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PERM

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PERM Outline

On March 28, 2005, the Department of Labor (DOL) implemented the current process for submitting Labor Certifications - the Program Electronic Review Management (PERM). PERM replaced the previous paper system known as Reduction in Recruitment (RIR). This is the first step for many employment-based green card cases and is required for applicants under category employment-based preference 2 or employment-based preference 3 (EB2 and EB3).

The purpose of a Labor Certification is for an employer to test the labor market to ensure that at any given point there are no willing and able U.S. workers or Permanent Residents available for an open position for which Labor Certification is being sought. By approving a PERM Petition, DOL has certified that no sufficiently-qualified US workers exist in the employment area to fill the open position at the time when recruitment is conducted. An employer may then proceed to file the immigrant petition for the foreign worker and hire a foreign worker (technically referred to as "alien") on a permanent basis.

In order to file the PERM Petition, the following criteria must be met:

- Applications filed on or after March 28, 2005, must be filed using the new PERM process and adhere to the new PERM Regulations.
- The job opportunity must be for a full time, permanent position.
- A bona fide recruitment must be conducted for the job opening to try and recruit willing and able U.S. workers.
- Job requirements must adhere to what is customarily required for the occupation in the U.S. and may not be tailored to the foreign worker's qualifications.
- The employer must pay at least the prevailing wage for the occupation in the area of intended employment.

The PERM Petition can be filed through the online system or mailed to the DOL. Employers must be able to prove their business is incorporated and legitimate. The date the DOL receives the PERM Petition for processing is called the Priority Date, which will affect later stages of the Green Card process with the U.S. Citizenship and Immigration Service

(USCIS). DOL reserves the right to audit any petition filed with a request for documentation, explanation of requirements or reasons why U.S. workers were not qualified. Once the PERM Petition has been approved, it has a validity period of 180 days in order to file the immigrant petition with the USCIS.

Employment-Based Category 2 (EB2) versus Employment-Based Category 3 (EB3)

EB2 and EB3 are categories considered once the immigrant petition is filed with the USCIS after PERM approval. The USCIS determines which category is applicable based on the requirements of the job offered in the PERM Petition. To qualify for Category EB2, the requirements must be a minimum of a Master's degree, or a Bachelor's degree and five years of post-bachelor's, progressively responsible experience. In order to qualify for Category EB3, the requirements for the offered job must be a minimum of two years of experience or a Bachelor's degree. To view the current backlogs in Employment-Based categories, please visit the [Visa Bulletin](#) [2].

Job Opportunity

The position must be a permanent offer, which is defined as a position that is not intended to be temporary, or for a definite term. PERM Petitions are geographically specific, so the location of employment must be considered. The details of the offered position must be finalized by the employer, including:

Job Title and Description

The job description must be reasonable and not unduly restrictive. Any restrictive job duties must be justified with evidence of business necessity.

Salary

For PERM cases, the U.S. DOL is required to review the offered job. They provide a determination on the minimum salary that must be offered to ensure the wage will not adversely affect U.S. workers. The employer must offer at least 100% of the Prevailing Wage determined.

Education and Experience

The employer must specify the level of education and experience required for the job. The foreign worker must meet all education and experience requirements in order to be considered. Foreign degrees can be considered, but need to be evaluated by an evaluation agency. Experience gained with overseas companies can be used to meet the employer's experience requirement.

Generally, experience gained with the sponsoring employer cannot be considered, except in cases where it can be proved that the job being offered to the alien is at least 50% different than the position he currently holds.

Green Card for Future Employment

The Green Card job is deemed under the law to be a job in the future. It is a job that is made

available to a foreign worker only upon approval of the Green Card. A foreign employee may already be working on the offered job (for instance on H-1 status), holding the same title for which certification is being sought. The position on H-1B is considered filled on a temporary basis, for that reason, the employer can still conduct recruitment for the position, which is currently held by the alien on H-1B. That position can be offered on a permanent basis only when the employee receives approval of their permanent status (Green Card). Accordingly, all incidentals (including salary, job description, etc.) of the permanent job commence only upon the approval of the Green Card. Based on the above argument, it is possible that the employer's H-1B job and the Green Card jobs are different.

