

## Frequently Asked Questions About PERM

Employers seeking to obtain permanent residence for an employee from abroad must often obtain a “labor certification” from the Department of Labor (DOL) as a first step in the process. DOL uses a system known as “PERM” to allow employers to file applications for such labor certifications.

### **Q. What Is PERM?**

**A.** PERM is a system through which employers can hire a foreign national by submitting an application electronically or by mail to DOL in which they attest that they have taken certain steps to recruit U.S. workers and that they have been unable to locate a qualified U.S. worker for the position. Employers will be responsible for documenting their compliance with the recruitment steps enumerated in the regulations, but they will only submit that documentation to DOL if DOL chooses to audit their applications. All labor certification applications for full-time permanent positions filed on or after March 28, 2005, must comply with these regulations.

### **Q. Where And How Are PERM Labor Certification Applications Processed?**

**A.** PERM centralizes processing of labor certification applications at two national processing centers, one in Atlanta and one in Chicago. Previously, labor certification applications were filed locally with State Workforce Agencies (SWAs), the state-level organizations responsible for unemployment insurance, job training and placement of workers. Under the PERM program, applications are no longer submitted to SWAs for processing, though SWAs will continue to provide determinations of the prevailing wages for occupations through their Labor Market Information (LMI) units.

### **Q. How Long Will It Take DOL To Process A PERM Application?**

**A.** Through electronic filing and the audit-based adjudication process, DOL reports that “clean” applications take less than 60 days to adjudicate. In users’ experience, applications may be processed very quickly – sometimes in less than a week – but normally take 60-90 days. Processing times for audited cases also vary, with some being decided quickly and others not processed for months.

### **Q. How Is Recruitment Being Handled Under PERM?**

**A.** PERM’s goal is to make nationally uniform the requirements for the recruitment steps an employer must take prior to filing an application for labor certification, and to require every

application to undergo pre-filing recruitment. Employers must utilize several forms of recruitment within the six months prior to filing the application, must place a job order with the State Workforce Agency (SWA), must post an internal notice of the job opportunity on site at the company as well through any in-house company media in which jobs are ordinarily posted, and must secure a prevailing wage determination from the SWA.

**Q. What Print Ads Are Required Under PERM?**

**A.** Prior to filing an application for labor certification, an employer must place two advertisements on two different Sundays in a newspaper of general circulation in the area of intended employment. For higher-level positions requiring experience and an advanced degree, the employer may use an advertisement in a professional journal in place of one of the Sunday ads. Both ads must have been placed more than 30 days, but not more than 180 days, before filing, and may be placed on consecutive Sundays. The ad must list the name of the employer, the geographic area of employment (only if the job site is unclear, e.g., if applicants respond to a location other than the job site or if the employer has multiple job sites), and a description of the position specific enough to apprise U.S. workers of the job opportunity. The employer may include minimum education and experience requirements or specific job duties in the ad as long as those requirements also appear on Application for Permanent Employment Certification, Form 9089. The ad must direct applicants to send resumes or report to the employer, as appropriate. The employer's physical address is not required. A central office or post office box may be designated for receipt of resumes. The ad need not include the salary or a detailed listing of the job description and requirements. However, if the ad does include the salary, the salary stated must meet or exceed the prevailing wage, as determined by the SWA.

**Q. Must A SWA Job Order Be Placed Under PERM?**

**A.** The employer must place a job order with its local SWA for the position. The job order should contain the same information as the advertisement, and the employer should request that the SWA refer any potentially qualified applicants directly to the employer.

**Q. Are Recruitment Steps For Professional And Non-Professional Jobs The Same?**

**A.** The recruitment for a professional occupation (those for which the attainment of a bachelor's or higher degree is the usual education requirement) consists of a job order and two print ads plus three additional steps. The recruitment for non-professional occupations consists only of a job order and the two Sunday advertisements.

