

PERM

it will drive you to drink
(so buckle in and have a mimosa)

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PERM Basics

- Program Electronic Review Management.
- Effective on and after March 28, 2005.
- Form 9089.
- Attestation based and reviewed electronically.
- Employer registration to file online (plc.doleta.gov).
- 5 year retention requirement.
- Permanent full time employment.
- 180 day validity period.
- Not transferable.
- Must file original certified PERM with I-140 Immigrant Petition.



Preliminary Considerations

- All costs borne by employer.
- Viability of recruitment.
- Ability to pay prevailing wage determination.
- Effect of layoffs.
- Normal requirements.
- Review immigration history of employee.
- Any unauthorized employment?
- Maintaining legal status.



The Employer's Role in PERM

- Employer, manager, and attorney work to craft job description.
- Employer approves prevailing wage determination.
- Company works with attorney to gather business necessity documentation, if needed.
- Company conducts recruitment and judges applicants based on minimum requirements only, and submits recruitment results to attorney.
- Employer verifies that no qualified U.S. workers have been found.
- Employer and employee review draft of PERM application prior to submission.

The Employee's Role in PERM

- The foreign national employee **must meet** the actual minimum requirements.
- Requirements are to be met through **work experience and education**:
 - Ask employee to provide at start of PERM process to verify;
 - Get experience letters at beginning of PERM process.
- Unless the foreign national employee has changed to a significantly different position, experience gained at the current employer cannot be used.

Latest Statistics - Timing

- Prevailing Wage Determinations taking 82 days (120 for non-OES wage data)
- As of March 2017, DOL was working on PERM cases filed in December 2016 (unaudited)
- DOL working through audited cases filed in July 2016
- On average, DOL has about a 40-50% audit rate (no current statistics)
- DOL delays can cause issues with recruitment expectations, H-1B max dates, travel and other issues



Timing Issues and Pre-Recruitment Preparation

- Careful drafting of the position description and requirements:
 - Expectation setting - timing, budgeting;
 - Role identification; specific skills and tools;
 - Growth in role;
 - Past PERM filings for same role;
 - NIV filing - consistency.
- PWD before recruitment when possible:
 - Anticipate occupation category and wage before filing;
 - OES and alternate surveys.
- How to Recruit when PWD is pending:
 - Case-by-case;
 - Which steps can be completed without exact PWD language and salary;
 - What to consider when starting recruitment early.

Job Description and Requirements

- Employer should provide a job description that includes the duties to be performed, the education level, experience and any special requirements/tools/programming languages, etc.
- Compare the employer's job title and description to the job title and description found in the OES/SOC Code for the position.
- Incorporate key words from the SOC Code into the first lines of the job description.
- Consider drafting the job description broadly to cover future promotions.

Job Description and Requirements, cont.

- The requirements dictate whether the position is EB-2 or EB-3.
- The job duties should clearly justify the education and experience requirements.
- Consider the degree and experience level of other employees filling the same or similar position with the company.
- Deviations from the norm should be justified.
- Tailoring. Just, don't.
- The foreign national employee must meet the requirements for the position.

Foreign equivalent *education* doesn't equal foreign equivalent *degree*

- 8 CFR sec 204.5(k)(2) defines acceptable degree equivalency for EB-2:
 - Advanced degree means any U.S. academic degree or professional degree or a foreign equivalent degree above that of a baccalaureate.
 - Only acceptable equivalency allowed per the reg is U.S. Bachelor's plus 5 years progressively more responsible experience
- Per *Matter of Shah* a three year bachelor's degree from India is presumed not to be the a foreign equivalent degree to a U.S. bachelor's degree. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l Comm'r 1977)

Key Considerations

- Job requirements and wage level.
- Equivalency issues.
- Actual minimum requirements (specify time frames for skill sets).
- Consistency (what's normally required).
- Travel requirements.
- Relocation possibilities.
- Possibility of promotions.
- Employer and foreign national should sign off on the requirements prior to starting recruitment.

