**PERM and the Employment Based Green Card Process**

PERM labor certification (LC) is the first in a three-step process in the majority of employment-based, permanent resident (commonly referred to as "green card") cases. This is an explanation to help those who aspire to become U.S. permanent residents understand the steps and timing involved from case initiation to the U.S. Department of Labor's (DOL) final determination or decision.

For anyone with an H-1B it is imperative to file a PERM by the 5th year of being in H-1B status, or at least 365 days prior to their 6th year, otherwise the H-1B holder will have no further grounds for extending their H-1B and must either change to a different visa or leave the U.S.

**Background: Typical Filing Timeline of Several Months**

From the start of the case to filing the PERM LC application, form ETA 9089, the PERM process usually takes four to six months. As explained in greater detail below, employers must complete certain detailed steps pertaining to efforts to recruit U.S. workers as part of the PERM process. These highly detailed requirements must completely be met before the case can be filed with the DOL.

**Minimum Requirements and Duties for Offered Position**

The starting point in the PERM LC process is establishing the duties and requirements for the position that forms the basis of the PERM case. There are specific regulations governing the content of the job description, as well as the job requirements or qualifications. These regulations must be carefully adhered to, as cases can be denied for issues that, to the average employer, may seem to be minor technicalities.

The sponsoring employer must set forth clearly defined job duties and educational and/or experience requirements needed to qualify for the position. The requirements set by the employer for the position must meet the DOL's "actual minimum requirements" rule. This means that the requested education and/or experience must reflect the employer's absolute minimum qualifications for the job to be performed in a competent (not superior) way.

An employer may never have considered these matters in the detail or in the same manner as the DOL prior to commencing a PERM case. In such a situation, it could take a number of days or even longer to finalize this initial part of a case. There is a high level of employer participation at this stage. Thus, the length of time required to complete this portion of a case depends in part upon the employer's availability.

A separate aspect of the analysis of the job definition is the determination of whether the sponsored employee will be able to document that s/he meets the employer's education and/or experience requirements. This can cause delays while efforts are made to obtain sufficiently detailed experience letters from prior employers, educational documents, and evaluations of foreign educational credentials.

**Benefits of Obtaining Prevailing Wage Before Recruitment**

In order to file the PERM application, it is necessary to obtain a prevailing wage determination (PWD) from the DOL. This establishes the appropriate minimum wage level required for the position. Wage determinations take approximately six weeks, as of this writing. While the PWD can be processed during the recruiting period, it is often advisable to obtain the determination prior to starting recruitment.

There are a number of reasons it is often beneficial for an employer to obtain the PWD before the recruitment process for the position begins. One reason is that there is a level of unpredictability in the DOL PWD process. If a wage is used that the employer believes will be the PWD, but the actual PWD issued weeks or months later turns out to be higher, the employer may be forced to restart the entire recruitment process from the beginning.

Timing issues are another reason many immigration practitioners favor obtaining the PWD before the employer starts recruitment. Recruitment efforts are only valid for a limited time, and if recruitment starts before the PWD is obtained, the PERM LC must be filed during the assigned validity period of the PWD. Thus, if recruitment cannot be completed before the PWD expires, it is often necessary to start the entire case over again.

The case can sometimes be salvaged if there is enough time to obtain a new PWD before the recruitment efforts expire. However, even when a new PWD is issued in time, the wage may be updated to a higher rate. This, too, may necessitate starting the recruitment anew. On the other hand, if the PWD is issued prior to any recruitment steps being taken; the validity of the wage determination is prolonged. Therefore, obtaining the prevailing wage before recruitment begins can avoid these potential complications.

**Recruitment Format and Requirements**

The DOL has exacting regulations as to the form and content of the recruiting efforts required of the sponsoring employer. The employer is required to use newspaper ads, a posting in the state labor department's job bank, and, for professional positions, three additional allowed forms of recruitment. The regulations address not only the types of recruitment, but also the content of the advertisements.

Various companies and agencies generally must be utilized during the advertising process, which sometimes leads to errors. Therefore, this process must be closely monitored. For example, the state labor job posting is required to run for 30 full days. Sometimes, however, the state agency will cut short the posting without authorization. If this occurs and is not corrected, the DOL may deny the case. Other forms of advertising may not have to run for such a long period of time, but they are subject to issues such as human or machine error, which could also render the recruitment campaign unacceptable to the DOL.

During recruitment, the employer must promptly and appropriately respond to any resumes or applications submitted by interested candidates for the proffered position. Otherwise, the DOL will not consider the recruiting efforts to be valid and acceptable. This almost always leads the employer to have numerous questions for the attorney as to the appropriate response and screening of potentially qualified applicants. If an employer improperly handles job applications or interviews, it can doom the process.

**30-Day "Quiet" or "Hold" Period**

Some people like to call the period between finishing most of the recruitment and filing the application a quiet or hold period. In reality, it is part of the required recruitment period. After the 30-day job order and most of the other recruiting is complete, the PERM LC filing still must wait for an additional 30 days. This is so that the employer can continue to receive and consider job applications in response to the prior recruiting efforts. In general, if a PERM LC is filed before the 30-day mark, it will be denied.

**Employer / Employee Sign Form Under Penalty of Perjury**

The attorney may be able to prepare the extensive ETA 9089 form during the recruitment period. However, the form cannot be finalized until after the recruitment process is completed. Once the form is finalized, it must be approved by both the employer and employee, who will be signing their respective portions of the form under penalty of perjury.

**Review PERM Carefully Before Signing and Filing**

Employers and employees should take the time to carefully review the entire form and address any issues or discrepancies **prior** to filing. A pending form cannot be corrected. The only option for fixing such errors is withdrawing and re-filing, and this is only possible if the recruiting and wage determination are still valid.

**Qualified Candidate/s Applying Terminates PERM**

Of course, if the recruitment locates qualified, willing, able, and available U.S. worker applicants to fill the offered position/s, the PERM application must end at that point, in most cases. If the employer wishes to do so, it may be possible to try again later, which would require starting the entire PERM process anew.

**Conclusion**

The PERM LC preparation process is a complicated, labor-intensive, time-consuming process with extensive case law on nuanced issues that most employers and employees may not realize. By understanding this process, the employer and employee can be sure to play their parts to help everything run smoothly.

Please note:

* PERM does not result in any type of direct work authorization by itself.
* A certified PERM may not be ported to another company.
* Only an approved I-140 AND an I-485 pending for 180 days may be ported to another company.
* You may utilize an approved I-140 priority date for a later approved PERM, but you cannot port an approved PERM priority date alone with no I-140.