**Q. What Are The Three Additional Recruitment Steps for Professional Jobs?**

**A.** An employer must both advertise the opening and carry out three additional recruitment steps, choosing from the following options: (1) attendance at job fairs; (2) advertisement of the position on the employer's website; (3) advertisement of the position on a job search website

other than employer's, including an ad on a newspaper's web site in conjunction with a print ad; (4) participation in on-campus recruiting; (5) placing a notice in a newsletter or publication of a trade or professional organization; (6) retaining private employment firms; (7) including the position in an employee referral program, if it includes identifiable incentives; (8) placing a notice of the job opening at a campus placement office, if the job requires a degree but no experience; (9) advertisement in local and ethnic newspapers, to the extent they are appropriate for the job opportunity; and (10) placing radio and television advertisements. The employer must conduct three separate recruitment steps; *i.e.*, may not conduct one of the three steps three times. With respect to these additional steps, an employer may advertise either for the specific job opportunity or merely for the occupation involved in the application. All three recruitment steps must have taken place no more than 180 days before filing, but only one of the steps may have taken place within 30 days of filing. The employer must specify the dates of each of the three additional recruitment steps it has undertaken on the application form, and maintain documentation of the recruitment step, such as a dated printout from a website, or a flyer announcing the employer's participation in a job fair.

**Q. Does PERM Require An Employer to Post a Notice of Job Opportunity?**

**A.** An employer must post a Notice of Job Opportunity in conjunction with the outside recruitment for the position. The notice must be posted for a period of ten business days, and the notice period may be no more than 180 days before filing and no less than 30 days before filing. The Notice is posted at a location such as an employee notification bulletin board in an area accessible to all of the employer's employees. The Notice must contain the salary for the position, but may contain a salary range so long as the lower level of the range meets or exceeds the prevailing wage. The notice may contain the same description of the position as is placed in the newspaper advertisement, and should include a contact person for employees who wish to apply for the position. In addition, the notice must contain language indicating that the posting is in connection with an application for labor certification, and that any person having information bearing on the application can submit that information to the Department of Labor. Importantly, in addition to a printed posted notice, an employer must place the notice in any and all in-house media, whether electronic or printed, in accordance with normal procedures used for recruitment for similar positions in the organization. The notification must include all information posted in print, including salary range and DOL contact information. Since the notification in such media need only be done if it is the employer's normal practice to do so for the job classification in issue in the application, an employer could avoid listing executive-level positions if it is not normal practice to do so. Duration of the in-house media notification should be as long as other comparable positions are posted.

**Q. Can An Employer Use Qualification in Excess of What DOL Considers "Normal?"**

**A.** DOL will generally not allow an employer to use job requirements that exceed the requirements for a position as found in the DOL's description of the occupation in its Standard Occupational Classification (SOC) system unless the employer can justify it on the basis of

“business necessity.” To meet this exception, the employer must show that the requirements are reasonably related to the position and necessary to perform the job duties in the context of the employer’s operation. This ability to deviate from the SOC system is important, as that system categorizes jobs into far fewer categories than the Dictionary of Occupational Titles formerly used to measure “normal” requirements.

**Q. Can Experience Gained With The Petitioning Employer Be Used?**

**A.** Employers may use experience gained by a foreign national with the petitioning employer (as an employee or contractor), but only where the experience was gained in a position that was not “substantially comparable” to the position involved in the labor certification. A prior position will be considered “substantially comparable” if at least 50% of the duties of the two positions are the same. For example, if a software engineer who spends 100% of her time implementing software is promoted to a team leader position in which she spends 20% of her time managing and 80% of her time implementing software, the two positions are “substantially comparable” and her experience as a software engineer cannot be used to qualify her for the position of team leader (of course, her experience prior to joining the employer as a software engineer could be used, if it was enough to qualify her as a team leader).

**Q. Is The Use Of Alternative Experience Permitted?**

**A.** Any alternative means for a worker to be considered qualified must be “substantially equivalent” to the primary means of being considered qualified. For example, if the labor certification application involves a household cook position, it would be reasonable to require one year of experience as a household cook or, alternatively, one year of experience as a restaurant cook, as the two periods of cooking experience are comparable. It would not be reasonable to require one year as a cook or, alternatively, one year of experience as a “household worker with some cooking duties” as the alternative requirement is less stringent than the primary requirement.

**Q. If The Job Requires Four Skills And A Job Applicant Lacks One Of These Four Skills, Is This A Lawful Reason To Reject The Applicant?**

**A.** Lack of one of four required skills may not be enough to lawfully reject an otherwise qualified U.S. worker. The employer will need to explore and evaluate whether the U.S. worker applicant could perform the job with a reasonable amount of on the job training in the lacking skill(s). What is reasonable will depend on the particular employer and the job opportunity. For example, if it would not be reasonable to spend six months training a U.S. worker in one of the required four skills, this would need to be explained and documented.