Proving U.S. Workers are Unavailable or Unqualified

In order to demonstrate that no U.S. workers meet the employer's minimum requirements for the offered position, the employer must test the local labor market. The law requires that an advertisement placed for labor certification purposes must contain the employer's name; the place where employees will work; and a method of contacting the employer. The print ad should also be placed in the appropriate section of the newspaper. If it is not placed in the appropriate section, it will not be considered a good faith effort to recruit the US workers. The following recruitment efforts are required on part of the employer:

Mandatory Advertising

- 30 Day Job Order posted with the State Workforce Agency
- 2 Sunday Newspapers in the largest circulated newspaper in the employment area
- Job Posting Notice posted for 10 business days at the job location

Additional Advertising

in addition to the required types of ads, the employer must post a minimum of three more ads from the following list of options:

- Corporate web site
- Job search web site other than the employer's
- Private recruitment firms
- Employee referral program with incentives
- Local and ethnic newspapers
- Job fairs
- On-campus recruiting
- Trade or professional organizations
- Campus placement offices

U.S. workers will have an opportunity to forward their resumes and be considered for the position. The employer must review each resume received against the requirements for the position and prepare a recruitment report that categorizes the lawful job-related reasons for rejection of U.S. applicants and provides the number of U.S. applicants rejected in each category. While the employer is not obligated to hire a qualified applicant, the PERM process must be put on hold even if there is one applicant who is qualified in all regards and is willing to accept the job at the salary offered. The employer can test the labor market again in six months.

Neither the attorneys nor the employee for whom the PERM is being applied are permitted to review the resumes. Only the employer can perform the resume review and give their comments. Once the employer provides the reasons for rejection of applicants, the attorney can then review the reasons and make sure that the employer has not rejected any US workers for unlawful reasons.

Advertising Process for University Professors

Labor Certification for university professors can be applied under a procedure called "Special Handling". Under Special Handling, the university is allowed to use the advertisements placed to hire the alien even if the advertisements are older than 6 months. The only condition is that the Labor Certification must be filed within 18 months from the date when the alien was selected.

A foreign college/university professor's application for alien labor certification must document that the alien was selected for the job opportunity in a competitive recruitment and selection process through which the alien was found to be more qualified than any of the United States workers who applied for the job. This documentation regarding "competitive recruitment and selection process" must include:

1. A statement, signed by an official who has actual hiring authority from the employer outlining in detail the complete recruitment procedures undertaken; and which must set forth:
 - a. The total number of applicants for the job opportunity;
 - b. The specific lawful job-related reasons why the alien is more qualified than each U.S. worker who applied for the job; and
 - c. A final report of the faculty, student, and/or administrative body making the recommendation or selection of the alien, at the completion of the competitive recruitment and selection process;
2. A copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements;
3. Evidence of all other recruitment sources utilized; and
4. A written statement attesting to the degree of the alien's educational or professional qualifications and academic achievements.

Audit Notifications from DOL

When the PERM Petition is filed online, none of the supporting evidence is filed. All documentation related to the PERM process must be kept on file for 5 years from the date the ETA 9089 is filed. In the event of an audit, the DOL/Certifying Officer may request any evidence related to the preparation of the PERM process, including Prevailing Wage Determinations, proof of advertisements, resumes received with employer's justification as to why each applicant is not qualified, and proof of Business Necessity if the requirements for the offered position are greater than the DOL standard requirements.

Standard Vocational Preparation and Business Necessity in DOL Audits

When the requirements of the offered job exceed the "normal" job requirements the DOL considered for the position, the employer may be audited to justify these higher requirements. Many professional jobs are placed in this situation by the abnormally low requirements defined by the U.S. Department of Labor. These requirements are embodied in a concept

known as Specific Vocational Preparation (SVP). When the SVP is exceeded for a job, the employer may be required to justify the requirements. The SVP standards, in our opinion, are inappropriately low. For instance, the SVP for a Software Engineer typically permits the employers to require no more than a Bachelor's degree with maximum two years experience or Master's degree with no experience. This is patently inconsistent with the market conditions. In all such cases, where the employer exceeds the SVP, a justification by DOL may be sought.

