

THE LABOR CERTIFICATION PROCESS AND THE “PERM” REGIME

Filing a labor certification application is the first step in the green card process for the majority of foreign nationals seeking permanent residence in the United States based on employment. By filing a labor certification application, the foreign national’s sponsoring employer is in effect making two assertions to the U.S. Department of Labor (“DOL”): 1) that there are no qualified, available U.S. citizens or permanent residents who are willing to take the job that the employer wishes to offer to the foreign national, and 2) that the employer wishes to employ the foreign national in the position upon approval of the green card and for a reasonable period of time thereafter.

In order to file the labor certification application, the employer must test the labor market according to DOL regulations and, as a result of a series of recruitment steps, be able to conclude that there are indeed no qualified, available U.S. citizens or permanent residents who are willing to accept the position.

PERM—which stands for “Program Electronic Review Management”—is the electronic filing system designed by DOL to process labor certification applications. Preparation of an application for labor certification under PERM involves the following steps:

- (A) Draft a description of the job duties and job requirements for the position being offered to the foreign national. The job requirements must express the *minimum* qualifications that an applicant must have to successfully perform the job duties. Requirements are considered to be “minimum requirements” if they reflect the minimum amount of time necessary for an employee to gain competence in the profession or in a specific skill and if no worker with fewer qualifications has been hired for the same position with that employer;
- (B) Request a prevailing wage determination for the position from DOL;
- (C) Conduct a series of recruitment steps to test the labor market;
- (D) Evaluate any applications submitted in response to the recruitment efforts and respond to applicants;
- (E) Prepare a recruitment report that details the steps taken to test the labor market and the results of the recruitment; and
- (F) File the application with the DOL (if the recruitment did not yield an able, willing, qualified, and available U.S. citizen or permanent resident).

A. Draft a job description and set of minimum job requirements.

With our assistance, the employer drafts the job description and minimum job requirements for the offered position so that they comply with DOL regulations. There are a number of constraints that must be considered when drafting the requirements for any given job. Any job for which a foreign national is sponsored is placed into one of DOL’s “occupational categories.” For each occupational category, DOL has determined a set of “normal” job duties and “normal” job requirements that are – in its estimation – typically associated with the jobs that fall into that category. There are challenges for the case that arise from drafting job requirements that exceed the requirements that DOL considers “normal” for the position. For example, exceeding the normal requirements can result in a higher prevailing wage and can also provoke an audit from DOL after the application is filed. Heightened requirements can also be deemed “unduly restrictive.”

There are other issues to keep in mind when drafting the requirements:

- i. The employer cannot require education or experience that the foreign national does not have.
- ii. In most cases, an employer can only require education and experience that the foreign national gained *prior* to being hired by the employer. There is an exception to this rule. The foreign national can rely on experience gained with the sponsoring employer to qualify for the offered position so long as the foreign national gained that experience in a position whose job duties are more than 50 percent different from the offered position.
- iii. The amount of experience that is required should be less than the amount of experience that the foreign national has. If the requirements for the position match too closely the foreign national's qualifications, we face a risk of being audited on the basis of "tailoring."
- iv. Fluency in a foreign language can be required only if it is essential to performing the job duties (as it would be for a translator, for example) or if the employer can document the employee's need to communicate with a large majority of customers, contractors, or employees who are unable to communicate in English.
- v. DOL considers experience gained in the job offered to be good preparation for any position. If there is an experience requirement for an offered position, the sponsoring employer should state the requirement as "x number of months/years of experience *in the job offered.*"
- vi. An employer may also indicate that it will accept experience gained in some alternative occupation, but only if the alternative occupation is substantively comparable to the job offered, and the employer also agrees to consider applicants with any suitable combination of education, training, or experience. For example, an employer wishing to sponsor someone for the position of "Cook" could indicate the experience requirement as "2 years of experience in the job offered or as a Chef." An applicant could qualify for the position on the basis of 2 years of experience as a Cook, 2 years of experience as a Chef, or some combination of education, training, and experience that is roughly equivalent to 2 years of experience as a Cook or a Chef.
- vii. Any special skills that the employer requires should be quantifiable in terms of months or years of experience and able to be objectively evaluated. They must have demonstrable business necessity, meaning that they are reasonable in the context of the employer's business, and the evidence shows that the special requirements are essential to perform the job's duties. The foreign national's qualifications should substantially exceed each of the special skill requirements.

B. Determine a "prevailing wage"

After drafting a job description and set of minimum job requirements, we will then submit a request for a prevailing wage determination to the Department of Labor. It will take DOL approximately 2 months to issue the determination. A prevailing wage is the average salary for employees in a given occupational category in a given geographical area, as determined by DOL. The employer must offer a wage to the foreign national that is equal to at least 100 percent of the prevailing wage for the offered position. However, the employer does not have to pay the prevailing wage until the green card is approved, which is often several years after the labor certification application is submitted.

Every occupational category has four wage levels associated with it depending on how advanced the particular job is. When we submit a request for a prevailing wage determination to the DOL, the agency determines a) the occupational category into which the job should be classified based on the job duties associated with the offered position, and b) the wage level for the job based on the education and experience requirements associated with it.