**Q. What Salary Does PERM Require Employers To Pay In Connection With The Labor Certification Position?**

**A.** An employer must complete a Prevailing Wage Determination Request Form (PWDR) and file it with the SWA before filing the Labor Certification Application. The SWA will use its wage survey data to provide a prevailing wage unless an employer provides an acceptable alternative survey. The SWA uses DOL's Online Wage Library to provide a wage level based on a formula that compares the employer's requirements to the DOL's Standard Vocational Preparation criteria. The employer also has the option of using a qualifying survey, which must meet certain specified criteria to be considered acceptable. These criteria are essentially the same as the criteria under RIR except that a median figure, not just an arithmetic mean, can in certain circumstances be used for the prevailing wage.

The employer must attest that it will pay 100% of the prevailing wage at the time that the foreign national beneficiary obtains permanent residence on the basis of the Labor Certification.

**Q. What Can An Employer Do If It Does Not Agree With The SWA Prevailing Wage Determination And It Cannot Find A Qualifying Alternate Survey?**

**A.** An employer has the opportunity for one submission of additional information to persuade the SWA to change the appropriate skill level or job classification or find that the alternative survey qualifies. After that one submission is made, the employer may either appeal the SWA's determination to the Certifying Officer or file a new prevailing wage request. If the employer does not agree with the Certifying Officer's determination, then the employer may file an appeal to BALCA.

**Q. How Long Is The PWD Valid?**

**A.** The SWA specifies the validity period of the prevailing wage on the PWDR form. It must be valid for at least 90 days and no more than one year from the determination date on the form. Employers must either begin the recruitment, or file their PERM applications, within the validity period on the PWDR.

**Q. What Recruitment Documentation Must Be Prepared By Employer?**

**A.** The employer must prepare documentation of all of its recruitment steps, such as newspaper tearsheets for advertisements and printouts of web sites. The employer should maintain copies of all resumes or applications submitted in connection with the recruitment steps. In addition, the employer must prepare a recruitment report that describes the recruitment steps taken and the results. This report shall include the number of hires and the number of U.S. workers rejected, categorized by the lawful job-related reasons for rejection. Although it does not need to include the identity of the individual U.S. workers who applied for the job opportunity, it must track them sufficiently that an auditor can determine which resumes were evaluated for each job opportunity. The employer must sign the recruitment report and retain it as part of the supporting documentation.

**Q. What Must Employer Do If Application Is Selected For Audit?**

**A.** If an application is selected for audit, the employer is required to provide the supporting documentation within 30 days of a request by a Certifying Officer (CO). After the documentation has been submitted, the CO can approve the application or deny the application. In addition, if the Certifying Officer is not satisfied that the documentation establishes unavailability of U.S. workers, the CO may require supervised recruitment after the filing. The supervised recruitment will involve a new newspaper advertisement and job order, this one directing responses to the CO, and the employer will be expected to give an applicant-by-applicant evaluation of whether the applicants met the qualifications for the position. If an employer fails to respond to a request for documentation, or is deemed to have misrepresented the recruitment steps it took or its reasons for rejecting U.S. workers, the CO may require the employer to use supervised recruitment for all of its applications for a period of up to two years.

**Q. How Long Must Employer Retain Recruitment Documentation?**

**A.** The employer must retain its recruitment documentation for five (5) years from the date of filing of the application, as the DOL may reopen its labor certification determination even after approval and conduct an audit.

**Q. What Happens To Pending Cases and New Cases Prior to March 28, 2005?**

**A.** Pending cases and new cases filed before PERM's effective date will continue to be processed under the current system, if the employer wishes.

**Q. Can Cases Filed Under the Current System Be Converted To A PERM Case?**

**A.** A pending case can be converted to a PERM case, while preserving the original filing date, by withdrawing the pending case and refileing it. A case may be withdrawn and refiled if it is an RIR application, or if it is a "traditional" application for which supervised recruitment has not yet begun. In order to be refiled and keep the original filing (priority) date, the application must be for the "identical job opportunity," and must otherwise comply with all of the PERM requirements. If it is found not to be "identical," then the earlier filing date or priority date will be lost. In order to refile, therefore, an employer would need to have conducted recruitment that meets the PERM standards no more than 180 days prior to the request for conversion. Given the expense of newspaper advertising alone, many employers will opt to leave their RIR cases pending with DOL rather than converting them to PERM.