Experience Gained with Sponsoring Employer

Normally, when a foreign employee gains the necessary credentials through experience with the petitioning employer, U.S. Department of Labor (?USDOL?) holds that the employer has trained the foreign worker (referred to as ?alien? under U.S. laws) for the position and is not willing to offer U.S. workers similar training, thereby making the job unavailable for U.S. workers. In this situation, the employer may justify the requirements by showing that the position being offered for green card is a position different from the one in which the foreign employee gained the qualifying experience. At a minimum, the employer must be able to demonstrate that the duties of position held by the alien are at least 50% different than the Labor Certification position. USDOL has indicated in its comments that ?[t]his requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.?

Illustrations

FACTS:

An employee started working with an employer, ?CurrentCorp? as a Systems Analyst two years ago. Before the employee joined CurrentCorp, he or she already had one year's experience as a Systems Analyst with another employer, ?OldCorp.?

Scenario 1:

CurrentCorp applies for certification of Systems Analyst position for the employee.

Question

How much experience can they require? Is it one year, the experience the employee had before he or she joined CurrentCorp; two years, the experience he or she gained with CurrentCorp or three years, the total experience the employee possesses?

Answer

CurrentCorp can only require one years experience for the position of Systems Analyst. CurrentCorp cannot require experience the employee gained while working with them.

Scenario 2:

CurrentCorp applies for certification of SENIOR Systems Analyst position for the employee. The Senior position consists of less than 50% of the duties performed as a Systems Analyst.

Same Question

How much experience can they require? Is it one year, the experience the employee had before they joined CurrentCorp; two years, the experience the employee had gained with CurrentCorp or three years, the total experience the employee possesses?

Answer

CurrentCorp can require three years experience for the position of Senior Systems Analyst. CurrentCorp can require experience the employee gained with them because the position of SENIOR Systems Analyst is more than 50% different from the position of Systems Analyst.

Question

Location to file the PERM Petition: corporate headquarters, a corporate branch office or the place where an employee is actually working?

Answer

Depending upon the circumstances of each case, all three are possible.

Typically, filing through corporate headquarters (?HQ?) is appropriate where the job carries a probability of relocation, or of course, if the employee is already working at the HQ and is expected not to move from the HQ.

Filing from a branch office is most appropriate when an employee?s job is located at the branch office and expected to continue working there ?permanently.? It is theoretically possible to file even from a client site where an employee is working. But as a practical matter, it may be difficult. In cases of client site deployment, we would need to document (perhaps best done with a letter or testimonial from the client) that the placement at the client site is long term and indefinite. That is most often difficult. Clients are typically unable or unwilling to provide such a letter or testimonial. Usually, even in such cases, it is appropriate to file from the HQ.

The probability of relocation is expressly stated in the labor certification itself in terms such as: ?relocation possible or 100% travel possible.? But if the job is not subject to any relocation, such language is inappropriate. The labor certification process is largely driven by an employer?s good faith. If an employer determines in good faith that a job is subject to relocation, the requirement can be added in the Labor Certification. If the employer does not indicate the possibility of relocation and if the employee is moved from the location indicated on the Labor Certification as a permanent place of employment the labor certification could fail (unless the employee is moved to that location after he gets his green card. In those cases, we might have to start the process all over again from the beginning).

Thus, as a planning point, in cases where there is any possibility of relocation of an employee, the HQ is the safest and the most appropriate place of filing the labor certification.

As an ancillary matter, please note, immigration laws do not require an employer to pay any relocation expenses for an employee, UNLESS payment of relocation expenses is their usual practice.

DOL Requirements on Expenses

In July 2007, DOL passed regulations requiring that the employer pay all the expenses incurred at the Labor Certification stage. This includes attorney legal fees, advertising expenses and miscellaneous expenses. The employer cannot request any kind of compensation, monetary or otherwise, from the foreign worker.

Legal Representation with our Office

Each PERM Petition is unique and individual based on the company job description, requirements and the applicant?s background. Our office will assist in the preparation of the

PERM Petition, determining category of filing that is applicable, guidance with regulations and requirements, advice on legal issues, researching audit responses and document maintenance. A case manager will be assigned to each case, with a 24-hour turnaround time on emails and phone calls. Rajiv Khanna will review each case at every step of the process and attorneys will be available to clients for consultation at no additional charge.

Green Card:

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