

## **Permanent Residence Based on Employment Through the Labor Certification Process**

The Immigration and Nationality Act (INA) requires that aliens seeking permanent residence in the second and third employment-based preferences first receive a labor certification from the U.S. Department of Labor (DOL). The second employment-based preference covers aliens with exceptional ability in the sciences, arts or business and with advanced degrees in professional fields. The third employment-based preference covers aliens with bachelor's degrees in their fields, skilled workers and unskilled workers.

### **Step 1: Labor Certification**

The labor certification process is initiated by filing a completed Application for Alien Employment Certification (Form ETA-750, Part A and Part B) with the State Workforce Agency. ("SWA") Perhaps the most crucial items on an Application for Alien Employment Certification are those found in the Offer of Employment, Part A of the Application, which describes the job offered and the minimum requirements for that job. They are Item 9 (Name of Job Title), Item 12 (Rate of Pay), Item 13 (Description of Job to be Performed), Item 14 (Minimum education, training and experience for worker to perform satisfactorily the job described in Item 13) and Item 15 (Other Special Requirements). The information that is provided to complete these Items will determine what recruitment program the local office of the state employment service will require of the employer. It also will largely determine whether the company's recruitment effort turns up American workers who are able, willing, qualified and available to perform the job for which a labor certification is being sought.

### **Specifying the Job**

The Department of Labor ("DOL") focuses on two issues:

1. Does the job description included in the application represent the employer's "actual minimum requirements" for the job in question or can someone with less training or experience satisfactorily perform the job; and
2. Is the job in question being described without "unduly restrictive" requirements.

It is important to remember that the labor certification process was set up to protect the American worker and ensure that a foreign national is certified for a particular job or position if and only if a minimally qualified American worker cannot be found. The fact that a foreign national may possess better qualifications than a given American worker who responds to the employer's recruitment effort is not considered relevant. Rather, DOL wants to make certain that the job duties and job requirements in Items 13 and 15 are the normal requirements of the job identified

in Item 9 and that the employer is not demanding excessive experience, education or training requirements.

Working within the parameters established by DOL, the employer's goal is to describe the job, including the minimum education, training, and experience requirements to satisfactorily perform the job, in as specific a way as is possible without being "unduly restrictive."

The DOL normally does not allow an employer to use the experience that a foreign national gained either in the job for which a labor certification is being sought or in a substantially similar job with that employer. DOL takes the position that, since the foreign national did not have that experience at the time he or she began the job, requiring such experience from a U.S. worker would be unduly restrictive. However, under current DOL guidelines, experience or training that the applicant gained with a different employer may be used, as well as any experience gained with the applicant's current employer, so long as that experience was gained in a sufficiently dissimilar position.

In determining whether two positions are sufficiently dissimilar, the DOL looks at (i) the relative job duties and supervisory responsibilities, (ii) the job requirements, (iii) the positions of the jobs in the employer's job hierarchy, (iv) whether and by whom the positions have been filled previously, (v) the current employment practices of the employer regarding the positions, (vi) the job salaries and (vii) whether either position is newly created.

DOL takes the position that any "special requirement" contained in Item 15 of Part A is a restrictive job requirement unless the employer establishes that the "special requirement" is deemed restrictive, the employer must either delete it or justify it on the basis of "business necessity."

## **Recruiting**

Once the duties of the position and the requirements for the position are identified, there are two options for proceeding: the "regular" labor certification process, which involves recruitment for U.S. workers under the supervision of the State Workforce Agency and the "reduction-in-recruitment" or "RIR" process. Under the "regular" labor certification process, the duties of the position and requirements for the position are specified on the Application for Alien Employment Certification, Form ETA-750, which is then filed with the SWA office designated to accept applications for that state. The SWA office will determine if the salary being offered for the position is equal to at least 95% of the prevailing wage for the subject occupation in the area of intended employment. If the salary being offered meets the "prevailing wage," the employer will then be required to advertise the opening in either a professional journal or in a newspaper of general circulation for three consecutive days. The ad is a blind ad that does not identify the prospective employer, though it does contain all the information about the position from the Form ETA-750. It contains instructions directing interested applicants to send their resumes to a P.O. Box operated by the SWA office. The resumes received by the SWA office will be sent to the employer, which will need to report back to the SWA as to whether any of the applicants met all of the actual minimum requirements for the position specified in the application.

