

LABOR DEPARTMENT CHANGES VISA REGULATIONS

New rule promises to shorten processing times, but will the process be more complex?

By **ANDREW L. WIZNER** and
ERIC FLEISCHMANN

For the first time in almost 28 years, the U.S. Department of Labor has re-engineered the labor certification process for employers seeking permanent visas ("green cards") for foreign workers. The new regulation, set to take effect on March 28, 2005, implements an e-filing system for the first time. Agency officials tout processing times of two to three months compared to current backlogs of up to three years. Although the new process appears benign and customer-friendly, it vests the DOL with new authority to audit cases, including certified applications, during a five-year period commencing with the filing date.

Labor certification finds its roots in a provision of the Immigration and Nationality Act that renders certain intending immigrants inadmissible to the U.S., unless their employers prove that qualified American workers are unavailable in the geographic area of intended employment. The Department of Labor, whose mission is to protect jobs for U.S. workers, operates the alien labor certification program. Over the last ten years, DOL has significantly cut the program budget, leading to a decrease in manpower and a concomitant increase in backlog cases.

Employers interested in retaining foreign workers should nonetheless welcome PERM. The new program will make it possible for employers to bring new workers from abroad in a more reasonable time and also to retain existing employees. Foreign

Andrew Wizner and Eric Fleischmann, partners in the Hartford law firm of Leete, Kosto & Wizner, LLP, limit their practice to immigration law.



ANDREW WIZNER



ERIC FLEISCHMANN

employees currently on a U.S. payroll may have work authorization based on a business-related nonimmigrant (temporary) classification such as specialty occupation worker (H-1B), intra-company transferee (L-1), treaty trader or investor (E-1/E-2) or free trade treaty national (TN). These temporary visas limit stays in the U.S. to specific periods of time, unlike green cards which permit foreign workers to remain indefinitely.

The "Green Card" Process

The path to employment-based permanent residence for many foreign workers consists of three steps, beginning with the employer's application for labor certification. Following DOL approval of an employer's application, the employer must file an Immigrant Petition with the U.S. Citizenship and Immigration Services ("USCIS"), an agency within the Department of Homeland Security. The Immigrant Petition establishes the employer's ability to pay the foreign worker. Concurrently, the foreign worker may file an application to adjust status to lawful permanent resident if present in the U.S. and if an immigrant (permanent) visa is available. Alternatively, the foreign worker must wait until USCIS approves the employer's Immigrant Petition and thereafter apply for an immigrant visa at a U.S. consulate abroad.

Struggling Toward PERM

The DOL has indicated for several years its desire to improve the processing speed

and cost-effectiveness of labor certification adjudications. The standard process under the old system imposes labor-intensive and time-sensitive responsibilities on local and regional DOL offices to supervise employer recruitment. These procedures include agency review of individual resumes and determinations regarding employers' reasons for rejecting U.S. workers.

In the late 1990s, the agency focused on a single regulatory provision permitting employers to conduct required recruitment in advance of filing applications. Expanding on this provision through General Administration Letters and other guidance documents, DOL tweaked the program to encourage employers to conduct unsupervised recruitment and to file applications requesting a reduction in the standard post-filing procedures.

PERM modifies the Reduction in Recruitment program and transforms it into the basic method of applying for permanent labor certification. Unlike Reduction in Recruitment, however, PERM provides for e-filing and relieves the agency—at its own election—of the responsibility to review supporting documentation for each case. (Attendees at recent briefings in the new DOL National Processing Centers found relatively limited file storage space indicating perhaps an anticipated reduction in paper-intensive and case-specific review). These program enhancements not only should demand less of DOL's limited budget, but also improve processing times.

Wages: What Rules Apply?

A comparison of the old system to PERM reveals that the new program will present some interesting challenges to employers in the areas of required wages, recruitment, and recordkeeping.

The labor certification process has always required employers to pay foreign workers at least the prevailing wage. Under the old system, employers could pay 95 percent of the prevailing wage, as determined by a State

Workforce Agency ("SWA", formerly known as state employment security agency). The SWA prevailing wage determination typically relied on the two-level Occupational Employment Statistics survey published by DOL itself.

The new system will require employers to pay 100 percent of the prevailing wage. Recent legislation, effective March 8, 2005, mandates that DOL provide four wage levels. In the past, employers could choose whether or not to use the government's survey, but the new system offers no such alternative. PERM will instead require employers to appeal unfavorable prevailing wage determinations within 30 days.

DOL operates the existing labor certification process through regional offices, which issued inconsistent and informal guidelines regarding pre-filing recruitment procedures. PERM replaces this system with two national processing centers and provides uniform recruitment requirements.

The threshold question in determining the quantity and quality of required recruitment under PERM is whether the employer seeks to certify a professional or nonprofessional occupation. Applications for nonprofessional occupations require employers to place a job order with the SWA and to advertise in two Sunday editions of the newspaper of general circulation in the area of intended employment. Certification of professional occupations will include these

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two steps, plus three additional steps from a list of eight options.

The Audit Process

Under PERM, DOL will certify, deny or select applications for audit. Employers must retain the required records for five years. The regulations apparently grant DOL the authority to audit and revoke approved labor certification at any time in this five-year period. In addition, USCIS and Department of State officials may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact. In contrast, the current DOL program produces a final determination not subject to later audit.

In the event that DOL audits a case under PERM, the employer will have just 30 days to prove the actual minimum requirements for the position, demonstrate that it has not hired workers with less training or experi-

ence for "substantially comparable" jobs, and provide a report describing the recruitment steps, the number of hires, and, if applicable, the number of U.S. workers rejected. Certifying officers may also request copies of the resumes submitted during the recruitment period.

Prior to promulgation of the PERM regulation, DOL also published a related rule that established two national backlog reduction centers in Philadelphia and Dallas. These offices will process the large caseload that the agency has amassed under the pre-PERM program. DOL officials recently stated that they hope to clear the backlog within 24-30 months on a "first in-first out" basis.

Employers may convert pending, backlogged cases and preserve their employees' place in line for a permanent visa by filing an identical case under PERM. The regulation requires simultaneous withdrawal of the pending backlogged application. This procedure bears some risk because DOL could later determine that the PERM case is not identical. Foreign workers therefore run the risk that re-filing under PERM will delay issuance of a permanent visa. In addition, conversion may cause problems for H-1B workers who are eligible for renewals beyond their six-year limitation of stay based on delayed processing of backlogged applications. Employers should therefore carefully consider whether or not to convert pending cases to PERM. ■

Did you know...

- Congress added 20,000 new H-1B visas for the current fiscal year?
- New rules now apply to L-1 intracompany transferee visas?
- Employers may soon file permanent labor certification applications online?

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Elizabeth B. Leete Gale S. Kosto Andrew L. Wizner Eric Fleischmann

21 Oak Street, Suite 309, Hartford, CT 06106 • (860) 249-8100 voice • (860) 727-9184 fax
www.lkwvisa.com