage skill level, such as the Bureau of Labor Statistics survey, as long as the survey does not provide usable data for varying skill levels for the occupation. Service Contract Act and Davis Bacon Act wages are no longer mandated but may be used by the employer.

- **Recruitment.** In the recruitment phase, the employer will be required to consult the DOL's list of "professional occupations" to determine the recruitment rules for each position. Typically, the employer will be required to place two Sunday advertisements, complete a local SWA job order, and conduct three other recruitment steps, from a menu of defined recruitment activities. Under the final rule, the advertisement will need to contain the name of the employer, and a job description sufficient to link the ad with the job opportunity as later described on the application form. The salary need not be included in the ad. In addition, an internal posting notice must be conducted electronically and via other company communication. The internal posting may be the type of posting that is normally done by the employer for similar occupations. It must contain the salary offered or a salary range, the bottom of which may not be below prevailing. The employer will be responsible for maintaining a detailed recruitment summary and must make it available to DOL in the event of an audit. The summary need not identify each U.S. worker who applies for the job. However, in the event of an audit, DOL may request copies of resumes of applicants. An employer's supporting documentation regarding recruitment must be retained for five years.
- **Qualified U.S. Workers.** An applicant who fails to meet the employer's stated minimum requirements for the position may be deemed unqualified; however, if an applicant lacks a skill that may be gained through a reasonable period of on-the-job training, the lack of that skill will not be a lawful reason for rejection of that worker. A "reasonable period of on-the-job training" is not defined as it may vary by occupation and industry.
- **Experience gained with the same or affiliated employer.** The initial PERM proposal prevented employees from using experience gained with the sponsoring employer toward the requirements for a labor certification application, even if the employee worked for the employer in a different job, as a contractor, with a predecessor company, successor in interest, or related entity. The final rule abandons that proposal and allows experience gained with the same or affiliated employer if the jobs are not "substantially comparable." "Substantially comparable" jobs are defined as jobs that require performance of the same duties over 50% of the time.
- **Business Necessity and Alternative Requirements.** Unlike the proposed rule, the PERM final rule retains the employer's ability to justify requirements that are not considered normal to the occupation, or requirements that exceed the DOL's standard vocational preparation, through documenting the business necessity of the special requirements. Alternative requirements are permitted. However, where the foreign national qualifies for the position by meeting the alternative requirements, the employer must be prepared to show that the job opportunity was open to U.S. workers who met the alternative requirements as well.
- **"Undue Influence."** Where a beneficiary of a labor certification appears to have "undue influence" over the job opportunity, the employer will be required to demonstrate that there is indeed a bona fide job opportunity available for U.S. workers. This may occur if the job

opportunity involves a high level position in the company, such as CEO or President, where the beneficiary was one of the founders of the business, or in certain instances where the beneficiary owns a percentage of the company. This will also be the case where the beneficiary is one of a very small group of employees of the company.

- **Audits in lieu of Notices of Findings.** After a PERM labor certification is filed, the DOL may conduct an audit. Some audits may be random, others may be generated by an issue or problem in the application. Audits will replace the current system in which the regional certifying office issues a Notice of Findings indicating that there are problems or deficiencies in the labor certification application.
- **Upgrading or converting a case to PERM.** Labor certification applications that are currently pending at the state or regional DOL may be re-filed under PERM and maintain the original filing or priority date, unless the case is a supervised recruitment case and a job order has already been opened at the SWA. However, there are several concerns with re-filing a case to PERM. First, it is important to understand that in order to re-file under PERM, the original case is withdrawn and a new case must be re-filed and meet all PERM requirements. This may involve new advertising and recruitment. Moreover, the employer should be certain that the case will meet all the other PERM requirements including wage requirements as well as other issues. In addition, in order to convert successfully to PERM, the job opportunity applied for in the PERM case must be identical in all respects to the job opportunity in the original non-PERM case, including job duties, educational requirements and experience requirements. Employers should approach conversion cautiously, because the beneficiary will lose the benefit of the original priority date if the PERM case is rejected.