An employer can avoid the supervised recruitment described above by applying for a reduction in recruitment. (“RIR”). To qualify for RIR treatment, there must be a pattern of recruitment within the past six months, and the employer must demonstrate that no U.S. worker who responded to the advertisement met the minimum requirement for the position (or that insufficient numbers of qualified U.S. workers responded, in the case of multiple openings). Advertisements supporting RIR requests need not contain all the details required by DOL’s regulations for a supervised recruitment under the “regular” process.

In addition to the advertisement, the employer, as part of the recruitment effort, must post a Notice of Job Opportunity in a conspicuous location at the place of intended employment. The Notice must be posted for at least ten (10) business days where notices to employees are normally posted; or in cases where there is an appropriate bargaining representative representing the occupational classification in which a labor certification is being sought, the employer must provide notice of the filing of the permanent labor certification application to the bargaining representative. The Notice provides all the information about the position specified on the application (though salary may be expressed as a range).

### **Reporting Results of Recruitment**

Under both the regular and RIR procedures, proof of the advertisements for the position must be provided to the DOL, and the employer must prepare a report of recruitment that details the results of the recruitment and accounts for all of the applications or resumes received. The foreign national’s immediate supervisor, or some other appropriate person, must review each of the resumes received in response to the advertisements as well as any responses to the job posting. In a supervised recruitment under the regular procedure, each applicant must be contacted to confirm that he or she is still interested in the job at the salary stated.

Should an applicant who is contacted indicate that he or she remains interested in the position at the salary stated, the person handling the recruitment should confirm that the applicant, in fact, does meet all the minimum requirements set out in Items 14 and 15 of Part A of the Labor Certification Application. If the applicant does, he or she should be scheduled as soon as possible for a detailed interview with a person familiar with the requirements for the position. If, on the other hand, upon further inquiry the applicant either does not meet the minimum requirements for the position, has no interest, has no interest in the position at the stated salary or does not fall into the classes of persons who must be considered, he or she need not be considered further. It is important, however, that with respect to each applicant contacted, the employer be able to provide the date and time of the contact and the lawful, job-related reason or reasons for rejecting the applicant.

The purpose of the detailed interview is to make a final determination whether an applicant meets the minimum job-related requirements for the position or fails to meet the requirements. If, based upon the detailed interview, it is ultimately determined that a particular applicant does not meet the minimum job-related requirements specified by the employer for the position, or otherwise cannot satisfactorily perform the duties of the position set forth in Item 13 of Part A of the Application, then the applicant may be rejected. Again, the specific job-related reason or reasons for rejecting each applicant should be noted in the report of the recruitment.

While the labor certification process is completely at odds with any normal recruitment process, the employer is not compelled to hire any American worker who may be found through this process. If it should be shown that qualified American workers are available for the positions in question, however, the DOL will deny the required individual labor certification.

### **Step 2: Immigrant Visa Petition**

If the Department of Labor approves the application for Labor Certification, the employer may file a petition to classify the foreign national employee as a second or third preference immigrant. The employer must establish that it has the ability to pay the wage offered in the labor certification, and the foreign national must prove that he or she meets all the educational, experience and special requirements specified in the labor certification. When approved, the immigrant visa petition is assigned a “priority date” based on when the underlying labor certification was filed with the Department of Labor. This priority date is used to determine when the foreign national may complete the third step of the process.

### **Step 3: Permanent Residence**

Once the foreign national’s priority date is reached, he or she may apply for permanent residence. The employee will be given a medical exam and background checks to establish that he or she is admissible as an immigrant and can be given employment authorization and travel permission during the adjudication of this final step, if necessary. It is also possible to file Step 2 and Step 3 concurrently.

### **Processing Times**

Processing times may vary by region of the country, by the country of birth of the foreign national and by the preference category for which the foreign national is qualified. While processing time from initiation to receipt of permanent residence status is usually at least two and one half to four year, an attorney should be consulted about the circumstances of a particular case for an estimate of the processing time for that foreign national.