

MEMORANDUM

To: Clients

Regarding: Employment-Based Immigration Procedure

This Memorandum explains the rules and processes involved in employment-based immigration.

I. Employment-Based Immigration: A General Overview

Employment-based immigration is the process by which a foreign national obtains a green card based on an offer of permanent employment in the United States. It entails three steps: (1) unless exempted by statute or waived by the US Citizenship and Immigration Services (“USCIS”), the employer must obtain a “labor certification” from the US Department of Labor (“DOL”) under its online “PERM” (Program Electronic Review Management) program; (2) the employer must file with the USCIS on Form I-140 an immigrant visa petition requesting classification in a particular Employment-Based (“EB”) immigrant visa category and, (3) the foreign worker must apply for lawful permanent residence or the “green card” by filing an application on Form I-485 for “adjustment of status” with the USCIS in the United States or by applying for an immigrant visa at a US Consul overseas.

II. The PERM Labor Certification Requirement

A. Significance of PERM. PERM is an application that asks DOL to certify that the employer’s recruitment demonstrates a lack of minimally qualified US workers who are available and willing to accept the job at the prevailing wage in the area of intended employment. It is designed to protect US workers, not to help the employer hire the foreign worker. The process bears no relationship to real world recruitment. Thus, it will often seem counter-intuitive and be very frustrating. However, it is the foundation of the employment-based immigrant process and must be planned and executed with care.

B. Bona Fide Job Opportunity Required. The employer must have a bona fide, full-time job opportunity that is available to US workers. Even though the foreign national beneficiary may be working for the employer currently, usually in H-1B status, the position that is described in the PERM application must be considered “vacant,” and the beneficiary may not assume it on a permanent basis until green card approval.

C. PERM Mechanics and Timeframes. An employer files the PERM application electronically on ETA Form 9089 after registering with DOL and completing recruitment. The earliest a PERM application can be filed is usually three to four months from starting the process. The employer must develop and maintain in a “PERM Audit File” documentation of its compliance with PERM requirements. After filing the PERM, the employer is subject to random or targeted audit. DOL can take many months to adjudicate a PERM application, and an audit or denial necessitating an appeal will add substantial delay.

D. Restrictions on PERM Validity. A PERM is only valid for 180 days. If an immigrant visa petition is not filed within this period, the PERM becomes useless. Also, subject to an exception for “permanent portability” discussed below, once a PERM application is certified, it remains valid only for the named alien, employer and specific job opportunity. Therefore, any promotions or significant changes in job duties or location before permanent residence is granted could jeopardize the green card case, and the employer must keep this in mind when describing the job offered.

E. PERM Does Not “Lock In” the Employment Relationship. The filing or approval of a PERM does not, in and of itself, require the employer to continue to employ the foreign national or otherwise change what may be the “at will” nature of an employment relationship. The employer may withdraw the application at any time. On the other hand, the application does not bind the employee to the employer, particularly in light of “permanent portability,” which allows the worker to obtain the green card based on a similar job with another employer.

F. Employer Must Pay All Fees and Costs. DOL regulations require the employer to pay all legal fees and costs of the PERM process. These regulations probably are unlawful but have not been challenged in court.

III. The Nuts and Bolts of PERM

We will walk you through the essential steps in the PERM process, which are as follows:

A. Develop Job Description and Minimum Requirements. The job description and minimum requirements are determined by three factors. First, the employer must identify the core duties of the position and the absolute minimum education, training and experience required. Second, the requirements may not exceed what DOL deems normal unless adequately documented as arising from business necessity. DOL’s standards of “normalcy” for specific job classifications are contained in the “O*NET” at <http://online.onetcenter.org/>. Employers may find it helpful to search this website for the occupational classifications that best describe the job offered, which will provide guidance on what is considered “normal.” Among other restrictions on job requirements, they may not be tailored to the foreign worker’s qualifications. Third, the foreign worker must have met the requirements when hired by the employer unless the experience was gained in a job that is not “substantially comparable” to the one offered or unless it is no longer feasible to train a US worker.

B. Obtain a Prevailing Wage Determination. Before filing, the employer must obtain a Prevailing Wage Determination (“PWD”) from DOL. The PWD must be based on a DOL survey or other survey meeting regulatory standards. The O*NET website referenced above crosswalks to the DOL survey, which helps us predict the PWD for particular occupational classifications. The prevailing wage does not have to be paid until green card approval. *The employer must give us evidence up front demonstrating its ability to pay the prevailing wage at the time of filing the PERM through and including the date of green card approval.*

C. Conduct Prefiling Recruitment. Once the job duties, requirements and PWD are complete, the employer must recruit in accordance with strict regulations. All recruitment steps must take place no more than 180 days before filing, and, with one exception noted below, the PERM cannot be filed until 30 days after the last step was taken.

1. *Post Notice of the Job Opportunity.* The employer must post notice of the job opportunity at a conspicuous location at the worksite for at least ten consecutive business days between 180 and 30 days before filing. The notice must contain the salary, which can be expressed in the form of a wage range for confidentiality purposes.

