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ALM

Streamlined PERM System Frought With Pitfalls

Electronic labor certification process is still unpredictable

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In the wake of the Department of Labor's reengineering of the labor certification process for foreign workers almost two years ago, employers are wondering whether streamlined processing comes at the expense of adjudicative fairness. The new system, a necessary first step in qualifying foreign workers for lawful permanent resident status, introduced e-filing of attestation-based applications as a means to reduce processing times. Known as PERM, the new process appears to be customer-friendly, but it is full of potential pitfalls.

The labor certification process has its roots in a provision of the Immigration and Nationality Act that renders certain intending immigrants inadmissible



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to the United States 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 pro-

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gram. A labor certification application requests the DOL to certify a position as one for which a qualified U.S. worker is not available, thereby permitting the foreign worker-beneficiary to occupy the position indefinitely and obtain status as a lawful permanent resident. The PERM process requires employers to recruit for the position through print and other media in order to demonstrate that the local labor market is unable to produce a qualified U.S. worker.

Labor-Based Green Card

Employers may engage the labor certification process on behalf of current or prospective employees. These employees may already be employed in the U.S. in a variety of nonimmigrant (temporary) classifications, 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 spe-

cific periods of time, unlike green cards which permit foreign workers to remain permanently.

Although the Immigration and Nationality Act offers various options to obtain status as a lawful permanent resident, labor certification is by far the most common employment-based path to a green card. The process consists of three steps starting with the labor certification itself. In the second step, the employer files an Immigrant

Petition for Alien Worker with the U.S. Citizenship and Immigration Services (USCIS) following approval of the labor certification application. In the third step, the foreign worker has a choice. The employee may apply through the USCIS to adjust status from nonimmigrant to lawful permanent resident status. Alternatively, the employee may apply for an immigrant visa at a U.S. consulate abroad and thereafter arrive in the U.S. as a lawful permanent resident.

The PERM Process

The regulations set forth a restrictive sequence of events leading up to the filing a PERM application, which requires attention to the timing of prevailing wage determinations, recruitment, and filing deadlines. As the program advances to its third year of operation, the

agency is still issuing frequent advisories on how the system should work. For example, the agency recently issued guidance regarding a little known and less understood distinction lurking in the regulations between "timelines" and "time periods" for certain required actions.

The PERM regulations define exactly what steps employers must take in the recruitment process. In determining how to conduct recruitment, the employer must

first find out whether the occupation is considered professional or nonprofessional. Applications for nonprofessional occupations require employers to place a job order with the State Workforce Agency (SWA) and to advertise in two Sunday editions of the newspaper of general circulation in the area of intended employment. Certification of professional occupations must include these recruitment techniques, plus three supplemental methods from a list of ten options.

The process requires employers to pay foreign workers at least the prevailing wage, as determined by a SWA. The prevailing wage determination typically relies on the four-level Occupational Employment Statistics Survey published by DOL. Employers may appeal unfavorable prevailing wage determinations.

Following submission of the application, DOL may act in one of three ways: certify, deny, or audit. Approvals often take only a few weeks or months. Denials may occur instantaneously through the PERM computer matrix or later in the adjudicatory process. In the event of an audit, the employer must respond within 30 days; but the regulations do not impose a deadline on DOL to complete the audit. Agency guidance prohibits employers from withdrawing applications once the audit is initiated. Employers must retain full records for five years from the date of filing as the application is continuously subject to audit during that period.

A Rough Start

During the last two years, the DOL has

taken some steps towards making the PERM system stable. In the first six months following the system's implementation, the DOL erroneously denied hundreds of applications. These actions highlighted the role of the online computer matrix that is apparently programmed to screen applications for immediate denial. Although the DOL has tweaked the system, attorneys have developed experience in avoiding negative interpretation of responses to questions in disparate parts of the application. Conflicting answers to seemingly unrelated questions may lead to a quick denial.

Similarly, the agency denied numerous applications due to typographical errors. Successful appeals of these cases to the Board of Alien Labor Certification Appeals brought about upgrades to the online system to aid applicants in entering correct data regarding recruitment and other actions according to the proper "timeline" or "time period".

As the system is based on attestations, the regulations require the employer to draft and retain a recruitment report explaining how it determined that there were no qualified workers in the geographic area of intended employment. The application itself allows only for affirmative or negative answers to a variety of "loaded" questions that beg for an explanation. Unfortunately, the mechanical nature of the system precludes applicants from providing evidence or information favorable to approval, unless and until the DOL audits the application. Employers are unable to submit evidence

with their application at the time of filing. Knowing where the online application is amenable to lawyerly creativity is the key to obtaining approvals.

Backlog Reduction Efforts

Prior to promulgation of the PERM regulation, DOL published a related rule that established two national backlog-reduction centers in Philadelphia and Dallas. These offices are still processing the huge, years-old caseload of labor certification filings made prior to March 28, 2005, when DOL implemented PERM. DOL intends to eliminate the backlog by the end of the current fiscal year, September 30, 2007, when funding for backlog elimination expires.

Meanwhile, employers may re-file backlogged cases using the PERM program and still preserve their employees' place in line for a permanent visa. The regulations deem a re-filing as a withdrawal of the backlogged application so that only a single application, bearing the filing date of the pre-PERM case, remains in the agency's processing queue.

This process poses a risk that must be carefully assessed prior to re-filing.

Although the new PERM labor certification appears straightforward, employers should beware—even if an application is approved, it is subject to later audit. A denial could have devastating consequences for the employee-beneficiary. Employers should be sure to prepare their cases carefully, document well, and retain records. ■

Did you know...

- Foreign Investors qualify for E visas valid for five years?**
- Three-year O visas are for Outstanding individuals?**
- Multinational managers qualify for three-year L visas?**

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