

## PERM Labor Certification

Lawful permanent residence is an "immigrant" status (not a U.S. citizenship). This status entitles the applicant to live and work in the United States permanently. Obtaining permanent residence through employment sponsorship involves going through the following three phases:

- Labor certification approval,
- Immigrant worker petition approval, and
- Consular processing abroad or "adjustment of status" to permanent residence in the U.S.

PERM stands for Program Electronic Review Management process which took effect on March 28, 2005 and replaces the previous Reduction in Recruitment (RIR) process. The main distinction between PERM and the previous RIR Labor Certification process is that under PERM, electronically filed PERM Labor Certification application are normally expected to be adjudicated in around 45-90 days by the Department of Labor (DOL).

PERM Labor Certification recruitment is an extremely complicated procedure and many law firms are still not comfortable with this new area of law. However, Root Law Group has handled and continues to successfully handle a large number of PERM cases. After all, we are an exclusive immigration law firm with heavy emphasis on business and employment-based immigration.

### PROCEDURE

#### Phase 1 - PERM Labor Certification ("LC")

The labor certification is normally the first step in obtaining permanent residence (green card) status based on a prospective job offer. The labor certification is a determination that there is a shortage of American workers who are willing and able to by the DOL perform the offered job. That is accomplished by the employer advertising the position in the newspaper and other media.

Before filing an application, the employer must conduct specified recruitment activities, similar to RIR recruiting under the previous system. This recruitment must include the following:

- Job site posting
- Two Sunday newspaper ads (or one Sunday newspaper ad and a professional journal where appropriate)
- A job order through the state workforce agency
- For professional job offers, at least three other forms of recruitment are required, which can include: a commercial Internet ad; an ad on the employer's Web site; an internal incentive program; participation in a job fair; on-campus recruiting or use of a campus placement office; local or ethnic newspapers; a trade or professional journal; a radio or TV ad; and the use of headhunter agencies.

The advertising must have occurred within six months of filing the application. All but one ad and an internal notice must be placed a minimum of thirty days before the application is filed.

The advertising requirements under PERM take about three to four months to complete, and must be completed before the application is filed. This means that in many cases our clients will have an approved labor certification in about six

months from the date the process is started.

The LC application describes the job duties, salary, minimum experience and education requirements needed to perform these job duties. A valid prospective employer-employee relationship must exist. However, the entire LC process can be done for immigrants who are either inside or outside the U.S.

The employment requirements must be normal to the occupation. They should meet the employer's business needs, but cannot be too narrow, or tailor-made specifically for the foreign worker.

As part of the Labor Certification preparation, the employer must obtain a prevailing wage determination ("PWD") from the State Workforce Agency (SWA) before the application is filed. The wage offered must meet or exceed the PWD. This is another big change from the old procedure. This means the PERM application cannot be filed (and the priority date cannot be established) if there is an unresolved dispute over the prevailing wage.

Among the changes with prevailing wage determinations, the employer must now offer 100% of the prevailing wage, not 95% as before. However, there is now more flexibility in prevailing wage information, since the official wage statistics now provide four salary levels for each job instead of just two.

The prospective employer must diligently test the labor market by seeking out qualified U.S. workers to fill the offered position. Any responses to the employer's recruitment efforts must be evaluated carefully. The employer can reject applicants only for lawful, job-related reasons.

PERM applications are filed directly with the Department of Labor over the Web. The state agencies will supply the prevailing wage, but no longer process the applications.

No documentation need be submitted with the application. However, the employer must maintain copies of the ads, resumes, and other documents showing that the recruitment actually occurred as reported. The DOL will audit selected cases. Applicants must then produce all supporting documents in thirty days. If the documents cannot be immediately produced, the application will be denied.

PERM does not change the special rules available for Schedule A occupations including nurses and physical therapists (who are pre-certified) and university teachers (who apply under an easier-to-meet standard).

All Labor Certification cases filed before March 28, 2005 continue to be processed under the previous regulations by two national backlog centers operated by the Department of Labor in Philadelphia and Dallas. The state workforce agencies no longer handle any Labor Certification cases. The Department of Labor is promising that all old cases will be processed by September 30, 2007.

#### Phase 2 (Immigrant Worker Petition)

Once the labor certification is approved by DOL, the employer will need to file an immigrant visa petition on their employee's behalf. The petition and supporting documents will be filed at a CIS California Service Center. This phase currently takes about three to five months.

At this stage, the employer will need to demonstrate the company's ability to pay the prevailing wage, which may require submission of company's financial statement or tax returns CIS.

USCIS (Citizenship and Immigration Services) Premium Processing option is also available for this phase for an extra \$1000 in filing fees. Premium Processing cases are reviewed by CIS within 15 working days.

#### Phase 3 (Consular Processing Abroad or "Adjustment of Status")

Upon approval of the petition, an employee will be eligible to apply for permanent residence at a U.S. consulate abroad or at a local CIS office, if he is still in valid Nonimmigrant status and if the quota is "current" in his appropriate employment-based preference category. In this final phase, emphasis will be based on the employee's overall qualifications to immigrate to the U.S., such as, whether the employee has a criminal record, or whether the employee has a contagious disease, etc. A qualified immigration attorney should, of course, assist the employee (and his family) with this process through the final interview.

Currently, a quota system exists, which is determined by the number of immigrant visas the State Department allocated under various employment-based "preference" categories. The employee's place in line in the quota system is "reserved" as of the date the DOL accepts the initial LC application. This is called the "priority date" which can be tracked each month from the State Department Visa Bulletin published releases. The quota varies depending upon whether a degree and/or two years' or less than two years' experience is required to perform the job.

Adjustment of status applications at the CIS California Service Center are currently backlogged by about 9-12 months. However, CIS has allocated additional funds and personnel to reduce the backlog to a target goal of 6 months.

Processing at an U.S. consulate abroad takes about 4 months, but that may vary depending upon the consulate used. Once the sponsored employee becomes an immigrant, the sponsoring employer must have a good-faith intent to employ him on a permanent basis. If the sponsoring employer lacks such intention, the application for the employee's lawful permanent residency status may be considered fraudulent. As a rule of thumb, the employee should work for the sponsoring employer for at least one year after immigration. This is not a hard and fast rule, and CIS will look at legitimate business reasons for not continuing the employment (e.g., the company closes, goes bankrupt, experiences layoffs, or employee is involved in egregious behavior, etc.)

Furthermore, employers are reminded that they are required under the Immigration Reform and Control Act of 1986 to document on Form I-9 the work permission status of all employees (including U.S. citizens) hired after November 6, 1986.

#### STATUS WHILE IMMIGRANT PETITION IS PENDING

During this entire process, the sponsored employee and his/her family, residing in the U.S., should maintain their valid nonimmigrant (temporary) status. However, the applicant (as well as his/her dependents) are eligible to apply for work authorization upon filing for adjustment of status in the U.S.

#### DEPENDENTS

Spouses and unmarried minor children (under 21 years of age) must maintain their independent status as described in the preceding section. They will be able to immigrate as dependents if they apply along with the primary applicant. However, if the children are over 21 at the time the applicant immigrates, they may need to qualify for status in their own right.