Sometimes a prevailing wage determination is unfavorable – meaning that the prevailing wage has been determined to be higher than the wage the employer wishes to offer. If that is the case we have several options. We can a) change the job duties or decrease the requirements for the position, which often results in a lower prevailing wage; b) rebut the decision and explain why the position should be classified at a lower wage level or in a different occupational category altogether; or c) propose that an alternative wage survey, instead of DOL data, be used as the basis for determining the prevailing wage.

C. Test the labor market.

Once we have drafted a job description and a set of minimum requirements and obtained a favorable prevailing wage determination, we are now ready to test the labor market. PERM rules are very specific as to how the labor market test is to be conducted. (The recruitment process discussed below applies to all labor certification applications except those involving certain college or university professors, physical therapists, and professional nurses.)

- i. Job Order:** A 30-day online job order is placed with the relevant State Workforce Agency.
- ii. Sunday Ads:** The employer must run two Sunday advertisements in a newspaper of general circulation. If the job requires experience and an advanced degree, and a professional journal normally would be used to advertise the job opportunity, the employer may place an advertisement in the professional journal most likely to bring responses from available U.S. workers in lieu of one of the Sunday advertisements.
- iii. Internal posting notice.** The employer must post a notice of the job opportunity at the location of employment for at least 10 consecutive business days. The employer must also place the notice in any in-house media that it would normally use to provide notice of similar positions.

Each of the recruitment steps must be completed at least 30 days and not more than 180 days before filing the labor certification application. After 180 days, the advertising expires and can no longer be used as the basis for the application.

Three additional, unique recruitment steps must be conducted for “professional” positions. A professional job is one for which DOL considers a Bachelor’s or higher degree to be the normal educational requirement, even if the employer does not require such a degree. Two of these three additional steps must be completed at least 30 days and not more than 180 days prior to filing the PERM application. One of the three steps may be completed within the 30 days prior to filing.

The three additional steps must be chosen from among the following categories:

- (a) Job fair.

- (b) Employer's web site.
- (c) Job search web site other than the employer's.
- (d) On-campus recruiting.
- (e) Trade or professional organizations.
- (f) Private employment firms.
- (g) Employee referral program with incentives.
- (h) Campus placement offices.
- (i) Local and ethnic newspapers.
- (j) Radio and television advertisements.

Once the various steps are selected by the employer, our firm will place the external ads on behalf of the employer. These include the Job Order, the Sunday Ads, and any of the three additional steps that do not require posting by the employer.

D. Evaluate the applicants.

The employer is required to carefully review every application submitted in response to any of the recruitment steps. A U.S. worker's application may be rejected if the candidate lacks the minimum requirements for the position. However, a candidate may not be rejected if s/he lacks a skill that the U.S. Department of Labor believes can be acquired during a "reasonable period of on-the-job training." Consequently, any U.S. citizen, U.S. permanent resident, U.S. national, asylee or refugee applicant who appears "almost qualified," or whose total combination of education, skills, and experience is sufficient to qualify him or her for the position, cannot be rejected, absent an explanation by the employer as to why the skill at issue cannot be acquired during a reasonable period of on-the-job training. The U.S. Department of Labor has not specified what constitutes a "reasonable period." The applicants' qualifications must be assessed based on whether the applicant meets the minimum requirements for the position, not whether the applicant is as qualified as the sponsored foreign national.

The employer should respond to all candidates, potentially qualified and clearly unqualified within 14 days of receiving an application via certified mail/return receipt requested or some other documentable method of communication (i.e. email).

E. Draft the recruitment report.

The employer's recruitment report, which we will help prepare, must describe and document the recruitment steps that were conducted and the results of the labor market test. The recruitment report must include the number of U.S. citizen or permanent resident applicants rejected and the lawful job-related reasons for rejection, as well as the number of candidates hired, if any, as a result of the labor market test. The employer must sign and date the recruitment report. We will keep it on file—along with evidence of all of the recruitment steps that were undertaken in connection with the labor market test—for a period of five years from the date of filing the application for labor certification.

If there is a lay-off by the employer in the geographic area where the foreign national is expected to work that involves the occupation for which labor certification is being sought, the employer must be able to document in the recruitment report that it has notified and contacted the laid-off U.S. workers and made them aware of the job opportunity.

F. File the application for labor certification.

The application for labor certification (Form ETA 9089) consists of a long series of questions that elicit detailed information about the employer and the job that is the subject of the application. The application also requests information about the foreign national's employment history. There is currently no filing fee for the application, though this may change. The application is filed alone, without the recruitment report or any other evidence of the labor market test. The application may be filed either electronically or by mail, though DOL has indicated that electronically filed cases will be processed more quickly than those submitted by mail. One can anticipate an adjudication of 3 - 8 months unless the application is audited.

DOL will select "problem" applications as well as some applications chosen randomly to be audited. Conscientious preparation of the job description and job requirements can often minimize the likelihood of an audit, though an audit is never entirely avoidable.

If a case is audited, the employer will be notified and required to submit any requested documentation within 30 days. After review of the documentation, DOL may approve or deny the case or request even more information. Decisions on audits can take a year. DOL also has the option in audited cases of ordering the employer to conduct "supervised recruitment" for an individual case or for any future filings (for up to two years).