Emerging PERM Issues

- Telecommuting and Travel
 - Who is Barbara Farmer? The current state of guidance on travel and telecommuting
 - Travel is a benefit AND a burden
 - Potential U.S. workers must be informed of travel and telecommuting options and requirements
 - Where is the job located if travel and/or telecommuting is 100% of the time?
 - Effect of travel and telecommuting on the prevailing wage determination

Emerging PERM Issues

- Unquantified experience requirements and H.14.
- Example: “must have in depth knowledge in C++.”
- Rash of denials. Basis “not able to determine minimum requirements”.
- OFLC agreed to reopen pending pub of FAQ.
- FAQ published on March 6, requiring quantification in all postings and on 9089.

Emerging PERM Issues

- FAQ pulled down on March 10, after pressure from AILA, with this language:
- In light of stakeholder input, which the Office of Foreign Labor Certification (OFLC) is considering, OFLC has temporarily removed from its website PERM FAQ Round 14 regarding Actual Minimum Requirements, originally published on March 6, 2017. OFLC will clarify and republish PERM FAQ Round 14 to provide additional information on its applicability to PERM applications and associated prevailing wage requests and determinations.

Emerging PERM Issues

- Unlikely that FAQ will be posted again soon, as AILA may have convinced DOL that reg is needed.
- New reg may be difficult in Trump environment.
- For the moment, no need to modify practices, as new FAQ or reg would likely exclude pipeline cases.
- But stay alert on this issue.

Emerging PERM Issues

- Competitive Salary Denials
 - “Competitive salary offered...”
 - “Salary negotiable...”
 - “Depends on experience...”
- Most RFRs have not been granted and have been sent to BALCA
- OFLC guidance at Stakeholder Meetings
 - “Competitive Salary” or similar language OK if salary range on ETA Form 9089
 - If 3rd party site adds the “competitive salary” language, document and provide in the event of an audit

Emerging PERM Issues

- BALCA and *Matter of Symantec*
 - Numerous BALCA cases apply *Matter of Symantec* to reverse denials relating to supplemental recruitment
- No “harmless error” exception exists at BALCA - especially relating to the Notice of Filing
- Applicant review issues - employer must carefully document its review of U.S. worker applicants

Emerging PERM Issues

- **Benefits - What Needs to be in the Ads?**
 - ANY employer-provided housing
 - Options for telecommuting - but is there a “de minimus” standard?
 - Travel and relocation - what is the difference?
 - Travel = Going somewhere and coming back, usually on a fairly short-term basis
 - Relocation = Changing residential location to accommodate a long-term work-related stay
 - How much detail is enough to apprise U.S. workers of benefits provided?

Emerging PERM Issues

- PERM Drafting in a Time of Uncertainty
 - H.14 Denials and Competitive Salary Denials - Unpredictable Changes
 - Guarding Against Future Changes
 - Stick to What We Know
 - Keep it Simple
 - Be Precise in Language
 - Monitor and Understand Shifts in OFLC Focus

Electronic Submission of Supporting Docs

- ETA announces enhancement to streamline PERM processing intended to reduce the burden on applicants/eliminate or decrease need to send documents via US Mail/FedEx:
 - As of April 15, 2017 PERM CMS will allow submission of electronic documents while the ETA 9089 is pending review, and up to 30 calendar days after notice of final action on the application.
 - Can't upload for cases that are incomplete or 'certified-expired'
 - Upload by browsing, and selecting your category/document type
 - System will display the docs that are uploaded, user must save or your upload will be cancelled
 - PLC Help will send an email when docs are uploaded

Current Audit Triggers

- Current triggers are subject to change and DOL may practice a “moving target” approach.
- Current patterns/high-frequency industries and professions:
 - A high salaried professional position with a low threshold of educational or experience requirements;
 - Lesser skilled positions;
 - Financial industry positions;
 - Applications from high volume users of the PERM portal.
 - K-12 (some).
 - Degree, no experience (some).
 - Employers who are frequently audited seem to get more of the same.
- Triggers are not consistent. Identical applications can have a different result with only some being designated for audit.
- Weirdly, even triggers don’t affect employers who have never been audited.



Current Random Audit Frequent “Issues”

- Business necessity of requirements.
- Disqualified applicants, “could they trained in reasonable period of time?” Also: “employment applications, pre-screening questionnaire(s), test(s), and any other assessment tools used for the job opportunity.”
- Employee referral programs.
- Payment of fees (tho seems to have been phased out).
- NOT asking for:
 - PWD
 - JO
 - Signed 9089
 - Communications with applicants





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**Questions?
Comments?**