2. *In-house Media.* The employer must publish notice of the job in any and all in-house media, whether electronic or printed, in accordance with normal procedures used for recruitment for similar jobs in the organization. The employer must let us know if this requirement applies.

3. *Job Order.* The employer must place a job order with the SWA for a period of 30 days and cannot file the PERM application until 30 days after the job order ends. We will usually handle this.

4. *Sunday Newspaper Ads.* The employer must place a print ad on two different Sundays in the newspaper of general circulation in the geographic area of the proposed place of employment between 30 days and 180 days prior to application filing. If the job requires an advanced degree and experience, the employer may use a professional journal in lieu of one of the Sunday ads.

5. *Additional Recruitment Steps for Professional Jobs.* Employers must advertise in three other venues for professional jobs that normally require at least a bachelor's degree. One of these steps may be taken within the 30 day period before filing. These steps are as follows:

- Job fairs
- Employer's website
- Job search website, which can include one published in conjunction with a print ad
- On-campus recruiting
- Trade or professional organizations
- Private employment firms
- Employee referral program with incentives
- Campus placement offices
- Local and ethnic newspapers as appropriate
- Radio and television ads

D. Consider Job Applicants. The employer must promptly consider all applications sent in response to the recruitment. It may only reject US applicants for lawful, job-related reasons, which we will detail at a later point in the process. If the employer receives an application from a single US worker who is minimally "qualified" and can reasonably perform the job, it is not required to offer the position to that person. However, it may not file the PERM application unless the applicant is rejected for lawful, job-related reasons.

E. Recruitment Report. The employer must prepare and sign a report describing the results of recruitment, including the steps taken, the number of applicants, number of hires, number of US workers rejected and lawful, job-related reasons for rejection (discussed below). We will provide a template format for this purpose.

F. PERM Audit File. We will prepare this File with documentation of the employer's compliance with legal requirements. We will maintain it in case DOL audits the application, and will provide it to the employer on PERM approval.

G. Filing the PERM Application. Upon completion of the above steps, we will provide a draft PERM application. Once it is finalized, we will file it on the employer's behalf. There is no filing fee. Upon filing, DOL will send the employer an email requesting verification of the application. Also upon filing, we will circulate the PERM application for signature by the employer and the foreign worker.

VI. Steps after PERM Approval

A. The I-140 Immigrant Visa Petition. The employer must file the certified PERM application together with the I-140 immigrant visa petition at the appropriate USCIS Service Center. The petition must include proof of the employer's ability to pay the proffered wage. It also must include proof that, as of the date the PERM was filed, the employee met the minimum requirements stated thereon. The immigrant visa petition will ask the USCIS to classify the job and the alien in the EB-1, EB-2 or EB-3 immigrant preference category, which determine immigrant visa availability under our annual quota system and whether and when a green card will be available. If an immigrant visa is available, the foreign worker and immediate family members can file applications for adjustment of status to permanent residence concurrently with the I-140 immigrant petition or can apply for an immigrant visa abroad.

B. Immigrant Visa Availability. An immigrant visa number will be available to an alien whose "priority date" is current. The "priority date" is the date of PERM filing and marks the alien's place in line if the demand for immigrant visas exceeds the supply under our annual visa quota system resulting in a visa waiting line. (The State Department Visa Bulletin, published monthly, shows priority dates that are currently being processed. See http://www.travel.state.gov/visa/frvi/bulletin/bulletin_1360.html). If the alien's visa category is "oversubscribed" and the priority date is not current, the application for permanent residence cannot be filed with the I-140 petition. Rather, the alien must wait until the priority date is current and visas are available.

C. Application for Permanent Residence. Once the priority date is current, the alien can apply for adjustment of status to lawful permanent residence (i.e., the green card) with the USCIS in the United States or for an immigrant visa at a US consulate abroad. Both result in the "green card" or permanent residence. While many applicants prefer to apply for adjustment in the United States, others may process at a US consulate abroad due to the need for frequent travel abroad, USCIS processing delays, or ineligibility for processing in the United States. One advantage of filing for adjustment is that the applicant and immediate family members who also apply for adjustment can file concurrently applications for work authorization, which will generally be adjudicated within 90 days and which will authorize employment in one-year increments pending approval of the adjustment application. If the alien travels abroad while the adjustment application is pending, unless in valid H or L status, he or she first must obtain special travel permission known as "advance parole," or the adjustment application will be deemed to have been abandoned.

D. Effect of Job Changes: Permanent Portability. As discussed above, a material change in the duties, terms or conditions of the job that is described in the PERM application can preclude green card issuance. However, there is an exception that allows the alien to "port" off of the petitioner's I-140 petition to a new employer and still obtain a green card, provided the following conditions are met:

the I-485 adjustment application was pending for at least 180 days at the time of adjudication; the new job is in the same or similar occupation; the I-140 was approved or would have been approvable if adjudicated within 180 days; and, at the time of filing both the I-140 and the I-485, the employer and the employee intended to take up the employment offered on green card approval.

VII. Conclusion

This Memo gives only a brief overview of employment based immigration and the PERM process, which are highly complex and technical. We will do everything possible to simplify your tasks, but success in the process will require the full cooperation of the employer and the employee. Of course, we will be happy to answer any questions you may have.